IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH (Court – I)
KOLKATA

CP (IB) No. 1/KB/2024

A Petition under Section 95(1) of the Insolvency and Bankruptcy Code, 2016;

In the matter of:

Indian Bank ***…Financial Creditor/Applicant***

Versus

Sushil Kumar Ganeriwala **…** ***Personal Guarantor/Respondent***

Order pronounced on: 16/01/2024

Coram:

Shri Rohit Kapoor	**:**	**Member (Judicial)**
Shri Balraj Joshi	**:**	**Member (Technical)**

Appearances (through video conferencing)**:**

Mr.Santosh Kr. Ray, Adv.]For the Financial Creditor/Applicant
Ms. R.Sanyal, Adv.]

Mr. Kuldip Mallick,Adv.] For the Personal Guarantors
Mr.Rohit Keshri,Adv.]

ORDER

Per Balraj Joshi, Member (Technical):

1. The Court convened *via* video conference.
2. The present Petition **CP (IB) No. 1/KB/2024** under consideration is a Petition filed under section 95(1) of the Insolvency and Bankruptcy Code, 2016 (**'*Code')***

read with rule 7(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution process for Personal Guarantors to Corporate Debtor) Rules, 2019 ('***Personal Guarantors Rules***') and regulation 4(2) of IBBI (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Regulations, 2019 ('***Personal Guarantors Regulations'***) filed by ***Indian Bank ('Petitioner')*** a Body Corporate constituted under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, for initiating the Insolvency Resolution Process ('***IR Process'***) against **Sushil Kumar Ganeriwala** One of the directors of **M/s Bengal Brahmaputra Realty LTD (CIN: U45400WB2008PTC127292)** (hereinafter referred to as **" Corporate Debtor "**) for debt amounting to Rs. 3,71,82,644.55p/-

3. The factual matrix of the case is that the Applicant is a banking company constituted under the Banking Companies (Acquisition and Transfer of Undertaking) Act,1970 Act and **"the Corporate Debtor "** and guarantor had approached the applicant seeking grant of various financial facility. On the representations made by the " **Corporate Debtor ",** the Applicant extended various Credit facilities on 18.2.2011, and granted Cash Credit Facility. As per the Credit Facility, " Corporate Debtor " was obliged to repay the Principal sum of loan along with interest on in accordance with repayment schedule as set out in the agreement. The Deed CD of Guarantee was executed on 25/05/2011. The " Corporate Debtor " and the guarantor had failed and/or neglected to make payment as per terms of the said Facility Agreement. Thereafter, the applicant had classified the account of the "Principal Debtor" (Corporate Debtor) as a non-performing asset (NPA) on 31.03.2021.

4. The Applicant Bank, thereafter, proceeded to issue statutory Demand Notice under Section 13(2) of SARFAESI Act, 2002 on 20/04/2021 to the Corporate Debtor and also instituted proceedings under Section 7 of the code (IBC).

5. The Financial Creditor has filed an application before the Learned DRT under section 19 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993.

6. The personal guarantor viz Mr. **Sushil Kumar Ganeriwala** has executed personal guarantee on 25/05/2011 in favour of the Applicant to secure the repayment of the principal amount of the Cash Credit Facilities together with all interest, additional interest, liquidated damages, premium on repayments, reimbursement of all costs, charges and expenses and all other obligations payable as per the Facility Agreement. The Applicant has issued a Demand Notice in **Form B** on 29.11.2023 under Rule 7(1) of the IB Rules, 2019 and reply to the demand notice sent by the Guarantor.

7. In this factual conspectus, the applicant prays for initiation of insolvency resolution process, against the respondent/guarantor. 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. Form B is at page 123-128, Form C is at page 1-19 of the application. Rule 7(3) of the IB (Application to Adjudicating Authority for Insolvency resolution Process for Personal Guarantors to Corporate Debtors) Rules 2019, requires a copy of the Petition/Application to be served on to the guarantor and the Corporate Debtor. An affidavit of service in this regard has been filed by the Financial Creditor.

