



**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH (Court-II)
KOLKATA**

C.P. (IB)/262(KB)2022

***An application under Section 95(1) of the Insolvency and Bankruptcy
Code, 2016.***

In the matter of:

State Bank of India

...Financial Creditor

Versus

Nikunj Bothra

...Personal Guarantor

And

Neeraj Kumar Sureka

...Applicant/Resolution Professional

Date of pronouncement:**07.01.2025**

CORAM:

**SMT. BIDISHA BANERJEE, HON'BLE MEMBER (JUDICIAL)
SHRI D. ARVIND, HON'BLE MEMBER (TECHNICAL)**

Appearance (via video conferencing/physically)

Mr. Uttiyo Mallick, Adv.] For the Financial Creditor
Ms. Payal Saha, Adv.]
Ms. Vedika Sureka, Adv.]

Mr. Saurav Jain, Adv.] For the Resolution Professional

Mr. Anuj Singh, Adv.] For the Personal Guarantor
Ms. Ankita Baid, Adv.]
Ms. Trinisha De, Adv.]



O R D E R

Per: Bidisha Banerjee, Member (Judicial)

1. The Court Convened in a hybrid mode.
2. This C.P.(IB)/262(KB)2022 has been preferred by the Financial Creditor to seek initiation of Insolvency Regulation Process against the Respondent Personal Guarantor to Corporate Debtor Rule, 2019 (“Personal Guarantors Rules”) and Regulation 4(2) of IBBI (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Regulations, 2019 (‘Personal Guarantors Regulations’) in terms of Section 99 (1) of the Insolvency and Bankruptcy Code, 2016 read with applicable Regulation of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors), 2016.
3. The amount in debt is Rs.1,56,99,27,221.86/- (Rupees One Hundred Fifty-Six Crore Ninety Nine Lakhs Twenty Seven Thousand Two Hundred and Twenty-one and Paise Eighty Six only) as on 30.11.2013 Default occurred on 28.02.2022.
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. The Applicant had proposed the name of the Insolvency Professional for appointment as Resolution Professional. In view of the above, Mr.

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Neeraj Kumar Sureka, IBBI Registration No. IBBI/IPA-001/IP-P01539/2019-2020/12517, email ID: ipneerajsureka@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.

6. The Resolution Professional report under Section 99 indicated the following:

6.1. The State Bank of India ("SBI") had sanctioned various credit facilities to Salasar Ispat Limited ("SIL"/ "Corporate Debtor") on 08.06.2010, SBI sanctioned Term Loan, Working Capital, SLC and LC (inlands) for an aggregate limit of Rs.2,650.00 Lakhs.

6.2. At the request of the Corporate Debtor, SBI renewed and enhanced credit facilities on several occasions. Lastly on 25.03.2013, SBI had enhanced and sanctioned the limits for the credit facilities for an aggregate limit of Rs. 5, 821.00 Lakhs as detailed below:

	Rs.In Lakhs	
WC Facilities	Existing Limit (as per letter of arrangement	Revised Limit (as per letter of arrangement

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	dated 22.06.2012)	dated 25.03.2013)
Fund Based Limits – FBL		
CC	2,500.00	3,592.00
SLC	100.00	0.00
TL-1	1,305.00	972.00
TL-2	400.00	457.00
WCTL	0.00	800.00
Total FBL(A)	4,305.00	5,821.00
Non-Fund Based Limits-NFBL		
LC (both way inter- changeability from LC to BG and vice versa)	1,500	0.00
Total NFBL(B)	1,500.00	0.00
Total Exposure (A=B)	5,805.00	5,821.00

6.3. The guarantor along with other Personal Guarantors to SIL had jointly and severally executed and delivered a Deed of Guarantee in favour of SBI on 25.03.2013 for repayment and discharge of Rs.5821 Lakhs with interest, enhanced interest, fees, commission, charges, costs and expenses including the Legal Cost and/or other money due to SBI in respect of the above credit facilities. Personal Guarantees were given by Mr.

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Nikunj Bothra, Mr. Anand Kumar Agarwal and Mr. Ayush Agarwal.

- 6.4. Due to irregularity in deposit of the Loan Amount to the SBI interest component as per the terms and conditions of the Sanction Letter, the Loan Accounts became irregular and was classified as Non-Performing Asset (“NPA”) on 27.06.2013 by the SBI.
- 6.5. SBI as such proceeded against the Corporate Debtor SIL and Personal Guarantors under SARFAESI Act, 2002 and issued a statutory notice u/s. 13(2) of the SARFAESI Act, 2002 on 15.12.2014 to SIL as well as the guarantors demanding a sum Rs. 60,06,44,562.27/- outstanding as on 31.05.2013(inclusive of interest till 31.05.2013) plus unapplied interest from 01.06.2013 at the contractual rate on demanded amount together with incidental expenses, cost law charges, etc.
- 6.6. A demand notice/recall notice was also issued by the Advocate Mr. Ramesh Chandra Prusti to the Corporate Debtor and to the Guarantors on 18.12.2014 for repayment of Rs.72,11,75,171.27 (inclusive of interest upto 30.11.2014) outstanding towards the various credit facilities extended by SBI plus further interest with effect from 01.12.2014 till realization.

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6.7. Due to non-receipt of any payment from SIL as well as the guarantors, SBI filed an Original Application (O.A) being no. 106 of 2015 u/s 19 of the Recovery of Debts and Bankruptcy Act, 1993 before the Learned Debt Recovery Tribunal-I, Kolkata on 04.03.2015 for recovery of outstanding amount as on 31.01.2015 as detailed below:

Facility	Total outstanding (with int. applied up to 30.11.2013)	Uncharged interest calculated upto 31.01.2015	Total Outstanding
Cash Credit Account	37,63,80,506.27	10,45,72,599.00	48,09,53,105.27
Term Loan Account-1	9,72,43,540.00	2,56,22,102.00	12,28,66,642.00
Term Loan Account-2	4,57,00,000.00	1,19,62,815.00	5,76,62,815.00

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Working Capital Term Loan Account	8,00,00,000.00	2,09,32,885.00	1,00,92,885.00
Total	59,93,24,046.27	16,30,90,401.00	76,24,14,447.27

6.8. As per the information provided by the SBI, a sum of Rs.3,73,00,000/- was recovered by SBI by sale of Plant & Machinery in the E-Auction held on 28.02.2018.

