

NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH (COURT-II)

Company Petition No. (IB)-221(ND)2022

IN THE MATTER OF :

PNB Housing Finance Limited
Having its registered as well as
Corporate Office at :
9th Floor, Antriksh Bhawan,
22, Kasturba Gandhi Marg,
New Delhi - 110001

...Financial Creditor/ Applicant

Versus

Mr. Ashok Kumar Gupta
S/o Mr. Gyan Prakash Gupta
R/o Plot No. 687, Defence ,
Enclave, Delhi - 110092

....Personal Guarantor/ Respondent

Order Delivered on : 06.06.2022

SECTION: 95(1) of IBC 2016

CORAM:

SH. ABNI RANJAN KUMAR SINHA, HON'BLE MEMBER (J)

SH. L. N. GUPTA, HON'BLE MEMBER (T)

PRESENT:

For the Applicant : Adv. Astha Ojha & Adv. Gauri Goel
For the Respondent : Adv. Rajesh Kumar Gupta &
Adv. Rajat Chaudhary

ORDER

PER SHRI L. N. GUPTA, MEMBER (T)

Under consideration is the Application preferred by PNB Housing Finance Limited (hereinafter referred to as the '**Applicant/Financial Creditor**') through Resolution Professional Mr. Varun Vashisht under Section 95(1) of IBC, 2016 read with Rule 7(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for IRP for Personal Guarantors to Corporate Debtor) Rules, 2019 for initiating the Insolvency Resolution Process (hereinafter referred to as the "**IR Process**") against Mr. Ashok Kumar Gupta, who is (hereinafter referred to as the '**Personal Guarantor**') of M/s. Ajnara India Limited and Adonis Buildtech Pvt Ltd (hereinafter referred to as the '**Corporate Debtors**').

2. The present application is coming up for appointment of the RP as proposed by the Financial Creditor.

3. That vide order dated 17.03.2022, this Adjudicating Authority has issued limited notice to the Personal Guarantor and pursuant to that the Ld. Counsel for the Personal Guarantor has caused appearance on 13.04.2022 confirming that it has received a copy of the petition. Further, the Financial Creditor was directed to file a brief written synopsis.

4. That accordingly, the Financial Creditor has filed its written synopsis indicating the requisite compliance of the Code. The scanned copy of the written synopsis filed by the Financial Creditor are reproduced overleaf :

PNB HOUSING FINANCE LTD, VS. ASHOK KR. GUPTA

IB NO. 221 OF 2022

NOTE ON ARGUMENTS

Sr. No.	Date	Document	Page
1.	14.12.2016, 24.05.2017, 28.08.2018	At the request of Corporate Debtor i.e. Ajnara India Ltd. & Adonis Buildtech Pvt. Ltd., six Financial facilities were granted to them by the Financial Creditor; Facility I- Rs. 50 Crores- Debt fell due on 05.06.2021 Facility II- Rs. 75 Crores- Debt fell due on 05.06.2021 Facility III- Rs. 85 Crores- Debt fell due on 05.06.2021 Facility IV- Rs. 25 Crores- Amount duly paid Facility V- Rs. 35 Crores- Debt fell due on 05.06.2021 Facility VI- Rs. 10 Crores- Debt fell due on 05.06.2021	60, 110, 156
2.	14.12.2016; 24.05.2017; 28.08.2018	PG herein stood as Guarantor to secure the loan facility. He undertook to comply with the conditions of the Sanction Letter and Loan Facility in the event of default by CD	104, 149, 208
3.	05.06.2021	Due to recurring defaults of the CD the account of CD was declared NPA	254
4.	19.11.2021	Demand Notice under Form B was issued to PG which was duly received by it on 22.11.2021 & 24.11.2021	370
5.	01.12.2021	Despite notice the CD & PG failed to pay the outstanding amount of Rs. 1,82,34,06,251.65/-	402
6.	17.03.2022	Hence present Petition filed for initiating Insolvency against the PG, wherein the PG was again served on 24.03.2022 with the Court Notice, but he failed to its reply	

