

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
KOLKATA BENCH,
KOLKATA**

C.P (IB) No.210/KB/2021

In the matter of

An application under section 95 of the Insolvency and Bankruptcy Code, 2016.

And

In the matter of:

State Bank of India, Stressed Assets Management Branch-I, Nagaland House, 11 & 13, Shakespeare Sarani, Kolkata-700017.

... Applicant / Financial Creditor

Versus

In the matter of:

Shri Manoj Toshniwal, son of Late Pushkar Narayan Toshniwal , CL- 280, Salt Lake, Sector- II, Kolkata-700091.

...Respondent/ Guarantor

Date of hearing : 07/01/2022

Order Pronounced on : 14/01/2022

Coram:

Mr. Rohit Kapoor, Member (Judicial)

Mr. Harish Chander Suri, Member (Technical)

Counsels appeared through Video Conference

1. Mr. Ramesh Chandra Prusti, Adv.] For the Financial Creditor
2. Mr. Binoy Upadhyay, Adv.

1. Mr. Mainak Bose, Adv.] For the Respondent /Guarantor
2. Ms. Urmila Chakraborty, Adv.
3. Mr. Pranav Sharma, Adv.

ORDER

Per: Harish Chander Suri, Member (Technical)

1. The Court is convened by video conference today.
2. This petition under section 95(1) of the IBC ,2016 has been filed by the State Bank of India (hereinafter referred to as the Applicant/Financial Creditor) to initiate Insolvency Resolution Process in respect of Mr. Manoj Toshniwal (hereinafter referred to as the Respondent/ Guarantor).
3. It is submitted that the applicant is a body corporate constituted under the provisions of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1955, having its Corporate Office at Mumbai and its local Head office at Samriddhi Bhawan, 1, Strand Road, Kolkata and Branch Office at Stressed Assets Management Branch-I, Nagaland House, 11& 13 , Shakespeare Sarani, Kolkata. It is submitted that the application has been filed through authorized officer and constituted attorney Mr. Tapan Kumar Satapathy, who is duly authorized and competent to file this application and to do all related acts and deeds. It is submitted that the Corporate Debtor M/s EMC Limited had availed various credit facilities from the applicant bank, which were enhanced and renewed from time to time and at the time of availing the said credit facilities, the Guarantor/ respondent herein of the Corporate Debtor had executed various Banking and guarantee documents. The said guarantor thereby guaranteed due repayment and discharge of all the dues payable by the Corporate Debtor with interest, costs, charges, expenses and/or other money due to applicant in respect of or under the said credit facilities or any of them, forthwith on demand by the applicant bank and for that purpose Mr. Manoj Toshniwal being the guarantor in the instant matter executed Deed of Guarantee and several documents whereby and whereunder he guaranteed the repayment and discharge of all the dues

and liabilities to be payable by the Corporate Debtor with interest, costs, charges, expenses and/or other money which is due to applicant in respect of or under the said credit facilities or any of them. The guarantee documents were executed by the guarantor on several dates i.e. on 23.02.2011, 01.08.2012, 04.04.2013, 06.08.2013, 21.04.2014, 30.06.2015, 22.01.2016, 29.06.2016 and 19.01.2018,

4. It is submitted that at the time of availing the said Credit Facilities several other documents viz. acceptance notice, promissory notes, and updated repayment schedule were also executed by the borrower and guarantors individually, jointly and severally in favour of the applicant for availing the said Credit facilities.
5. It is submitted that Corporate Debtor thereafter started defaulting in the repayment of the credit facilities and failed to adhere to the terms and conditions of the sanction and could not maintain the accounts as regular, as such the accounts of the Corporate Debtor was classified as non-performing asset (NPA) on 05.09.2018.
6. It is submitted that the applicant/ Financial Creditor by issuing a notice dated 15.12.2018 under section 13(2) of the SARFAESI Act, 2002 to the principal borrower as well as Guarantors demanded a sum of Rs.1554,13,93,164.90 plus interest due from 15.12.2018 with further interest at the contracted rate until payment but in spite of said notice, neither the principal borrower nor the personal guarantor being the respondent herein paid up the dues of the Applicant/Financial Creditor and accordingly the applicant bank filed an Original Application (O.A) under section 19 of the Recovery of Debts and Bankruptcy Act, 1993, before the Learned Debts Recovery Tribunal-1 in the year 2019 for recovery of the outstanding dues for a sum of Rs. 13,65,19,84,971.00 as on 28.02.2019 with further interest and costs and expenses from the Corporate Debtor and their guarantors and the said Original Application O.A. No. 181 of 2019 (State Bank of India-vs- Sundar Lal Dugar & Ors)

is pending before the Hon'ble DRT-I, Kolkata.

