NATIONAL COMPANY LAW APPELLATE TRIBUNAL
CHENNAI BENCH

Company Appeal (AT)(CH) (Ins) No.262 of 2022

[Arising out of Order dated 24.02.2022 passed by the `Adjudicating Authority', `National Company Law Tribunal', Kochi Bench, Kerala, in CP (IBC)/37/KOB /2021 and CP (IBC)/ 38/ KOB/2021.]

IN THE MATTER OF:

Jose M.M
Aged 65, S/o Mathew MylakulathEttan,
House No XXV/98, Mathew Vihar,
KoonamthaiEdapally PO,
Kochi 682024
Through Counsel for the Appellant ...**Appellant**

Versus

State Bank of India
Stressed Assets Management Branch (SAMB)
1112, Raja Plaza,
Avinashi Road, Coimbatore 641037
Represented by Assistant General Manager,
Registered Office: State Bank of India,
Corporate Centre, State Bank Bhavan,
Madam CamaRoa, Nariman Point
Mumbai 400021 ...**Respondent**

With

Company Appeal (AT) (CH) (Ins) No.227 of 2022

[Arising out of Order dated 24.02.2022, passed by the `Adjudicating Authority', `National Company Law Tribunal', Kochi Bench, Kerala in CP (IBC)/37/KOB /2021 and CP (IBC)/ 38/ KOB/2021.]

IN THE MATTER OF:

Merin Jose
Aged 64, W/o Jose MM,
House No XXV/98, Mathew Vihar,
KoonamthaiEdapally PO,
Kochi 682024
Through Counsel for the Appellant ...**Appellant**

Versus

State Bank of India
Stressed Assets Management Branch (SAMB)
1112, Raja Plaza,
Avinashi Road, Coimbatore 641037
Represented by Assistant General Manager,
Registered Office: State Bank of India,
Corporate Centre, State Bank Bhavan,
Madam CamaRoa, Nariman Point
Mumbai 400021 **...Respondent**

Present:

For Appellant	:	**Ms. Liza, Advocate.**
ForRespondent	:	**Mr. P.V. Vinod, Advocate.**

J U D G M E N T
(Virtual Mode)

NARESH SALECHA, MEMBER (TECHNICAL)

The Present Appeal is filed against the common `impugned order' dated 24.02.2022, passed in CP (IBC)/37/KOB/2021 & CP (IBC)/38/KOB/2021 by the `Adjudicating Authority', `National Company Law Tribunal', Kochi Bench, Kerala, whereby, the `Adjudicating Authority' admitted application under Section 95(1) of Insolvency & Bankruptcy Code, 2016 (**in short IBC**) `CIRP' proceedings filed by `State Bank of India-Respondent/Financial Creditor' (in short **`FC'**) against `Corporate Debtor' (in short **`CD'**) and `Personal Guarantors' (in short **`PG'**) and initiated `Insolvency & Resolution Process' against `Appellant' under Section 100 of IBC and appointed `Mr. Jossy Steephen Kattur' as `Insolvency Resolution Professional' (in short **`IRP'**). Since common issues and legal points are involved in both the `Appeals' bearing `Appeal' numbers Company Appeal

(AT) (CH) (INS) No. 227 of 2022 & Company Appeal (AT) (CH) (INS) No. 262 of 2022, both are being taken up together and common order is being passed accordingly.

Brief Facts:

2. Mrs. Merin Jose- Appellant/PG [MD of ITMA Hotels India Pvt. Ltd. (in short **ITMA**)] in Company Appeal (AT) (CH) (Insolvency) No. 227 of 2022 and Mr. Jose M.M.- Appellant/PG Director (in ITMA) in Company Appeal (AT) (CH) (Insolvency) No. 262 of 2022 have been involved in hospitality industry since year 2010. A consortium of banks consisting of erstwhile State Bank of Travancore (SBT) along with State Bank of Bikaner & Jaipur (SBBJ) sanctioned term loan facilities of Rs. 74 Crores to CD (ITMA) for construction of a Star Hotel under name "Jomer Symphony". The facility was further renewed in the year 2013 for Rs. 95.7 Crore along with working capital facility of Rs. 7 Crore.

3. On default in the payment by `Corporate Debtor', SBT declared accounts of `Corporate Debtor' as NPA in October, 2015 and SBBJ also declared accounts of `Corporate Debtor' as NPA in November, 2015. Subsequently, Financial Creditor filed OA No. 443/2016 for recovery of then outstanding amount of Rs. 113.2 Crores before Debt Recovery Tribunal at Ernakulam.

4. Subsequent to merger of SBT & SBBJ with SBI (`FC') on 31.03.2017 the accounts of `CD' were transferred and maintained by `FC'.

