IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH

Coram: SHRI DEEP CHAND JOSHI,
HON'BLE JUDICIAL MEMBER

SHRI RAGHU NAYYAR,
HON'BLE TECHNICAL MEMBER

IA No. 229/JPR/2021
In CP No. (IB) 25/95/JPR/2021

IN THE MATTER OF:

SHAPOORJI PALLONJI FINANCE PRIVATE LIMITED

...Petitioner / Financial Creditor

VERSUS

REKHA SINGH

...Respondent / Personal Guarantor

IA No. 229/JPR/2021

Rekha Singh
R/o 201, Kanchan Apartments, Tilak Nagar,
Opp. L.B.S. College, Raja Park,
Jawahar Nagar, Jaipur- 302004 (Rajasthan)

...Applicant / Personal Guarantor

VERSUS

Shapoorji Pallonji Finance Private Limited
Office at:- SP Centre, Courtyard 10B,
41/44 Minoo Desai Road, Colaba,
Mumbai- 400005 (Maharashtra)

...Non-Applicant / Petitioner

AND

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IA No. 227/JPR/2021

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In CP No. (IB) 26/95/JPR/2021

IN THE MATTER OF:

SHAPOORJI PALLONJI FINANCE PRIVATE LIMITED

...Petitioner / Financial Creditor

VERSUS

SIDDHARTH SINGH

...Respondent / Personal Guarantor

IA No. 227/JPR/2021

Siddharth Singh
R/o 201, Kanchan Apartments, Tilak Nagar,
Opp. L.B.S. College, Raja Park,
Jawahar Nagar, Jaipur- 302004 (Rajasthan)

...Applicant / Personal Guarantor

VERSUS

Shapoorji Pallonji Finance Private Limited
Office at:- SP Centre, Courtyard 10B,
41/44 Minoo Desai Road, Colaba,
Mumbai- 400005 (Maharashtra)

...Non-Applicant / Petitioner

AND

IA No. 226/JPR/2021
In CP No. (IB) 27/95/JPR/2021

IN THE MATTER OF:

SHAPOORJI PALLONJI FINANCE PRIVATE LIMITED

...Petitioner / Financial Creditor

VERSUS

AJAY KUMAR SINGH

...Respondent / Personal Guarantor

IA No. 226/JPR/2021

Ajay Kumar Singh
R/o 201, Kanchan Apartments, Tilak Nagar,
Opp. L.B.S. College, Raja Park,
Jawahar Nagar, Jaipur- 302004 (Rajasthan)

...Applicant / Personal Guarantor

VERSUS

Shapoorji Pallonji Finance Private Limited
Office at:- SP Centre, Courtyard 10B,
41/44 Minoo Desai Road, Colaba,
Mumbai- 400005 (Maharashtra)

...Non-Applicant / Petitioner

For the Petitioner : Cyrus Bharucha, Adv.
Shivangshu Naval, Adv.
Akanksha Noval, Adv.
Bhakti Popat, Adv.
Jatin Doshi, Adv.
Aman Shah, Adv.
Aanchal Choudhary, Adv.
Rohit Lalwani, Adv.
Dinesh Bulli, In Person
Mithil Pattani, In Person

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For the Respondent/Applicant : Amol Vyas, Adv.

Order Pronounced On: 22.02.2022

Per: Shri Raghu Nayyar, Technical Member

ORDER

1. The Present Applications bearing IA No. 226/JPR/2021 in CP No. (IB) - 27/95/JPR/2021, IA No. 227/JPR/2021 in CP No. (IB) - 26/95/JPR/2021 and IA No. 229/JPR/2021 in CP No. (IB) - 25/95/JPR/2021 have been filed by the Personal Guarantors namely, Ajay Kumar Singh, Siddharth Singh and Rekha Singh respectively, against the Petitioner / Financial Creditor, namely Shapoorji Pallonji Finance Private Limited. The Applicants / Personal Guarantors have separately filed applications under Section 60(5) of the Insolvency and Bankruptcy Code ('IBC' / 'Code'), 2016 read with Rule 49 of the NCLT Rules, 2016 seeking the dismissal of the Company Petition No. (IB) - 27/95/JPR/2021, Company Petition No. (IB) - 26/95/JPR/2021 and Company Petition No. (IB) - 25/95/JPR/2021 respectively filed under Section 95 of IBC, 2016 against the Personal Guarantor(s), on account of not being maintainable. Since the factual matrix of the aforementioned Company Petitions and Interim Applications lies on a common framework of facts, we are considering Company Petition No. (IB) - 27/95/JPR/2021 and IA No.

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226/JPR/2021 as the typical illustrative case in the present matter and therefore, we observe, analyse and decide as follows hereinafter.

