IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH- I
KOLKATA

IA(IB)No.356/KB/2024

In

Company Petition (IB) No. 67 of 2023

In the matter of:

An application under Section 99 of the Insolvency and Bankruptcy Code;

Read with

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

In the matter of:

ADITYA BIRLA FINANCE LIMITED

...FINANCIAL CREDITOR

Versus

SARITA MISHRA

...RESPONDENT/PERSONAL GUARANTOR

Date of Pronouncement of Order: 20/12/2024

Appearances (via video conferencing/physically):

For Financial Creditor-:
i) Mr. Amit Kumar Nag, Adv
ii) Mr. Rishav Banerjee, Adv
iii) Ms. Ranjabati Ray, Adv
iv) Ms. Ritika Ghosh,Adv

For the Resolution Professional-: Ms. Pooja Agarwal, Adv
Mr. Kumar Aggarwal, RP

O R D E R

Per: Balraj Joshi, Member (Technical)

1. The Court Convened in a hybrid mode.

2. This **IA(IB)No. 356/KB/2024 in CP (IB) No.67/KB/2023** has been preferred by the Resolution Professional and the Financial Creditor to seek initiation of Insolvency Process against the Respondent Personal Guarantor to Corporate Debtor Under Section 99 and Section 95(1) of IBC read with Rule 7(2) of IBBI (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Regulations, 2019 ('Personal Guarantors Regulations').
3. The amount in Debt & Default (including any interest or penalties) is Rs.**2,25,27,97,209.39**/-(Rupees **Two Crore twenty five lakhs twenty seven thousand two hundred nine and thirty nine paise** only), Date on debt and default occurred is **24.03.2021**.
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. It is to be noted that Hon'ble Supreme Court in the judgment 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 propositions that can be culled out from 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. *No adjudicatory function of Adjudicating Authority is contemplated at the admission stage. To read in such a requirement at that stage would be to rewrite the statue 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.*

6. The Resolution Professional, **Mr. Rajesh Kumar Agarwal** has vide his report dated 09.02.2024 suggested/stated as extracted hereunder:

<u>DETAILED REPORT</u>

A. An Overview:

SL. No.	**Particulars**	**Remarks**
1.	Section in which application is filed	Section 95 of the IBC
2.	Whether the application filed under Section 95 of the Code is complete	Yes, the application filed by the Creditor under

		Section 95 of the Code, 2016 is complete
3.	Nature of Transaction between the Applicant and the Corporate Debtor	Various Credit Facilities were provided by the financial creditor to the corporate Debtor for which respondent herein had executed a deed of personal guarantee.
4.	Date of the order of Hon'ble NCLT for appointment of RP	19.01.2024
5.	Date of Communication of order to the RP	24.01.2024
6.	Whether Form B was served on the Debtor required by the Law	Yes
7.	Date of Form B served on the Debtor	The FC issued Form B demand notice Dated 19.01.2023 to last known address of Personal Guarantor on 19.01.2023. However, Demand Notice was returned with a remark "Item Returned Unclaimed"
	Whether Debtor has Questioned/Challenged the application filed by the Creditor	No reply is received from Debtor
9.	Brief details of the issues raised by the Debtor	NA
10.	Date when RP sought Information/Clarifications from the Debtor	25.04.2024
11.	Date when the Debtor provided clarifications	No Clarification received

12.	Date of communication to the Creditor by the RP to inform appointment of the RP	25.04.2024

B. Summary:

SL. No.	Report under Section 99 of IBC	Remarks
1.	Particulars of the Applicant/Financial Creditor	**Adity Birla Finance limited** Room No. 401, Camac Square, 4th floor , 24 Camac Street Kolkata -700016
2.	Particulars of Corporate Debtor under CIRP	**Ariyant Logistics Private limited. No CIRP is initiated against the Corporate Debtor.**
3.	Details of personal guarantee given to Applicant by personal guarantor.	**Sarita Mishra, N-8, Purvanchal Company-Op, Hatira Ghuni, Near Halabudotolla Jhil Bagan, Rajarhar, Gopalpur (M) North 24 paraganas, kolkata-59**
4.	Date of invocation of personal guarantee by financial creditor.	**19.01.2021**
6.	Date of filing Petition under Section 94/95 of IBC.	The Financial Creditor issued Demand Notice dated 19.01.2023 in Form B under Rule 7(1) of the IBBI (Application to Adjudicating Authority for Insolvency Resolution Process of Personal Guarantors to Corporate Debtors) Rules, 2019 to the guarantors of the Corporate Debtor at their last known address which was returned back stating addressee absent.