1. A bare perusal of Section 60 of the Code, primarily shows that Section 60 of the Code has following three limbs/ situations/ conditions under which an Application can be entertained before the Adjudicating Authority against the PG:

- A. Section 60(1) deals with the situation where the Adjudicating Authority will be NCLT having territorial jurisdiction over the place where the registered office of the corporate person is located. {fresh filing}
- B. Whereas Section 60(2) starts with a non-obstante Clause i.e. *Without prejudice to sub-section (1) and notwithstanding anything to the contrary contained in this Code*. Therefore, Section 60(2) deals with a situation where, the Adjudicating Authority would be NCLT where CIRP or liquidation proceedings of a Corporate Debtor is pending. {pending CIRP against CD}
- C. Section 60(3) which deals with the situation where the Adjudicating Authority would be NCLT which has seized of the matter against the Corporate Debtor and the insolvency resolution process or liquidation, or bankruptcy proceeding is already pending against the Corporate Guarantor or Personal Guarantor in any Court or Tribunal shall be transferred to such NCLT dealing with CIRP or liquidation process of such Corporate Debtor. {Transfer}

2. Even a bare perusal of the aforesaid provision clearly shows that all the above three sub-sections of Section 60 are independent to each other and comes into effect on three different situations/circumstances. The language used in Section 60(2) i.e. *Without prejudice to sub-section (1) and notwithstanding anything to the contrary contained in this Code* is relevant to show the clear intent of the Legislature to keep the IRP of PG separate. This can also be deduced from a perusal of the judgment passed by Hon'ble Supreme Court in "*Lalit Kumar Jain Vs. UOI* (Transferred Case (Civil) No. 245/2020). The Hon'ble Supreme Court in Lalit Kumar (supra) @ para 99 and 100 has held that *Section 179, which*

defines what the Adjudicating Authority is for individuals 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... It is clear from the above analysis that Parliamentary intent was to treat personal guarantor differently from other categories of individuals..."

3. The aforesaid interpretation of sub-section (1), (2) and (3) of Section 60 can also be drawn from a bare perusal of the judgment passed by the Hon'ble NCLAT on 08.01.2019 in **Ferro Alloy Corporation Limited vs. Rural Electrification Corporation Limited**, {Company Appeal No. (AT) (Insolvency) 92 of 2017} and upheld by **Hon'ble Supreme Court** vide order dated 11.02.2019, wherein the Hon'ble NCLAT has categorically held, that it is not necessary to initiate CIRP process against the principal borrower before initiating CIRP against Corporate Guarantor. Reliance is also placed on para 34 of the judgment.
4. That Subsequently the Hon'ble NCLAT in the matter of **SBI vs. Mahendra Kumar Jajodia** [Comp AT (Ins) 60/2022] observed that *"the substantive provision for an Adjudicating Authority is Section 60, Sub-Section (1), when a particular case is not covered under Section 60(2), the Application referred in Section 60(1) can very well be filed in NCLT..."* This observation of the Hon'ble NCLAT came to be challenged before the Hon'ble Supreme Court in **Mahendra Kumar Jajodia vs. SBI** (CA 1971/1972 of 2022) wherein the Court on 21.03.2022, while taking note of its observations passed in **Lalit Kumar Jain vs. Union of India & Ors.** [2021(9) SCC 321] issued notice in the Civil Appeal and has *only* stayed the Insolvency against the Personal Guarantor, *until further order*. That no conclusive decision has been taken by the Hon'ble Supreme Court in its order dated 21.03.2022 qua the maintainability of Insolvency against PG, in absence of CIRP against CD.
5. There is a prima facie case considering the aforesaid provision and large amount of jurisprudence available on this aspect, that the Hon'ble Supreme Court would pass an order allowing Insolvency of PG. **Therefore, in the present case at this juncture it would not be prudent for this Hon'ble Tribunal to conclusively decide the present Petition in absence of any final order from the Hon'ble Supreme Court in the present issue, since this would greatly prejudice the bona fide Financial Creditor.**

5. That from perusal of the application as well as written submissions, it is observed that the Financial Creditor has neither given information regarding pendency of any CIRP or Liquidation proceedings against the Corporate Debtor nor provided information in respect of pendency of any application seeking admission of CIRP in respect of the Corporate Debtor namely, M/s. Ajnara India Limited.

