

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

Company Petition No. (IB)-375(ND)2021

IN THE MATTER OF :

**PNB Housing Finance Ltd.
9th Floor, Antriksh Bhawan,
22 Kasturba Gandhi Marg,
Connaught Place
New Delhi-110001**

...Creditor

Versus

**Mr. Goldy Gupta
(Partner of M/s. Star Raison Landmarks and
Directors of Star Realcon Pvt. Ltd.)
A-26, New Krishna Park,
Najafgarh Road,
New Delhi-110018**

**Also at
301, 3rd Floor, RG Trade Tower,
Netaji Subhash Place,
Pitampura,
New Delhi-110034**

**Also at
Khasra No. 139 to 148 Part, 197 to 200,
200T, Group Housing Residential Land,
Alwar, Rajasthan-301019**

...Personal Guarantor

Order Delivered on: 20.10.2021

SECTION: 95(1) of IBC 2016

CORAM:

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

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

PRESENT:

**For the Financial Creditor : Mr. V.D' Costa Advocate
For the Respondent : Mr. Chandrashekhar A. Chakalabbi**

ORDER

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

The present Application has been preferred by M/s PNB Housing Finance Ltd. **(the ‘Applicant/Financial Creditor’)**, under Section 95(1) read with Rule 7(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for IRP for Personal Guarantors to Corporate Debtor) Rules, 2019, for initiating the Insolvency Resolution Process **(the “IR Process”)** against Mr. Goldy Gupta (the **“Personal Guarantor /Debtor”**), who is the Partner of M/s Star Raison Landmarks and Directors of Star Realcon Pvt. Ltd. **(the ‘Corporate Debtor’)**.

2. That the Applicant/Creditor viz., PNB Housing Finance Ltd, a Company incorporated under the erstwhile Companies Act 1956, is a Housing Finance Company. It is stated by the Applicant that the Borrowers namely, M/s. Star Raison Landmarks, M/s. Pinnacle Housing Pvt. Ltd. and M/s. Star Realcon Pvt Ltd. (collectively termed as **‘Borrowers’**) had approached the PNB Housing Finance Ltd. (**PNBHFL**) in January 2017 for grant of a credit facility to the tune of Rs.40,00,00,000/- (Forty Crores Only) for the purpose of construction and development of Phase II and III of project “The Essentia” situated at the village Khizuriwaf, Tehsil Tijara, Alwar, Rajasthan (the **‘Project’**). It is added by the Applicant that it had sanctioned a construction finance loan of Rs.40 Crores only to the Borrowers vide Sanction Letter dated 19.01.2017 bearing reference no. PNBHFL/CF/MC-06/2016-17. The

Loan was advanced at a floating interest rate of 14.50% per annum to be calculated on monthly rest basis. It was agreed that additional interest 2% per month would be levied in the event of delayed payment of EMI.

3. It is submitted by the Applicant that the sanctioned amount towards construction of the project, was disbursed in two tranches namely, Facility-I for Rs.15,00,00,000/- in Loan Account No. A-WFH/CCF/0017 /346644 and Facility-II for Rs.25,00,00,000/- in Loan Account No. B-WFH/ CCF/0017/346647. Accordingly, a written Loan Agreement dated 10.02.2017 was executed in respect of the above referred Loan Transactions(s), between the Borrowers and Financial Creditor as the Lender. It is further added that against the Loan 'A', an amount of Rs.15,00,00,000/- was disbursed via RTGS in two tranches on 21.02.2017 and 16.09.2017, whereas against the Loan 'B', an amount of Rs.5,00,00,000/- out of the sanctioned amount of Rs.25,00,00,000/- was disbursed in three tranches on 08.02.2018, 28.03.2018 and 04.07.2018 in favour of M/s. Star Raison Landmarks.

4. It is stated by the Applicant/Creditor that the Corporate Debtor committed breach of the Loan Agreement dated 10.02.2017, by defaulting payment of the EMI's due and payable. In the circumstances, the Applicant/Creditor issued a Demand Notice dated 28.12.2020 calling upon the guarantors as well as the Borrowers to pay the outstanding amount of Rs.4,41,50,495.39 (Rupees Four Crores Forty One Lacs Fifty Thousand Four Hundred Ninety Five and Thirty Nine Paisa) only due as on 09.12.2020, but of no avail.

5. It is further stated that the Financial Creditor terminated the loan facility No. B-WFH/CCF/0017/346647 vide Loan Recall Notice dated 27.01.2021 and called upon the Borrowers as well as the guarantors to pay an amount of Rs.4,12,23,678/- due and payable as on 22.01.2021.