5. The Debt Recovery Tribunal pronounced final order dated 20.09.2019 between SBI (Successor of SBT & SBBJ) and ITMA Hotels India Pvt. Ltd.,

(Defendant No. 1) Mrs. Merin Jose, Erstwhile MD of ITMA Hotels India Pvt. Ltd, (Defendant No. 2) Mr. Jose M.M, Erstwhile Director of ITMA Hotels India Pvt. Ltd. ((Defendant No. 3) along with Jomer Properties and Investment Pvt. Ltd. (Defendant No. 4) in the original OA before DRT. According to this, OA was disposed in terms of compromise settlement between the parties as per Clause No. 1-10 of compromise settlement. The Final Order accepted compromise settlement of Rs. 77 Crore to be paid in various tranches. Rs. 12 Crore had already been paid and remaining Rs. 65 Crore was to be paid subsequently. Out of this, Rs. 28 Crores was to be paid on or before 31.03.2019 and remaining Rs. 37 crores were required to be paid on or before 25.09.2019. In addition to this, Rs. 4.63 crore was to be deposited towards the deficit of 100% cash margin on outstanding bank guarantees.

> *"3(4) The balance settlement amount of Rs,37.00 (Rupees Thirty Seven Crores only) should be paid by the defendants on or before 25.09.2019. For payment of remaining amount of Rs.37.00 Crores. No interest will be charged on the compromise amount If the engine settlement amount is paid on or before 28.07.2019 (i.e, within four months from the date of letter to the defendants conveying approval of compromise). Interest at MCLR+2% will be charged on the balance amount paid after 28.07.2019 (ie, after four month from the 30" day from the date of the letter conveying the approval of compromise settlement).*

3(5). In addition to the above, another amount of Rs.4.63 Crore also should be deposited by the defendants with SME Branch of the applicant bank at Ernakulam towards the deficit of Rs.100% cash margin on the first defendant by erstwhile State Bank of Travancore. The last date for deposit of this amount is 25.09.2019."

Final Order further stated that in case payments are not effected within stipulated time, the compromise settlement would stand automatically withdrawn / cancelled and the entire amount as claimed in the OA along with the interest and cost shall become payable forthwith and would becomes recoverable from the defendants and mortgaged properties.

6. Admittedly, after the `CD' made an upfront settlement payment of Rs. 12 crore and Rs. 5 crore was paid on 31.12.2019, `CD' failed to make balance payments as per terms in compromise settlement. Aggrieved by this default, `FC' filed an Application bearing No. CP (IB)/30/KOB/2020 before the `National Company Law Tribunal', Kochi Bench, to initiate `Corporate Insolvency Resolution Process', against the `CD' and `PG' under Section 7 of the IBC.

7. Aggrieved by `Impugned Order' dated 24.02.2022, the present two appeals as discussed above, have been filed before this `Appellate Tribunal'.

<u>Appellant's Submissions</u>:

8. Learned Counsel for the Appellant brought out the facts of the case during the course of arguments and mentioned that due to COVID-19

Pandemic, `CD' could not make payments as per compromise terms before the DRT, Ernakulam.

9. Learned Counsel for the Appellant admitted that Appellant/s were made party in the DRT Proceeding, however, it was made incapacity as MD/ Director, respectively of the ITMA (`CD') and not in personal capacity. Hence, it will be incorrect to proceed against them in the present case.

10. Learned Counsel for the Appellant further brought out that after settlement between CD and FC, the final order was passed by the DRT, Ernakulam and one specific clause in the final order was stipulated in eventuality of any future default in the payments within the stipulated time. The specific clause which was incorporated in the Final Order is mentioned in Para-4 of the 'Memo of Appeal', which is mentioned here as under:-

> *"4. That, in the event of the defendants committing any default, the applicant bank shall file a memo showing the default and the details of the amount hitherto received (i.e., since 23.06.2016 to 20.09.2019), and the amount, if any, received subsequent to the date of this final order pursuant to the compromise, along with memo of costs as also the details of the remaining securities available; whereupon Recovery Certificate shall be issued to recover the balance 0A claim amount, along with interest from 23.06.2016 and costs as prayed for in the OA and in terms of this final order."*

11. Learned Counsel for the Appellant takes a plea that instead of following the final order of Debt Recovery Tribunal, Ernakulam, the Respondent filed an Application, before the `Adjudicating Authority', (`National Company Law

Tribunal'), Kochi Bench, for initiating `Corporate Insolvency Resolution Process'), which was not in accordance with law.

