

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 316 of 2021

[Arising out of Order dated 12th March, 2021 passed by the Adjudicating Authority (National Company Law Tribunal), Court No. 5, Mumbai Bench in CP (IB) No. 1192/MB/2020]

IN THE MATTER OF:

Mr. Ravi Ajit Kulkarni,

(Personal Guarantor of Pratibha Industries Limited)

Address – Flat 401, 574 Ushakamal

Behind Telephone Exchange,

Chembur, Mumbai – 400 071.

...Appellant

Versus

State Bank of India

Through the Resolution Professional,

Mr. Ram Ratan Kanoongo

Office of RP –

Headway Resolution and Insolvency Services Pvt. Ltd.

708, Raheja Centre, Nariman Point,

Mumbai – 400 021.

...Respondent

For Appellant: Mr. Krishnendu Datta, Sr. Advocate with Mr. G. Aniruth Purusothaman, Mr. Ravi Raghunath, Mr. Kunal Kanungo, Advocates.

For Respondents: Mr. Ayush J. Rajani, PCA and Ms. Sandhya Iyer, Advocate.

With

Company Appeal (AT) (Insolvency) No. 317 of 2021

[Arising out of Order dated 12th March, 2021 passed by the Adjudicating Authority (National Company Law Tribunal), Court No. 5, Mumbai Bench in CP (IB) No. 1189/MB/2020]

IN THE MATTER OF:

Mr. Ajit Bhagwan Kulkarni,

(Personal Guarantor of Pratibha Industries Limited)

Address – Flat 401, 574 Ushakamal

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For Respondents: Mr. Ayush J. Rajani, PCA and Ms. Sandhya Iyer, Advocate.

J U D G M E N T**[12.08.2021]****A. I. S. Cheema, J.**

Company Appeal (AT) (Insolvency) No. 316 of 2021 is filed by the Appellant – Ravi Ajit Kulkarni, Personal Guarantor of 'Pratibha Industries Limited' against the impugned order passed by the Adjudicating Authority (National Company Law Tribunal) Court No. 5, Mumbai Bench in C.P. (IB) 1192/MB/2020 in application under Section 95 of the Insolvency and Bankruptcy Code, 2016 ('IBC' for short) appointing Resolution Professional and calling report under Section 99 of the IBC. The application had been filed by

Respondent – State Bank of India through the Resolution Professional – Mr. Ram RatanKanoongo.

2. Company Appeal (AT) (Insolvency) No. 317 of 2021 is filed by the Appellant –AjitBhagwan Kulkarni, Personal Guarantor - ‘Pratibha Industries Ltd.’ against the impugned order passed by the Adjudicating Authority (National Company Law Tribunal) Court No. 5, Mumbai Bench in C.P. (IB) 1189/MB/2020 in application under Section 95 of IBC appointing Resolution Professional and calling report under Section 99 of the IBC. The application had been filed by Respondent – State Bank of India through the Resolution Professional – Mr. Ram RatanKanoongo.

3. Unless mentioned otherwise we will be referring to pleadings, documents and arguments as in Company Appeal (AT) (Insolvency) No. 316 of 2021 for the sake of convenience. The facts involved and arguments in both the Appeals are similar. The impugned orders are also similar.

Company Appeal (AT) (Insolvency) No. 316 of 2021

4. The Appellant claims that the application filed by the Respondent was listed for hearing before the Adjudicating Authority on 15th January, 2021 but was adjourned for paucity of time to 4th February, 2021. On 4th February, 2021, the matter was taken up for hearing and reserved for orders. Subsequently, the impugned order came to be passed on 12th March, 2021, confirming appointment of Mr. Ram RatanKanoongo as the Resolution

Professional in the Company Petition. According to the Appellant, no notice of hearing was issued by the Adjudicating Authority nor by the Advocate of Respondent giving intimation with regard to date of hearing of the matter. Thus, the issue raised is whether the Adjudicating Authority failed to issue notice to the Appellant and thus Principles of Natural Justice were not followed. According to the Appellant, the Adjudicating Authority could not proceed to hear and adjudicate the case on merit without issuing notice, under Rule 44 of National Company Law Tribunal Rules, 2016 (NCLT Rules in short). It is claimed that no opportunity was given to the Appellant to put up any submissions. Issue raised is whether the service of advance copy of petition can be deemed to be service of notice of hearing.

5. The Appeal claims and it is argued that the Adjudicating Authority failed to follow Rule 38 of NCLT Rules with regard to service of notice. According to the Appellant notice through Court should have been served.

6. The Learned Senior Counsel for the Appellant submitted that Corporate Insolvency Resolution Process (CIRP) with regard to the Corporate Debtor – ‘M/s Pratibha Industries Ltd.’ was pending before the Adjudicating Authority Mumbai, and that the debt had become due on 1st February, 2016 and default had occurred on 7th April, 2016 but the application now had been filed after four years from the date of default. The Appellant was served notice with advance copy of the application but it was not through Court process. The Adjudicating Authority by the impugned orders allowed the application after

recording that there was a default by the Appellant by not fulfilling debt owed to the Corporate Debtor and also confirmed appointment of the Resolution Professional. It is argued that such findings recorded without notice to the Appellant – Debtor – Personal Guarantor was in violation of various sections of Companies Act, 2013 and the NCLT Rules. Learned Counsel also placed reliance on judgment in the matter of *‘Swiss Ribbons Private Limited and Another vs Union of India and Others’*, (2019) 4 SCC 17, which referred to the various provisions of Companies Act and NCLT Rules to hold that the Adjudicating Authority needs to serve a copy of the application on the Respondent. Reliance is also place on the judgment in the matter of *‘Innoventive Industries Ltd. v. ICICI Bank’*, (2018) 1 SCC 407 and referred Para 28 to submit that the Debtor would be within its rights to show that there is no default or that the debt is not due in the fact or in law. It is argued that such opportunity was not given to the Debtor before passing of the impugned orders. It is also argued that the Adjudicating Authority has already recorded finding to the effect that there was “default” and has already “allowed” the application filed by the Respondent. It is also argued that after such findings recorded, the Resolution Professional could not while giving report under Section 99 propose rejection when finding is already recorded.

7. It is argued by the Learned Counsel for the Appellant that when application was filed under Section 95 of IBC, the Respondent – Debtor did not get opportunity to seek replacement of the Resolution Professional. It is argued

that the Resolution Professional has already given report under Section 99 and matter is at the stage of considering the report under Section 100 of IBC.