7. It is submitted that the guarantor is jointly and severally liable like the Corporate Debtor pursuant to the deed of guarantee executed by the Guarantor, and also as per section 128 of the Indian Contract Act, 1872 the guarantor is liable to pay the total outstanding dues together with further interest, liquidated damages and outstanding interest.
8. It is stated that CIRP of the Corporate Debtor has already commenced vide order dated 12.11.2018 passed by this Adjudicating Authority, in C.P. No. 1237/KB/2018.
9. It is submitted that having found no other way, the applicant sent a demand notice dated 04.01.2021 in Form-B under Rule 7(1) of the Insolvency and Bankruptcy (application to Adjudicating Authority for insolvency Resolution Process of personal guarantors to Corporate Debtors) Rules, 2019 to the personal Guarantor by Speed Post by demanding Rs. 19,32,35,48,778.10 as on 31.12.2020 as the outstanding dues to be payable by the Corporate Debtor along with other charges and interest levied from time to time.
10. It is submitted that the Guarantee of the Guarantor is jointly and severally as that of the Corporate Debtor and the default of the Corporate Debtor to the financial creditor is to the sum of Rs.19,32,35,48,778.10 as 31.12.2020; the guarantor is also liable to the tune of Rs.19,32,35,48,778.10 to the financial creditor and the personal guarantee has been given to secure the dues of Rs.19,32,35,48,778.10.
11. It is further submitted that by the instant application, the applicant herein wants to bring to the notice of the Adjudicating Authority that the Personal Guarantor has committed default in making repayment of the Loan amount to the applicant for which he has given personal guarantee to the applicant on behalf of the Corporate Debtor.

12. It is submitted that the applicant/financial creditor has referred the matter to CIBIL after the account became NPA on 05.09.2018.
13. It is submitted that the present application in Form C has been filed by the applicant against the Guarantor.
14. On being issued the advance notice, Mr. Mainak Bose appears for the Respondent/guarantor and submitted his arguments even before the reply to the application and submitted that this application under section 95(1) is not maintainable. The matter was therefore fixed for hearing including the preliminary issue of maintainability, on 7th January, 2022. Ld. Counsel submitted that this petition is not maintainable as per section 60(2); the petition against the Corporate Guarantor or personal Guarantor can only be maintainable if either the Corporate Debtor is under CIRP or if the Corporate Debtor is under liquidation. According to the Ld. Counsel since in respect of the Corporate Debtor in this matter, the resolution plan has already been accepted and approved, this application under section 95(1) of the Code against the present respondent/guarantor is not applicable under this law.
15. On preliminary discussion, it has come out that only issue that needs answer from this Adjudicating Authority is whether corporate guarantor or personal guarantor, as the case may be of such Corporate Debtor would be maintainable before the NCLT or not under section 95(1), in the light of section 60 of the Code.
16. To reach an appropriate level of understanding, we must go to the scheme of IBC dealing with the Corporate Debtor and their guarantors. On the one hand and partnership firm and their guarantors on the other hand.
17. Section 60 makes the provisions for corporate persons. Sub section (1) of Section 60 has the following components or building blocks:
 - i. *The Adjudicating Authority,*

- ii. *In relation to insolvency resolution and liquidation,*
- iii. *For corporate persons including corporate debtors and personal guarantors thereof,*
- iv. *Shall be,*
- v. *The National Company Law Tribunal,*
- vi. *Having territorial jurisdiction over the place,*
- vii. *Where the registered office of the corporate person is located,*

18. This sub section deals with the territorial jurisdiction of the NCLT, where the registered office of the corporate person is located. As per the section the proceedings against the Corporate Debtors, and the personal guarantors thereof shall be filed before the same NCLT within the jurisdiction of which the registered office of the corporate person is located.

19. Similarly, Section 60(2) has the following components;

- i. *Without prejudice to sub section (1) and notwithstanding anything to the contrary contained in the Code,*
- ii. *Where a corporate insolvency resolution process or liquidation proceeding of a corporate debtor,*
- iii. *Is pending before a National Company Law Tribunal,*
- iv. *An application relating to the insolvency resolution or (Liquidation or Bankruptcy),*
- v. *of a corporate guarantor or personal guarantor as the case may be,*
- vi. *Of such corporate debtor,*
- vii. *Shall be filed before such National Company Law Tribunal,*