6.9. A demand notice was issued by SBI on 08.08.2021 in Form B under Rule 7(1) of the Insolvency & Bankruptcy Board of India (Application to Adjudicating Authority for Insolvency Resolution Process of Personal Guarantors to the Corporate Debtor) Rules, 2019 demanding Rs.1,48,68,26,619.34 inclusive of interest calculated up to 31.07.2021 together with interest and other charges at the applicable rates w.e.f 01.08.2021 as outstanding dues payable by the Corporate Debtor SIL.

6.10. However, the Financial Creditor could not provide the proof of delivery of the demand notice, but that the demand notice was acknowledged by Ld. Advocate Mr. Ashok Kumar Singh, on behalf of Personal Guarantor vide his letter dated 17.09.2021.

Which implies that the demand notice was duly delivered to his address.

6.11. SBI thus filed the present Company Petition (IB) NO.262(KB) of 2022 on 11.08.2022 to initiate Insolvency Resolution Process against Sri Nikunj Bothra u/s. 95 of the Insolvency and Bankruptcy Code, 2016 for a default of Rs.1,56,99,27,221.86 outstanding as on 28.02.2022.

7. The Resolution Professional Mr. Neeraj Kumar Sureka has vide his report dated 11th January, 2024 has recommended admission of the personal guarantor into the Insolvency resolution process. The relevant portion of his report has been extracted and appended below for the sake of convenience.

Recommendation

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III. RESOLUTION PROFESSIONAL'S RECOMMENDATION:

As stated above, the dues claimed by SBI on various occasions have been detailed below:

Date	Occasion	Amount claimed by SBI	Amount claimed up to
15/12/2014	Sec 13(2) notice	60,06,44,562/27	31/05/2013
18/12/2014	Demand notice/recall notice by Advocate	72,11,75,171/27	30/11/2014
04/03/2015	O/A/ before DRT-I, Kolkata	76,24,14,447/27	31/01/2015
08/08/2021	Demand notice (Form B) to guarantor	1,48,68,26,619.34	31/07/2021
11/08/2022	Sec 95 application CP (IB) No/ 262 (KB) 2021	1,56,99,27,221.86	28/02/2022

The amount as claimed in Section 95 application can be further classified as below:

Account	Principal	Interest up to 28.02.2022	Amount Outstanding as on 28.02.2022
32059533976	37,63,80,506.27	64,90,16,838.47	1,02,53,97,344.74
31205368187	9,72,43,540.00	16,47,07,368.91	26,19,50,908.91
32907228055	8,00,00,000.00	13,51,90,028.18	21,51,90,028.18
32907269193	84,00,000.00	5,89,88,940.03	6,73,88,940.03
TOTAL	56,20,24,046.27	1,00,79,03,175.59	1,56,99,27,221.86

As evident from the above facts and information/explanation received by the RP, the RP understands that SBI had claimed an outstanding amount of Rs. 1,56,99,27,221.86 up to 28.02.2022 in the section 95 application filed against the guarantor Sri Nikunj Bothra. Vide

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email dated 29.12.2023, SBI has not confirmed to have received any payment towards the outstanding dues from the guarantor Sri Nikunj Bothra.

The RP, vide email and Letter dated 23.12.2023 and further email dated 28.12.2023 sent to Sri Nikunj Bothra, sought details of payment, if any, made by him subsequent to the demand notice issued by SBI. Sri Nikunj Bothra, vide his email dated 28.12.2023 did not provide any details of making payment to the SBI but claimed that petitions filed by SBI against the guarantor is false, frivolous and misconceived. Further, Sri Bothra acknowledged receipt of notice dated August 04, 2021 demanding a sum of Rs. 148,68,26,619.34 served by SBI. Further, he claimed that no part of the said amount borrowed by the Corporate Debtor was utilized by him for his own cause and that all of it was utilized by the Corporate Debtor. Mr. Bothra further claims to have never signed an Agreement of Guarantee with the above-named Bank as a 'Personal Guarantor' on behalf of the Corporate Debtor. However, on perusal of Deed of Guarantee dated 25.03.2013 annexed as "Exhibit N" to the section 95 application, it is apparent that Deed of Guarantee has been duly signed by the Guarantor.

Copies of emails/letter sent to the Guarantor and copy of reply email of guarantor are annexed hereto and marked as ANNEXURE "E".

On perusal of interest calculation sheet as filed by SBI in Section 95 application, the RP observed in the interest calculation sheet that in few instances, no. of days has been wrongly calculated and also the different base rate has been applied by SBI. Considering the same, the RP has verified the interest calculation sheet and it appears that there is difference between the amount which has been claimed by SBI in the section 95 application and RP's verification. The details of such difference of Balances are given hereunder:

Particulars	Principal	Interest up to 28.02.2022	Amount Outstanding as on 28.02.2022
Account No. 3205933976			
As per Section 95 Application	37,63,80,506.27	64,90,16,838.47	1,02,53,97,344.74