8. The Counsel for the Respondent submitted that in the scheme of IBC Part III as far as it relates to insolvency of Debtors - Personal Guarantors of the Corporate Debtor, the concerned merits of the matter are to be looked into at the stage of Section 100 and the earlier provisions show that when application filed, the step to be taken is the appointment of Resolution Professional. It is also stated that Insolvency and Bankruptcy Board of India ('IBBI' in short) has a procedure whereby database of IBBI is shared with the Adjudicating Authorities concerning Insolvency Professionals including information about disciplinary proceedings from time to time and the Adjudicating Authorities appoint Resolution Professional from the said database and that there are guidelines issued in this regard. The Resolution Professional appointed in the present matter could thus directly be appointed by the Adjudicating Authority as had been done without resorting to calling name specially and that the impugned order could not be faulted with. It is argued that under Rule 51 of NCLT Rules, the Adjudicating Authority can regulate its own procedures and even decide what will be the appropriate stage when notice needs to be issued. In the present matter, it is claimed that, the Demand Notices were duly served on the Debtor and necessary proof was produced and after application was filed the application and then even the amended application was served on the Personal Guarantor/s.

9. Before discussing, it would be appropriate to refer to relevant judgments and the procedure, in short.

10. Judgment in the matter of '*Lalit Kumar Jain vs Union of India &Ors.*' passed by the Hon'ble Supreme Court of India in Transferred Case (Civil) No. 245/2020 dated 21st May, 2021 is relevant. In the said judgment the Hon'ble Supreme Court considered the vires and validity of a notification dated 15th November, 2019 issued by the Central Government, which was reproduced in Para 63 of the judgment. The issue raised before the Hon'ble Supreme Court appears to have been with regard to extending the provisions of IBC only as far as they relate to Personal Guarantors of Corporate Debtors. In Para 78 of the judgment the Hon'ble Supreme Court dealt with how different provisions of IBC had been enforced at different times. The Hon'ble Supreme Court discussed (in Para 81) that it was evident that the method adopted by the Central Government to bring into force different provisions of IBC had a specific design which was to fulfil the objectives underlying the Code, having regard to its priorities. Provisions of Section 60 of IBC were also dealt with and it was found that the objective of the amendment in Section 60 was to ensure that Adjudicating Body dealing with insolvency of Corporate Debtors also had before it the insolvency proceedings of Personal Guarantors to such Corporate Debtors. Para 94 and 95 of the Judgment read as under:

"94. The impugned notification operationalizes the Code so far as it relates to personal guarantors to corporate debtors:

- (1) *Section 79 pertains to the definitional section for the purposes of insolvency resolution and bankruptcy for individuals before the Adjudicating Authority.*
- (2) *Section 94 to 187 outline the entire structure regarding initiation of the resolution process for individuals before the Adjudicating Authority.*

95. The impugned notification authorises the Central Government and the Board to frame rules and regulations on how to allow the pending actions against a personal guarantor to a corporate debtor before the Adjudicating Authority. The intent of the notification, facially, is to allow for pending proceedings to be adjudicated in terms of the Code. Section 243, which provides for the repeal of the personal insolvency laws has not as yet been notified. Section 60(2) prescribes that in the event of an ongoing resolution process or liquidation process against a corporate debtor, an application for resolution process or bankruptcy of the personal guarantor to the corporate debtor shall be filed with the concerned NCLT seized of the resolution process or liquidation. Therefore, the Adjudicating Authority for personal guarantors will be the NCLT, if a parallel resolution process or liquidation process is pending in respect of a corporate debtor for whom the guarantee is given. The same logic prevails, under Section 60(3), when any insolvency or bankruptcy proceeding pending against the personal guarantor in a court or tribunal and a resolution process or liquidation is initiated against the corporate debtor. Thus if A, an individual is the subject of a resolution process before the DRT and he has furnished a personal guarantee for a debt owed by a company B, in the event a resolution process is initiated against B in an NCLT, the provision results in transferring the proceedings going on against A in the DRT to NCLT.”

[Emphasis supplied]

11. Para 98 to 100 read as under:

“98. This court was clearly cognizant of the fact that the amendment, in so far as it inserted Section 2(e) and altered Section 60(2), was aimed at strengthening the corporate insolvency process. At the same time, since the Code was not made applicable to individuals (including personal guarantors), the court had no occasion to consider what would be the effect of exercise of power under Section 1(3) of the Code, bringing into force such provisions in relation to personal guarantors.

99. The argument that the insolvency processes, application of moratorium and other provisions are incongruous, and so on, in the opinion of this court, are insubstantial. The insolvency process in relation to corporate persons (a compendious term covering all juristic entities which have been described in Sections 2 [a] to [d] of the Code) is entirely different from those relating to individuals; the former is covered in the provisions of Part II and the latter, by Part III. Section 179, which defines what the Adjudicating authority is for individuals⁶⁶ is “subject to” Section 60. Section 60(2) is without prejudice to Section 60(1) and notwithstanding anything to the contrary contained in the Code, thus giving overriding effect to Section 60(2) as far as it provides that the application relating to insolvency resolution, liquidation or bankruptcy of personal guarantors of such corporate debtors shall be filed before the NCLT where proceedings relating to corporate debtors are pending. Furthermore, Section 60(3) provides for transfer of proceedings relating to personal guarantors to that NCLT which is dealing with the proceedings against corporate debtors. After providing for a

common adjudicating forum, Section 60(4) vests the NCLT "with all the powers of the DRT as contemplated under Part III of this Code for the purpose of sub-section (2)". Section 60 (4) thus (a) vests all the powers of DRT with NCLT and (b) also vests NCLT with powers under Part III. Parliament therefore merged the provisions of Part III with the process undertaken against the corporate debtors under Part II, for the purpose of Section 60(2), i.e., proceedings against personal guarantors along with corporate debtors. Section 179 is the corresponding provision in Part III. It is "subject to the provisions of Section 60". Section 60 (4) clearly incorporates the provisions of Part III in relation to proceedings before the NCLT against personal guarantors.

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 supplied]

12. What appears is that action against Personal Guarantor can be maintained during pendency of CIRP of Corporate Debtor or even later. Para 107 and 108 (part) of the same Judgment may now be referred:

"107. In Committee of Creditors of Essar Steel (I) Ltd. v. Satish Kumar Gupta⁶⁸ (the "Essar Steel case") this court refused to interfere with proceedings initiated to enforce personal guarantees by financial creditors; it was observed as follows:

"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 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."

108. 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 guarantor's 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 as there is no discharge under Section 134 of that Act. This court observed as follows:

“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 Indian Contract Act, 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 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 *JagannathGaneshramAgarwala v. ShivnarayanBhagirath* [AIR 1940 Bom 247; see also *In re Fitzgeorge Ex parte Robson* [(1905) 1 KB 462]).”*

[Emphasis supplied]

13. In para 111 it was held:

“111. 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.”

14. The above Judgment of the Hon'ble Supreme Court in the matter of '*Lalit Kumar Jain*' (supra) makes the context clear in which the provisions of Part III of IBC have to be acted upon against Personal Guarantor. It also makes clear as to aspects which cannot be agitated in such proceedings for Resolution relating to Personal Guarantors of Corporate Debtor.