		It may kindly be noted that the guarantor has not intimated any change of address to the Financial Creditor. It is submitted that the Hon'ble Supreme Court has interpreted the term "Served" in the case of Madan & Co vs- Wazir Jaivir Chand with reference to Section 27 of General Clauses Act, 1897 in situations where letters have not been able to be delivered, and has held that in such situations, a more reasonable effective, equitable and practical interpretation ought be to read the word "served" as "sent by post", correctly and properly addressed and the word "receipt" as the tender of the letter by the postal peon at the address mentioned in the letter. Therefore, the Form B Demand Notice is deemed to have been served. The Respondent has failed to pay the outstanding dues after the said notice. Thus, to seek remedy, the Applicant/Financial Creditor has been left with no other option and to file this instant application to initiate Insolvency Resolution Process under Rule 7(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019.

		The creditor, Aditya Birla Finance Limited duly submitted the aforesaid complete application on 18/11/2024.
7.	Amount in default by Corporate Debtor to the Applicant at the time of commencement of CIRP.	Not Applicable as no CIRP has been initiated against Corporate Debtor.
8.	Amount provided in the Resolution plan, if any, against the claim of the applicant.	Not Applicable as no CIRP has been initiated against Corporate Debtor
9.	Balance due from personal guarantor.	It may kindly be noted that the liability of the Corporate Debtor and the Guarantor is co-extensive. The outstanding sums due and payable by the Corporate Debtor along with the guarantors including the Respondent herein to the Financial Creditor amounts to a sum of Rs.**2,25,27,97,209.39**/-(Rupees **Two Crore twenty five lakhs twenty seven thousand two hundred nine and thirty nine paise** only as on **24.03.2021**
10.	Net worth of Personal Guarantor as on date of the report.	Not attached
11.	Copies of past years balance sheet Corporate Debtor.	**Statement of account maintained by Aditya Birla Finance Limited showing the details of deposits made or credits received in the**

		ordinary course of business in respect of the debt of the Corporate Debtor is annexed herewith and marked as annexure-J
12.	Details of actions taken by Applicant or any other Financial Creditor against Personal Guarantor under any other Act in respect of destowed by Corporate Debtor.	After the account was declared as NPA, the Financial Creditor/Applicant initiated SARFAESI proceedings and as such in due course and process of law issued a notice under Section 13(2) of the SARFAESI Act, 2002 upon the borrower company as well as the personal guarantor herein on 07.06.2021. However, in spite of receipt of the said 13(2) Notice, the personal guarantor herein has failed and neglected to repay the amount as sought for in the said 13(2) Notice.

i) Recommendations are as under:

Recommendations (Admit/Reject)	a) Based on the gathered facts averted by the Financial Creditor in the petition U/S 95 of IBC, 2016 as well as information obtained from the website of IBBI and public domain , the undersigned Resolution Professional is of the view that the petition satisfies all the requirements as set out under section 95 and Section 99 of the IBC 2016 . b) Accordingly , in the opinion of the undersigned Resolution Professional , the petition made by **Adity Birla**

	Finance Limited , the Financial Creditor , before the Hon'ble National Company Law Tribunal , Kolkata to initiate the Insolvency Resolution Process against **Sarita Mishra**, the Personal Guarantor of **Ariyant Logistic Private Limited** Under Section 95 of the Insolvency and Bankruptcy Code, 2016 is recommended for admission . c) The order dtd . 19.01.2024 was received on 24.01.2024 whereby RP was directed to make a recommendation for acceptance or rejection of the petition vide IA No. CP (IB) 67 / KB / 2023 within the stipulated period in terms of the provision of Section 97 of IBC , 2016.

ii) The Personal Guarantor has neither entered appearance nor refuted the statements in the report of Resolution Professional.

iii) We have considered the report and perused the details of claim indicated therein.

iv) However we note that no CIRP admittedly and irrefutably has been filed against the principal borrower as yet.