8. Mr. Kuldip Mallick, appearing for personal guarantor took a preliminary objection that this Adjudicating Authority has got no jurisdiction in terms of Rule 3(1) of the Application to Adjudicating Authority for Insolvency Resolution Process for personal guarantor to Corporate Debtor, Rules 2019. He

also handed in a written note of submission wherein following objections have been taken in regard to maintainability of the petition :

i. This Hon'ble doesn't have jurisdiction to try and/or entertain the petition.

ii. No petition under IBC, 2016 has been instituted as against the alleged Borrowed namely **"Bengal Brahmaputra Realty Limited** (herein after referred to as the said Company)

iii. It is submitted that for the NCLT to have jurisdiction to entertain and/or adjudicate an Application under Section 95(1) of the IBC Code, 2016, the Company ought to be under CIRP or Liquidation.

iv. Admittedly the Company is neither under CIRP or Liquidation nor any proceedings under the IBC, 2016 is pending adjudication.

v. The Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 in

*3 1 (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);*

vi. Rule 3 sub-Rule (a) provides that NCLT has jurisdiction only for the purpose of Section 60 of the Code and for other matters, the **Debt Recovery Tribunal** has the Jurisdiction.

vii. **Hence this Hon'ble Tribunal shall not have jurisdiction.**

viii. The Petition is barred by Limitation.

ix. The personal guarantor has already resigned from the directorship of the Principal Borrower company on 30.01.2015.

x. There is no challenge to such revocation of Personal Guarantee.

xi. The Applicant by a letter dated 25.02.2015 received by the Applicant on 26.03.2015 has invoked the personal guarantee as against the respondent. The same has been challenged and is pending for adjudication before the High Court at Calcutta in C.A.N. 1 of 2023, pending same, this petition is not maintainable.

xii. Thereafter subsequently the Respondent has again sent a follow up letter dated 16.09.2015 received by the Applicant on 29.09.2015 and that at instant of revoking the Loan, the Bank has enhanced the Financial Assistance. Thus guarantee cannot be invoked against him.

xiii. The said Suit also states about collusion and connivance between the bank officials and the Directors of the Company.

xiv. The respondent herein has already filed Section 397/ 398 petition before Company Law Board, now National Company Law Tribunal against the Present Director namely Mr. Ramesh Kumar Prithani, Mrs. Anshu Prithani and Anup Mohta for siphoning of funds and for Oppression and mismanagement by other personal guarantor / directors of the principal borrower and petition under Section 397/ 398 of the Companies Act, 1956 is already pending before this Bench being CP 157 of 2015.

xv. There is further requirement for adjudication of the dispute prior this Petition can be entertained.

9. For the above contention, Ld. counsel suggested that this Adjudicating Authority not having jurisdiction in the matter as section 60 (1) clearly envisages its applicability in the matter relating to insolvency resolution of the corporate person and since in the instant case, no such proceedings are pending against the corporate debtor and therefore, this particular application not been tenable.

10. In this regard he drew our attention to the provisions of Section 60(2) which provides as under:-

> *"60(2)- Without prejudice to sub-section (1) and notwithstanding anything to the contrary contained in this Code, where a corporate insolvency resolution process or liquidation proceeding of a corporate debtor is pending before a National Company Law Tribunal, an application relating to the insolvency resolution or [liquidation or bankruptcy of a corporate guarantor or personal guarantor, as the case may be, of such corporate debtor] shall be filed before such National Company Law Tribunal."*.

11. He averred that this lends credence to his assertion that this application is not maintainable as no insolvency proceeding are presently continuing against the Corporate Debtor.