6. It has been submitted that the Applicant/Creditor, vide notice dated 25.02.2021, invoked the arbitration clause of the Loan Agreement. Additionally, the Creditor presented the post-dated securities cheque(s) for encashment. However, even the security cheques were dishonoured for which, proceedings under Section 138 of the Negotiable Instruments Act, 1881 have been initiated, which are pending adjudication before Court.

7. It is further submitted by the Applicant that since the Guarantor of the Borrowers having co-extensive liability along with the Borrowers are liable to pay the dues towards both the loan facilities, it had invoked the personal guarantee tendered by the Guarantor vide its Loan Recall Notice dated 27.01.2021.

8. It is added by the Applicant/Creditor that it had sent a Demand Notice dated 22.06.2021, seeking payment of the outstanding /unpaid debt of Rs.3,92,89,697/-. The Tracking Report of the Demand Notice depicting successful delivery to the Personal Guarantor is annexed by the Applicant on page no. 195 and 196 of the Petition.

9. That the Personal Guarantor has replied to the Demand Notice and the scanned copy of the reply is reproduced overleaf :



12.07.2021

The Authorized Signatory,
PNB Housing Finance Ltd.
having its office at 9th Floor,
Antariksh Bhawan,
22 Kasturba Gandhi Marg,
New Delhi-110001

Subject: Reply to the FORM B issued by PNBHFL dated 22.6.2021

Dear Sir,

Under the instructions and authority of our client, Shri Goldy Gupta, we are hereby issuing this reply to your FORM B dated 22.6.2021 as under,

1. At the outset, our client denies that there has been any default on his part in the repayment of the Construction Finance Loan availed by the borrower, M/s Star Raison Landmarks [hereinafter 'the borrower']. The facts alleged in your notice claiming default by our client are denied in their entirety. Allegations which are not specifically controverted shall not be deemed to have been admitted.
2. M/s Star Raison Landmarks is the borrower to the Construction Finance Loan [Loan account A and B] availed from PNBHFL. The abovementioned facility is secured by the hypothecation agreement

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and mortgage of several immoveable properties. Though PNBHFL had sanctioned Rs. 40,00,00,000/- [rupees forty crores only], it had disbursed Rs 20,00,00,000/- [rupees twenty crores only] to the borrower in tranches on 21.02.2017, 16.09.2017, 08.02.2018, 28.03.2018 and 04.07.2018.

3. Though the borrower was regular in repaying the EMI amounts between 2017 and 2020, the prolonged lockdown due to COVID in 2020 and 2021 hindered its capacity to repay the loan amounts. It is worth emphasizing that around 90% out of the total loan amount of Rs. 40,00,00,000/- (Rupees forty crores) has already been repaid and as per your calculation the current outstanding amount is ONLY Rs. 3,92,89,697/- (Rupees Three Crores Ninety-Two Lacs eighty-nine thousand six hundred and ninety-seven only).
4. PNBHFL's decision to initiate action against our clients appears to be arbitrary and based on extraneous considerations. There is absolutely no justification to take any recourse against our client even while the loan account continues to be serviced by the borrower. Further, it is necessary to highlight that the borrower had sought for restructuring of their outstanding loan amount with PNBHFL under the applicable RBI Circulars dated 6.8.2020 and

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5.5.2021. The said proposal for restructuring has been denied by PNBHFL without assigning any reason, whatsoever. Notwithstanding the same, we are informed that the borrower is committed to repay the outstanding amounts.

5. Despite odds, the borrower had paid Rs. 57,00,000/- [Rupees Fifty-Seven Lacs only] in March 2021 and Rs. 10,00,000/- [Rupees Ten Lacs only] in first week of April 2021. This aspect bears testimony to the fact that the borrower is bonafide and is committed to repay the outstanding. The borrower is a solvent entity and is fully committed to repay the outstanding loan amount. It is necessary to highlight that the loan amount was secured by assets worth at least 10 times the loan amount. Therefore, it is unfortunate that PNBHFL has been indulging in arm twisting acts by initiating proceedings against our client.
6. Apart from the above, your notice against our client seeking to invoke provisions under the IBC, 2016 is contrary to the objects and intentions of the code itself. Contrary to the object of resolving a Corporate Debtor, PNBHFL intends to coerce a quick recovery even while the borrower continues to honor its commitment to repay the loan amounts.