12. Also, Learned Counsel for the Appellant submitted that there was no specific inclusion of 'penal interest' in the final order of the Debt Recovery Tribunal, Ernakulam. Hence, penal interest amounting to Rs. 129,38,65,395.94/- was an incorrect one.

13. Learned Counsel for the Appellant also mentioned that action of `FC' is barred by limitation, since, account of the `CD' was made `NPA' in the year 2015, whereas, notice to guarantors was given on 17.11.2015 and application under Section 95(1) of the IBC was made on 26.10.2021 almost after 6 years from the date when the accounts of `CD' were declared `NPA'.

14. Learned Counsel for the Appellant further argued that Section 238 A of the IBC clearly stipulate that *"the provisions of the Limitation Act, 1963 shall, as far as may be, apply to the proceedings or appeals before the Adjudicating Authority, the National Company Law Appellate Tribunal, the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal, as the case may be."*

15. Learned Counsel for the Appellant cited cases of Hon'ble Supreme Court in the matter of ***Babulal VardharjiGurjar vs. Veer Gurjar Aluminium Industries Pvt. Ltd.*** & Ors. Reported in (2020) 15 SCC 1 and ***B.K. Educational Services Pvt. Ltd. vs. Paras Gupta & Associates***: AIR 2018 SC 5601.

16. Learned Counsel for the Appellant also raised issues regarding debt and dues itself claimed by `FC' stating that these are uncertain, disputed and imaginary claims.

17. Finally, Learned Counsel for the Appellant referred to the Hon'ble Supreme Court of India Judgement in ***Swiss Ribbons vs. Union of India***, 2019 (4) SCC 17, according to which, IBC is a beneficiary legislation to put `CD' back on its feet and not merely `recovery legislation for creditors'.

18. Learned Counsel for the Appellant concluded with prayer that `impugned order' dated 24.02.2022, may be suspended along with action taken by `Insolvency Resolution Professional' also be suspended with immediate effect.

Respondents Submissions:

19. Learned Counsel for the Respondent vehemently opposed the `Appeal' and relief sought therein. Learned Counsel pointed that the `Appellant' itself is only seeking to suspend the `impugned order' dated 24.02.2022 as well as action of `IRP' and as not sought any relief to set aside the `impugned order' itself.

20. Recalling the facts of the case, Learned Counsel narrated various dates of sanctioning financial loan and working capital facility and for the same Mrs. Merin Jose and Mr. Jose M.M executed Personal Guarantees Agreement in favour of `FC' on 03.07.2014. Subsequent to default of loan repayment, a loan recall notice was issued to `CD' & `PG' on 08.10.2015. A Notice under Section 13(2) of SARFAESI Act was issued on 17.11.2015, granting 60 days to `CD' and `PG' for making payments. As no payment was

received from `CD' and/or `PG', `FC' filed OA 443 of 2016 before DRT, Ernakulam on 27.06.2016 for recovery of the then outstanding of Rs. 113.20 Crore.

21. Subsequent to merger of SBT & SBBJ into SBI, accounts of `CD' were transferred to SBI (`FC') w.e.f 31.03.2017. `CD' on 26.02.2019 requested for compromise settlement and the same was approved by `FC' on 21.03.2019. According to the compromise settlement of Rs. 77 crore along with 100% cash margin for existing `BG' of Rs. 5.03 crore was agreed to be paid on or before stipulated dates. However, `CD' could made only Rs. 12 Crore on 27.03.2019 and Rs. 5 crore on 31.12.2019. Learned Counsel stated that based on the compromise settlement, final judgement was passed by DRT, Ernakulam on 20.09.2019. As per the final order, provision was made for recovery of full principle amount along with cost with interest in clause 3(6) of Settlement *"If the deposits/Payments are not effected by the defendants within the time stipulated above, the compromise settlement would stand automatically withdrawn/cancelled and the entire amount as claimed in the OA along with interest and costs as claimed therein shall become payable forthwith and would become recoverable from the defendants and the mortgaged properties."* Learned Counsel stated that `FC' has produced the statement of account with certificate issued under Bankers Books Evidence Act, 1891 to prove the debt which were never disputed by the `Appellant' and total outstanding as of 31.07.2021 was Rs. 1,97,54,49,848,81/-.

22. Learned Counsel for the Respondent assailed the point of limitation prayed by the Appellant and mentioned that subsequent to declaration of account of `CD' as `NPA', `OA' was filed before the DRT, Ernakulam on

27.06.2016 and based on the compromise settlement approved by `FC' on the request of `CD', DRT, Ernakulam passed a decree on 20.09.2019 and Rs. 5 crore was deposited by `CD' on 31.12.2019. The `FC' filed an `Application' under Section 95(1) of IBC on 03.11.2021 within two years from the date of final order of DRT, Ernakulam and from the last payment. Learned Counsel further argued that taking Hon'ble Supreme Court Suo Moto Writ Petition No. 2020 excluding period of limitation from 15.03.2020 to 28.02.2022, the present `Application' was filed within 74 days from the last payment of 31.12.2019 and is well within Limitation period.