20. Similarly, section 60(3) has the following components:

- i. *An insolvency resolution process or (Liquidation or Bankruptcy proceeding of a corporate guarantor or personal guarantor, as the case may be of the corpore debtor).*
- ii. *Pending in any court or Tribunal shall stand transferred,*
- iii. *To the Adjudicating Authority dealing with insolvency resolution*

process or liquidation proceeding of such corporate debtor,

21. Section 60(4) has the following components:
- i. The National Company Law Tribunal shall vest with,
 - ii. All the powers of the DRT,
 - iii. As contemplated under Part III of this Code,
 - iv. For the purpose of sub section (2),
22. Section 60(5) has the following components:
- i. Notwithstanding anything to the contrary contained in any other law for the time being in force,
 - ii. The National Company Law Tribunal,
 - iii. Shall have jurisdiction to entertained 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 properties 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.
23. This Section 60 IBC provides that the National Company Law Tribunal shall be the Adjudicating Authority for insolvency resolution and liquidation of corporate debtors and also lays down the criteria for establishing the territorial jurisdiction of the Tribunal. This section also provides that the insolvency resolution or bankruptcy proceeding relating to a personal guarantor of a corporate debtor shall also be filed before the National Company Law Tribunal.
24. Now coming back to the petition under section 95(1) filed by the applicant herein which is opposed by the respondent guarantor, we have to analyse the provisions of section 95 of IBC.
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25. Section 95(1) has the following components;
- i. A creditor may apply either by himself, or
 - ii. jointly with other creditors, or
 - iii. Through a resolution professional
 - iv. To the Adjudicating Authority,
 - v. For initiating an insolvency resolution process,
 - vi. Under this section by submitting an application,
26. It would appear from the aforesaid provisions of the Code that while enacting Insolvency and Bankruptcy Code, 2016, the Legislature had made sure that no guarantor whether corporate guarantor, personal guarantor of the Corporate Debtor, or the personal guarantor of the partnership firm, escapes its liability on any technical grounds.
27. The law of guarantee has been strictly followed and sought to be completely implemented in the Code.
28. Section 60(i) clearly envisages that 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 a place where the registered office of the corporate person is located. So the language of sub section (1) of Section 60 is very clear that there is no other forum for proceeding against the personal guarantors of the corporate debtors than the one before which the proceedings against the Corporate Debtor are pending i.e. National Company Law Tribunal, which has territorial jurisdiction over the place where the registered office of the corporate person is located
29. If we read section 60(2), it is undoubtedly clear that an application relating to insolvency resolution (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, where a corporate insolvency resolution process or liquidation proceedings of a corporate debtor is pending, notwithstanding anything to the contrary contained in the Code and without prejudice to whatever has been mentioned in sub section (1) of Section 60. A conjoint reading of Section 60(1) and Section 60(2) of the Code thus makes it explicitly clear that an application relating to the insolvency resolution or liquidation of a corporate guarantor or bankruptcy of a personal guarantor shall be filed before such National Company Law Tribunal within whose territorial jurisdiction, the corporate insolvency resolution process or liquidation proceedings of a corporate debtor is pending. Section 60(3) further specifically ensures that the insolvency resolution process or liquidation of the corporate guarantor or bankruptcy proceedings of a 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 proceedings of such Corporate Debtor.

30. To provide further edge to the provisions relating to proceedings against the Corporate guarantors and personal guarantors, sub section 4 of Section 60 further provides that 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), meaning thereby that the Legislature had in its mind that in the case of personal guarantee even if the proceedings are initiated before the Debt Recovery Tribunal, the same shall stand transferred to the Adjudicating Authority dealing with insolvency resolution process or liquidation proceedings of such corporate debtor. The Legislature has further armed the National Company Law Tribunal with the powers of Debt Recovery Tribunal as well, as contemplated under Part III of this code for the purpose of sub section (2) to deal with proceedings against personal guarantors as well.

31. Sub section (5) of section 60 further clarifies that notwithstanding

anything to the contrary in any other law for the time being in force, the National Company Law Tribunal shall have the jurisdiction to entertain or dispose of all types of applications or proceedings by or against the Corporate Debtor or corporate person, any claim made by or against the Corporate Debtor or corporate person, including claims by or against any of its subsidiaries constituted in India , any question of priority 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. These words of section 60(5) loudly speak that the National Company Law Tribunal has the jurisdiction and all the powers to entertain or dispose of any proceedings or applications by or against the Corporate Debtor or corporate person, including any claim made by or against the Corporate Debtor or corporate person, and also the claims by or against any of its subsidiaries situated in India and even any question of priorities or any question of law or facts arising out of or in relation to the insolvency resolution or liquidation proceedings or the Corporate Debtor or corporate person under this Code.