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As per RP's verification	37,63,80,506.27	64,57,01,846.13	1,02,20,82,352.40
Difference	-	33,14,992.34	33,14,992.34
Account No. 31205368187			
As per Section 95 Application	9,72,43,540.00	16,47,07,368.91	26,19,50,908.91
As per RP's verification	9,72,43,540.00	16,38,60,511.58	26,11,04,051.58
Difference	-	8,46,857.33	8,46,857.33
Account No. 32907228055			
As per Section 95 Application	8,00,00,000.00	13,51,90,028.18	21,51,90,028.18
As per RP's verification	8,00,00,000.00	13,44,94,343.43	21,44,94,343.43
Difference	-	6,95,684.75	6,95,684.75
Account No. 32907269193			
As per Section 95 Application	84,00,000.00	5,89,88,940.03	6,73,88,940.03
As per RP's verification	84,00,000.00	5,85,92,996.39	6,69,92,996.39
Difference	-	3,95,943.64	3,95,943.64
Total Difference	-	52,53,478.06	52,53,478.06

The copies of Interest calculation sheets as submitted with the section 95 application are annexed hereto and marked as ANNEXURE "F" and the copies of interest calculation sheets verified by RP are annexed hereto and marked as ANNEXURE "G".

As far as the requirements of section 95 of the Code are concerned, the RP would like to bring to the notice of the Hon'ble Tribunal that the demand notice in Form B dated 08/08/2021 was served upon the guarantor Sri Nikunj Bothra at the address available in the bank records i.e., Flat No. 36, 3rd Floor, Ganga Jamuna Building, Kolkata- 700017, West Bengal through speed post and receipt of the same has been duly acknowledged by guarantor. As already stated above, the copy of application under section 95 was served upon Sri Nikunj Bothra via speed post on 05.07.2022 and through email on 28.07.2022 as per the confirmation received from Advocate for Financial Creditor, Ms. Payal Saha vide



her email dated 26.12.2023. As per the track report, the same was delivered on 07.07.2022.

A copy of affidavit of service of Application is already annexed as ANNEXURE "D".

In the opinion of the RP, the application made by State Bank of India before the Hon'ble National Company Law Tribunal, Kolkata to initiate Insolvency Resolution Process against Sri Nikunj Bothra, the personal guarantor of M/s. Salasar Ispat Limited u/s 95 of the Insolvency and Bankruptcy Code, 2016 is **admissible. This Hon'ble Tribunal may, upon perusing the facts stated above, pass an appropriate direction on the amount of claim to be admitted.**

8. A bare perusal of the report extracted above indicates that no Corporate Insolvency Resolution Process or CIRP has been initiated against the principal borrower M/s HARIDRA VINTRADE PRIVATE LIMITED.
9. At hearing it was argued that in absence of any CIR proceeding initiated against the principal borrower the present petition under Section 95(1) seeking to initiate insolvency proceedings against the Personal Guarantor of the Principal Borrower is not maintainable before this Adjudicating Authority i.e., NCLT. It would eventually lie before the jurisdictional the Debt Recovery Tribunal (DRT).
10. Thus, the issues that have cropped up for determination in the present matter are two folds are:
 - (i) ***Whether proceedings against Personal Guarantor under Section 95 of the Code is maintainable even when no CIRP proceedings have been initiated against the Corporate Debtor/ Principal Borrower.***



- (ii) ***Whether the present application under Section 95(1) of the Code against the Personal Guarantor would be maintainable before this forum, or should the creditor approach the Learned Debt Recovery Tribunal (DRT) for its relief.***

11. To determine the same, we would refer to a few statutory provisions in this context as under:

A. Liability of the Personal Guarantors is co-extensive with the Principal Debtor:

Section 128 of the Indian Contract Act, 1872, stipulates that the liability of the surety or guarantor is co-extensive with the principal debtor unless it is otherwise provided by the contract.

There is no quarrel over the proposition and the celebrated decisions of ***Lalit Kumar Jain v. Union of India*** reported in **(2021) 9 SCC 321** and ***Dilip B Jiwrajka vs Union of India & Ors.*** in **Writ Petition (Civil) No. 1281 of 2021** also propound the same.

B. Adjudicating Authority for Personal Guarantors:

Section 179 of the I&B Code, 2016, expressly stipulates what would be the Adjudicating Authority for **individuals** and partnership firms. It lays down the following:

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

(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.

Thus, essentially the Adjudicating Authority for “individuals” and “individual debtor” and partnership firms would be the jurisdictional DRT.

C. Insolvency Resolution process against a Personal Guarantor:

(i) Section 94 of chapter III of Part IV of the Code applies to Insolvency Resolution Process against a **debtor** who commits a default. The opening words of Section 94 are as under:

94. (1) A **debtor** who commits a default may apply, either personally or through a resolution professional, to the Adjudicating Authority for initiating the insolvency resolution process, by submitting an application.

It proceeds further,

(2) Where the **debtor** is a partner of a firm, such debtor shall not apply under this Chapter to the Adjudicating Authority in respect of the firm unless all or a majority of the partners of the firm file the application jointly.

(3) An application under sub-section (1) shall be submitted only in respect of debts which are not excluded debts.

(4) A **debtor** shall not be entitled to make an application under sub-section (1) if he is—

- (a) an undischarged bankrupt;
- (b) undergoing a fresh start process;
- (c) undergoing an insolvency resolution process; or
- (d) undergoing a bankruptcy process.

(5) A **debtor** shall not be eligible to apply under sub-section (1) if an application under this Chapter has been admitted in respect of the **debtor** during the period of twelve months preceding the date of submission of the application under this section.

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

Thus, an individual debtor and partnership firms (through all of its partners) can apply under Section 94 of the Code for initiating a resolution process against itself.

(ii) **Section 95(1) of the Code** similarly stipulates the following:

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.

Thus, the insolvency proceedings against a debtor partnership firm or its partners will also lie before the NCLT.