15. Part III deals with Insolvency Resolution and Bankruptcy of Individuals and Partnership Firms. The provisions applied, as is clear from judgment in the matter of '*Lalit Kumar Jain*' (supra) are only with regard to Personal Guarantors to the Corporate Debtors under Section 2(e) of IBC. Chapter III of the Part III deals with Insolvency Resolution Process which we are concerned in the present matter. Section 94 deals with application by Debtor to initiate Insolvency Resolution Process. Debtor has been defined under Section 79(12) as under:

“(12) “debtor” includes a judgment-debtor;”

Debtor includes a judgment debtor. Thus, it is an inclusive definition.

16. Debt has been defined under Section 3(11) as under:

*“**“debt”** means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;”*

[Emphasis supplied]

17. We are not concerned in the present matter with application by Debtor to initiate Insolvency Resolution Process against himself/itself. Here Section 95 is relevant. Section 95 to 100 may be reproduced for reference and to examine the same:

“95. Application by creditor to initiate insolvency resolution process. –

(1) A creditor may apply either by himself, or jointly with other creditors, or through a resolution professional to the Adjudicating Authority for initiating an insolvency resolution process under this section by submitting an application.

(2) A creditor may apply under sub-section (1) in relation to any partnership debt owed to him for initiating an insolvency resolution process against-

(a) any one or more partners of the firm; or

(b) the firm.

(3) Where an application has been made against one partner in a firm, any other application against another partner in the same firm shall be presented in or transferred to the Adjudicating Authority in which the first mentioned application is pending for adjudication and such Adjudicating Authority may give such directions for consolidating the proceedings under the applications as it thinks just.

(4) An application under sub-section (1) shall be accompanied with details and documents relating to-

(a) the debts owed by the debtor to the creditor or creditors submitting the application for insolvency resolution process as on the date of application;

(b) the failure by the debtor to pay the debt within a period of fourteen days of the service of the notice of demand;
and

(c) relevant evidence of such default or non-repayment of debt.

(5) The creditor shall also provide a copy of the application **made** under sub-section (1) to the debtor.

(6) The application referred to in sub-section (1) shall be in such form and manner and accompanied by such fee as may be prescribed.

(7) The details and documents required to be submitted under sub-section (4) shall be such as may be specified.

96. Interim- moratorium. - (1) When an application is filed under section 94 or section 95 –

(a) an interim-moratorium shall commence on the date of the application in relation to all the debts and shall cease to have effect on the date of admission of such application;
and

(b) during the interim-moratorium period -

(i) any pending legal action or proceeding in respect of any debt shall be deemed to have been stayed;
and

(ii) the creditors of the debtor shall not initiate any legal action or proceedings in respect of any debt.

(2) Where the application has been made in relation to a firm, the interim-moratorium under sub-section (1) shall operate against all the partners of the firm as on the date of the application.

(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

97. Appointment of resolution professional. –

(1) If the application under section 94 or 95 is filed through a resolution professional, the Adjudicating Authority shall direct the Board within seven days of the date of the application to confirm that there are no disciplinary proceedings pending against resolution professional.

(2) The Board shall within seven days of receipt of directions under sub-section (1) communicate to the Adjudicating Authority in writing either –

(a) confirming the appointment of the resolution professional; or

(b) rejecting the appointment of the resolution professional and nominating another resolution professional for the insolvency resolution process.

(3) Where an application under section 94 or 95 is filed by the debtor or the creditor himself, as the case may be, and not through the resolution professional, the Adjudicating Authority shall direct the Board, within seven days of the filing of such application, to nominate a resolution professional for the insolvency resolution process.

(4) *The Board shall nominate a resolution professional within ten days of receiving the direction issued by the Adjudicating Authority under sub-section (3).*

(5) *The Adjudicating Authority shall by order appoint the resolution professional recommended under sub-section (2) or as nominated by the Board under sub-section (4).*

(6) *A resolution professional appointed by the Adjudicating Authority under sub-section (5) shall be provided a copy of the application for insolvency resolution process.*

98. Replacement of resolution professional. -

(1) *Where the debtor or the creditor is of the opinion that the resolution professional appointed under section 97 is required to be replaced, he may apply to the Adjudicating Authority for the replacement of the such resolution professional.*

(2) *The Adjudicating Authority shall, within seven days of the receipt of the application under sub-section (1) make a reference to the Board for replacement of the resolution professional.*

(3) *The Board shall, within ten days of the receipt of a reference from the Adjudicating Authority under sub-section (2), recommend the name of the resolution professional to the Adjudicating Authority against whom no disciplinary proceedings are pending.*

(4) *Without prejudice to the provisions contained in sub-section (1), the creditors may apply to the Adjudicating Authority for replacement of the resolution professional where it has been decided in the meeting of the creditors, to replace the resolution professional with a new resolution professional for implementation of the repayment plan.*

(5) Where the Adjudicating Authority admits an application made under sub-section (1) or sub-section (4), it shall direct the Board to confirm that there are no disciplinary proceedings pending against the proposed resolution professional.

(6) The Board shall send a communication within ten days of receipt of the direction under sub-section (5) either-

(a) confirming appointment of the nominated resolution professional; or

(b) rejecting appointment of the nominated resolution professional and recommend a new resolution professional.

(7) On the basis of the communication of the Board under sub-section (3) or sub-section (6), the Adjudicating Authority shall pass an order appointing a new resolution professional.

(8) The Adjudicating Authority may give directions to the resolution professional replaced under sub-section (7) –

(a) to share all information with the new resolution professional in respect of the insolvency resolution process; and

(b) to co-operate with the new resolution professional in such matters as may be required.

99. Submission of report by resolution professional. -

(1) The resolution professional shall examine the application referred to in section 94 or section 95, as the case may be, within ten days of his appointment, and submit a report to the Adjudicating Authority recommending for approval or rejection of the application.

(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 by furnishing -

(a) evidence of electronic transfer of the unpaid amount from the bank account of the debtor;

(b) evidence of encashment of a cheque issued by the debtor; or

(c) a signed acknowledgment by the creditor accepting receipt of dues.

(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.

(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.

(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.

(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).

(7) After examination of the application under sub-section (6), he may recommend acceptance or rejection of the application in his report.

(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.

(9) The resolution professional shall record the reasons for recommending the acceptance or rejection of the application in the report under sub-section (7).

(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.

100. Admission or rejection of application. -

(1) The Adjudicating Authority shall, within fourteen days from the date of submission of the report under section 99 pass an order either admitting or rejecting the application referred to in section 94 or 95, as the case may be.

(2) Where the Adjudicating Authority admits an application under sub-section (1), it may, on the request of the resolution professional, issue instructions for the purpose of conducting negotiations between the debtor and creditors and for arriving at a repayment plan.

(3) The Adjudicating Authority shall provide a copy of the order passed under sub-section (1) along with the report of the resolution professional and the application referred to in section 94 or 95, as the case may be, to the creditors within seven days from the date of the said order.