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7. Accordingly, we call upon you to recall your notice dated 22.6.2021. We also request you to allow the borrower to repay the outstanding loan amount which is less than 10% of the entire facility borrowed from PNBHFL. In the event, PNBHFL pursues to take any recourse against our clients, it shall be responsible for all the costs and consequences.


Chandrashekhar A. Chakalabbi
For
Dharmaprabhas Law Associates

10. That during the course of hearing on 09.08.2021, the Ld. Counsel for the Applicant informed this Bench that the Applicant has filed IB Applications against the Borrowers/Corporate Debtors before this Adjudicating Authority to initiate CIR Process against them. The cases are registered as CP. (IB)-408/2021 titled as M/s. PNB Housing Finance Ltd. Vs. M/s. Star Realcon Pvt. Ltd. and CP. (IB)-407/2021 titled as M/s. PNB Housing Finance Ltd. Vs. M/s. Pinnacle Housing Pvt. Ltd.

11. That the Ld. Counsel for the Personal Guarantor appeared on the advance notice and opposed the prayer made by the Applicant on the ground of the maintainability of the present petition. Both the parties have also filed their written submissions with regard to maintainability of the present petition.

12. It is averred by the Respondent in its written submissions that :

“1. As per Section 179(1) and Section 179(2) of the IBC, 2016 the adjudicating authority for initiation of insolvency proceedings against individuals and firms is conferred upon the Debt Recovery Tribunal. Therefore, the present petition filed under Section 95 of the Insolvency and Bankruptcy Code ought to have been filed before the Debt Recovery Tribunal.

*2. Section 60(2) provides jurisdiction to National Company Law Tribunal to entertain petitions against personal guarantors who have extended guarantee to the Corporate Debtor and where the CIRP or the liquidation proceedings have been admitted against the Corporate Debtor. It is submitted that though S. 7 petitions have been filed against the co-borrowers who are the Corporate Debtors in the present case, **no order of admission has yet been passed by this Hon’ble Tribunal** and therefore, the petitions filed by the 25-12 Financial Creditor under Section 95 are not maintainable before this Tribunal **as being premature.***

*C. The judgment of the Hon’ble National Company Law Appellate Tribunal in the case of Ferro Alloys Corporation Ltd. [Company Appeal (AT) (Insolvency) No. 92 of 2017] is inapplicable in as much as, **firstly**, the judgment pertained to a regime prior to the notification of the provisions against the personal guarantor on 15.11.20219 and **secondly**, the issue involved in that litigation related to corporate guarantors and not personal guarantors.*

*D. It is submitted that the notification dated 15.11.2019 has notified all the provisions relating to individuals who have extended personal guarantee to Corporate Debtor. The legislative intent as evidenced by the judgment of the Hon’ble Supreme Court in Lalit Kumar Vs. UOI (para 99) is that under **Section 60(2) the NCLT would get jurisdiction only in case where the CIRP or the liquidation proceedings are pending against the Corporate Debtor.**”*

13. Further, the Personal Guarantor has placed reliance on the decision of Mumbai Bench of NCLT dated 09.07.2021 passed in the matter of Altico Capital India Ltd. Vs. Rajesh Patel & Ors. I.A 1062/2021 in C.P. 293/2020. The order dated 09.07.2021 is reproduced below:

“IA-1062/2021

The above I.A. is filed by the Financial Creditor under section 95 of IBC against the personal guarantor. However, on an enquiry from the Bench it came out that the Corporate Debtor for which the personal guarantee has been given is not under CIRP. In view of the above, the present I.A. cannot be prosecuted and therefore the above I.A. 1062/2021 is disposed of and CP 293/2020 is also dismissed.”

14. That the Personal Guarantor has also place reliance on the Judgment of **NCLT Chennai in CP/713/IB/CB/2018 titled as SBI v. Vijaraj Surana**. The relevant extracts of the order are reproduced below :

“17. Let us contemplate a converse situation, if no CIRP is initiated against principal borrower, in such situation, can NCLT as Adjudicating Authority will have jurisdiction to proceed independently against personal guarantor in the absence of CIRP against the principal borrower, certainly not because personal guarantor being an individual, proceedings lie against him before DRT as Adjudicating Authority. This jurisdiction to proceed against personal guarantors before NCLT is contingent upon CIRP proceeding pending before NCLT....”