It is evident that Section 94 or 95 of the Code do not specifically mention about “Personal Guarantor”, **but the reference is to the word ‘Debtor’, as the Code when introduced in 2016 did not contemplate that the cases of personal guarantors to the corporate debtor would be made amendable to the jurisdiction of NCLT.** By way of **Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Regulations, 2019**, which was brought into effect from 1st December 2019, Personal Guarantors in respect of Principal Borrower or a corporate debtor was brought within the ambit of



IBC for the first time. Thus, the said provisions for “debtor” have been made applicable to the personal guarantors of the corporate debtors.

Under the said regulations a “**corporate debtor**” means a corporate person for whom the guarantor has given a personal guarantee and the Resolution Process means the Insolvency Resolution Process of a “**guarantor**”.

The Resolution Process commencement date means the date of admission of an application under Section 100 of the Code.

Resolution Process applies to the application preferred under Sections 94 or 95 which is again in relation to a “**debtor**” who commits a default. Thus, Personal Guarantor to a Corporate Debtor is also a “Debtor”.

Thus, both **Section 179** of the Code as well as **Sections 94** and **95** use the word “**Debtor**” (and not Personal Guarantor) and under Regulations of 2019 a Personal Guarantor to a Corporate Debtor is a “**Debtor**” himself. Under Section 179 of the Code, the said “Debtor” has to approach the DRT and under Section 94 and 95 of the Code, the said “Debtor” also has right to approach the NCLT under the given circumstances as spelt out in Section 60 and Section 179 of the Code.

(iii) Under Section 105 of the Code: -

A “**debtor**” shall prepare in consultation with the Resolution Professional a repayment containing a proposal to the creditors for restructuring of his debts or affairs.

(iv) Under Section 115 of the Code:

Where the Adjudicating Authority rejects the repayment plan under Section 114 the “**debtor**” or the creditors shall be entitled to file an application for bankruptcy under Chapter IV of the code.



(v) **Chapter I of Part III of the Code** deals with Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms where amount of default is not less than one thousand (which may extend to 1 Lakh if notified).

The Adjudicating Authority in terms of the provision therein is the **DRT** and a “**debtor**” can be an “**individual**” or a partner of a partnership firm.

(vi) **Chapter IV of Part III of the Code:**

The Chapter relates to bankruptcy orders in the case of “**individuals and partnership firms**” and is not necessarily a fall out of a failed repayment plan.

Bankruptcy can be sought for if a plan under Section 94 or 95 is rejected under Section 100(4) on the basis of report submitted by the Resolution Professional, if the application was filed with an intention to defraud the creditors, or under Section 115(2) upon rejection of the repayment plan or an early termination of the repayment plan.

Thus, there is apparently no distinction between a “**debtor**”, an “**individual debtor**” or an “**individual**” or a “**personal guarantor**” under Sections 94 to 120 of Chapter III of the Code. As such Bankruptcy Orders can be passed by the NCLT itself against the Personal Guarantor or “**debtor**” in accordance with Chapter IV, consequent an application under Section 94 and Section 95 of the IBC against to a personal guarantor too.

(vii) Further, we would refer to **Section 5(22) of the Code** which enunciates that “**personal guarantor**” means an *individual* who is the surety in a contract of guarantee to a corporate debtor.

(viii) **Section 179 of the Code specifies as under:**



Subject to the provisions of Section 60 the Adjudicating Authority in relation to Insolvency matters of “individuals” and “firms” shall be the DRT having territorial jurisdiction.

There is no reason to believe that the word “individuals” under Section 179 of the Code cannot apply to “individuals” under Section 5(22) of the Code or to “Debtors” or “Personal Guarantors” under Section 94 and 95 of the Code. Thus, there is apparently no reason to believe that the word “individuals” under Section 179 of the Code is different from the word “individuals” in Sections 5(22) and 115 of the Code or the word “debtor” or “individuals” in Section 179 of the Code is distinct from the word “individuals” (which applies to Personal Guarantor) under Section 115 of the Code. Thus, “individuals” under Section 179 of the Code can also mean “Personal Guarantors” as well as “individual debtors”.

Thus, apparently there is no reason why Section 179 of the Code will not apply to the Personal Guarantors.

(ix) Sections 60 (1) of the Code stipulates that:

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.

In terms of Section 60(1) of the Code, the Adjudicating Authority (NCLT) in relation to **“Insolvency Resolution”** (and not recovery) and “Liquidation” for “Corporate Debtors” and “Personal Guarantors” shall be NCLT having territorial jurisdiction or the place where the registered office of the corporate person is located.



Thus, the Adjudicating Authority for insolvency resolution of the corporate persons including corporate debtors and personal guarantors thereof (of such corporate debtors) shall be NCLT having territorial jurisdiction or the place where the registered office of the corporate person is located.

(x) Section 60(2) of the Code enumerates that *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.*

Thus, it applies to a pending proceeding before NCLT and nothing else.

(xi) Section 60 (4) of the Code says that:

The National Company Law Tribunal shall be vested with all the powers of the Debt Recovery Tribunal as contemplated under Part III of this Code for the purpose of sub-section (2).

Thus, in terms of Section 60 (4) of the Code, the National Company Law Tribunal shall be vested with all the powers of the Debt Recovery Tribunal as contemplated under Part III of this Code for the purpose of sub-section (2) of Section 60 of the Code.

(xii) Therefore, in terms of **Section 60(2) of the Code**, if jurisdiction for Personal Guarantor even without a CIRP against Principal Borrower is vested in the NCLT, then why would Sub-Section 4 of Section 60 be introduced.