2. The Company Petition No. (IB)- 27/95/JPR/2021 has been filed by Shapoorji Pallonji Finance Private Limited, the Financial Creditor, under Section 95 of IBC, 2016 to initiate insolvency resolution process in the case of Shri Ajay Singh (hereinafter referred to as the Personal Guarantor / Applicant) under Section 60 & 95 of IBC read with Rule 7(2) of Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtor) Rules, 2019. The Personal Guarantor had through a personal guarantee secured repayment of a term loan of Rs. 25,00,00,000/- advanced by the petitioner to Jumbo Finvest (India) Limited, a Non-Banking Finance Company ('NBFC'), under facility agreement dated 27.03.2018. However, the Debtor had failed to make payment of interest amounts for the months of September 2020 & October 2020 and also failed to repay the principal amount instalment for the quarter ending in September 2020. The Petitioner was heard on 17.06.2021 when the following order was passed in related CP No. (IB) 25/95/JPR/2021:

> *Heard Mr. Cyrus Bharucha, Adv. and Mr. Shivangshu Naval, Adv., Ld. Counsels for the petitioner. The Petitioner shall file a short affidavit with regard to the page reference of the relevant demand notice, acknowledgement of the receipt of the said demand notice and the relevant emails within two weeks. The Petitioner shall also file copy of the master data of the Corporate Debtor for which the Respondent is a personal guarantor along with the affidavit. Order is reserved.*

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3. On 12.07.2021, the Personal Guarantor filed IA No. 180/JPR/2021 to set aside the aforesaid order dated 17.06.2021 on the basic premise that the same had been passed without hearing the Personal Guarantor. The said IA was heard on 20.07.2021 and dismissed on the anvil, as inter-alia the reserved order of 17.06.2021 in the main CP was already pronounced on 16.07.2021.

4. This Adjudicating Authority had innately addressed concern of the Personal Guarantor since notice of presence was issued to the Applicant/ Personal Guarantor herein, i.e. Shri Ajay Kumar in the main Company Petition vide the aforementioned order dated 16.07.2021, which is extracted as follows:

> *"3. Facts as stated in the present application are that the Personal Guarantor by way of personal guarantee secured repayment of a term loan of ₹25,00,00,000/- advanced by the Applicant to Jumbo Finvest (India) Limited under facility agreement dated 27.03.2018 (Annexure-B). However, the Debtor has failed to make payment of interest amount for the months of September 2020 & October 2020 and also failed in making repayment of principal amount instalment for the quarter ending in September 2020. Thus, the present application is filed against personal guarantor.*
>
> *4. Heard the submissions made by the Counsel for the Applicant. Issue notice to the Non-Applicant Personal Guarantor. Counsel for the Applicant shall collect the notice from the Registry and send the same along with complete paper book immediately to the Non-Applicant at its registered address by speed post and file affidavit of service along with tracking report within two weeks.*
>
> *5. Response, if any, may be filed within 3 weeks and rebuttal thereof, if any, may be filed within 2 weeks thereafter. List the matter for further proceedings in the case on 07.09.2021."*

Quite independently, and soon thereafter on 12.08.2021, the Hon'ble NCLAT had pronounced its judgement in the case of *Ravi Ajit Kulkarni vs.*

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State Bank of India [NCLAT Company Appeal (AT) (Insolvency) No. 316 of 2021], which inter alia outlined the need to issue limited notice in Section 95 cases for presence of the Personal Guarantors. The order of this Adjudicating Authority dated 16.07.2021 was not in variance therewith.

5. Subsequently, after receipt of notice in the main petition, the Applicant / Personal Guarantor filed the captioned IA No. 226/JPR/2021, seeking dismissal of the relevant company petition on the following main grounds:

   i. Jumbo Finvest (India) Ltd. is a NBFC registered with the Reserve Bank of India. As per the provisions of Section 3(7) of IBC, the provisions of the Code are not applicable to a Non-Banking Financial Company. As per Section 3(7), a 'Corporate Person' means a company as defined in clause (20) of Section 2 of the Companies Act, 2013 (18 of 2013), a Limited Liability Partnership as defined in clause (n) of sub-section (1) of Section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009), or any other person incorporated with limited liability under any law for the time being in force <u>but shall not include any Financial Service Provider</u>. [*Emphasis added*]

   ii. Presently, there is no on-going insolvency process with respect to Jumbo Finvest (India) Ltd. and therefore, the application filed by the petitioner is not maintainable.

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iii. As per Section 60 of IBC, insolvency of a Personal Guarantor can be filed before the Hon'ble Adjudicatory Authority only if either Corporate Insolvency Resolution Process (CIRP) or liquidation proceedings are pending against the Corporate Debtor before the National Company Law Tribunal (NCLT). Therefore, no insolvency application can be filed against the personal guarantor of Non-Banking Financial Company (NBFC) and hence, the main Petition CP No. (IB)- 27/95/JPR/2021 which has been filed by the Financial Creditor, under Section 95 of IBC, 2016 against the Applicant / Personal Guarantor is not admissible. Further, reliance was placed on clause 29 of the Insolvency and Bankruptcy Code (Second Amendment) Bill, 2018.

6. Since the aforesaid application raised a fundamental question at the threshold of hearing of the instant case, it was taken up at the very inception. The Petitioner / Financial Creditor filed its reply to the aforementioned IA 226/JPR/2021 of the Applicant / Personal Guarantor as follows:

i. The Petitioner / Financial Creditor submitted that Section 60(1) of the IBC states that as regards insolvency resolution or liquidation of corporate persons, the NCLT bench having territorial jurisdiction of the area where the registered office of the Corporate Person is located will be the concerned Adjudicating Authority. Section 60(1) further provides that insolvency resolution or liquidation of Personal

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Guarantors of such Corporate Persons will also go before the same NCLT having territorial jurisdiction where the registered office of the Corporate Person is located.

ii. Section 60(1) of the IBC makes it clear that there is no necessity for a CIRP to exist against a Corporate Person for a CIRP to be entertained against the Personal Guarantor of such Corporate Person. A CIRP against the Personal Guarantor of such Corporate Person can be entertained by the NCLT having territorial jurisdiction where the registered office of the Corporate Person is located. The above shows that Section 60(1) of the IBC would include in its ambit an individual covered by Section 95 of the IBC, if being sued in his capacity as a Personal Guarantor.

iii. The Non-Applicant / Financial Creditor submitted that the contention of the Petitioner stating that in light of changes made to the IBC read with the Insolvency and Bankruptcy (Insolvency and Bankruptcy Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019, the petitioner is barred by law from initiating CIRP against an NBFC like Jumbo Finvest (India) Limited can in no way mean that no CIRP can be initiated against Personal Guarantors of NBFCs till the RBI has initiated CIRP against the requisite NBFC.