(4) If the application referred to in section 94 or 95, as the case may be, is rejected by the Adjudicating Authority on the basis of report submitted by the resolution professional or that the application was made with the intention to defraud his creditors or the resolution professional, the order under sub-section (1) shall record that the creditor is entitled to file for a bankruptcy order under Chapter IV.”

[Emphasis supplied]

18. “Creditor” referred in Section 95 has not been defined in Part III. As such definition of Creditor at Section 3 (10) may be referred, which is as under:

*“**“creditor”** means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder;”*

19. Thus, a Creditor includes Financial Creditor, Operational Creditor, Secured Creditor, Unsecured Creditor and also Decree-holder. The Creditor under Section 95 can apply (i)by himself or (ii)jointly with other creditors or (iii)through Resolution Professional to the Adjudicating Authority for initiating Insolvency Resolution Process under Section 95 by submitting an application. The Insolvency and Bankruptcy (Application to Adjudicating Authority for

Insolvency Resolution Process of Personal Guarantors to Corporate Debtors) Rules, 2019 ('Rules' for short) defines "Adjudicating Authority" in Rule 3(1)(a) as under:

"(a) "Adjudicating Authority" means-

(i) for the purpose of section 60, the National Company Law Tribunal constituted under section 408 of the Companies Act, 2013 (18 of 2013); or

(ii) in cases other than sub-clause (i), the Debt Recovery Tribunal established under sub-section (1A) of section 3 of the Recovery of Debts and Bankruptcy Act, 1993 (51 of 1993);"

Thus, for Debtor i.e. Personal Guarantors to Corporate Debtor the "Adjudicating Authority" is the National Company Law Tribunal.

20. Sub-section (2) and (3) of Section 95 deal with Insolvency Resolution Process of Partners of the Firm or the Firm with which we are not concerned in the present matter.

21. Under Section 95(4), the Application as per Rule 7 has to be in Form C. Rule 7 reads as under:

"7. Application by creditor.— (1) *A demand notice under clause (b) of sub-section (4) of section 95 shall be served on the guarantor demanding payment of the amount of default, in Form B.*

(2) The application under sub-section (1) of section 95 shall be submitted in Form C, along with a fee of two thousand rupees.

(3) The creditor shall serve forthwith a copy of the application referred to in sub-rule (2) to the guarantor and the corporate debtor for whom the guarantor is a personal guarantor.

(4) In case of a joint application, the creditors may nominate one amongst themselves to act on behalf of all the creditors.”

22. Coming back to Section 95(4), the application under Section 95(1) needs to be accompanied with details and documents relating to (a) the debts owed by the Debtor to the Creditor or Creditors submitting the application for insolvency resolution process as on the date of application; and (b) the details and documents relating to failure by the debtor to pay the debt within a period of 14 days of service of notice of demand. The notice of demand as per Rule 7(1) has to be in Form C (supra). The service of notice has to be effected as per Rule 3(1)(g). “Service” has been defined in the Rules as follows:

“(g) “serve” means sending any communication by any means, including registered post, speed post, courier or electronic means, which is capable of producing or generating an acknowledgement of receipt of such communication:

Provided that where a document cannot be served in any of the modes, it shall be affixed at the outer door or some other conspicuous part of the house or building in which the addressee ordinarily resides or carries on business or personally works for gain.”

23. Reverting again to Section 95(4), the application under sub-section (1) should be accompanied with details and documents disclosing “relevant evidence of the default or non-repayment of debt”.

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

25. Section 96 deals with Interim-moratorium. As is clear from the section reproduced above, relevant is that when an application is “filed” under Section

95, the interim-moratorium will automatically kick in. Thus, the effect of interim-moratorium immediately starts when the application is “filed”. No adjudication is involved here.

26. Coming to Section 97, it deals with appointment of the Resolution Professional. It is clear from Section 97 that the Creditor can apply by himself or jointly with other Creditors or through the Resolution Professional. Sub-section (1) of Section 97 states that if the application under Section 95 is filed through the Resolution Professional, the Adjudicating Authority shall direct the Board within 7 days of the date of the application to confirm that there are no disciplinary proceedings pending against Resolution Professional and the Board has to communicate within 7 days of receipt of directions in writing either to confirm the appointment of the Resolution Professional or to reject the appointment of the Resolution Professional and to nominate another Resolution Professional in the insolvency resolution process.

27. In this context Rule 8 needs to be referred to, which reads as under:

“8. Confirmation or nomination of insolvency professional.—

(1) For the purposes of sub-section (2) of section 97 and sub-section (5) of section 98, the Board may share the database of the insolvency professionals, including information about disciplinary proceedings against them, with the Adjudicating Authority from time to time.

(2) For the purposes of sub-section (4) of section 97 and sub-section (3) of section 98, the Board may share a panel of

insolvency professionals, who may be appointed as resolution professionals, with the Adjudicating Authority.”

28. It is argued by the Learned Counsel for the Respondent that the IBBI from time to time puts on its database particulars regarding the Insolvency Professionals including information regarding disciplinary proceedings against them and that the panel of the insolvency professionals is shared with the Adjudicating Authorities and such procedure helps the Adjudicating Authorities take timely action in the proceedings and the Adjudicating Authority in the present matters could appoint the Resolution Professional through whom the application under Section 95 had been filed.

29. Under Section 97(3), where an application under Section 95 is filed by the Creditor himself, and not through the Resolution Professional, the Adjudicating Authority is required to direct the Board, within 7 days, to nominate a Resolution Professional and the Board needs to nominate the same within 10 days and then the Adjudicating Authority shall, by order, appoint the Resolution Professional recommended under Sub-section (2) or as nominated by the Board under sub-section (4). Here again, the procedure as provided under the Rules vide Rule 8 would apply and Section 97 of IBC will have to be read with Rule 8.

30. Between Section 97 dealing with appointment of Resolution Professional and Section 99 which deals with submission of report by Resolution Professional, the legislature has provided Section 98 which deals with regard to

replacement of Resolution Professional. Counsel for the Appellant argued that before taking report from the Resolution Professional, the Debtor should have got an opportunity to seek replacement of the Resolution Professional and by the impugned order this opportunity has been denied.

31. Going through Section 98 of IBC, we do not find that Section 98 is stage specific. Section 98 itself shows that the Section could be resorted to even on stages like implementation of repayment plan which would be stage beyond Section 116, where implementation and supervision of repayment plan is provided for. Thus, the argument that before report of Resolution Professional the Debtor must get a chance to seek replacement of Resolution Professional and thus notice was required to be given has no substance. It is only after the Resolution Professional is appointed by the Adjudicating Authority under Section 97(5), that step under Section 98 is contemplated.