23. To buttress his point, Learned Counsel referred to Hon'ble Supreme Court of India Judgment in the matter of CA No. 1650 of 2020 ***Dena Bank (now Bank of Baroda) vs. C. Shivakumar Reddy & Anr.*** and ***Sesh Nath Singh and Anr. Vs. BaidyabatiSheoraphuli Co-operative Bank Ltd. and Anr***. (Civil Appeal No. 9198 of 2019) and also referred to the Judgement passed by this `Appellate Tribunal' in the matter of ***Atharva Auto Logistics Pvt. Ltd. vs. Intec Capital Ltd. &Anr.*** in CA (AT) (Insolvency) No. 303 of 2022.

24. Learned Counsel therefore mentioned that the `Application' made before the Adjudicating Authority was absolutely within the time frame stipulated in the IBC.

25. Learned Counsel also opposed the averment of the `Appellant' regarding not following clause 3(6) of final order of the DRT, Ernakulam dated 31.12.2019. He further mentioned that according to clause 3(7), it was Applicant's entitlement to obtain `Recovery Certificate' and doesn't come in way of his way of Application of IBC.

26. Learned Counsel stated that the Adjudicating Authority had appointed `Resolution Professional' who had also confirmed debt in record and Resolution Process had also commenced on 24.02.2022 and the Resolution Process is at final stage and therefore `Appeal' should be dismissed, being infructuous.

27. Concluding his pleadings, Learned Counsel for the Respondent submitted that the `Appeal' filed is only with an intention to derail the `process of resolution' and need to be dismissed with costs.

Findings

28. Heard the Learned Counsel for the Parties and also perused record available along with Written Submissions by the Parties. Several issues have been raised in the `Appeal' which are required to be deliberated upon before coming to final conclusion. It will be necessary for us to take issue by issue discussion and we shall proceed accordingly in subsequent discussion;

Issues:- (i) Whether, debt was dues and default took placed?

(ii)Whether the present application filed under Section 95(1) of the IBC is barred by law of limitation.

(iii) Whether guarantee given as Managing Director/ Director of CD shall be treated as personal guarantee or otherwise.

(iv) Whether, on failure of settlement agreement, the FC need to go to DRT or can directly approach Hon'ble Adjudicating Authority for enforcing claims of FC against CD as well as personal guarantor.

(v) Whether, the provision of interest by Adjudicating Authority was incorrect and contrary to DRT final order.

29. **Issues**:- (i) **<u>Whether, debt was dues and default took place?</u>**

29(a). To understand whether in the present appeal any debt existed at all, which was due and not paid resulting into default. We need to see the exact definitions of relevant sections in the IBC.

The `Debt' has been defined in Section 3 (11) of IBC which is as under:-

> *"3(11). "**debt**" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;"*

Since, the term `Claim' is mentioned in above definition of debt, we need to refer to definition of `Claim', under Section 3(6) of IBC, which is as under:-

> *"3(6). "**claim**" means-*
> *(a) A right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;*
> *(b) Right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;"*

Similarly, `Default' is also defined under Section 3(12) of IBC, which is as under: -

> *"3(12). "**default**" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not [paid] by the debtor or the corporate debtor, as the case may be;*

The `Financial Creditor' and `Financial Debt' is also defined under Section 5(7) & Section 5(8) of the IBC, which is as under: -

*"(7) "**financial creditor**" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;*

*(8) "**financial debt**" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes—*

(a) money borrowed against the payment of interest;

(b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;

(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

(e) receivables sold or discounted other than any receivables sold on nonrecourse basis;

(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing; [Explanation. -For the purposes of this sub-clause,-

(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

(ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;

29(b) As seen from above, 'financial debt' is an inclusive and non-exhaustive definition given under Section 5(8) of the IBC to mean "*a debt alongwith interest, if any, which is disbursed against the consideration for time value of money. F*inancial creditors have relationship with the entity as financial contract, like loan or security etc.

29(c) We have noted from the Written Submissions of Respondent that FC has produced the statement of account with certificate issued under Bankers Books Evidence Act, 1891 to prove the debt which were never disputed by the Appellant and total outstanding as of 31.07.2021 was Rs. 1,97,54,49,848,81/-.