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iv. The Non-Applicant / Financial Creditor further submitted that in addition to the provisions of the IBC, the contract of guarantee provided by the Personal Guarantor is also covered under the Contract Act, 1872. Under Section 126 of the Contract Act, a contract of guarantee means a contract to perform a promise or discharge the liability of a third person, in case of his failure to perform such promise or discharge such liability. Section 128 of the Contract Act stipulates that the liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract. In the present case, the liability of the Personal Guarantor is as if he himself was a co-obliger along with Jumbo Finvest (India) Limited. Thus, the Personal Guarantor can be proceeded against even under the Contract Act. The Non-Applicant / Financial Creditor placed reliance upon the Report of the Insolvency Law Committee, February 2020. The said report under Para 7.1 and 7.3 referred to Section 128 of the Contract Act to enunciate that the creditor has the right to recover its dues from either the principal debtor or the guarantor; or from both of them simultaneously. The said report also held that to restrict the above rights would prejudice the rights of the creditor provided under the contract of guarantee.

7. The Applicant / Personal Guarantor preferred a Rejoinder to the Reply of the Financial Creditor / Petitioner in the present matter vide Diary No.

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1574/2021. The submissions made by the Financial Creditor / Petitioner were strongly denied vide the aforesaid Rejoinder on the following grounds:

i. The Applicant / Personal Guarantor submitted that unless & until, CIRP has been initiated against the Corporate Debtor, no insolvency application against Personal Guarantor can be filed and placed reliance on the order of the NCLT Mumbai Bench-IV in *Insta Capital Private Limited vs. Ketan Vinod Kumar Shah [CP(IB)/1365/MB-IV/2020]*.

ii. The Applicant / Personal Guarantor further submitted that a bare perusal of Section 60(2) of IBC would go to show that it is necessary that CIRP has already been initiated against the Corporate Debtor prior to the filing of the Insolvency application against the Personal Guarantor. As far as Section 60(1) of IBC is concerned, the same does not deal with the situation as to when an Insolvency Resolution or Bankruptcy against the Personal Guarantor can be initiated. It merely deals with the territorial jurisdiction with the NCLT for dealing insolvency application.

iii. The Applicant / Personal Guarantor submitted that the notification no. S.O. 4139(E) dated 18.11.2019 issued by Ministry of Corporate Affairs would go to show that CIRP can only be initiated against Financial Service Providers by the Reserve Bank of India, where the asset size of the NBFC is Rs. 500 crores or more as per the last audited

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balance sheet. In this regard, it is submitted that as per the last audited balance sheet of the Jumbo Finvest (India) Limited, the asset size as per the Note No. 17 for the balance sheet as at 31.03.2020 is approx. Rs. 487 crores and therefore, even the aforesaid notification is not applicable in the present facts and circumstances. It is further relevant to note that even for the balance sheet as ending on 31.03.2021 as per the unaudited figures, the total asset size of the Jumbo Finvest (India) Ltd. is approx. Rs. 407 crores, which is far below than the threshold limit as specified in the aforesaid notification. In view of the aforesaid submissions, it is clear that even RBI is not empowered to initiate CIRP against Jumbo Finvest (India) Limited and accordingly, no personal insolvency application can be filed against the Personal Guarantors. Furthermore, even assuming though not admitting that CIRP can be initiated against Jumbo Finvest (India) Limited, then also, since no application either under Section 7 or 9 of IBC is pending against Jumbo Finvest (India) Limited. Therefore, the present application filed by the petitioner is not maintainable and the same is required to be dismissed with heavy cost.

iv. The Applicant / Personal Guarantor submitted that the provisions of the Contract Act have nothing to do with the initiation of the insolvency against the Personal Guarantors. It was also submitted that there is no provision for filing of the insolvency application against

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the Personal Guarantors when no CIRP is pending against the Corporate Debtor. Moreover, it was submitted that even the aforesaid report cited by the petitioner only discussed the initiation of the concurrent proceedings against the Principal Borrower and the guarantor; however, the Insolvency Law Committee has not made any recommendations in its report. It is further submitted that even going by report of the committee, there is no concurrent proceeding pending before the NCLT in respect of Jumbo Finvest (India) Limited and hence, even the contents of the aforesaid report do not have any bearing on the present application filed by the applicant.

8. The question for consideration is whether CIRP can be initiated against any Personal Guarantor of M/s Jumbo Finvest (India) Limited, who is a NBFC and a Financial Services Provider ('FSP'), by the Financial Creditor / Petitioner under Section 95 of IBC, particularly in absence of any CIRP against the NBFC? In order to answer the same, it is important to consider the following:

a) Whether CIRP can be initiated against any Personal Guarantor(s) to a Corporate Debtor before initiation and / or irrespective of CIRP against the Corporate Debtor?

b) Whether insolvency resolution process(es) can be initiated against the Personal Guarantors of a NBFC / Financial Services Provider before

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initiation and / or irrespective of CIRP against the NBFC? If so, under what criteria?