32. So, in a way the National Company Law Tribunal has the exclusive jurisdiction and enjoys all the powers to decide all the questions relating to any claim by or against the Corporate Debtor, including the corporate guarantors and personal guarantors and is vested with the powers of the Debt Recovery Tribunal as well, for any purpose if and when required to be exercised.
33. So finally, it may be seen that section 60 of the IBC provides that the National Company Law Tribunal shall be the only Adjudicating Authority for insolvency resolution and liquidation, and also lays down the criteria for establishing the territorial jurisdiction of the Tribunal. This Section also provides that the insolvency resolution or Bankruptcy proceedings relating to a personal guarantor of a corporate debtor shall also be filed before the National Company Law Tribunal.

34. The next argument of the Ld. Counsel for the Respondent is that the proceedings under section 95(1) of the Code shall not be maintainable once the Resolution Plan has been approved. To counter the argument of the Ld. Counsel, we may deal with the language Section 95 of the Code.
35. Section 95 (1) of the Code has the following ingredients:
- i. A Creditor may apply either by himself or jointly with other creditors, or
 - ii. Through a resolution professional,
 - iii. To the Adjudicating Authority,
 - iv. For initiating an insolvency resolution process under this section by submitting an application.
36. Sub section 95(1) of the Code is common for the corporate guarantors and personal guarantors of corporate debtor and would also permit an application to be filed by a creditor against for initiating an insolvency resolution process, in relation to a personal guarantor and in relation to any partnership debt owed to the creditor for initiating insolvency resolution process against the firm or bankruptcy proceedings against any one or more of the partners of the firm.
37. In the present case i.e. State Bank of India vs. Shri Manoj Toshniwal, the creditors SBI has applied under section 95(1) for bankruptcy of the personal guarantor of the Corporate Debtor.
38. Ld. Counsel appearing for the Financial Creditor has referred and replied upon the judgments of Hon'ble Supreme Court passed in Transferred Appeal No. 245/2020 in the matter of **Lalit Kumar Jain vs. Union Bank of India & Ors.**
National Company Law Appellate Tribunal, Principal Bench, New Delhi,
Mr. Ravi Ajit Kulkarni vs. State Bank of India Company Appal (AT)
(Insolvency) No. 316 of 2021.
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39. The Hon'ble Supreme Court of India in Para 108 of the judgement passed in the matter of **Lalit Kumar Jain vs. Union Bank of India & Ors.** has held as under:-

“ 108. It is, therefore, clear that the sanction of a resolution plan and finality imparted to it by Section 31 does not per se operate as a discharge of the guarantor's liability. As to the nature and extent of the liability, much would depend on the terms of the guarantee itself. However, this court has indicated, time and again, that an involuntary act of the principal debtor leading to loss of security, would not absolve a guarantor of its liability. In Maharashtra State Electricity Board (Supra) the liability of the guarantor (in a case where liability of the principal debtor was discharged under the insolvency law or the company law), was considered. It was held that in view of the unequivocal guarantee, such liability of the guarantor continues and the creditor can realize the same from the guarantor in view of the language of section 128 of the Contract Act as there is no discharge under Section 134 of that Act. This court observed as follows:-

7. Under the bank guarantee in question the Bank has undertaken to pay the Electricity Board any sum up to Rs.50,000 and in order to realize it all that the Electricity Board has to do is to made a demand. Within forty-eight hours of such demand the Bank has to pay the amount to the Electricity Board which is not under any obligation to prove any default on the part of the Company in liquidation before the amount demanded is paid. The Bank cannot raise the plea that it is liable only to the extent of any loss that may have been sustained by the Electricity Board owing to any default on the part of the supplier of goods i.e. the Company in liquidation. The liability is absolute and unconditional. The Fact that the Company in liquidation i.e. the principal debtor has gone into liquidation also would not have any effect on the liability of the Bank i.e. the guarantor. Under Section 128 of the Indian Contract Act, the liability of the surety is coextensive with that of the principal debtor unless it is otherwise provided by the contract. A survey is no doubt discharged under Section 134 of the Indian Contract Act by any contract between the creditor and the principal debtor by which the principal debtor is released or by any act or omission of the creditor, the legal consequence of which is the discharge of the

principal debtor. But a discharge which the principal debtor may secure by operation of law in bankruptcy (or in liquidation proceedings in the case of a company) does not absolve the surety of his liability (See Jagannath Ganeshram Agarwala vs. Shivnarayan Bhagirath [AIR 1940 Bom 247; see also In re Fitzgeorge Ex parte Robson [(1905) 1 KB 4621]].