32. Section 99 require the Resolution Professional to “examine the application” and to “submit the report” to the Adjudicating Authority “recommending for approval or rejection of the application”. What the Resolution Professional does under Section 99(2) is to “require the Debtor to prove repayment of the debt claimed as unpaid by the Creditor” by furnishing (a) evidence of electronic transfer of the unpaid amount from the bank account of the Debtor; (b) evidence of encashment of a cheque issued by the Debtor; or (c) a signed acknowledgement by the Creditor accepting receipt of dues. This is mere collection of evidence. These provisions give opportunity to the Debtor to

submit material in his favour. Section 99(3) provides that 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”. Thus, where debt concerned is registered with information utility is established, it would be conclusive evidence of valid debt and Personal Guarantor is not entitled to raise dispute regarding validity of the debt. Thus, where the debt is registered as mentioned, dispute of validity of debt cannot be raised and thus Adjudicating Authority need not adjudicate on it.

Section 99(4) shows that purpose of “examining” the application, is that 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. Thus, Resolution Professional has option to call for information from different sources. Sub-section (5) of 99 makes provision that the person from whom information or explanation is sought “shall” furnish the same within seven days of receipt of request. Here again, the procedure for Resolution Professional is of collecting necessary material or evidence.

33. Like Section 99(1) and Section 99(4), sub-section (6) of Section 99 also refers to the Resolution Professional “examining” the application and ascertaining if the applicant satisfies the requirements set out in Section 95 and that the applicant has provided the necessary information and given explanation sought by the Resolution Professional. It is only after such

collecting material and, examination by the Resolution Professional, Section 99(7) requires the Resolution Professional to “recommend” acceptance or rejection of application in his report. (Provision with regard to fresh start has not been enforced and thus sub-section (8) of Section 99 will not be relevant for present.) Sub-section (9) of Section 99 requires the Resolution Professional to “record” the reasons for acceptance or rejection of the application. Thus, the recommendation has to be supported by Resolution Professional with reasons. Resolution Professional does not adjudicate and only gives his reasons for the recommendation. Copy of report is to be given to the Debtor or Creditor, as the case may be, as per Section 99(10).

34. Then comes Section 100 which deals with admission or rejection of application. This has to be done within 14 days from the date of submission of report under Section 99. Sub-section (2) of Section 100 shows that Adjudicating Authority can, on request of the Resolution Professional, issue instructions for the purpose of conducting negotiations between the Debtor and the Creditors and for arriving at a repayment plan. Under Section 100(3) copy of the order admitting or rejecting the application is required to be provided alongwith the report to the Creditors within 7 days from the date of order. Sub-section (4) of Section 100 provides for contingency where Creditors would be entitle for Bankruptcy Order under Chapter IV.

35. Form B under Rule 7(1) deals with demand notice to be served on the Guarantor demanding payment of the amount of default. ‘Form C’ relates to

Rule 7(2) which gives a format of application to be submitted by the Creditor to initiate Insolvency Resolution Process. 'Form C' may be reproduced as inter-alia it relates to declaration to be given by the Insolvency Professional including declaration of no disciplinary proceeding pending. It is material as the Creditor can file application through Insolvency Professional. The 'Form C' reads as follows:

FORM C

[See rule 7(2)]

APPLICATION BY CREDITOR TO INITIATE INSOLVENCY RESOLUTION PROCESS

[Under rule 7(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019]

[Date]

To

The Adjudicating Authority

[Address]

From

[Name and address of the creditor]

In the matter of [name of the guarantor]

Subject: Application to initiate insolvency resolution process in respect of [name of the guarantor] under the Code.

Madam/Sir,

[Name of the creditor], hereby submits this application to initiate an insolvency resolution process in the case of [name of guarantor].

The details for the purpose of this application are set out below:

Part - I PARTICULARS OF APPLICANT

1.	Title and full name			
2.	Date of birth and e-mail address			
3.	Contact number(s)	Home	Mobile	Business

4.	Identification number	Aadhaar number	CIN	PAN	GSTIN
5.	Address	Present	Permanent	Business	
6.	Bank Account details (Joint and Several)	Account number	IFSC Code	Name of the Bank and Branch	
				Address	

Part – II
PARTICULARS OF THE GUARANTOR

1.	Title and full name						
2.	Date of birth and e-mail address (to the extent known)						
3.	Any other name by which the guarantor is or has been known (as applicable) (to the extent known)						
4.	Address	Present	Permanent	Business			
5.	Occupation/ Business/ Profession						
6.	Annual income (to the extent known)						
7.	List of associates of the guarantor, including relatives, who may be creditors (to the extent known)	Name	Age	Address			

8.	Bank account details (Joint and Several)	Account number	IFSC Code		Name of the bank and Branch address	
9.	Identification number	Aadhaar number	Passport number	PAN	GSTIN	
10.	Contact number(s)	Home	Mobile		Business	
11.	List of assets of guarantor as on the application date (to the extent known) Note: this will include all assets of guarantor, irrespective of them being excluded assets.	Immovable	Description	Estimated value	Excluded asset or not	
		Movable	Description	Estimated value	Excluded asset or not	
		Vehicles				
		Shares in listed companies				
		Shares in other companies				
		Life insurance policy				
		Jewellery				
		Pension policy				

		Investment in mutual funds			
		Investment in other funds			
		Investment in partnerships and other business concerns			
		Any other movable property			
12.	Number of directorships held in the preceding three years (along with name of company in which directorship is held) and CIN of such companies				
13.	Marital status (single, married, divorced, widowed, co-habiting, separated, or specify any other) (to the extent known)				
14.	Details regarding personal guarantor (in addition to information in serial numbers 1-13 of this part) -				
	Name of corporate debtor for which guarantee is given				
	Any current or past position held in the corporate debtor (to the extent known)				
	Identification number of the corporate debtor				
	Whether corporate debtor is an associate (to the extent known)				
	Any securities held in corporate debtor for whom guarantee is given				

15.	Where the guarantor is not resident in India, the name and address of person resident in India authorised to accept the service of process on guarantor's behalf	
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Part-III
PARTICULARS OF DEBT

1.	Total debt (including any interest or penalties)	
2.	Amount in default	
3.	Date on which debt was due	
4.	Date on which default occurred	
5.	Nature of the debt	
6.	Secured debt including particulars of security held, the date of its creation, its estimated value as per the creditor (as applicable)	
7.	Unsecured debt (as applicable)	
8.	Details of retention of title arrangements (if any) in respect of goods to which the debt refers (attach a copy)	
9.	Details of any mutual credit, mutual debts, or other mutual dealings between the guarantor and the creditor, which may be set-off against the claim (attach proof)	
10.	Particulars of an order of a court, tribunal or arbitral panel adjudicating on the default, if any (attach a copy of the order)	
11.	Record of default with the information utility, if any (attach a copy)	