9. The Petitioner / Non-Applicant has relied on the following citations:

   i. *Lalit Kumar Jain v Union of India [(2021) 9 SCC 321]*

   ii. *Dr. Vishnu Kumar Agarwal v. Piramal Enterprises Pvt Ltd. [NCLAT Company Appeal (AT) (Insolvency) No. 346 of 2018]*

   iii. *M/s Piramal Enterprises Ltd v. Dr. Vishnu Kumar Agarwal [NCLAT Civil Appeal No. 878/2019]*

   iv. *Spectrum Voyages v. Fortis Healthcare [NCLAT Company Appeal (AT) (Insolvency) No. 409 of 2018]*

   v. *Edelweiss Asset Reconstruction Co. Ltd. v. Sachet Infrastructure Pvt. Ltd. [NCLAT Company Appeal (AT) (Insolvency) No. 377 of 2019]*

   vi. *Robust Hotels Vs. EIH Ltd. [(2017) 1 SCC 622]*

   vii. *M D Frozen Food Exports V. Hero Fincorp [(2017) 16 SCC 741]*

   viii. *Piramal Capital & Housing Finance Limited v. Anil Kumar & Ors. [2020 SCC OnLine Bom 515]*

   ix. *SBI v. Athena Energy Private Ltd. [NCLAT Company Appeal (AT) (Insolvency) No. 633 of 2020]*

10. Before continuing further, it is important to take a look at Section 60 of the Code which is extracted as follows:

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

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Tribunal having territorial jurisdiction over the place where the registered office of the corporate person is located.

(2) Without prejudice to sub-section (1) and notwithstanding anything to the contrary contained in this Code, where a corporate insolvency resolution process 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.

(3) An insolvency resolution process or [liquidation or bankruptcy proceeding of a corporate guarantor or personal guarantor, as the case may be, of a corporate debtor] pending in any court or tribunal shall 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 Debt Recovery Tribunal as contemplated under Part III of this Code for the purpose of sub-section (2).

(5) -----x----- -----x----- -----x-----

(6) -----x----- -----x----- -----x-----

11. The reading of Section 60 is clear. It states in sub clause (1) that jurisdiction for insolvency resolution and liquidation of Corporate Persons including Corporate Debtors <u>and Personal Guarantors thereof</u> shall lie with the NCLT {bench} in whose jurisdiction the registered office of the Corporate Person is located. Sub clause (2) states that <u>without prejudice to sub clause (1)</u> and <u>notwithstanding anything contrary in the Code</u>, if resolution / liquidation of a Corporate Debtor is pending before a NCLT {bench}, an{y} application relating to resolution / liquidation / bankruptcy of a Corporate / Personal Guarantor, as the case may be, shall be filed before the said NCLT {bench}. Further, as per sub clause (3), any resolution / liquidation / bankruptcy proceeding of a Corporate / Personal Guarantor, if pending in any other court / tribunal, shall be transferred to the Adjudicating Authority avatar of

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the jurisdictional NCLT {bench} dealing with resolution / liquidation proceedings of the concerned Corporate Debtor. This enunciation in sub clause 3 may appear confusing and give rise to an incorrect implication that resolution / liquidation of a Corporate Debtor should be pending before the Adjudicating Authority prior to initiation of resolution / liquidation / bankruptcy of a Corporate / Personal Guarantor. However, on a conjoint reading, it is clear that these sub clauses imply convergence of proceedings for a Corporate Debtor and its related Corporate / Personal Guarantors in the NCLT {bench} having jurisdiction over the concerned Corporate Debtor. Sub clause 4 states that the NCLT {bench} would be vested with powers of the Debt Recovery Tribunal ('DRT') as per Part III of IBC, which has been brought into effect only in respect of Personal Guarantors.

12. While this order was being finalised, the Hon'ble NCLAT pronounced its order in *SBI v. Mahendra Kumar Jajodia [Company Appeal (AT) Insolvency No. 60 of 2022]* which held as follows:

Sub-Section 1 of Section 60 provides that Adjudicating Authority for the corporate persons including corporate debtors and personal guarantors shall be the NCLT. The Sub-Section 2 of Section 60 requires that where a CIRP or Liquidation Process of the Corporate Debtor is pending before ***'a'*** *National Company Law Tribunal the application relating to CIRP of the Corporate Guarantor or Personal Guarantor as the case may be of such Corporate Debtor shall be filed before '****such****' National Company Law Tribunal. The purpose and object of the sub-section 2 of Section 60 of the Code is that when proceedings are pending in '****a****' National Company Law Tribunal, any proceeding against Corporate Guarantor should also be filed before '****such****' National Company Law Tribunal. The idea is that both proceedings be entertained by one and the same NCLT. The sub-section 2*

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of Section 60 does not in any way prohibit filing of proceedings under Section 95 of the Code even if no proceeding are pending before NCLT.

13. Therefore, reliance of the Applicant / Personal Guarantor on judgement of NCLT Mumbai in *Insta Capital Private Limited vs. Ketan Vinod Kumar Shah* (*supra*) is unfounded and appears to be per incuriam. The issue of whether CIRP against a Corporate / Personal Guarantor can be initiated prior to commencement of CIRP against a Corporate Debtor is no longer res integra. This does not help case of the Personal Guarantor / Applicant.