6. It is stated by the Financial Creditor that the Hon'ble NCLAT in the matter of M/s Ferro Alloy Corporation Limited Vs. Rural Electrification Corporation Limited, Company Appeal No. (AT) (Insolvency) 92 of 2017 has held that hat it is not necessary to initiate CIRP process against the principal borrower before initiating CIRP against Corporate Guarantor. It has been added that the said Judgment has been upheld by the Hon'ble Supreme Court.

7. It is further stated by the Financial Creditor that the Hon'ble NCLAT in the matter of SBI vs. Mahendra Kumar Jajodia [Comp AT (Ins) 60/2022] has observed that *the substantive provision for an Adjudicating Authority is Section 60, Sub-Section (1), when a particular case is not covered under Section 60(2), the Application referred in Section 60(1) can very well be filed in NCLT...*"

8. It has been added that the aforesaid Judgment of NCLAT has been stayed by the Hon'ble Supreme Court vide order dated 21.03.2022 passed in the matter of Mahendra Kumar Jajodia vs. SBI in Civil Appeal (CA 1971/1972 of 2022).

9. That in the circumstances, it was submitted by the Financial Creditor that it would not be prudent for this Adjudicating Authority to conclusively decide the present Petition in the absence of any final order from the Hon'ble Supreme Court on the present issue.

10. We have heard the parties and perused the Application and Written Submissions on record. That, in the meantime, the Judgement of Hon'ble NCLAT dated 27.01.2022 passed in the matter of **State Bank of India Vs. Mahendra Kumar Jajodia** has been upheld by **Hon'ble Supreme Court vide order dated 06.05.2022 in the matter of Mahendra Kumar Jajodia Vs SBI in Civil Appeal No. 1871 and 1872 of 2022**. The copy of the Order is reproduced below :

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL No(s). 1871-1872 OF 2022

MAHENDRA KUMAR JAJODIA ETC.

Appellant(s)

VERSUS

STATE BANK OF INDIA,
STRESSED ASSET MANAGEMENT BRANCH

Respondent(s)

ORDER

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

The Appeals are dismissed.

.....J.
(S. ABDUL NAZEER)

.....J.
(VIKRAM NATH)

NEW DELHI
MAY 06, 2022



11. Hence, from the Judgement of the Hon'ble NCLAT in **Mahendra Kumar Jajodia (Supra)**, it can be inferred that Application filed under Section 95 of IBC cannot be rejected merely on the ground that no CIRP or Liquidation Proceeding of the Corporate Debtor is pending before the NCLT.

12. Accordingly, we would like to proceed in the matter.

13. It is averred by the Applicant in Part III of its Application that the Personal Guarantor/Respondent has made a default of Rs 182,34,06,251.65. It has been added that the Account of the Corporate Debtor was classified as NPA on 05.06.2021.

14. That the Applicant has annexed with the application, the Personal Guarantee deeds dated 14.12.2016, 24.05.2017, 28.08.2018 executed by the Mr. Ashok Kumar Gupta in favour of the Financial Creditor PNB Housing Finance to secure the loans granted to the corporate debtor M/s. Ajnara India Limited.

15. That in order to demonstrate that the Guarantees were invoked, the Applicant has annexed the copy of the Loan Recall Notice dated 01.09.2021 issued to the Corporate Debtor and the Personal Guarantor from page 319 to 339 of the application.

16. It is stated by the Applicant that Financial Creditor had issued a Demand Notice dated 19.11.2021 under Section 95(4)(b) of IBC, 2016 vide speed post, which has been duly served to the Personal Guarantor on 22.11.2021. The copy of the tracking report is placed on record at Page 394 of the Application.