12. In *Lalit Kumar Jain v. Union of India*, reported in **(2021) 9 SCC 321**, the Hon'ble Apex Court observed that:

“**123.** This legal position was noticed and approved later in *Industrial Finance Corpn. of India Ltd. v. Cannanore Spg. & Wvg. Mills Ltd.* [*Industrial Finance Corpn. of India Ltd. v. Cannanore Spg. & Wvg. Mills Ltd.*, (2002) 5 SCC 54] An earlier decision of three Judges in *Punjab National Bank v. State of U.P.* [*Punjab National Bank v. State of U.P.*, (2002) 5 SCC 80] **pertains to the issues regarding a guarantor and the principal debtor.** The Court observed as follows : (*Punjab National Bank case* [*Punjab National Bank v. State of U.P.*, (2002) 5 SCC 80] , SCC p. 80-81, paras 1-6)

“1. The appellant had, after Respondent 4's management was taken over by U.P. State Textile Corporation Ltd. (Respondent 3) under the Industries (Development and Regulation) Act, advanced some money to the said Respondent 4. In respect of the advance so made, Respondents 1, 2 and 3 executed deeds of guarantee undertaking to pay the amount due to the Bank as guarantors in the event of the principal borrower being unable to pay the same.

2. Subsequently, Respondent 3 which had taken over the management of Respondent 4 became sick and proceedings were initiated under the Sick Textile Undertakings (Nationalisation) Act, 1974 (for short “the Act”). The appellant filed suit for recovery against the guarantors and the principal debtor of the amount claimed by it.

3. The following preliminary issue was, on the pleadings of the parties, framed:

‘Whether the claim of the plaintiff is not maintainable in view of the provisions of Act 57 of 1974 as alleged in Para 25 of the written statement of Defendant 2?’

4. The trial court as well as the High Court, both came to the conclusion that in view of the provisions of Section 29 of the Act, the suit of the appellant was not maintainable.

5. We have gone through the provisions of the said Act and in our opinion the decision of the courts below is not correct. Section 5 of the said Act provides for the owner to be liable for certain prior liabilities and Section 29 states that the said Act will have an overriding effect over all other enactments. **This Act only deals with the liabilities of a company which is nationalised and there is no provision therein which in any way affects the liability of a guarantor** who is bound by the deed of guarantee executed by it. The High Court has referred to a decision of this Court in Maharashtra

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

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

124. *In Kaupthing Singer & Friedlander Ltd. [Kaupthing Singer & Friedlander Ltd. (No. 2), In re, (2012) 1 AC 804 : (2011) 3 WLR 939 : (2012) 1 All ER 883, paras 11, 12, 53-54] the UK Supreme Court reviewed a large number of previous authorities on the concept of double proof i.e. recovery from guarantors in the context of insolvency proceedings. The Court held that : (AC p. 814, para 11)*

“11. The function of the rule is not to prevent a double proof of the same debt against two separate estates (that is what insolvency practitioners call “double dip”). The rule prevents a double proof of what is in substance the same debt being made against the same estate, leading to the payment of a double dividend out of one estate. It is for that reason sometimes called the rule against double dividend. In the simplest case of suretyship (where the surety has neither given nor been provided with security, and has an unlimited liability) there is a triangle of rights and liabilities between the principal debtor (“PD”), the surety (“S”) and the creditor (“C”). PD has the primary obligation to C and a secondary obligation to indemnify S if and so far as S discharges PD's liability, but if PD is insolvent S may not enforce that right in competition with C. S has an obligation to C to answer for PD's liability,

and the secondary right of obtaining an indemnity from PD. C can (after due notice) proceed against either or both of PD and S. If both PD and S are in insolvent liquidation, C can prove against each for 100p in the pound but may not recover more than 100p in the pound in all.”

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

***126.** For the foregoing reasons, it is held that the impugned notification is legal and valid. It is also held that approval of a resolution plan relating to a corporate debtor does not operate so as to discharge the liabilities of personal guarantors (to corporate debtors). The writ petitions, transferred cases and transfer petitions are accordingly dismissed in the above terms, without order on costs.”*

(Emphasis Added)

Thus, irrespective of approval of a resolution plan relating to a Principal Borrower or Corporate Debtor, a Personal Guarantor still remains liable to repay.

13. Our experience is that in an application under Section 94 or 95 of the Code, a “Personal Guarantor” is let off even with a repayment plan which proposes as repayment of 0.001% of the debt owed. Much of the exercise is futile.

14. Most of the time when petitions under Section 95(1) of the Code are moved before us against a Personal Guarantor to a Principal Borrower where no CIRP is either initiated or pending before the NCLT against the said Principal Borrower, the creditors choose to submit that NCLT is the proper forum where Insolvency Resolution Process of Personal Guarantor would lie

even without a CIRP ever initiated against Principal Borrower. Reference to that would be made to the following decisions:

(a) In ***Mahendra Kumar Agarwal vs. PTC Financial Services Ltd*** [Company Appeal (AT)(Ins) No. 8 of 2023] reported in **MANU/NL/0682/2023**, and

(b) In ***State Bank of India, Stressed Asset Management Branch vs. Mahendra Kumar Jajodia*** [Company Appeal (AT)(Ins) No. 60 of 2022],

15. In ***Mahendra Kumar Agarwal (Supra)***, the Hon'ble NCLAT Chennai held as under:

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

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

(Emphasis Added)



16. The stress is on the word “pending” because the order does not specify any proceeding being “initiated” and concluded against the Principal Borrower prior in point of time.

17. Similarly, in **Mahendra Kumar Jajodia (Supra)** the Hon’ble NCLAT, Principal Bench, New Delhi, held that:

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

(Emphasis Added)

18. Thus, in both the said decisions i.e., **Mahendra Kumar Agarwal (Supra)** and **Mahendra Kumar Jajodia (Supra)**, we would note that Hon’ble NCLATs have held that even where no CIRP or Liquidation Proceeding is “**Pending**” against the Principal Borrower, the Insolvency Resolution Process of a Personal Guarantor would lie before the NCLT. We would note that **Mahendra Kumar Agarwal (Supra)** and **Mahendra Kumar Jajodia (Supra)**, were not such cases where no CIRP was even filed against the Principal Borrower rather the CIRP against the Principal Borrower had been preferred in prior point of time that had culminated into a Resolution Plan and so no CIRP was “pending” when the Section 95

application was moved. Hence, in our considered opinion, the decisions are not an authority on the proposition whether even without a CIRP initiated against the principal borrower an application under Section 95(1) would be maintainable.