14. The Petitioner / Non-Applicant has referred to the case of *Dr. Vishnu Kumar Agarwal vs. Piramal Enterprises Pvt Ltd. (supra)*. This matter dealt with the issue of whether a CIRP can be initiated against a Corporate Guarantor, if the Principal Borrower is not a Corporate Debtor / Corporate Person and whether CIRP can be initiated against two Corporate Guarantors simultaneously for the same set of debt / default, to which the Hon'ble NCLAT decided in affirmative in relation to the former issue and held that without initiating any CIRP against the Principal Borrower, it is always open to the Financial Creditor to initiate CIRP under Section 7 against the Corporate Guarantors, as the creditor is also the Financial Creditor qua a Corporate Person who is also a Corporate Guarantor liable for any default of the Principal Borrower by virtue of guarantee agreement. With respect to the latter issue, the Hon'ble NCLAT held that Corporate Guarantor(s), who is / are implicitly Corporate Debtor(s), is / are liable for any default.

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However, for a particular claim, once CIRP has been admitted against a Corporate Debtor, who may be either a Corporate Guarantor or Principal Borrower, then the same Financial Creditor cannot trigger CIRP against any other associated Corporate Debtor (either Corporate Guarantor or Principal Borrower), for the same claim amount. This case dealt with the restriction of simultaneous proceedings and is currently sub-judice before the Hon'ble Supreme Court of India. It is quite clearly different from the facts of the present case.

15. The Petitioner / Non-Applicant also referred to *SBI vs. Athena Energy Ventures Pvt. Ltd. (supra)*. However, the ruling in this case differed to a certain extent from the *Vishnu Kumar Agarwal case (supra)* because it dealt with the issue of whether a CIRP can be initiated against a Corporate Guarantor and its Principal Borrower simultaneously for the same set of debt / default, to which the Hon'ble NCLAT took into consideration the applicability of Section 60 of the Code and held that the Code does not prevent the creditor from filing CIRP petitions simultaneously against both the Principal Borrower and the surety. The Hon'ble NCLAT bench was unable to agree with the fact that when for a specific debt, CIRP is initiated against the Borrower, then the amount may be said to be not due or not payable in law by the Guarantor. In simultaneous resolution proceedings, it could be a matter of adjustment when the creditor receives debt due from the Borrower / Guarantor in the respective CIRP; that the same should be

taken note of and adjusted in the other CIRP, which could be conveniently done, more so when an IRP / RP in both the CIRP is same. In other words, double dip is allowed for the creditor but double payment is not permissible. Hence, this case helps the petitioner / Non-Applicant only to the extent that an application for insolvency resolution can be filed simultaneously against various sureties of the Principal Borrower that is a NBFC in the present case, which presents its own challenges as examined subsequently herein.

16. The Petitioner / Non-Applicant has also referred to *Lalit Kumar Jain vs. Union of India (supra)*, which dealt with constitutionality of the impugned Notification S.O. 4126(E) passed by the Central Government, dated 15.11.2019. The Hon'ble Supreme Court upheld the validity of the said notification that brought into effect various provisions of IBC including certain sections of Part III, only in relation to Personal Guarantors. The said judgement clarified issue of jurisdiction within which the application of insolvency resolution against the Personal Guarantors shall lie. Option to proceed against Personal Guarantors is not a contentious question in the instant case. Reference to Section 179 of the Code adequately clarifies issue of forum in which proceedings may be initiated against individuals and Personal Guarantors. Section 179 reads as follows:

(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

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personally works for gain and can entertain an application under this Code regarding such person. *[Emphasis Added]*

(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) -----x----- -----x----- -----x-----

It is unequivocally clear from the above that proceedings against Personal Guarantors of Corporate Debtors shall be initiated as per Section 60 before the appropriate NCLT {bench} and in any case do not lie before DRT.

17. The Petitioner / Non-Applicant also relied on *Spectrum Voyages vs. Fortis Healthcare (supra)*, where the issue of territorial jurisdiction in Section 60(1) of the code had been clarified on the basis that the power to adjudicate will lie with that NCLT under whose territorial jurisdiction the registered office of the corporate person is situated. The instant order does not detract from the same.

18. The Petitioner / Non-Applicant relied on *Edelweiss Asset Reconstruction Co. Ltd. vs. Sachet Infrastructure Pvt. Ltd. (supra)*, also wherein different entities had pooled their land for development of a township and consequently, it was held by the Hon'ble NCLAT that in such a situation, a group insolvency approach has to be adopted, which is quite different from

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the facts in consideration in the extant matter wherein CIRP has been sought to be initiated against the Personal Guarantors.

19. The Petitioner / Non-Applicant further relied on Robust Hotel Pvt. Ltd. vs. EIH Ltd. (*supra*), which dealt with the concept of bar of jurisdiction of civil courts and temporary injunction. This judgement is not relevant to the core issue in the facts of the present matter before this bench.

20. Finally, the Petitioner / Non-Applicant relied on *M.D. Frozen Food Export Pvt. Ltd. vs. Hero Fincorp Ltd. (supra)*, where the Hon'ble Supreme Court held that SARFAESI proceedings, which are in the nature of enforcement proceedings, can go along simultaneously with arbitration proceedings that are adjudicatory in nature. Financial institutions have an option of invoking either or both. The basic ratio of the said judgement can be extrapolated to imply that a Financial Creditor can proceed against the Corporate Debtor or the Personal Guarantor, or both. Our analysis herein is not in direct conflict with the underlying rationale.