12. We have examined the contentions of the Ld. Counsel appearing for the Personal guarantor. The issue is no longer *res integra* as the Hon'ble NCLAT had the occasion to examine the issue in **State Bank of India, Stressed Asset Management Branch Vs. Mahendra Kumar Jajodia,** wherein it has been inter-alia held that :

> *8. The use of words 'a' and 'such' before National Company Law Tribunal clearly indicates that Section 60(2) was applicable only when a CIRP or Liquidation Proceeding of a Corporate Debtor is pending before NCLT. The object is that when a CIRP or Liquidation Proceeding of a Corporate Debtor is pending before 'a' NCLT the application relating to Insolvency Process of a Corporate Guarantor or Personal Guarantor should be filed before the same NCLT. This was to avoid two different NCLT to take up CIRP of Corporate Guarantor. Section 60(2) is applicable only when CIRP or Liquidation Proceeding of a Corporate Debtor is pending, when*

CIRP or Liquidation Proceeding are not pending with regard to the Corporate Debtor there is no applicability of Section 60(2).

9. Section 60(2) begins with expression 'Without prejudice to sub-section (1)' thus provision of Section 60(2) are without prejudice to Section 60(1) and are supplemental to sub-section (1) of Section 60.

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

13. In view of the above, we are of the considered opinion that pendency of the CIRP against the Corporate Debtor is not a *sine qua non* for invoking provisions of section 95.

14. In this context, it is to be noted that Hon'ble Supreme Court in the judgement of **Dilip B. Jiwrajka V/s Union of India & Ors.** in WP(civil)No. 1281 of 2021 dated 09.11.2023 has upheld the Constitutional Validity of the Sections 94 to 100 and the Conclusion of the Judgments inter-alia are as follows:

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

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

iii. The submission that a hearing should be conducted by the adjudicatory authority for the purpose of determining 'jurisdictional facts' at the stage when it appoints a resolution professional under Section 97(5) of the IBC is rejected. No such adjudicatory function is contemplated at that stage. To read in such a requirement at that stage would be to rewrite the statute which is impermissible in the exercise of judicial review;

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

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

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

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

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

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

15. In this regard particular attention drawn to para no vi of the ibid order which states that

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

16. As such the issue of the jurisdiction raised by the Ld. Counsel for Personal guarantor having been put to rest in light of forgoing discussion herein above, other issues raised by Ld. Counsel are the ones that would be considered at the stage of admission of the Petition, once the RP's report is received and the comments of the Personal guarantor on the same are available for consideration by this Adjudicating Authority .

17. Accordingly this application being maintainable, we appoint **Niraj Agrawal,** IBBI Registration No. **IBBI/IPA-001/IP-P00130/2017-2018/10272**, email: niraj@execonservices.com as Resolution Professional in exercise of the power conferred under section 97 of the IBC, 2016 on this Authority. The Resolution Professional is directed to file declaration within seven days from the date of receiving this Order to the effect that he fulfils all the requirements for being appointed as Resolution Professional in the matter.

18. The Resolution Professional shall exercise all the powers as enumerated under section 99 of the IBC, 2016 read with the Rules made thereunder and as brought out in the judgment of Hon'ble Supreme Court (Supra) He is directed to make the recommendations for acceptance or rejection of this Application within the stipulated time as envisaged under section 99(1) of the IBC, 2016. The RP shall give a copy of the report under sub-section (7) of section 99 of IBC, 2016 to the Applicant, as soon as the same is filed before this Authority.

19. It is made known to everyone that on filing this Application by the Applicant/ Creditor the interim-moratorium commences in terms of section 96(1)(a) of IBC, 2016. The relevant section is reproduced below:

> **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.*

20. The Counsel on record for the Applicant is hereby directed to serve the copy of this Order along with copy of the Application and documents on the Resolution Professional by all available modes for information and compliance. Proof of service shall be filed with this Bench for record.
21. **List this matter on 31-01-2024** for further consideration.
22. The Registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.
23. Certified Copy of this order be issued, if applied for, upon compliance of all requisite formalities.

(Balraj Joshi) **Member (Technical)**	**(Rohit Kapoor)** **Member (Judicial)**

Signed on this, 16th day of January , 2024

PJ