15. That in response to the contentions of the Personal Guarantor, it is argued by the Applicant/Creditor that the Adjudicating Authority for individuals (Personal Guarantor) shall be, what has been provided under Section 60 of the Code [as amended vide the Insolvency and Bankruptcy

Code (Second Amendment) Act, 2018] [effective from 06.06.2018]. The Applicant has submitted that a bare perusal of Section 60 of the Code shows that this Section has following three limbs/situations, under which an Application can be entertained before this Adjudicating Authority :

“A) Section 60(1) deals with the situation where the Adjudicating Authority will be NCLT having territorial jurisdiction over the place where the registered office of the corporate person is located. {fresh filing}

B) Whereas Section 60(2) deals with a situation where, the Adjudicating Authority would be NCLT where CIRP or liquidation proceedings of a Corporate Debtor is pending. {pending CIRP against CD}

C) Section 60(3) which deals with the situation where the Adjudicating Authority would be NCLT which has seized of the matter against the Corporate Debtor and the insolvency resolution process or liquidation or bankruptcy proceeding is already pending against the Corporate Guarantor or Personal Guarantor in any Court or Tribunal shall be transferred to such NCLT dealing with CIRP or liquidation process of such Corporate Debtor. {Transfer}”

16. It is further submitted by the Applicant that all the aforesaid three sub-sections of Section 60 are independent of each other and come into effect in three different situations. This can also be deduced from perusal of the judgment passed by the Hon'ble Supreme Court in the matter of **Lalit Kumar Jain Vs UOI** (Transferred Case (Civil) No. 245/2020). The aforesaid interpretation of Sub-section (1), (2) and (3) of Section 60 can also be drawn from a bare perusal of the judgment passed by the Hon'ble NCLAT on 08.01.2019 in the matter of **Ferro Alloys Corporation Limited vs. Rural Electrification Corporation Limited**, [Company Appeal (AT) (Insolvency) No. 92 of 2017) which was upheld by the Hon'ble Supreme Court vide order dated 11.02.2019, wherein the (IB)-375(ND)2021

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Hon'ble NCLAT has categorically held that it is not necessary to initiate CIRP process against the principal borrower before initiating CIRP against the Corporate Guarantor.

17. It is added by the Applicant that the Hon'ble NCLAT, while passing the aforesaid Judgment relied upon the landmark judgment in the matter of **Bank of Bihar Limited vs. Dr. Damodar Prasad & Anr. (1969) 1 SCR 620**, wherein the Hon'ble Supreme Court held that “under Section 128 of the Indian Contract Act, save as provided in the contract, the liability of the surety is co-extensive with that of the principal debtor. The surety became thus liable to pay the entire amount. His liability is immediate. It cannot be deferred until the creditor exhausted his remedies against the principal debtor. Further the Hon'ble Supreme Court held that the Financial Creditor has not only right to recover the outstanding dues by filing a suit, but also has a right to initiate resolution process against the corporate person, whose liability is co-extensive with that of the principal borrower.

18. That it is submitted further by the Applicant that the notification relating to Part III was challenged in the matter of **Lalit Kumar Jain Vs. Union of India**, wherein the Hon'ble Supreme Court in para 99 and 100 of the Judgement held that “.....*Section 179, which defines what the Adjudicating Authority is for individuals is “subject to” Section 60. Section 60(2) is without prejudice to Section 60(1) and notwithstanding anything to the contrary contained in the Code, thus giving overriding effect to Section 60(2) as far as it provides that the application relating to insolvency*

resolution, liquidation or bankruptcy of personal guarantors of corporate debtors shall be filed before the NCLT, where proceedings relating to corporate debtors are pending.....” It is contended by the Applicant that it is clear from the aforesaid analysis that the Parliamentary intent was to treat the personal guarantor differently from other categories of individuals.

19. After hearing submissions of both the parties, perusing the documents placed on record and written submissions of the parties, we observe that in the present case, though the CIRP has not been initiated against the Corporate Debtor, as revealed by the parties, the Applicant/Creditor has filed Applications No. CP. (IB)-408/2021 titled as M/s. PNB Housing Finance Ltd. Vs. M/s. Star Realcon Pvt. Ltd. and CP. No. (IB)-407/2021 titled as M/s. PNB Housing Finance Ltd. Vs. M/s. Pinnacle Housing Pvt. Ltd against the Borrowers/Corporate Debtors before this Adjudicating Authority to initiate CIR Process against them. Hence, we find that the facts of the present case and issues raised herein are akin to the facts of the **Company Petition No. (IB)-395(ND)/2021-PNB Housing Finance Ltd. Vs. Mr. Mohit Arora**, decided by this Bench recently vide Order dated 29.09.2021 and the issues raised therein. In the aforesaid case, we have held that :