17. That the interim-moratorium has already commenced as stipulated under Section 96 (1) (a) in relation to all the debts of the personal guarantor and shall cease to have effect on the date of admission of this Application and during the interim-moratorium period, the following are prohibited:

- (a) Any pending legal action or proceeding in respect of any debt of the personal guarantor shall be deemed to have been stayed; and
- (b) The Creditors of the personal guarantor shall not initiate any legal action or proceedings in respect of any debt.

This shall, however, not apply to such transactions as notified, if any, by the Central Government in consultation with any Financial Sector Regulator.

18. The Applicant has proposed the name of Mr. Varun Vashisht, Insolvency Professional having registration no. IBBI/IPA-001/IP-P01919/2020-2021/13141 for appointment as Resolution Professional, who has given his consent. That an undertaking has also been given by the said IP that no disciplinary proceedings are pending against him.

19. That as per Section 97(1) of IBC, 2016, this Adjudicating Authority is required to direct the IBBI (hereinafter referred to as the "Board") within seven days of the date of the application to confirm that there is no disciplinary proceeding pending against the Insolvency Professional. Vide communication dated 03.06.2022, the IBBI has conveyed that the online database shared by the Board with the Adjudicating Authority may be used for the purpose. Hence, we refer to the website of IBBI to verify the records as to whether any disciplinary proceeding is pending against the IP Mr. Varun Vashisht. The relevant details appearing on the IBBI website against the named IP are as reproduced overleaf :

INSOLVENCY PROFESSIONALS

Home > Insolvency Professionals > Varun Vashisht >

IBBI/IPA-001/IP-P-01919/2020-2021/13141

IP Details

AFA Details

Assignment Details

Assignment Analytics

CPE Details

Orders

Professional Qualifications

Work Experience

Name of the IP	Varun Vashisht
Registration no	IBBI/IPA-001/IP-P-01919/2020-2021/13141
Date of Registration	14-Jul-20
Member of IPA	Indian Institute of Insolvency Professionals of ICAI
Member of IPE	Sun Resolution Professionals Private Limited
Member of IPA Since	07-Jan-20
Email id	cavarunvashisht[at]gmail[dot]com
Address	R-8, SOUTH EXTENSION PART 2, South, National Capital Territory of Delhi, 110049
Have valid AFA	Yes
AFA Certificate No.	AA1/13141/02/160822/102871
AFA Valid Upto	16-Aug-22
Total CPE Earned	
Total Assignments	0

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INSOLVENCY PROFESSIONALS

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IBBI/IPA-001/IP-P-01919/2020-2021/13141

IP Details

AFA Details

Assignment Details

Assignment Analytics

CPE Details

Orders

Professional Qualifications

Work Experience

Orders Date	Subject	Orders Remarks
No Records Found		

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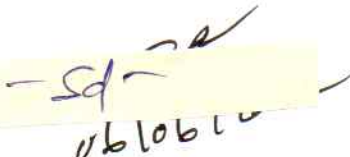
20. That from the perusal of the order section available on the IBBI website, it can be inferred that no order has been passed till date against the IP Mr. Varun Vashisht, as on date. **In the circumstances in the interest of justice and to avoid delay, we confirm the appointment of Mr. Varun Vashisht, Insolvency Professional having registration no. IBBI/IPA-001/IP-P01919/2020-2021/13141 as Resolution Professional.**

21. **Mr. Varun Vashisht, the Resolution Professional shall exercise all the powers as enumerated under Section 99 of the IBC, 2016 r/w the Rules made thereunder. He is directed to examine the Application and make recommendations along with the reasons in writing for acceptance or rejection of this Application, within the stipulated time as envisaged under the provisions of Section 99 of the IBC, 2016.** The RP shall give a copy of the report under Section 99(7) to the Applicant/Creditor as soon as the same is filed before this Adjudicating Authority.

22. The Applicant or his Counsel and the Registrar/Court Officer are directed to serve the copy of this Order along with copy of the Application and documents immediately on Mr. Varun Vashisht the Resolution Professional so appointed by all modes for information and compliance.

23. List the matter on 06.07.2022.


(L. N. GUPTA)
MEMBER (T)


(ABNI RANJAN KUMAR SINHA)
MEMBER (J)