21. In order to decide the present dispute, it is essential to look into certain restrictive provisions of the Code related to nature of the Corporate Debtor. It is apposite to go through the following definitions stated hereunder in logical sequence and the Notification S.O. 4139(E) dated 18.11.2019:

> ***Section 3 (8)*** *"corporate debtor" means a corporate person who owes a debt to any person;*
>
> ***Section 3 (7)*** *"corporate person" means a company as defined in clause (20) of section 2 of the Companies Act, 2013, a limi*

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defined in clause (n) of sub-section (1) of Section 2 of the Limited Liability Partnership Act, 2008, or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider;

Section 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*

Section 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 maybe;*

Section 3 (17) *"financial service provider" means a person engaged in the business of providing financial services in terms of authorisation issued or registration granted by a financial sector regulator;*

Section 3(16) *"financial service" includes any of the following services, namely: -*

a) Accepting of deposits
b) Safeguarding and administering assets consisting of financial products, belonging to another person, or agreeing to do so;
c) Effecting contracts of insurance;
d) Offering, managing or agreeing to manage assets consisting of financial products belonging to another person;
e) Rendering or agreeing, for consideration, to render advice on or soliciting for the purposes of-
  i. buying, selling, or subscribing to, a financial product;
  ii. availing a financial service; or
  iii. exercising any right associated with a financial product or financial service;
f) establishing or operating an investment scheme;
g) maintaining or transferring records of ownership of a financial product;
h) underwriting the issuance or subscription of a financial product; or
i) selling, providing, or issuing stored value or payment instruments or providing payment services;

Section 5(22) *"personal guarantor" means an individual who is the surety in a contract of guarantee to a corporate debtor;*

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22. Undoubtedly, the Principal Borrower, i.e. Jumbo Finvest (India) Ltd. is a Financial Service Provider. As seen from the facts and documents presented before us, Jumbo Finvest (India) Limited (which was formerly known as Jumbo Finvest Private Ltd.) has been granted a Certificate of Registration dated 24.11.2011 to commence / carry on the business of Non-Banking Financial Institution without accepting public deposits, by the RBI.

23. It is also important to refer to Notification S.O. 4139(E) dated 18.11.2019 (also referred to as 'FSP Threshold Notification') which is as follows:

MINISTRY OF CORPORATE AFFAIRS

NOTIFICATION

New Delhi, the 18th November, 2019

S.O. 4139(E). —In exercise of the powers conferred by section 227 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Central Government in consultation with the Reserve Bank of India hereby notifies as under:

The insolvency resolution and liquidation proceedings of the following categories of financial service providers shall be undertaken in accordance with the provisions of the Insolvency and Bankruptcy Code, 2016 read with the Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019 (in this notification referred to as the 'Rules') and the applicable Regulations:

Sl. No.	Category of Financial Service Provider (rule 2 of the Rules)	Appropriate Regulator [clause (a) of sub-rule (1) of rule 3 of the Rules]	Dealing with third-party assets (rule 10 of the Rules)
(1)	(2)	(3)	(5)
1	Non-banking finance companies (which include housing finance companies) with asset size of Rs.500 crore or more, as per last audited balance sheet.	Reserve Bank of India	To be notified separately

[F. No. 30/4/2017–Insolvency Section]

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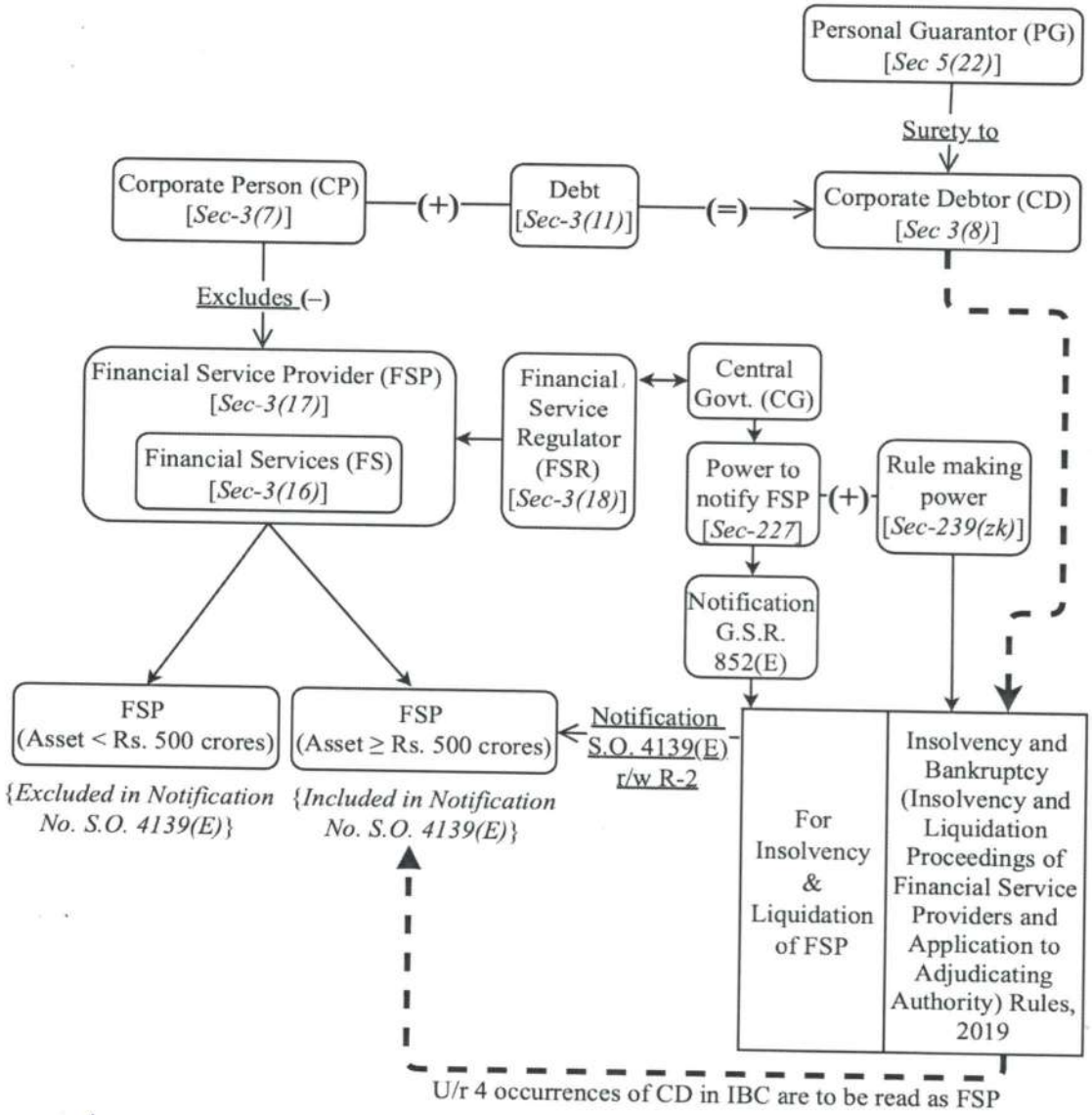
24. The following diagram helps in getting a clear picture regarding the different definitions revolving around Corporate Debtor and Financial Creditors and their relation with the Financial Service Providers:



