

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH-IV**

**CP (IB)/ 1365/MB-IV/2020**

Under Section 95 Of Insolvency and  
Bankruptcy Code, 2016 read with Rule 7(2)

Of

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

*In the matter of*

Insta Capital Private Limited

.... Applicant

Vs.

Ketan Vinod Kumar Shah

.... Respondent

Order pronounced on: 10.08.2021

**Coram:**

Mr. Rajesh Sharma

Mrs. Suchitra Kanuparthi

Hon'ble Member (Technical)

Hon'ble Member (Judicial)

*Appearances (through video conferencing)*

For the Applicant : Mr. Shizu, Advocate

For the Respondent : Ms. Rubina Khan, Advocate

**ORDER**

*Per: Suchitra Kanuparthi, Member (Judicial)*

1. The Court is convened through videoconference.
2. This Petition has been filed by the Applicant (Financial Creditor) Insta Capital Private Limited, under Section 95 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred as Code) read with Rule 7(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 (Personal Guarantors Insolvency Rules) against Ketan Vinod Kumar Shah, Personal Guarantor/Respondent of the Corporate Debtor S.K. Products LLP, for initiating Insolvency Resolution Process.
3. The brief facts of the case are that the Corporate Debtor S.K. Products LLP, had applied for sanction of loan from the Financial Creditor vide application form dated 05.10.2018. The total amount due is Rs.31,52,781/- which includes principal outstanding of Rs.27,50,000/- alongwith interest of Rs.4,02,781/- @18% p.a. from 12.04.2019 to 03.02.2020. The debt was due as on 12.04.2019, and the default occurred on 12.04.2019.
4. The Financial Creditor annexed the documents to prove the existence of debt and amount in default provided hereunder:
  - a. Copy of Board Resolution dated 05.10.2018
  - b. Copy of Loan application dated 05.10.2018
  - c. Copy of finance proposal dated 10.10.2018

- d. Copy of discount letter dated 11.10.2018
  - e. Copy of loan recall notice dated 18.09.2019
  - f. Copy of demand notice dated 03.02.2020
5. S.K. Products LLP, vide letter dated 10.10.2018, proposed disbursal against Bill of Exchange. The financial creditor had advanced a cheque dated 11.10.2018 bearing No. 930048 and executed a demand Bill of Exchange dated 11.10.2018 alongwith the discount letter dated 11.10.2018, Post-dated cheques issued by S.K. Products LLP to Financial Creditor which got dishonored on presentation. The Financial Creditor issued loan recall notice to the guarantor and sent demand notice dated 03.02.2020 under Rule 7(1) of Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019.
6. The Applicant/Petitioner filed Affidavit to produce Board Resolution dated 04.03.2019 and certain judgement on record.
7. The Financial Creditor relied upon the judgments of Hon'ble Supreme Court and other courts and states that the rights of surety are coextensive with that of the principal debtor. In view of the above settled law, the guarantor cannot insist that the creditor must first exhaust all remedies against the principal debtor before

recovering the debts from surety holders. The liability of principal debtor and the surety though coextensive are separate liabilities arising out of the same transaction.

8. The Ld. Counsel for the Financial Creditor had relied upon the judgment of Hon'ble National Company Law Appellate Tribunal (hereinafter referred as NCLAT) in the case of *State Bank of India Vs. Athena Energy Ventures Private Limited*, in which it is held that Corporate Insolvency Resolution Process (hereinafter referred as CIRP) can be initiated against both the Corporate Debtor as well as personal guarantor simultaneously for the same set of debt and default. The Hon'ble NCLAT relied upon the observations made by the Insolvency Law Committee at Para 14 which is reproduced hereunder : -

*“14. It would be appropriate now to refer to the observations made by Insolvency Law Committee in its Report of February 2020. Relevant part of the report has been filed by the Appellant as Annexure-C (Diary No. 233/3). Para 7 of the report is as follows:*

*7.3 The Committee noted that while, under a contract of guarantee, a creditor is not entitled to recover more than what is due to it, an action against the surety cannot be prevented solely on the ground that the creditor has an alternative relief against the principal borrower. Further, as*