12.	Details of succession certificate, or probate of a will, or letter of administration, or court decree (as may be applicable), under the Indian Succession Act, 1925 (10 of 1925) (attach a copy)	
13.	Provision of law, contract or other document under which debt has become due (attach a copy)	
14.	A statement of bank account where deposits are made or credits received normally by the creditor in respect of the debt of the corporate debtor, from the date on which the debt was incurred (attach a copy)	
15.	List of documents attached to this application in order to prove the existence of debt and the amount in default	
16.	Statement by creditor in respect of excluded debts	<p>I [<i>creditor</i>] hereby state that the debt(s) for which the insolvency resolution process application is filed does not include any-</p> <ul style="list-style-type: none"> (i) liability to pay fine imposed by a court or tribunal; (ii) liability to pay damages for negligence, nuisance or breach of a statutory, contractual or other legal obligation; (iii) liability to pay maintenance to any person under any law for the time being in force; (iv) liability in relation to a student loan; (v) any other debt prescribed under section 79(15)(e) of the Code.
17.	If you are a secured creditor, tick the applicable box in the right column relating to forfeiture of right to enforce security during the period of the repayment plan, which will determine the voting share as per section 110 of the Code	<p><input type="checkbox"/> I agree to forfeit my right to enforce my security [<i>insert description</i>] during the period of the repayment plan.</p> <p><input type="checkbox"/> I do not agree to forfeit my right to enforce my security [<i>insert description</i>] during the period of the repayment plan.</p>

Part-IV

PARTICULARS OF & DECLARATION BY INSOLVENCY PROFESSIONAL (IF APPLICATION FILED THROUGH INSOLVENCY PROFESSIONAL)

1.	Title and full name			
2.	Address	Present	Permanent	Business
3.	E-mail address(es)			
4.	Contact number	Home	Mobile	Business
5.	Declaration by insolvency professional	<p>I, <i>[name of insolvency professional]</i>, an insolvency professional enrolled with <i>[name of insolvency professional agency]</i> having registration number <i>[registration number.]</i> have been proposed as the resolution professional by <i>[name of applicant guarantor]</i> in connection with the proposed insolvency resolution process of <i>[name of the guarantor]</i>.</p> <p>I hereby:</p> <p>(i) agree to accept appointment as the resolution professional if an order of appointment is passed by the Adjudicating Authority;</p> <p>(ii) state that the registration number allotted to me by the Board is <i>[insert registration number]</i> and that I am currently qualified to practice as an insolvency professional;</p> <p>(iii) disclose that I am currently serving as an interim resolution professional / resolution professional / authorized representative / liquidator/ bankruptcy trustee in <i>[insert number and details of the proceedings]</i>;</p> <p>(iv) certify that there are no disciplinary proceedings pending against me with the Board or <i>[name of the insolvency professional agency he is a member of]</i>;</p> <p>(v) affirm that I am eligible to be appointed as a resolution professional in respect of the guarantor in accordance with the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Regulations, 2019;</p> <p>(vi) make the following disclosures in accordance with the code of conduct for insolvency professionals as set out in the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 <i>[insert disclosures, if any]</i>.</p> <p>(Signature of the insolvency professional)</p>		

[Name of the creditor] has paid the requisite fee for this application through *[state means of payment]* on *[date]*.

Yours sincerely,

Signature of creditor/ person authorised to act on behalf of the creditor [<i>Please enclose the authorisation document if this application is being submitted on behalf of the creditor</i>]
Name in block letters
Address of person signing

List of documents to be attached to the application:

1. All documents mentioned in serial number. 15 of Part III of this form.
2. Copy of the demand notice served on the guarantor in Form B.
3. Copy of the income tax returns with detailed computation of the income of the guarantor, or the firm, as the case may be, for the previous three years, if available.
4. Copy of the personal guarantee contract.
5. Copy of the authorisation, wherever required under this form.
6. Proof that the application fee has been paid.
7. Documents evidencing the debt and the default in relation to the debt, as may have been provided by the guarantor at any point in time, if available.
8. Documents evidencing the assets, liabilities, income and any other relevant information as may have been provided by the guarantor at any point in time, if available.
9. Documentary evidence of all information sought in each entry for each Part of the form.

36. The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Regulations, 2019 ('Regulations' for short) are the regulations which inter-alia deals with registration of claims, meeting of creditors and voting and repayment plan. Relevant for the present matter is Regulation 4, which reads as follows:

“4. Eligibility of resolution professional. – (1) An insolvency professional shall be eligible to be appointed as a resolution professional for a resolution process, if–

(a) he, the insolvency professional entity of which he is a partner or a director, and all the partners and directors of the said insolvency professional entity are independent of the guarantor;

(b) he is not subject to any ongoing disciplinary proceeding or a restraint order of the Board or of the insolvency professional agency of which he is a professional member; and

(c) the insolvency professional entity of which he is a partner or a director, or any other partner or director of such insolvency professional entity does not represent any party in the resolution process.

Explanation.- For the purposes of this sub-regulation, -

(i) a person shall be considered independent of the guarantor, if he –

(a) is not an associate of the guarantor;

(b) is not a related party of the corporate debtor; and

(c) has not acted or is not acting as interim resolution professional, resolution professional or liquidator in respect of the corporate debtor;

(ii) the expression “related party” shall have the meaning assigned to it in sub-section (24) of section 5.

(2) An insolvency professional, other than who has filed an application under section 94 or 95 on behalf of a guarantor or a

creditor, as the case may be, shall provide a written consent in Form A to the Adjudicating Authority before his appointment as resolution professional in a resolution process.”

37. Form A referred in Regulation 4(2) is part of the Forms under the Regulations and provides for particulars required to be given by the Resolution Professional while giving written consent to act as Resolution Professional. These are protective measures. The procedures are time bound and legislature has expressed faith in the Resolution Professionals empanelled. Section 97(2)(a) does not bar the same Resolution Professional from being appointed who may have filed the application for Creditor under Section 95(1).

38. Going through the above Sections, Rules and Regulations, the scheme which appears to be provided by the legislature appears to be that when application under Section 95 is “filed” by the Creditor/s by themselves or through Resolution Professional as per the prescribed format, the interim-moratorium kicks in when the application is filed. Filing of the application has been dealt with under Rules as per Rule 10, 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.”

[Emphasis supplied]

39. This takes us to Rule 20 to 24 and 26 of Part III of NCLT Rules which deals with institution of proceedings, petition, appeals etc. and procedure and particulars to be set out in the address for service and presentation of petition or appeal, etc. Once the application has been “filed” and treated so by numbering the application by the Adjudicating Authority, the next stage contemplated for the Adjudicating Authority is to only appoint the Resolution Professional under the provisions of Section 97 and the Resolution Professional is to then “examine” the application as per requirements laid down in Section 99 where the Resolution Professional has to also give opportunity to the Debtor/ Personal Guarantor and submit the report.