I. CP normally excludes a Financial Service Provider (FSP), hence CD also usually excludes FSP.

II. In normal situations, no CIRP can be initiated against a CD, which per se (by definition) excludes a FSP.

III. However, due to interplay of the notifications and rules as shown in the diagram, FSPs with assets size equal to, or greater than, Rs. 500 crores, are included within the definition of CD.

IV. The dotted line shows the connection as to how FSPs having asset size equal to, or greater than, Rs. 500 crores are brought within the domain of CD.

V. Consequently, PGs to FSPs having asset size equal or greater than Rs. 500 crores are brought under the ambit of initiating CIRP.

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25. While a Corporate Debtor is a Corporate Person, who owes a debt to any person, it must be kept in mind that Corporate Person does not normally include any Financial Service Providers. At the same time, this needs to be seen through the filter of Section 227 of IBC, 2016 which reads as follows:

> ***Section 227 Power of Central Government to notify financial service providers, etc.***
> *Notwithstanding anything to the contrary [contained in this Code] or any other law for the time being in force, the Central Government may, if it considers necessary, in consultation with the appropriate financial sector regulators, notify financial service providers or categories of financial service providers for the purpose of their insolvency and liquidation proceedings, which may be conducted under this Code, in such manner as may be prescribed.*
> *[Explanation.- For the removal of doubts, it is hereby clarified that the insolvency and liquidation proceedings for financial service providers or categories of financial service providers may be conducted with such modifications and in such manner as may be prescribed.]*

The non-obstante clause in Section 227 empowers the Central Government to notify the Financial Service Providers or categories of Financial Service Providers for proceedings that may be conducted in accordance with IBC.

26. Therefore, in exercise of the powers conferred by Section 227 of the Code, the Central Government, in consultation with the Reserve Bank of India, vide notification G.S.R. 852(E) dated 15.11.2019 notified the Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicatory Authority) Rules, 2019 (herein also referred to as 'FSP Rules'). The relevant rules under the said notification are as follows:

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2. Application

These rules shall apply to such financial service providers or categories of financial service providers, as may be notified by the Central Government under section 227, from time to time, for the purpose of their insolvency and liquidation proceedings under these rules.

3. Definitions

(1) In these rules, unless the context otherwise requires, -

(a) -----x----- -----x----- -----x-----

(c) "appropriate regulator" means the financial sector regulator, as may be notified by the Central Government under section 227, for a category of financial service providers;

4. General Modifications

For the purposes of these rules, in all the provisions relating to insolvency and liquidation proceedings under the Code: -

i. for the expression "corporate debtor" wherever they occur, shall mean "financial service provider"; and

ii. for the expressions "insolvency professional", "interim resolution professional", "resolution professional" or "liquidator", wherever they occur, shall mean "administrator".

5. Corporate Insolvency Resolution Process of financial service providers

The provisions of the Code relating to the Corporate Insolvency Resolution Process of the corporate debtor shall, mutatis mutandis apply, to the insolvency resolution process of a financial service provider subject to the following modifications: -

a) ***Initiation of Corporate Insolvency Resolution Process. -***

i. no corporate insolvency resolution process shall be initiated against a financial service provider which has committed a default under section 4, except upon an application made by the appropriate regulator in accordance with rule 6;

b) -----x----- -----x----- -----x-----

27. The Central Government in exercise of powers conferred under Section 227 of the Code, vide FSP Threshold Notification dated 18.11.2019, notified the categories of Financial Service Provider, as per Rule 2, on which the aforementioned rules, i.e. the FSP Rules shall accordingly be applicable.