While discussions the facts of the case above, it has already been noted that various term loan and working capital facilities were given by SBT & SBBJ which later merged into SBI (FC). This fact was never disputed by Appellant. We also note that subsequent to FC's claim under SARFAESI Act and later before Hon'ble DRT, CD proposed compromise settlement which also clearly stipulated about existence and acceptance of debt in terms of both principal as well as interest.

Therefore, there was clear financial debt which was due and not paid and Adjudicating Authority has, therefore, rightly admitted Application under Section 95(1) of the IBC.

30. **Issue No.** (ii)**<u>Whether the present application filed under Section 95(1) of the IBC is barred by law of limitation</u>.**

30(a). Learned Counsel for Appellant challenged action of FC being barred by limitation since, according to the Appellant, accounts of the CD were made NPA in the year 2015 whereas, notice to guarantors was given on 17.11.2015 and application under Section 95(1) of the IBC was made on 26.10.2021 almost after 6 years from the date when the accounts of CD were declared NPA.

30(b) From records available with us, the following picture emerges with reference to various dates on which events happened to determine about applicability of limitation act in appeal before us.

S.No.	Dates	Events
01.	03.07.2014	Total Term loan of Rs. 95.77 Cr. And working capital agreement of Rs. 7 cr. was entered.
02.	03.07.2014	Mrs. Merin Jose and Mr. Jose M.M executed Personal Guarantee Agreement in favour of FC.
03.	05.10.2015	SBT declared account of CD as NPA.
04.	06.11.2015	SBBJ declared account of CD as NPA.
05.	08.10.2015	Loan recall notice issued to CD and PGs.
06.	17.11.2015	Notice u/s 13(2) of SARFAESI Act issued
07.	27.06.2016	OA No. 443 of 2016 filed before Hon'ble DRT Ernakulam for recovery of then outstanding amount of Rs. 113.20 cr.
08.	31.03.2017	Merger of SBT and SBBJ with SBI
09.	26.02.2019	CD requested for a compromise settlement to FC.
10.	21.03.2019	Compromise settlement approved by FC.
11.	20.09.2019	Hon'ble DRT Ernakulam passed based on compromise settlement between CD & FC.
12.	27.03.2019	CD remitted Rs. 12 Crore in terms of compromise settlement.
13.	27.12.2019	Further extension was given whereby, CD was required to pay Rs. 10 Crore before 10.01.2020, Rs. 20 Crore before 31.01.2020, Rs. 15 Crore

		before 28.02.2020 and balance Rs. 15 crore on or before 31.03.2020.
14.	31.12.2019	CD remitted Rs. 05 Crore in terms of compromise settlement which was after stipulated date.
15.	19.04.2021	FC intimated CD that compromise settlement has failed.
16..	03.11.2021	Application under Section 95(1) filed before Hon'ble Adjudicating Authority
17.	24.02.2022	Impugned Order issued.

30(c). From above it is clear that final order was passed by Hon'ble DRT on 20.09.2019 and the last payment of Rs. 5 crore was made by CD on 31.12.2019, whereas, the Application under Section 95(1) filed before Hon'ble Adjudicating Authority on 03.11.2021. Considering the Hon'ble Supreme Court Suo Moto Writ Petition No. 2020 excluding period of limitation from 15.03.2020 to 28.02.2022 the present application was filed within 74 days from the last payment of 31.12.2019.

30(d). We would like to refer to Judgments of the Hon'ble Supreme Court of India in the matter of ***Dena Bank (now Bank of Baroda) vs. C. Shivakumar Reddy & Anr.*** Reported in (2021) 10 SCC 330. The relevant paragraphs of the Judgement is mentioned here as under:-

> *"142. To sum up, in our considered opinion an application under Section 7 of the IBC would not be barred by limitation, on the ground that it had been filed beyond a period of three years from the date of declaration of the loan account of the Corporate Debtor as NPA, if there were an acknowledgement of the debt by the Corporate Debtor before expiry of the period of limitation of three years, in*

which case the period of limitation would get extended by a further period of three years.

143. Moreover, a judgment and/or decree for money in favour of the Financial Creditor, passed by the DRT, or any other Tribunal or Court, or the issuance of a Certificate of Recovery in favour of the Financial Creditor, would give rise to a fresh cause of action for the Financial Creditor, to initiate proceedings under Section 7 of the IBC for initiation of the Corporate Insolvency Resolution Process, within three years from the date of the judgment and/or decree or within three years from the date of issuance of the Certificate of Recovery, if the dues of the Corporate Debtor to the Financial Debtor, under the judgment and/or decree and/or in terms of the Certificate of Recovery, or any part thereof remained unpaid."