It has been argued by Learned Counsel for the Appellant that the Respondent – State Bank of India filed the application through Resolution Professional and such Resolution Professional cannot himself propose rejection of the application. We have already referred to the declaration which is sought from the Resolution Professional under the Regulations while giving consent and the statement required to be made in 'Form C' provided in the Rules. The Rules show that the IBBI follows a procedure of maintaining a panel of Insolvency Professionals with information about disciplinary proceedings against them from time to time. Under the Regulations relating to Resolution Professionals various safeguards have been provided and the Resolution Professionals are creatures of IBC read with Rules and Regulations and subject to discipline through IBBI. As mentioned the legislature has confidence in the Resolution Professionals under the system that they will act as Professionals in terms of IBC, its Rules and Regulations. IBC provides that the Creditor may, himself or through Resolution Professional file application under Section 95. Section 97 of IBC does not bar the same Resolution Professional from being appointed as Resolution Professional by the Adjudicating Authority. The safeguard for the Debtor is in Section 98 where the Debtor may seek replacement of the Resolution Professional. Thus, we are not accepting the fear expressed by the Appellant that how could the Resolution Professional appointed by the Creditor itself appointed by the Adjudicating Authority deal with the application filed by himself for the Creditor and give Report. What the Resolution Professional under Section 99 would be doing was requiring the

Debtor to furnish proof of repayment as per Section 99(2) and after doing the necessary spade work Resolution Professional has to recommend acceptance or rejection of the application with reasons. The decision making whether to admit or reject the application would be only by the Adjudicating Authority.

40. Learned Counsel for the Appellant referred to various sections of the Companies Act and Rules to submit that when application is filed notice through the Tribunal needs to be given to the Respondent – Personal Guarantor before appointing the Resolution Professional. Reliance has been placed on judgment in the matter of ‘*Swiss Ribbons*’ (Supra). In the said judgment the Hon’ble Supreme Court observed in Para 57 and 58 as follows:

“57. Section 420 of the Companies Act, 2013 states as follows:

“420. Orders of Tribunal.—(1) *The Tribunal may, after giving the parties to any proceeding before it, a reasonable opportunity of being heard, pass such orders thereon as it thinks fit.*

(2) The Tribunal may, at any time within two years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it, and shall make such amendment, if the mistake is brought to its notice by the parties:

Provided that no such amendment shall be made in respect of any order against which an appeal has been preferred under this Act.

(3) The Tribunal shall send a copy of every order passed under this section to all the parties concerned.

58. *Rules 11, 34 and 37 of the National Company Law Tribunal Rules, 2016 (NCLT Rules) state as follows:*

“11. Inherent powers.—*Nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the Tribunal to make such orders as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal.*

x xxx

34. General procedure.—*(1) In a situation not provided for in these Rules, the Tribunal may, for reasons to be recorded in writing, determine the procedure in a particular case in accordance with the principles of natural justice.*

(2) The general heading in all proceedings before the Tribunal, in all advertisements and notices shall be in Form No. NCLT 4.

(3) Every petition or application or reference shall be filed in form as provided in Form No. NCLT 1 with attachments thereto accompanied by Form No. NCLT 2 and in case of an interlocutory application, the same shall be filed in Form No. NCLT 1 accompanied by such attachments thereto along with Form No. NCLT 3.

(4) Every petition or application including interlocutory application shall be verified by an affidavit in Form No. NCLT 6. Notice to be issued by the Tribunal to the opposite party shall be in Form NCLT 5.

x xxx

37. Notice to Opposite Party.—(1) *The Tribunal shall issue notice to the respondent to show cause against the application or petition on a date of hearing to be specified in the notice. Such notice in Form No. NCLT 5 shall be accompanied by a copy of the application with supporting documents.*

(2) *If the respondent does not appear on the date specified in the notice in Form No. NCLT 5, the Tribunal, after according reasonable opportunity to the respondent, shall forthwith proceed ex parte to dispose of the application.*

(3) *If the respondent contests to the notice received under sub-rule (1), it may, either in person or through an authorised representative, file a reply accompanied with an affidavit and along with copies of such documents on which it relies, with an advance service to the petitioner or applicant, to the Registry before the date of hearing and such reply and copies of documents shall form part of the record.”*

A conjoint reading of all these Rules makes it clear that at the stage of the adjudicating authority's satisfaction under Section 7(5) of the Code, the corporate debtor is served with a copy of the application filed with the adjudicating authority and has the opportunity to file a reply before the said authority and be heard by the said authority before an order is made admitting the said application.”

41. It has been argued that although in the present matter the Creditor had served a copy of the application after it was filed and a copy of amended application also after it was filed to the Appellant but the notice through Court

was not served. We find from the scheme, as discussed above, the requirement is only to the extent that the application will be filed after serving a notice in terms of 'Form B' of the Rules and when the application is filed in Form C the same would be served on the Personal Guarantor. This acts as a notice to the Personal Guarantor who would be given opportunity by the Resolution Professional while examining the application in terms of Section 99 of IBC to submit material as mentioned. Before the stage of appointment of the Resolution Professional, the Code or Rules and Regulations do not provide for any hearing as such to be given to the Debtor. Undertone of Section 97(5) also is to bind Adjudicating Authority to appoint Resolution Professional as nominated by the Board. Thus, once application under Section 95 is "filed" the next step for Adjudicating Authority is to appoint the Resolution Professional.

42. However, considering the judgment of the Hon'ble Supreme Court in the matter of '*Swiss Ribbons*', it appears to us that keeping principles of natural justice in view, limited notice of the application should be given to the Personal Guarantors of the Corporate Debtors. The limited notice has to be only to secure presence of the Personal Guarantor referring to the Interim Moratorium which has commenced. Before appointment of the Resolution Professional no hearing as such is contemplated and before appointment of the Resolution Professional the Debtor cannot be allowed to raise disputes for which the stage would be Section 100. Under NCLT Rule 11, Adjudicating Authority is duty bound to pass orders to prevent abuse of process. As such, limited notice to

appear may be given to the Personal Guarantors so that when Resolution Professional is appointed, he may provide material as per Section 99(2) of IBC. Till the stage of Section 100, the process is of collecting necessary evidence.

43. The Appellant is himself criticizing the impugned order claiming that the Adjudicating Authority has already recorded finding that the Personal Guarantor has committed a default and thus the Resolution Professional cannot while examining the application under Section 99 give a contrary opinion. At the same time, the Learned Senior Counsel for the Appellant has tried to submit that before appointment of Resolution Professional the Personal Guarantor should be able to show that the debt is not due or that it is not payable. This is contradiction. In our view, the stage for examining merits of the Application would be Section 100 of IBC. To prevent abuse of process of double hearings, first on merit before appointment of Resolution Professional and again at the stage of Section 100 which will defeat the objects of IBC by protracted disputes, after limited notice to appear has been issued even if Debtor raises disputes on merit, the same may be adjudicated only after receipt of report from Resolution Professional under Section 99. Before that point of time the process is more of filing of application and collecting of evidence through a professional person like Resolution Professional.