*“31. While going through the Section 60(1), we have seen that the Adjudicating Authority, **in relation to** the insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the NCLT having territorial jurisdiction over the place where*

*the registered office of a corporate person is located. Hence, in the case herein, there is a situation where various IB applications for initiation of CIR process against the Corporate Debtor are pending, though the CIR Process is yet to be initiated. In our considered view, the moment the IB applications **in relations to** Insolvency resolution of the Corporate Debtor are pending before this Adjudicating Authority, the provisions of Section 60(1) get attracted and the jurisdiction to entertain insolvency process against the personal guarantor would, therefore, lie with the NCLT.*

*32. In the light of the aforesaid facts, we would like to summarise in relation to that i) there are pending IB cases in relation to initiation of insolvency resolution of the Corporate Debtor; ii) Section 60(2) of IBC 2016 is without prejudice to Section 60(1) as held by the Hon'ble Supreme Court in the matter of **Lalit Kumar Jain V. Union of India**; and iii) Section 179(1) of IBC 2016 is subject to Section 60 of IBC 2016, which includes Sub-Section (1), therefore, in our considered view, the jurisdiction **in relation to** the insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the National Company Law Tribunal in terms of Section 60(1) of IBC 2016.*

*33. Hence, **we conclude that in a situation where Application(s) in relation to the Corporate Debtor for initiation of CIRP is pending in National Company Law Tribunal (NCLT) then, initiation of CIRP of the Corporate Debtor is not a prerequisite for maintainability of an application under Section 95 of the IBC, 2016 filed for initiating IR Process against the Personal Guarantor of that Corporate Debtor before the NCLT.***

20. Therefore, in the present case having the similar facts and issues, we would like to reiterate that in the event of the Application(s) for Insolvency and Bankruptcy (IB) being pending for initiation of CIR Process before this Adjudicating Authority, commencement of CIRP against the Corporate Debtor is not a condition precedent for maintaining an application under Section 95 of the IBC, 2016 filed for initiating IR Process against the Personal Guarantor of the Corporate Debtor before the NCLT.

21. The Applicant has averred in its application that the Personal Guarantor has committed, prima facie, default in making repayment of the loan, for which he has given the personal guarantee to the Applicant/ Creditor on behalf of the Corporate Debtors/Borrowers. **Hence, we are inclined to proceed in the matter in accordance with the law.** As regards, the issue of limited notice to the personal guarantor as held by the Hon'ble NCLAT in the matter of **Ravi Ajit Kulkarni V. State Bank of India in Company Appeal (AT) (Insolvency) No. 316 of 2021** vide its judgement dated 12.08.2021, since the Personal Guarantor has already caused appearance on the advance notice, we do not see any need for issuing further notice.

22. It is, therefore, made known to everyone that on filing this Application by the Applicant/Creditor, the interim-moratorium commences as stipulated under Section 96 (1) (a) in relation to all the debts of the personal guarantor and shall cease to have effect on the date of admission of this Application and during the interim- moratorium period, the following are prohibited:

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

This shall, however, not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

23. The Applicant/Creditor has not proposed the name of any, Insolvency Professional, for appointment as Resolution Professional. Therefore, this Bench from the suggested panel of the IBBI appoints Mr. Brijesh Kumar Tamber, as the Resolution Professional in exercise of the powers conferred under Section 97 of the IBC, 2016 on this Authority subject to the Regulation 4 (1) and (2) of the Insolvency and bankruptcy Board of India (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Regulations, 2019. The details of the Resolution Professional are as under:

Name : Mr. Brijesh Kumar Tamber
Registration No. : IBBI/IPA-002/IP-N00523/2017-18/11593
E-mail : officeofbrijeshktamber@gmail.com

24. The Resolution Professional shall exercise all the powers as enumerated under Section 99 of the IBC, 2016 read with the Rules made thereunder. **He is directed to examine the Application and make recommendations along with the reasons in writing for acceptance or rejection of this Application within the stipulated time as envisaged under the provisions of Section 99 of the IBC, 2016.** The RP shall give

a copy of the report under Sub-Section (7) of Section 99 to the Applicant/Creditor, as soon as the same is filed before this Authority. Nothing expressed herein shall be construed as an opinion before the RP before filing his report.

25. For the purpose of making report/recommendations, nothing expressed herein shall be construed as an opinion/observation on the reported default of the personal guarantor.

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

27. List the matter on 08.11.2021.

Sd/-
(L. N. Gupta)
Member (T)

Sd/-
(Abni Ranjan Kumar Sinha)
Member (J)