We would also like to refer to Judgments of the Hon'ble Supreme Court of India in the matter of ***Sesh Nath Singh and Anr. Vs. Baidyabati Sheoraphuli Co-operative Bank Ltd. and Anr***. Reported in (2021) 7 SCC 313. The relevant paragraphs of the Judgement is mentioned here as under:-

"99. The Chief Metropolitan Magistrate or the Judicial Magistrate, as the case may be, exercising powers under Section 14 of the SARFAESI Act, functions as a Civil Court/Executing Court. Proceedings under the SARFAESI Act would, therefore, be deemed to be civil proceedings in a Court. Moreover, proceedings under the SARFAESI Act under Section 13(4) are appealable to the DRT under Section 18 of the SARFAESI Act. Mr. Dave's argument that proceedings under the SARFAESI Act would not qualify for exclusion under Section 14 of the Limitation Act, because

those proceedings were not conducted in a Civil Court, cannot be sustained.

100. Another civil proceeding whether in a Court of first instance or of appeal or revision, against the party, for the same relief, would have to be construed to include any civil Proceeding in a forum, whether of first instance, or appellate, or revisional, against the same party for similar relief, more so, having regard to the language and tenor of Section 238A of the Limitation Act which applies the provisions of the Limitation Act "as far as may be", to proceedings in the NCLT/NCLAT.

101. In our considered view, keeping in mind the scope and ambit of proceedings under the IBC before the NCLT/NCLAT, the expression 'Court' in Section 14(2) would be deemed to be any forum for a civil proceeding including any Tribunal or any forum under the 47 SARFAESI Act."

Also referred to the Judgement passed by this Appellate Tribunal in the matter of ***Atharva Auto Logistics Pvt. Ltd. vs. Intec Capital Ltd. & Anr.*** in CA (AT) (Insolvency) No. 303 of 2022. The relevant paragraph of the Judgement is mentioned here as under:-

"7. Learned Counsel for the Appellant has placed reliance on a Judgment of Hon'ble Supreme Court reported in 2020 (15) SCC 1 in the matter of 'Babulal Vardharji Gurjar Vs. Veer Gurjar Aluminium Industries Pvt. Ltd. & Anr.' and submitted that Hon'ble Apex Court has held that the date of default has to be ascertained on the basis of pleadings in Section 7 Application of the IBC. In the present case, Part-IV of the Section 7 Application of the IBC, 'Date of Default' is dated 25th August, 2017 there is no dispute

regarding that but along with the Application the relevant documents including ledger account of the payment were also brought on record where the last payment made by the Corporate Debtor has been mentioned on 31.07.2018 and the same has been noticed by the Adjudicating Authority. In view of the last payment made on 31.07.2018 as noted above, the Application was well within time and the Financial Creditor entitled for taking benefit of 3 years period of limitation from the date of last payment. The Judgment relied on by the Learned Counsel for the Appellant does not come to any aid to the Appellant in the present case."

From above events, as well as case laws of Hon'ble Supreme Court of India and NCLAT it is clear that the Application u/s 95(1) was filed within Limitation Period and we therefore, do not find any error in the Judgment of Adjudicating Authority on this point.

31. **Issue No.** (iii) **Whether guarantee given as Managing Director/ Director of CD shall be treated as personal guarantee or otherwise.**

31(a) Both the petitioners have taken plea that they had submitted the guarantee as MD/Director respectively of ITMA and not in their personal capacity, as such, the proceedings against them as PG by FC under Section 95(1) of the IBC is not tenable.

31(b) Similar issue came up in Judgment delivered by the Hon'ble Supreme Court in the matter of **Lalit Kumar Jain vs. Union of India & Ors.** Reported in (2021) 9 SCC 321 through several petitions before the Hon'ble Supreme Court challenging notification dated 15.11.2019 issued by Central

Government along with seeking other relief under IBC concerning the validity of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtor) (in short **PGCD**) Rules, 2019 issued on 15.11.2019. In Para 3 of the said Judgment it was mentioned which is as herein under:

> ***"3. …****At some stage or the other, these petitioners (compendiously termed as "the writ petitioners") had furnished personal guarantees to banks and financial institutions which led to release of advances to various companies which they (the petitioners) were associated with as* ***directors, promoters or in some instances, as chairman or managing directors****…."*
>
> *(emphasis supplied)*

31(c). Hon'ble Supreme Court had rejected and challenge by PGCD to Central Government notification dated 15.11.2019 by which PGCD were brought within same regime of IBC as govern the CD themselves.

31(d). Part II Chapter-I and II of the IBC contains Section 4 to 54 provided for Insolvency Resolution and Liquidation for Corporate Person.