44. In substance, once the application is “filed” (as per Section 95, 96 read with Rule 10) the Adjudicating Authority has to act on it, and following principles of natural justice, give limited notice to Personal Guarantor to

appear referring to the Interim Moratorium that has commenced as per terms of Section 96. Then the next stage is of appointing Resolution Professional as per Section 97 read with Rules and Regulations. Third stage will be Resolution Professional acting in terms of Section 99 and submitting Report. At the fourth stage comes in adjudication of the application under Section 100 which ought to be decided by giving hearing to parties keeping in view Application, evidence collected and report under Section 99.

45. Coming to the present matter and impugned order, we find that the Adjudicating Authority took note of the steps taken for filing of the application, sending of demand notice and filing application in 'Form C'. It has been then observed in Para 9 to 15 as under:

"9. The Bench, after hearing the Petitioner, notes that the Corporate Guarantor has not filed any submissions and on the date of hearing there was no representation from the side of the Respondent, i.e., the Personal Guarantor.

10. Based on the submissions made by the Applicant and the documents produced and placed on record before this Bench, the Bench has no doubt in its mind that there is a 'default' on the part of the Personal Guarantor by not fulfilling the debt owed to the Corporate Debtor, i.e., Pratibha Industries Limited as per the Deed of Guarantee entered between the parties through the Deed of Guarantee dated 10.03.2017.

11. This Bench "Allows" the Application filed by Mr. Ram Ratan Kanungo, Insolvency Resolution Professional on behalf of

State Bank of India, the Financial Creditor, under Section 95 of the Insolvency & Bankruptcy Code, 2016 read with Rule 7 of the IBC Rules 2019 against Mr. Ravi Ajit Kulkarni, the Personal Guarantor of the Corporate Debtor, M/s. Pratibha Industries Limited in CP No. 1192/2020. The Interim Moratorium as per Section 96(1) of the Code has commenced from the date of filing of Application by the Financial Creditor, i.e., 25.01.2021.

12. The Bench makes it clear that from the date of filing this Application i.e. 25.01.2021 by the Petitioner, Interim Moratorium commences as stipulated under Section 96(1) of the Code in relation to all the debts of the Personal Guarantor. During the Interim Moratorium period: (i) any pending legal action or proceedings in respect of any debt shall be deemed to have been stayed; and (ii) the creditors of the debtor shall not initiate any legal action or proceedings in respect of any debt. As per Section 96(3) of the Code, the provisions of sub-section 96(1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

13. The Bench notes that the appointment of Resolution Professional under Section 97 of the Code is critical and essential not only for the Applicant but also to safeguard the assets of the Personal Guarantor in terms of the provisions of the Code. Since the present Petition has been filed through the Resolution Professional, Mr. Ram Ratan Kanoongo, bearing Registration No. IBBI/IPA-001/IP-P00070/2017-18/10156, this Bench confirms the appointment of the Resolution Professional in the matter.

14. In this matter, the Resolution Professional, Shri Ram Ratan Kanoongo, shall exercise all the powers as enumerated under

Section 99 of the Code read with Rules made there under. He is directed to make the recommendations with reasons in writing for acceptance or rejection of this Application within the stipulated time as envisaged under the provisions of Section 99 of the Code. The Resolution Professional shall provide a copy of the report under sub-section 7 of Section 99 to the Creditor as soon as the same is filed before this Authority.

15. List the matter for further proceedings in the case on 15.04.2021.”

[Emphasis supplied]

46. The observations have been made by the Adjudicating Authority that the Corporate Guarantor (should have been only ‘Guarantor’) has not filed any submission and on date of hearing there was no representation. It appears that the Adjudicating Authority was of the view that service of ‘Form C’ on 29th August, 2020 and ‘Amended Form C’ on 28th January, 2021 was the notice. Having gone through the Form and Rules and Regulations, we do not find that anywhere it is provided that when the Form is submitted it would also contain notice of date as to when the matter is coming up before the Adjudicating Authority. In the absence of any such requirement, we find, as above, that there has to be limited notice for presence conveying the “filing” of application and commencing of Interim Moratorium under Section 96 from date of filing (to be mentioned).

47. We also find that it was an error on the part of Adjudicating Authority to observe in Para 10 as reproduced above and hold that there is a “default” when matter was at the stage of acting on the application under Section 95 read with Section 96. According to us, as mentioned, the stage for considering default would arrive when the matter is taken up under Section 100 of IBC. The Appellant is right when the Appellant submits that if the Adjudicating Authority gives such finding in advance, the report under Section 99 could not be in the negative. Again the Adjudicating Authority mentioned in Para 11 of the impugned order that it was “allowing” the application under Section 95. At the stage of Section 95 Adjudicating Authority is to act upon the application to take further steps. The stage for “allowing” Application to admit or reject the application would be under Section 100. At the stage of appointment of Resolution Professional, such allowing is not contemplated. In Section 97 no adjudication as such is involved.

48. The Personal Guarantor of Corporate Debtor can express “opinion” that Resolution Professional “appointed” under Section 97 is required to be replaced under Section 98 only after Resolution Professional has been appointed. No concurrence of such Personal Guarantor is required to be taken before appointment. Apparently, the “opinion” contemplated is limited to say “X” Resolution Professional should be replaced. Reading Section 98(1) with Section 98(3) what appears relevant is whether there is disciplinary proceeding pending against the “X” Resolution Professional appointed.

49. For reasons mentioned above, Company Appeal (AT) (Insolvency) No. 316 of 2021 requires to be partly allowed. The findings and observations made by the Adjudicating Authority in Para 9 to 11 of impugned order are set aside. The appointment of Mr. Ram Ratan Kanoongoas Resolution Professional is not disturbed. It is stated that he has already given report. As we have set aside the premature observations made, with regard to default, by the Adjudicating Authority, we set aside the report given in consequence to such order. We remit back the matter to the Adjudicating Authority. Parties to appear before Adjudicating Authority on 20th August, 2021. The Resolution Professional will give opportunity to the Appellant in terms of Section 99 and give fresh report. The Adjudicating Authority will then proceed further with the matter as per law in the light of our observations and findings. With these observations the appeal is disposed of.

Company Appeal (AT) (Insolvency) No. 317 of 2021

50. For reasons mentioned above, in this appeal also, we pass the following order:

Company Appeal (AT) (Insolvency) No. 317 of 2021 is partly allowed. The findings and observations made by the Adjudicating Authority in Para 9 to 11 of impugned order are set aside. The appointment of Mr. Ram Ratan Kanoongoas Resolution Professional is not disturbed. It is stated that he

has already given report. As we have set aside the premature observations made, with regard to default, by the Adjudicating Authority, we set aside the report given in consequence to such order. We remit back the matter to the Adjudicating Authority. Parties to appear before Adjudicating Authority on 20th August, 2021. The Resolution Professional will give opportunity to the Appellant in terms of Section 99 and give fresh report. The Adjudicating Authority will then proceed further with the matter as per law in the light of our observations and findings. With these observations the appeal is disposed of.

[Justice A.I.S. Cheema]
The Officiating Chairperson

[Dr. Alok Srivastava]
Member (Technical)

Archana