19. On contrary, we would note that, the Hon'ble Division Bench of Madras High Court in the case of **Rohit Nath v. KEB Hana Bank Ltd.** in C.R.P. (P.D.) No. 1289 of 2021, reported in **MANU/TN/5212/2021**, (hereinafter referred to as "**Rohit Nath I**"), clearly propounds at para 22 of the judgment that if a CIRP is initiated under the Code pertaining to the principal borrower, the insolvency resolution process pertaining to the guarantor would per force be before the same adjudicating authority, viz the NCLT. The Hon'ble Division Bench presided over by the Hon'ble Chief Justice has without any ambiguity or ambivalence held that, where there is no CIRP initiated in respect of the principal borrower, insolvency proceedings pertaining to the guarantor must necessarily be carried only to the jurisdictional Debt Recovery Tribunal and not to any other forum. The relevant extract is reproduced verbatim hereinbelow with supplied emphasis for clarity:

*"22. The text of Section 60(2) discloses that Section 60 of the Code would apply to an individual **only if there is a corporate insolvency resolution process pertaining to the corporate entity which is the principal debtor, that **has been filed or commenced.**** In other words, in case of company 'A' being the **principal debtor** and **an individual 'P'** the **guarantor** promising repayment of the credit facilities obtained by 'A', **if a corporate insolvency resolution process is initiated under the provisions of the Code pertaining to company 'A', the insolvency resolution process pertaining to guarantor 'P' would per force be before the same adjudicating authority, viz., the National Company Law Tribunal. **But, where there is no*****

corporate insolvency resolution process initiated in respect of company 'A', insolvency proceedings pertaining to guarantor 'P' must necessarily be carried only to the jurisdictional Debts Recovery Tribunal and not to any other forum. To repeat, the provisions of the Acts of 1909 and 1920 will have no manner of application to guarantors who have furnished guarantees in connection with credit facilities obtained by corporate entities.”

(Emphasis added)

20. In this judgment, the stress is on the word **“initiated”**, as the Hon’ble Division Bench has clearly made an observation that in case, no corporate insolvency resolution process is **initiated** in respect of the Principal Borrower, insolvency proceedings pertaining to guarantor **must necessarily be carried** only to the **jurisdictional Debt Recovery Tribunal** and **not to any other forum**.

21. Subsequently, in another case, being **Rohit Nath @ Rohit Rabindra Nath v. KEB Hana Bank Ltd.**, in C.R.P.No.2513 of 2022 and C.M.P.No.12925 of 2022, the Hon’ble Madras High Court in its judgment dated 30.03.2023, (hereinafter referred to as **“Rohit Nath II”**), considered whether the bankruptcy proceedings, pending on the file of the Debt Recovery Tribunal against the petitioner / personal guarantor has to be transferred to the file of the National Company Law Tribunal in view of the subsequent institution and pendency of an insolvency resolution process of the corporate debtor. The Hon’ble Chief Justice’s division bench observed that:

“6.6. It can further be seen that even the moratorium, which comes into force as per Section 14 of The IBC in respect of institution of suits, continuation of proceedings etc., is not applicable in respect of the guarantor as per Section 14(3)(b) of The IBC. Thus, we are of the view that the proceedings which are now

pending before the DRT, termed as 'bankruptcy proceedings' altogether lies in a different compartment and no purpose whatsoever would be made by transferring the same to the NCLT. **The purpose of transferring is to consider the resolution plan and the repayment plan together, so that, the management of the corporate entity be vested with the Directors, (who are more often not the personal guarantors) even while the debts are being discharged. Therefore, on more clear understanding of Section 60(3) of The IBC, the phrase 'as the case may be' would only relate to appropriate proceedings. If different proceedings are pending at different stages, the same need not be transferred inappropriately as the same would be in violence to the phrase 'as the case may be' found under Section 60(3) of The IBC.**

(Emphasis Added)

22. We have already noted that **Mahendra Kumar Jajodia (Supra)**, is one of such case, where the CIRP against Principal Borrower stood initiated at a prior point of time before the NCLT and had culminated into a Resolution Plan, therefore, it was not once such case where even without a CIRP being initiated against the Principal Borrower, the Financial Creditors moved the NCLT against the Personal Guarantor. Therefore, the said decision will lend no assistance to determine whether the NCLT would still have jurisdiction to entertain an application under Section 95(1) against the Personal Guarantor even when no CIRP is ever initiated (whether pending or disposed of against the Principal Borrower).

23. In **Mahendra Kumar Agarwal (Supra)** the Hon'ble NCLAT at Chennai noted the decision rendered by Hon'ble Madras High Court in **Rohit Nath I (Supra)**, as under:

“46. *The Learned Counsel for the 1st Respondent points out that in the decision of the Hon'ble Madras High Court*

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

(Emphasis Added)

The Hon'ble NCLAT however stressed on 'Pendency' of a CIRP against the corporate debtor as noticed hereunder:

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

(Emphasis Added)

24. Alike **Mahendra Kumar Jajodia (Supra)**, **Mahendra Kumar Agarwal (Supra)** also addressed the issue of jurisdiction in the context of "pendency" of a CIRP pending against the Corporate Debtor, not one "initiated" or "disposed of" already. The Hon'ble NCLAT has succinctly held that even when no proceedings were "pending" against the Corporate Debtor, insolvency proceedings can be initiated against the Personal Guarantor before NCLT having territorial jurisdiction, which is not in conflict with **Rohit Nath I (Supra)**.



