

MAINTAINABILITY OF APPLICATIONS UNDER SECTION 95 OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016 IN THE ABSENCE OF PENDING CIRP OF THE CORPORATE DEBTOR

I. Introduction

Proceedings against personal guarantors find their origin in Section 128 of the Contract Act, 1872 which deals with the co-extensive liability of a surety. It has long been considered that a surety's liability to pay the debt is not removed by reason of the creditor's omission to sue the principal debtor. Such a creditor is not bound to exhaust his remedy against the principal debtor before suing the surety, and a suit may be maintained against the surety even though the principal debtor has not been sued.

In fact, the Hon'ble Supreme Court of India ("Supreme Court") in the case of ***Bank of Bihar Limited v. Damodar Prasad & Anr.*** while relying upon the judgment of the Division Bench of the Hon'ble Bombay High Court in the case of ***Lachhman Joharimal v. Bapu Khandu & Anr.*** has stated that, "*a creditor is not bound to exhaust his remedy against the principal debtor before suing the surety and that when a decree is obtained against a surety, it may be enforced in the same manner as a decree for any other debt.*"

Quite pertinently, in the case of ***Industrial Investment Bank of India Ltd. v. Biswanath Jhunjunwala*** as well, the Supreme Court has observed that, "*the very object of the guarantee is defeated if the creditor is asked to postpone his remedies against the surety. In the present case the creditor is a banking company. A guarantee is a collateral security usually taken by a banker. The security will become useless if his rights against the surety can be so easily cut down.*"

Various courts in India have followed a similar consideration for proceedings instituted by a creditor against a personal guarantor in a catena of judgments. However, as far as proceedings instituted under Part III of the Insolvency & Bankruptcy Code, 2016 ("the Code") are concerned, different benches of the NCLT have taken differing views on the subject of maintainability of proceedings against personal guarantors in the absence of CIRP being initiated against the corporate debtor.

II. The Section

60 Adjudicating Authority for corporate persons -

(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 ¹[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.

(3) An insolvency resolution process or ²[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.

On a plain reading of the provision, we understand that:

Section 60 of the Code contemplates the instances in which Insolvency Resolution Process can be initiated against the personal guarantors of the corporate debtor. While the scope of Part I of the Code is to resolve the corporate debtor and ensure it is kept as a going concern, the scope of Part III of the Code is to ensure that the personal

guarantors of the corporate debtor do not obfuscate their obligations. Section 60 dictates the jurisdiction of the NCLT to adjudicate Applications filed under Section 95 of the Code.

III. Significant Judgments – Up until now various benches of the NCLT have taken up different stances as to the scope of Section 60 and the instances in which applications under Section 95 can be entertained by the NCLT:

- i. The Mumbai Bench of the Hon'ble NCLT in the case of ***Insta Capital Private Limited v. Ketan Vinod Kumar Shah*** held that where resolution process or liquidation proceedings against the corporate debtor were not pending, a financial creditor could not be allowed to initiate CIRP against the personal guarantors. It was opined that on a conjoined reading of Section 60 of the Code along with Section 128 of the Contract Act, 1872 CIRP could be initiated against the corporate debtor as well as the corporate guarantor. However, Section 60(2) of the Code contained a *non-obstante* clause which specified that only where a CIRP process or liquidation process of a corporate debtor was pending before the NCLT that an application initiating Insolvency Resolution against the personal guarantor of such a corporate debtor could be entertained. The bench further opined that, “*filing of applications seeking resolution of personal guarantors without the Corporate Debtor undergoing CIRP, would tantamount to vesting of jurisdiction on two courses one is NCLT and another in the Debts Recovery Tribunal.*”
- ii. It has been extensively argued that in the instances where the corporate debtors are not undergoing the CIRP or liquidation, the appropriate forum for applications against personal guarantors of the corporate debtors is the Debts Recovery Tribunal. Considering this submission, the Delhi Bench of the Hon'ble NCLT in the case of ***PNB Housing Finance Limited v. Mr. Mohit Arora*** held that, “*the moment the IB application in relation to Insolvency resolution of the Corporate Debtor is 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*”. The bench concluded that where applications in relation to the corporate debtor for initiation of CIRP is pending at NCLT, in those circumstances the initiation of CIRP of the corporate debtor no longer remains to be a prerequisite for the maintainability of an application under Section 95 of the Code.

IV. Stance of the Supreme Court:

Recently, the Supreme Court rejected a SLP preferred against the order of the Hon'ble

NCLAT passed in the case of ***State Bank of India, Stressed Asset Management Branch v. Manoj Kumar Jajodia***. Therein the Hon'ble NCLAT set aside the order of the Kolkata Bench of the Hon'ble NCLT rejecting the application filed under Section 95 of the Code. The Hon'ble NCLAT had distinguished the language of Section 60(1) and 60(2) of the Code and considered the legislative intent therein.

The Hon'ble NCLAT opined that the use of words 'a' and 'such' before National Company Law Tribunal clearly indicated that Section 60(2) was applicable only when a CIRP or liquidation proceeding of a corporate debtor was pending before a NCLT. Such a provision was introduced merely to avoid two different benches of the NCLT taking up the CIRP of the corporate debtor and the Insolvency Resolution Proceedings of the personal guarantor. The Hon'ble NCLAT further opined that Section 60(2) began with the expression "*Without prejudice to sub-section (1)*" and therefore when a particular case was not covered by the provisions of Section 60(2), the application as referred to in Section 60 could still be filed before the NCLT having territorial jurisdiction.

V. Conclusion

The Code as a legislation is comparatively at a nascent stage. It is interesting to note the manner in which the Tribunals are giving teeth to the provisions of the Code. A perusal of the landmark judgments indicates that increasing efforts are being made to interpret the sections keeping in mind the commercial steps and transactions undertaken by entities in this day and age. The Tribunals have been mindful to strike the right kind of balance to ensure that the personal guarantors of the corporate debtors are not allowed to elude their obligations to their creditors. In line with the intent of the legislators, the Tribunals, with every passing judgment have been evaluating in what circumstances applications filed against personal guarantors under Part III of the Code must be entertained. By virtue of the orders of the Supreme Court and NCLAT in ***Manoj Kumar Jajodia (supra)***, it is now settled law that applications filed under Section 95 against the personal guarantors are maintainable in the absence of pending CIRP or liquidation proceedings of the corporate debtor. By analysing the legislative intent behind Section 60 of the Code, the Supreme Court and NCLAT have finally answered questions pertaining to the concurrent jurisdiction of the Hon'ble NCLT and DRT when adjudicating matters of insolvency against individuals.

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