13. On the question whether an application under section 95(1) of The Insolvency and Bankruptcy Code, 2016 will be maintainable without initiating a proceeding against the principal borrower, we discuss as under:

Analysis and Finding

1. Apart from various other issues, the personal guarantor has raised the issue of maintainability of the petition before this Adjudicating Authority. Therefore, it becomes expedient to address the issue of maintainability first. The contention of the PGs is that unless there is a CIRP initiated or continuing the application for the IRP of the personal guarantor is not maintainable at NCLT as the Adjudicating authority in such cases shall be DRT.
2. In this regard, a starting point shall be a look on the provisions of the Code, on the issue of the Adjudicating authority for PGs. These are Section 60, Section 79 and Section 179 of IBC 2016 read with Relevant rules. These are reproduced hereunder:
3. Chapter VI of the code is titled " **Adjudicating Authority for Corporate Persons"** and starts with Section 60 , which is as under:

"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.

4. It is thus clear from 60(1) that the Adjudicating Authority **in relation to insolvency resolution and liquidation of the Corporate persons** and Personal guarantor thereof shall be NCLT. It clearly shows links the two proceedings together i.e. One against the Corporate person and the another against Corporate Guarantor and/or Personal guarantor thereof. Evidently when out of two elements that are supposed to be linked together , if one is absent then the other one shall be seen as a plain normal individual who has given a guarantee. This is further borne out of the fact that the term " Personal Guarantor" has been defined as " An individual who is surety in a contract of Guarantee to a Corporate Debtor."

5. It is here that the applicability of Part III of the code dealing with Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms takes stage. Chapter -I thereof contains the following provisions:

78. Application.

*This Part shall apply to matters relating to fresh start, insolvency and bankruptcy of **individuals** and partnership firms where the amount of the default is not less than one thousand rupees:*

Provided that the Central Government may, by notification, specify the minimum amount of default of higher value which shall not be more than one lakh rupees.

79. Definitions.

In this Part, unless the context otherwise requires, -

*(1**) Adjudicating Authority means the Debt Recovery Tribunal***

constituted under subsection (1) of section 3 of the Recovery of Debts Due to Banks and Financial Institution Act, 1993 (51 of 1993)

6. Chapter VI of the code deals with the Adjudicating authority for individual and Partnership firms

Section 179 of the Code *reads as under:*

(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.

Judicial precedents

7. Let us examine now some of the important judicial preceedants in the matter of jurisdiction of NCLT in the matter relating to Personal Guarantors to the Corporate Debtors.

Madras High Court

In the case of Rohit Nath v. KEB Hana Bank Ltd., Hon'ble Madras High Court while dealing with a civil revision petition filed by a PG against a pending PG

Proceeding before the DRT. Herein, the Madras High Court, while dismissing the petition, interpreted Section 60(2) of the Code to mean that Section 60 would apply to PGs only when the Corporate Debtor is undergoing CIRP. Further, it also noted that where no CIRP has been initiated against the Corporate Debtor, PG Proceedings must necessarily be carried only to the jurisdictional DRT and not to any other forum."

NCLAT – Mahinder Jajodia case

In this case Hon'ble NCLAT has held that for maintaining a petition under section 95 , the pendency of a CIRP or liquidation proceeding is not a " sine qua non". There is no doubt that the petition under section 95 is maintainable, even when there is no CIRP or liquidation pending. NCLAT in the subject order has held as under:

> *"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."