25. Whereas Hon'ble Madras High Court in **Rohit Nath I (Supra)** case has clearly propounded that where there is no Corporate Insolvency Resolution Process initiated in respect of a company meaning thereby the Principal Borrower or the Principal Debtor, Insolvency Proceeding pertaining to guarantor must necessarily be carried only to the jurisdictional Debt Recovery Tribunal (And not to any other Forum). The said view having not been reversed in appeal has attained a finality and binds us.

26. In view of the enumerations supra, that a Personal Guarantor is also an "individual", as Sections 5(22) and 179 of the Code envisages, as well as a "debtor", as Section 94 and 95 of the Code envisages, Section 179 of the Code will come into play where no CIRP against the Principal Borrower or Corporate Debtor is initiated or is pending or concluded and Section 94 and Section 95 of the Code will come into play where there is or was a CIRP against the Principal Borrower or Corporate Debtor.

27. We are of the considered opinion that in absence of a "pending" or concluded CIRP against a Principal Borrower an application under Section 95(1) to initiate Insolvency Resolution Process against a Personal Guarantor to a Corporate Debtor will not lie before the NCLT. It will lie only before the jurisdictional Debt Recovery Tribunal (DRT).

28. It is a settled position of law that DRT and NCLT proceedings proceed on different plane, therefore, NCLT will assume jurisdiction to try an insolvency and/or bankruptcy case against a personal guarantor only when a CIRP against the principal borrower has already been initiated before it and not otherwise.

29. We have noted that the Hon'ble **Single** Bench of Delhi High Court in **Axis Trustee Services Limited v. Brij Bhushan Singal and Another** reported in **2022 SCC OnLine Del 3634: (2022) 171 CLA 434** took



a view which seems to be a different from the Hon'ble Division Bench of Madras High Court in **Rohit Nath I (Supra)**. The judgment records:

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

(Emphasis Added)

30. In the said matter the contention of the plaintiff was that the proceedings against personal guarantors have to be filed in the DRT as CIR Proceedings against the corporate debtor stood concluded. Thus, it was a case of concluded CIRP against the Principal Borrower and not a case where no CIRP was ever initiated. The judgment is extracted hereunder for clarity:

*“26. On behalf of the plaintiff, reliance has been placed on sub-section (2) of Section 60 to contend that insolvency proceedings in respect of a personal guarantor of a corporate debtor shall be filed in the NCLT only if the CIRP is pending in respect of corporate debtor before the NCLT. **In view of the fact that the CIRP in respect of corporate debtor, Bhushan Steel already stands concluded, insolvency proceedings in respect of its guarantors have to be filed before the DRT and not the NCLT. The aforesaid submission overlooks the fact that sub-section (2) of Section 60, IBC starts with words ‘without prejudice to sub-section (1)’. Clearly,***

*sub-section (2) of Section 60 is supplemental to sub-section (1) of Section 60 and has to be read along with sub-section (1) of Section 60. **A harmonious reading of the aforesaid provisions would lead to the conclusion that sub-section (1) of Section 60 applies in respect of insolvency proceedings in respect of personal guarantors of corporate debtors irrespective of the fact whether CIRP is pending against the corporate debtor. ...***

The Hon'ble High Court clarifies that:

*"... The objective of sub-sections (2) and (3) is that where proceedings in respect of a corporate debtor have been **initiated** in one NCLT and those against a guarantor before another NCLT or another court or tribunal while the CIRP is pending in respect of the corporate debtor before a particular NCLT, the proceedings against the personal guarantor should also be before the same NCLT."*

In that light, the Hon'ble High Court held that:

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

(Emphasis Added)

31. At this juncture, it would be expedient to quote the Hon'ble Apex Court in ***Embassy Property Developments Pvt. Ltd. vs. State of Karnataka and Ors.*** reported in **MANU/SC/1661/2019**, wherein the Hon'ble Apex Court has clearly observed as under:

"32. Sub-section (4) of Section 60 of IBC, 2016 states that the NCLT will have all the powers of the DRT as contemplated under Part III of the Code for the purposes of Sub-section (2). Sub-section (2) deals with a situation where the insolvency resolution or liquidation or

bankruptcy of a corporate guarantor or personal guarantor of a corporate debtor is taken up, **when CIRP or liquidation proceeding of such a corporate debtor is already pending before NCLT. ...**

The Hon'ble Apex Court expounds the object of Section 60(2) of the Code in the following words:

"The object of Sub-section (2) is to group together (A) the CIRP or liquidation proceeding of a corporate debtor and (B) the insolvency resolution or liquidation or bankruptcy of a corporate guarantor or personal guarantor of the very same corporate debtor, so that a single Forum may deal with both. This is to ensure that the CIRP of a corporate debtor and the insolvency resolution of the individual guarantors of the very same corporate debtor do not proceed on different tracks, before different Fora, leading to conflict of interests, situations or decisions.

33. If the object of Sub-section (2) of Section 60 is to ensure that the insolvency resolutions of the corporate debtor and its guarantors are dealt with together, **then the question that arises is as to why there should be a reference to the powers of the DRT in Sub-section (4).** The answer to this question is to be found in Section 179 of IBC, 2016. Under Section 179(1), it is the DRT which is the Adjudicating Authority in relation to insolvency matters of **individuals** and firms. This is in contrast to Section 60(1) which names the NCLT as the Adjudicating Authority in relation to insolvency resolution and liquidation of corporate persons including corporate debtors and personal guarantors. The expression "**personal guarantor**" is defined in Section 5(22) to mean an **individual who is the surety in a contract of guarantee to a corporate debtor.** Therefore the object of Sub-section (2) of Section 60 is to avoid any confusion that may arise on account of Section 179(1) and to ensure that **whenever a CIRP is initiated against a corporate debtor, NCLT will be the Adjudicating Authority not only in respect of such corporate debtor but also in respect of the individual who stood as surety to such corporate debtor, notwithstanding the naming of the DRT Under Section**

179(1) as the Adjudicating Authority for the insolvency resolution of individuals. This is also why Sub-section (2) of Section 60 uses the phrase "notwithstanding anything to the contrary contained in this Code".