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*discussed above, the creditor is at liberty to proceed against either the debtor alone or the surety alone or jointly against both the debtor and surety. Therefore, restricting a creditor from initiating CIRP against both the principal borrower and the surety would prejudice the right of the creditor provided under the contract of guarantee to proceed simultaneously against both of them.*

*7.5 However, the committee noted that the appellate authority has, in certain cases, taken a view contrary to its decision taken in the Piramal Enterprises Ltd. 31 Case. For example, in Edelweiss Asset Reconstruction Company Limited V. Sachet Infrastructure Private Limited & Others. 32, the Appellate Authority has permitted simultaneous initiation of CIRP against the principal borrower and its corporate guarantors. Further, the appellate authority has also admitted a petition to review its aforesaid judgment in the Piramal Enterprises Limited case 33 Give this, the Committee decided that no legal changes may be required at the moment, and this issue may be left to judicial determination.”*

9. The Hon'ble NCLAT at Para 19 has categorically held that in the matter of guarantee, CIRP can proceed against the principal borrower as well as guarantor.

10. The Hon'ble NCLAT also clarified that in the matter of *Dr. Vishnu Kumar Agarwal Vs. Piramal Enterprises Limited*, it was held that once a petition under section 7 of the Code is filed against the principal debtor and CIRP is initiated, the Financial Creditor cannot file another application on the very same set of claims. The Hon'ble NCLAT therefore observed that they are unable to interpret law in the manner. It was interpreted in the matter of *Dr. Vishnu Kumar Agarwal Vs. Piramal Enterprises Limited*. Para 19 and 20 reproduced hereunder: -

*“19. It is clear that in the matter of guarantee, CIRP can proceed against principal Borrower as well as Guarantor. The law as laid down by the Hon'ble High Courts for the respective jurisdictions, and law as laid down by the Hon'ble Supreme Court for the whole country is binding. In the matter of Piramal, the Bench of this Appellate Tribunal “interpreted” the law. Ordinarily, we would respect and adopt the interpretation but for the reasons discussed above, we are unable to interpret the law in the manner it was interpreted in the matter of Piramal. For such reasons, we are unable to uphold the Judgment as passed by the Adjudicating Authority.*

*20. It is not shown that the application was otherwise incomplete. We thus, proceed to pass the following order :-*

**ORDER**

*The Appeal is allowed. Impugned order passed by the Adjudicating Authority dated 4<sup>th</sup> March, 2020 is quashed and set aside. CP(IB) No.466/7/HDB/2019 filed by the Appellant before Adjudicating Authority. The Adjudicating Authority is directed to admit the Application CP(IB)No.466/7/HDB/2019 and pass further necessary Orders as per provisions of IBC. The Adjudicating Authority is requested to appoint the same IRP/RP as has been appointed in CP(IB)No.616/7/HDB/2018 in the CIRP proceedings against M/s Athena Chattisgarh Power Limited. (Principal Borrower). The IRP/RP will act in accordance with law keeping observations in this judgment in view.*

*No order as to costs.”*

11. In view of the ratio laid down by the Hon'ble NCLAT in the matter of *State Bank of India Vs. Athena Chhattisgarh Power Ltd.*, the Financial Creditor for initiate proceedings simultaneously against the principal borrower and the corporate guarantor. In the case of *Edelweiss Asset Reconstruction Company Limited Vs. Sachet Infrastructure Limited and others*, the Hon'ble NCLAT permitted simultaneous initiation of CIRP against the principal borrower and its corporate guarantor.