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The FSP Threshold Notification clarified that insolvency resolution and liquidation proceedings of the Non-Banking Finance Companies (which include Housing Finance Companies) with asset size of Rs.500 crore or more, as per last audited balance sheet, shall be undertaken in accordance with the provisions of the Insolvency and Bankruptcy Code, 2016 read together with the FSP Rules. RBI was notified as the appropriate regulator thereunder.

28. It has been submitted by the Applicant / Personal Guarantors that as per the last audited balance sheet of Jumbo Finvest (India) Limited for year ending on 31.03.2020, the asset size is approx. Rs. 487 crores and as per unaudited figures for the year ending 31.03.2021, the total asset size of Jumbo Finvest (India) Limited is approx. Rs. 407 Crores. Therefore, the abovesaid NBFC i.e. Jumbo Finvest (India) Limited, is excluded from the ambit of the FSP Threshold Notification dated 18.11.2019. which as per Rule 2 of FSP Rules, 2019 classifies / prescribes applicability of the said Rules for Insolvency and Liquidation of FSPs having an asset size of Rs. 500 crores or more.

29. In view of the above, Jumbo Finvest (India) Limited, the Principal borrower does not *stricto sensu* qualify within the tight definition of Corporate Person under IBC, as the said definition excludes FSP. Further, the FSP Threshold Notification does not sweep it back into inclusion as a Corporate Person. So, as per debt being carried, such Principal Borrower does not qualify as a Corporate Debtor, as diagrammatically illustrated in Para 24 herein.

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30. Moreover, even if this FSP is excluded by virtue of the FSP Threshold Notification, the generic inclusion by virtue of Rule 4 of the FSP Rules enunciates that in all the provisions relating to insolvency and liquidation proceedings under the Code, the expression "Corporate Debtor" wherever it occurs, shall mean "Financial Service Provider". This cannot lead to a situation that the phrase Corporate Debtor in IBC is contextually read as FSP, while the FSP Threshold Notification excludes certain FSPs. The FSP Rules are applicable only to the extent that the concerned NBFC / Housing Finance Company qualifies under FSP Threshold Notification of asset size of Rs. 500 crores or more. In the present case, as stated earlier, the NBFC, i.e. Jumbo Finvest (India) Limited does not fall within the ambit of the category of NBFC having asset size of Rs. 500 crores or more; therefore, FSP rules shall not be applicable to it. Therefore, it is clear that Jumbo Finvest (India) Limited is not a Corporate Debtor in the present case.

31. Further, Personal Guarantor means an individual who is a surety in a contract of guarantee to a Corporate Debtor. Therefore, in order for an individual to be a Personal Guarantor, all the following pre-requisites are required to be fulfilled:

   i. The individual has to be a surety.

   ii. There has to be a contract of guarantee.

   iii. The individual has to be a guarantor to a *Corporate Debtor*.

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32. As follows from the preceding paras, Jumbo Finvest (India) Limited is shorn-off the tag of a Corporate Debtor and can, at best, qualify as a Principal Borrower albeit, as a corporate entity; therefore, the question of having a Personal Guarantor is out of picture. Unlike the *Piramal case (supra)*, where guarantors to the Principal Borrower were Corporate Guarantors and hence Corporate Debtors in their own right here, in this case, the guarantors to Jumbo Finvest (India) Limited do not strictly fall within definition of Personal Guarantors and have existence as individuals only. Provisions of IBC are not yet applicable for individuals.

33. The critical questions to be addressed can thus be concluded as follows:

i. Application(s) for CIRP can be initiated against any Personal Guarantor(s) to a Corporate Debtor irrespective of CIRP against the Corporate Debtor, which issue is no longer res integra.

ii. Insolvency resolution process(es) can be initiated against the Personal Guarantor(s) of a NBFC / FSP irrespective of CIRP against the NBFC, provided that the concerned NBFC falls within the category of those FSPs having assets size of Rs. 500 cores or more, thus being included in the definition of Corporate Debtor under IBC and being construed as **Financial Service Provider** wherever the term **Corporate Debtor** occurs in the Code.

34. In the present matter at hand, the three guarantors in CP No. (IB) - 27/95/JPR/2021 i.e. Shri Ajay Kumar Singh, CP No. (IB) - 26/95/JPR/2021

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i.e. Shri Siddharth Singh, and CP No. (IB) – 25/95/JPR/2021 i.e. Smt. Rekha Singh, entered into respective deed of guarantee on 27.03.2018 in favour of the Financial Creditor / Non-Applicant. The definition of Personal Guarantors under Section 5(22) of the IBC cogently implies that they can be recognised as Personal Guarantors under IBC, subject to the condition, and only if, that the person or entity for whom they have given guarantee is a Corporate Debtor. Therefore, as it is amply clear that Jumbo Finvest (India) Limited is not a Corporate Debtor, the guarantors of the aforesaid company cannot be considered as Personal Guarantors under provisions of IBC. Since consequences of CIRP are drastic and almost penal for any entity, whether corporate or individual, definitions must be strictly construed.

35. In view of entirety of the foregoing, the Interim Applications filed by the Guarantors, i.e. 226/JPR/2021, 227/JPR/2021 and 229/JPR/2021, are hereby allowed and accordingly stand disposed of.

36. Thus, we are of the view that the Company Petitions filed under Section 95 of the Code by the Financial Creditor against the Guarantors, CP No. (IB) 25/95/JPR/2021, CP No. (IB) 26/95/JPR/2021, CP No. (IB) 27/95/JPR/2021 are not maintainable and are accordingly dismissed.

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Deep Chandra Joshi
Judicial Member

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Raghu Nayyar
Technical Member