40. In Para 111, the Hon'ble Supreme Court held as under:-

“ 111. In view of the above discussion, it is held that approval of a resolution plan does not ipso facto discharge a personal guarantor (of a corporate debtor) of her or his liabilities under the contract of guarantee. As held by this court, the release or discharge of a principal borrower from the debt owned by it to its creditor, by an involuntary process, i.e. by operation of law, or due to liquidation or insolvency proceeding, does not absolve the surety/guarantor of his or her liability, which arises out of an independent contract.”

41. During the course of arguments, Ld. Counsel for the Personal Guarantor agreed that under Section 60(2) of the Code, an application relating to insolvency resolution or liquidation or bankruptcy of a Personal Guarantor shall be filed before the NCLT, where a CIRP or liquidation proceedings of the Corporate Debtor is pending.
42. Ld. Counsel for the Guarantor further submitted that this Tribunal does not have jurisdiction to try or adjudicate or entertain the purported petition against the respondent, as no CIRP proceeding or liquidation proceeding is pending.
43. Keeping in view of the aforesaid discussion on the powers of the National Company Law Tribunal to deal with the personal guarantors of the corporate debtor, it is quite clear that the proceedings under section 95(1) of the Code to initiate insolvency resolution process or bankruptcy, can be initiated and continued against the corporate guarantors including personal guarantors, and it has also been made clear that the National Company Law Tribunal shall be vested with the powers of the Debt Recovery Tribunal as well. For the purpose of enacting these provisions, the Legislature had the intent and will to ensure that the

corporate guarantors or personal guarantors of the corporate debtor against whom proceedings are pending before the National Company Law Tribunal shall also be tried before the same National Company Law Tribunal. These sections also provide that the proceedings against the corporate guarantors and personal guarantors of the Corporate Debtor could also be tried before the National Company Law Tribunal along with the Corporate Debtor and even if the Corporate Debtor has already been liquidated or its resolution plan has also been approved, the Corporate guarantors and personal guarantors continue to face the proceedings before the National Company Law Tribunal, for which, the provision has also been made in the Code. It vests with the powers of the Debt Recovery Tribunal in the National Company Law Tribunal. The provisions of sections 60 and 95(1) of this Code read together ensure that none of the Corporate guarantors or personal guarantors of the corporate debtor escape their liability under any circumstances till they either satisfy the claims of all the creditors or till they are either liquidated like the Corporate Debtor, or are declared bankrupt.

44. The Code ensures that the National Company Law Tribunal can proceed against the Guarantors of all kinds and recover the unrealised debt, which could not be recovered from the Corporate Debtor through its liquidation or even by approval of the Resolution Plan, because the liability of the Corporate Debtor and its Guarantors is co-extensive, joint and also several. The Code is also enacted in those lines and follows the law of guarantee. In view of the above discussions and consideration, we therefore, hold that application under section 95(1) is very much maintainable against the personal guarantor before NCLT in spite of the fact that the Resolution Plan has been approved in respect of the Corporate Debtor for which these personal guarantors stood guarantee.
45. No where in the Code it is mentioned that proceedings Under Section 95(1) cannot continue against personal guarantors before the Hon'ble

NCLAT, after the approval of the Resolution Plan.

46. Once it has been held that the application under section 95(1) of the Code is maintainable against the Guarantors even if the Resolution Plan has been approved, for realizing the unrealised/deficient debt from the Guarantors, the next step is appointment of RP under section 97(5) (6) of the Insolvency and Bankruptcy Code, 2016.
47. We, therefore, appoint **Mr. Kannan Tiruvengadam**, having Registration No. **IBBI/IPA-001/IP-P00253/2017-18/10482**, as RP under section 97(5)(6) of the Code.
48. The RP shall examine this application and submit his report in terms of section 99 of the Code.
49. It is further ordered that interim moratorium shall commence from the date of this order in relation to all the debts and shall continue till the application is admitted.
50. During the period of interim moratorium, any legal action or proceedings pending in respect of any debt of the respondent shall be deemed to have been stayed and the creditors of the debtor i.e. respondent herein shall not initiate any legal action or proceedings in respect of any debt.
51. The order of interim moratorium shall have effect from the date of this order.
52. Registry is hereby directed to communicate the order to the Financial Creditor, personal guarantor, the Corporate Debtor and the I.R.P. by Speed Post as well as through email.
53. List this matter on **22/03/2022** for filing of Report by the IRP.

54. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

(Harish Chander Suri)
Member (Technical)

(Rohit Kapoor)
Member (Judicial)

Order signed on this, the 14th January, 2022

PJ