**REPLY BY THE PERSONAL GUARANTOR**

12. The Personal Guarantor/Respondent had filed Affidavit in reply and raised preliminary objections against the maintainability of Petition u/s 95 on the following grounds: -

a. section 60(1) of the Code envisages that the National Company Law Tribunal will have jurisdiction in relation to Insolvency Resolution and liquidation of Corporate Persons including Corporate Debtor and personal guarantors. But however;

b. section 60(2) categorically stipulate notwithstanding anything contained in the Code where the Insolvency Resolution Process or liquidation proceedings against the Corporate Debtor is pending before National Company Law Tribunal.

c. The jurisdiction to entertain Insolvency and Bankruptcy proceedings against the individual will vest in the National Company Law Tribunal (hereinafter referred as NCLT) only on the following conditions:

- i. the individual is a personal guarantor to the debt availed by the corporate debtor;
- ii. an Insolvency Resolution Proceedings with respect to said Corporate Debtor is pending before the said NCLT; or



iii. liquidation proceeding with respect to corporate debtor is pending before NCLT.

d. Unless the aforesaid connections are met, NCLT shall not have jurisdiction for the insolvency *qua* the individuals as the said jurisdiction is specifically vested with the Debts Recovery Tribunals at part 3 of the Code.

### **FINDINGS**

13. We have carefully gone through the pleadings available on record, and opine that, though it is settled law that the liability of principal borrower and guarantor is coextensive as enunciated u/s 128 of the Contract Act, 1872, and the Creditor may proceed against the principal borrower or the guarantor simultaneously, however, the judgement of Hon'ble NCLAT in the case of *Dr. Vishnu Kumar Agarwal Vs. Piramal Enterprises Limited*, it was laid down that there cannot be two CIRP proceedings, one against the borrower and one against the guarantor.

14. The judgment of Hon'ble NCLAT in *State Bank of India Vs. Athena Energy Ventures Private Limited*, further clarified that CIRP can be initiated against the principal borrower and the guarantor.

15. The issue for consideration is whether a Financial Creditor can initiate CIRP against the personal guarantor in the absence of any resolution process/liquidation process against the corporate debtor.

16. It is pertinent to refer to section 60 of the code. Section 60 is reproduced as follows;

*Section 60 : Adjudicating Authority for Corporate Persons.*

*60(1) The Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the National Company Law Tribunal having territorial jurisdiction over the place where the registered office of the corporate persons located.*

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

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*(3) An insolvency resolution process or [liquidation or bankruptcy proceeding of a corporate guarantor or personal guarantor, as the case may be, of the corporate debtor] pending in any court or tribunal shall stand transferred to the Adjudicating Authority dealing with insolvency resolution process or liquidation proceeding of such corporate debtor.*

*(4) 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).*

*(5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of—*

*(a) any application or proceeding by or against the corporate debtor or corporate person;*

*(b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and*

*(c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.*

*6. 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 by or against a corporate 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.”*

17. Upon conjoined reading of section 60 r/w section 128 of the Contract Act, 1872, it is clear that the CIRP can be initiated against the Corporate Debtor as well as corporate guarantor. But however, in the instant case, section 60(2) contains a *non-obstante* clause which specifies that only where a CIRP process or liquidation process of a Corporate Debtor is pending before NCLT, an application initiating Insolvency Resolution Process against the Personal Guarantor, of such Corporate Debtor shall be filed before such NCLT. Further, the code also provides the definition of personal guarantor which includes the surety in a contract of guarantee to a Corporate Debtor which means that Financial Creditor can initiate proceedings of CIRP against the personal guarantor of Corporate Debtor. While Section 7 petition can be filed by the Financial Creditor against the Corporate Debtor and Corporate Guarantor, but under Section 95 of the Code can be filed by Financial Creditor only

against personal guarantor of Corporate Debtor, which is already been undergoing CIRP or is in Liquidation.

18. In view of the judgement of Hon'ble NCLAT in ***State Bank of India Vs. Atheena Energy Ventures Limited*** and the law as entailed in section 60(2), this bench is of the considered view that an application for insolvency for resolution against the personal guarantor is not maintainable unless that CIRP/liquidation is ongoing against the Corporate Debtor. It is further observed that filing of applications seeking resolution of personal guarantors without the Corporate Debtor undergoing CIRP, would tantamount to vesting of jurisdiction on two course one is NCLT and another is the Debts Recovery Tribunal.

19. In view of the above observation, the petition is dismissed with no costs.

Sd/-

Rajesh Sharma  
**Member (Technical)**  
10.08.2021

/Rohit/

Sd/-

Suchitra Kanuparthi  
**Member (Judicial)**