34. Sub-section (2) of Section 179 confers jurisdiction upon DRT to entertain and dispose of (i) any suit or proceeding by or against the individual debtor (ii) any claim made by or against the individual debtor and (iii) 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. Clauses (a), (b) and (c) of Sub-section (2) of Section 179 are identical to Clauses (a), (b) and (c) of Sub-section (5) of Section 60. Therefore the only reason why Sub-section (4) is incorporated in Section 60 is to ensure that NCLT will exercise jurisdiction - (1) not only to entertain and dispose of matters referred to in Clauses (a), (b) and (c) of Sub-section (5) of Section 60 in relation to the corporate debtor, (2) but also to entertain and dispose of the matters specified in Clauses (a), (b) and (c) of Sub-section (2) of Section 179, whenever the contingency stated in Section 60(2) arises.

(Emphasis Added)

32. Further, we would note that the decision rendered by the Hon'ble NCLAT in **Shapoorji Pallonji Finance Pvt. Ltd. v. Rekha Singh** in **Company Appeal (AT) (Insolvency) No. 397 of 2022, 398 of 2022 and 399 of 2022**, judgment dated **18.01.2023**, the Hon'ble NCLAT at para 4 has framed the question to answer as under:

"4. Question which needs to be answered in these Appeals is as to whether the applications filed by the Appellant under Section 95 of the I&B Code against the Personal Guarantors – Respondents was maintainable or not maintainable."

The Hon'ble NCLAT at paras 29 and 30 has clearly held that:

“29. In view of the foregoing discussion, we are of the view that submission of learned counsel for the Respondent that since the asset size of JFIL became less than Rs.500 Crore as on 31.03.2021, the Adjudicating Authority shall lose jurisdiction to proceed further and this Tribunal shall also have no jurisdiction to proceed in the matter, cannot be accepted. **We are of the view that jurisdiction will be there with the Adjudicating Authority, as per Notification dated 18.11.2019, which has to exercise on the date when application can be filed against the Financial Service Provider for insolvency. As a corollary, an application under section 95 can be filed against the Personal Guarantor only when on the same date insolvency can be commenced against the Financial Service Provider.**

30. The objection of the Respondent that application filed by the Financial Creditor under Section 95 is not maintainable since **no insolvency proceedings are pending** against the Principal Borrower has already been overruled by the Adjudicating Authority. The issue is fully covered by judgment of this Tribunal in “Company Appeal (AT) (Ins.) No. 60 of 2022, **State Bank of India vs. Mahendra Kumar Jajodia, decided on 27.01.2022**”, where interpreting Section 60(2) of the Code following was laid down in Paras 8, 9, 10 and 11:”

(Emphasis Added)

33. Thus, in view of the ratio laid down in **Embassy Property (Supra)** by the Hon’ble Apex Court and in **Shapoorji Pallonji (Supra)** by the Hon’ble NCLAT, it is clear that the jurisdiction of NCLT to consider an application under Section 95 of the Code against a personal guarantor to a corporate debtor starts when a CIRP is initiated against such corporate debtor.



CONCLUSIONS:

34. In view of the legal position enumerated above as it emanates from in the decisions rendered by the Hon'ble Chief Justice's Division Bench of Madras High Court in ***Rohit Nath I (Supra)*** and the Hon'ble Apex Court in ***Embassy Property (Supra)***, we can safely conclude that:

a. In terms of Section 60 (1) and (2) read with Section 179 of the I&B Code, NCLT is the only Adjudicating Authority in respect of Personal Guarantors to a Corporate Debtor **where a corporate insolvency resolution process or liquidation proceeding initiated against a corporate debtor is either pending before a National Company Law Tribunal or is already concluded.**

b. In absence of an "initiated" or "pending" or "concluded" CIRP against a Principal Borrower, an application under Section 95(1) to initiate Insolvency Resolution Process against a Personal Guarantor to a Corporate Debtor will not be maintainable before the NCLT. The Recovery Proceedings will lie only before the Debt Recovery Tribunal (DRT) having territorial jurisdiction.

35. In view of above, having noted that no CIRP was ever initiated against the Principal Borrower in respect of the respondent Personal Guarantor, before this Adjudicating Authority or any other Bench, we are of the considered opinion that this application preferred under Section 95 of the IBC is not maintainable before the NCLT.

IN THE NATIONAL COMPANY LAW TRIBUNAL

KOLKATA BENCH (Court-II)

KOLKATA

C.P. (IB)/262(KB)2022

- 36.** It is further discernible that the debt on which the date was due as mentioned in the petition as on 30.11.2013 and date on which default occurred is on 04.03.2015 whereas, the petition initiated Insolvency Resolution Process against the Personal Guarantor Shri Nikunj Bothra has been filed in the year 2022 without explaining how the limitation that started to run from 04.03.2015 would get extended. Hence, on that score also the petition deserved to be dismissed.
- 37.** Accordingly, the present petition is **dismissed**. Liberty is however be given to take a recourse of other legal remedies as would be advised in accordance with law.
- 38.** Accordingly, **C.P. (IB) No. 262/KB/2022** is **dismissed**.
- 39.** The Registry of this Adjudicating Authority shall serve a copy of this Order upon the Insolvency and Bankruptcy Board of India (IBBI) for their record and also upon the Registrar of Companies (ROC), to whom the companies are registered with by all available means for updating the Master Data of the Corporate Debtor.
- 40.** The certified copy of this order, if applied for, be supplied to the parties, subject to compliance with all requisite formalities.

D. Arvind
Member (Technical)

Bidisha Banerjee
Member (Judicial)

This Order is signed on the 07th January, 2025.

S. Ghose, (Steno)