Section 2 of IBC described the Applications of IBC Code. Section 2(e) of the IBC which case in force w.e.f. 01.12.2019 in so far as they relate to Personal Guarantor to Corporate Debtor. The new section 2(e) came vide notification dated 15.11.2019. The notification also enforced certain other provisions, namely, Section 78, 79 & 94 to 187 (Part III) which provide for Insolvency & Bankruptcy of Individual and also Section 239 (Power to make rules), Section 240 (Power to make regulations) and Section 249 (Part V) in so far as they relate to PGCD.

31(e). With these amendments through the amended Section 2(e) pertaining to PGCD, it was made possible to subject PGCD to Insolvency Proceedings before same Adjudication Authority (NCLT)/ Appellate Authority (NCLAT) who decides matter related to CD. Thus, if the CD's debt remains unpaid, the personal guarantor would not stand discharged but would himself be forced to face bankruptcy proceedings before the Adjudicating Authority.

After going through the various provisions of IBC as well as detailed judgement in the matter of 'Lalit Kumar Jain (Supra)' there is no doubt that personal guarantee given by Mrs. Merin Jose and Mr. Jose M.M are enforceable and Adjudicating Authority has correctly taken decisions accordingly. We therefore, do not find any error as regard this issue.

32. **Issue**(iv) **Whether, on failure of settlement agreement, the FC need to go to DRT or can directly approach Hon'ble Adjudicating Authority for enforcing claims of FC against CD as well as personal guarantor.**

32(a). Learned Counsel for the Appellant submitted that after settlement between CD and Respondent, final order was passed by the DRT, Ernakulam and one specific clause in the final order was stipulated that in eventuality of any future default in the payments within the stipulated time. Learned Counsel alleged that instead of following the final order of the DRT Ernakulam and going back to the DRT, Ernakulam, the Respondent filed an `Application' directly before the `National Company Law Tribunal', Kochi for initiating `CIRP' which was not in accordance with law. In notes of

Submissions filed on behalf of the Appellant in Company Appeal (AT) (Ins.) No. 227 of 2022. Ld. Counsel mentioned in his submissions, which is as herein under:-

> *"Hon'ble Supreme Court had passed the judgment which was dealt with in Kotak Mahindra Bank Ltd. v. A. Balakrishnan, 2022 SCC OnLine SC 706. And a three judge bench affirmed that "The holder of the Recovery Certificate would be a financial creditor and would be entitled to initiate CIRP, if initiated within a period of three years from the date of issuance of the Recovery Certificate".*
>
> *Section 22Aof the Recovery of Debts & Bankruptcy Act 1993 deals with the relevancy of a Recovery Certificate Any recovery certificate issued by the Presiding Officer under sub-section (22) shall be deemed to be decree or order of the Court for the purposes of initiation of winding up proceedings against a company registered under the Companies Act, 2013 (18 of 2013) or Limited Liability Partnership registered under the Limited Liability Partnership Act, 2008 (6 of 2009) or insolvency proceedings against any individual or partnership firm under any law for the time being in force, as the case may be. "*
>
> *Thus, the legislature and the Apex Court has clearly stated that, Recovery Certificate is a sine qua non for initiation of IBC."*

32(b). Learned Counsel for the Respondent opposed the averment of the `Appellant' regarding not following clause 3(6) of final order of the DRT, Ernakulam dated 31.12.2019. Learned Counsel further mentioned that according to clause 3(7) of final order of Hon'ble DRT, it was applicant entitlement to obtain recovery certificate and doesn't come in way of his way of Application of IBC.

We will like to specifically refer to the concerned paras of final order of the Hon'ble DRT Ernakulam for examination of this issue raised by Petitioners. Para 3(6) & 3(7) which are as herein under:-

> *"3(6). If the deposits/payments are not effected by the defendants within the time stipulated above, the compromise settlement would stand automatically withdrawn/cancelled and the entire amount as claimed in the OA along with interest and costs as claimed therein shall become payable forthwith and would become recoverable from the defendants and the mortgaged properties.*
>
> *3(7). In the event of cancellation of the compromise settlement as stated in clause 6 above and the amount of Rs. 4.63 Crores is not deposited as per clause 5 above, Rs. 4.63 Crores from out of the amount paid by the defendants under the compromise would be set apart for meeting the liability under the subsisting Bank guarantees issued on behalf of the first defendant. The balance if any available would adjusted towards the claim made in the OA. <u>The applicant would be entitled to apply for and obtain a Recovery Certificate</u> for the amount claimed in the OA less such amount if any adjusted, together with interest and costs as prayed for."*
>
> (*emphasis supplied)*

Thus, the DRT, Ernakulam order as mentioned in clause 3(7) give the right to the FC to apply for and obtain Recovery Certificate and not the mandatory obligation to do so. As such there is no embargo for FC not to approach the Hon'ble Adjudicating Authority, without approaching Hon'ble DRT.