Lalit Jain – Hon'ble Supreme Court

> *Hon'ble Supreme court in Lalit Kumar Jain v. Union of India has categorically held as under : - "There is sufficient indication in the Code-by Section 2(e), Section 5(22),Section 60 and Section 179 indicating that personal guarantors, though forming part of the larger grouping of individuals, were to be,in view of their intrinsic connection with corporate debtors, dealt with differently, through the same adjudicatory process and by thesame forum (though not insolvency provisions) as such corporate debtors".*

8. The whole gamut of the codal provisions and the judicial preceedents received the consideration of Hon'ble NCLAT , Chennai bench in Mahendra Kumar Agarwal Vs.PTC India Financial Services Ltd. and Another , In its elaborate judgement, Hon'ble NCLAT Chennai have elaborately dealt with various provisions of law and considered the judgements cited comprehensively dealing with the same and duly distinguishing the applicability to the facts of the case under consideration. In conclusion , the Hon'ble NCLAT , Chennai Bench has held as under:

> *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'.*

9. This is therefore clear that even in the absence of the CIRP or the Liquidation proceedings against the personal guarantor is maintainable. There is absolute clarity on the issue, but on the issue of Adjudicating Authority for the same, the judgement is silent. The issue has been touched upon by Hon'ble NCLAT in Mahendra Jajodia (supra), however it is respectfully submitted that the issue in that matter was whether a petition under section 95 is maintainable even when there was no CIRP pending or initiated against the Corporate Debtor and further on the applicability of Section 60(2). The answer to the first question is of course a resounding yes as already held by Hon'ble NCLAT, but since the nature of the appropriate forum for the same had not been argued before the Hon'ble NCLAT, the comprehensive view on the same i.e. whether the same is maintainable at NCLT or the DRT still remained open.

10. Having regard to the Preamble of the code which is based on the principal of value maximization, it was expedient that the proceedings in regard to the Corporate Debtor as well to the Corporate Guarantor or even the personal guarantor shall be filed before one entity only which can address the very essence of the value maximization. However, if the Corporate Debtor has already been resolved or even liquidated and there is no scope for further value maximization of the Corporate person, the proceedings against the personal guarantor are relegated to a modus of recovery only and not that of resolution of insolvency. An argument was made that the word " Insolvent " as applied to an individual has legal connotations and an undischarged insolvent may lose upon a number of rights and privileges and therefore it is important to label the person as Solvent or say "not insolvent" and therefore the proceedings against an individual may appear to be a " recovery proceeding ", but it has to be stamped as Insolvency proceedings out of which the individual if emerges victorious, would be a "discharged insolvent" .

11. Be that as it may, the essence of proceedings against a personal guarantor remains a recovery proceeding, which is clear from the words "Repayment Plan" as against a "Resolution Plan", which is so generic a word meant for resolving a corporate person. If that not be the case then the provisions of Section 60(2) would lose their relevance, since it stipulates that when the CIRP or liquidation proceeding is pending before **a** NCLT, 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 ostensibly to avoid multiplicity of the judicial fora. However, when this is not so, the proceedings in our humble opinion are **recovery proceedings** only and not being a recovery forum , the NCLT shall not be the Adjudicating authority in such cases. In order to further bolster this assertion we look at Section 60(4), which stipulates that :

> ***The National Company Law Tribunal shall be the vested with all the powers of the Debt Recovery Tribunal as contemplated under part (III) in this code, for the purpose of Sub- section (2).***

Thus it is recognized by the legislature that for Part-III , the Adjudicating authority shall be Debt Recovery Tribunal unless the context otherwise requires. This context has then been clearly laid bare in Section 60(4) above, that in such a context i.e. where the CIRP/liquidation is proceeding before **a** National company Law tribunal, the NCLT shall have powers of the DRT.

12. Next we also examine the provisions of Section 60(5) and the same is set out here:

(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*

It is clear that NCLT shall have jurisdiction on the matters arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor. In other words if any matter is not related to the insolvency or liquidation proceedings of the corporate debtor or corporate person under this code, NCLT shall not have jurisdiction.

With this conjoint reading of various provisions of law as also after having distinguished various judgements brought out above, we hold that since no application for insolvency has been filed against the Corporate Debtor in the instant case, this petition is not maintainable before us, but may be maintainable at other fora.

14. In this view of the matter, ***C.P. (IB) No. 67/KB/2023 is dismissed accordingly.*** The Petitioner is, however, at liberty to pursue other recovery measures available under the law.

15. Certified copy of the order may be issued, if applied for, upon compliance of all requisite formalities.

Balraj Joshi
Member (Technical)

Bidisha Banerjee
Member (Judicial)

Signed on 20/12/2024

NKS(LRA)