32(c). Incidentally, this `Tribunal', had passed the Judgment in the matter of **Bimalkumar Manubhai Savalia vs. Bank of India &Ors.** in Company Appeal (AT) (Insolvency) No. 1166 of 2019 as also deliberated on the issue and in Para 9 of the Judgement following ruling has been given :-

> *"We are of the view that the SARFAESI and DRT proceeding will not extent the period of limitation since those proceedings are independent and as per section 238 of IBC, the Insolvency and Bankruptcy Code is a complete Code and will have overriding effect on other laws. Therefore, the proceedings imitated or pending in DRT, either initiated under SARFAESI or under debts and due to Banks and Financial Institutions cannot be taken into account for the purposes of limitation."*

Thus, it is very clear that there was no requirement to approach the Hon'ble DRT for getting Recovery Certificate before approaching the Adjudicating Authority. We, therefore, do not find any merit in the contention of the Appellant on this issue.

33. **Issue** (v) **Whether, the provision of interest by Adjudicating Authority was incorrect and contrary to DRT final order.**

33(a). Learned Counsel for the `Appellant' submitted that there was no specific inclusion of 'penal interest' in final order of the DRT, Ernakulam. Hence, penal interest amounting to Rs. 129,38,65,395.94/- was incorrect.

33(b). Learned Counsel for the Respondent however stated that based on the 'compromise settlement' final order was passed by Hon'ble DRT on

20.09.2019. As per the final order, provision was made for recovery of full principle amount along with cost with interest in clause 3(6) of Settlement *"If the deposits/Payments are not effected by the defendants within the time stipulated above, the compromise settlement would stand automatically withdrawn/cancelled and the entire amount as claimed in the OA along with interest and costs as claimed therein shall become payable forthwith and would become recoverable from the defendants and the mortgaged properties."* Learned Counsel stated that `FC' has produced the statement of account with certificate issued under Bankers Books Evidence Act, 1891 to prove the debt which were never disputed by the Appellant and total outstanding as of 31.07.2021 was Rs. 1,97,54,49,848,81/-.

From the 'compromise settlement' as mentioned by the DRT, Ernakulam in the final order, it has been made clear that in case of failure of 'compromise settlement' entire amount as claimed in `OA' along with interest and cost shall become payable. We took note from Form C filed by FC before `Learned Adjudicating Authority' about details of Rs. 1,97,54,49,848.81 furnished as herein under in a tabular form:-

	Due Amount as on 31.07.2021
Principal	67,85,31,257.87
Interest	129,38,65,395.94
Other Charges/ Legal Expenses	30,53,195.00
Total	**197,54,49,848.81**

In any commercial loan, time value is very important. The definition of `financial debt' as provided in Section 5(8) of IBC mentioned herein above. It makes clear that `Financial Debt' along with interest against consideration for the time value of money is required. The DRT, Ernakulam has already provided in their final order about interest component in clause 3(6).

Further in Para 1 of the final order of DRT, Ernakulam, future interest @ 13.95% is also provided for. The relevant Para 1 is provided as herein under:-

> *"1. This original application is filed on 27.06.2016 under Section 19(1) of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 for recovery of a sum of Rs. 113,20,41,578/- <u>together with future interest</u> @ 13.95% p.a with monthly rests on Rs. 91,66,79,242/- and @14.15% p.a. with monthly rests on Rs/ 21,53,62,336/- from the defendants jointly and severally from 23.06.2016 till realization and by sale of OA schedule properties."*
>
> *(emphasis supplied)*

As such, the contention of Learned Counsel for the `Appellant' is devoid of merit.

34. Based on the above discussions and reasons, this `Tribunal', is of the considered view that no ground is made out for any interference by this `Tribunal' with the `impugned order' dated 24.02.2022 in CP (IBC)/37/KOB /2021 and CP (IBC)/ 38/ KOB/2021, passed by the `Adjudicating Authority' (`National Company Law Tribunal'), Kochi Bench, Kerala, and accordingly,

dismisses the instant Comp. App (AT) (CH) (Ins) No.262 of 2022 and Comp. App (AT) (CH) (Ins) No.227 of 2022. No costs. The connected pending Interlocutory Applications, if any, are Closed.

[Justice M. Venugopal]
Member (Judicial)

[Naresh Salecha]
Member (Technical)

30/08/2022

Simran