

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI**

Company Appeal (AT) (Insolvency) No.2282 of 2024

(Arising out of Order dated 04.12.2024 passed by the Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi CP(IB) No.214/(PB)/2024)

IN THE MATTER OF:

Anita Goyal ...Appellant

Versus

Vistra ITCL (India) Ltd. & Anr ...Respondents

Present:

For Appellants : Mr. Virender Ganda, Sr. Advocate with Mr. Raghav Kakkar, Mr. Ayandeb Mitra, Mr. Ashraf Belal, Advocates.

For Respondents : Dr. U. K. Chaudhary, Sr. Advocate with Mr. Ankur Singh, Ms. Pallavi Sengupta, Mr. Mansumyer Singh, Advocates for R-1.

Mr. Abhishek Anand, Mr. Karna Kohli, Ms. Palak Kalra, Advocates for RP.

With

Company Appeal (AT) (Insolvency) No.2283 of 2024

(Arising out of Order dated 04.12.2024 passed by the Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi CP(IB) No.213/(PB)/2024)

IN THE MATTER OF:

Ayush Goel ...Appellant

Versus

Vistra ITCL (India) Ltd. & Anr ...Respondents

Present:

For Appellants : Mr. Virender Ganda, Sr. Advocate with Mr. Raghav Kakkar, Mr. Ayandeb Mitra, Mr. Ashraf Belal, Advocates.

For Respondents : Dr. U. K. Chaudhary, Sr. Advocate with Mr. Ankur Singh, Ms. Pallavi Sengupta, Mr. Mansumyer Singh, Advocates for R-1.

Mr. Abhishek Anand, Mr. Karna Kohli, Ms. Palak Kalra, Advocates for RP.

J U D G M E N T

ASHOK BHUSHAN, J.

These two Appeal(s) have been filed by the Personal Guarantors of Corporate Debtor (“CD”) – Nivaya ASL Pvt. Ltd. – Principal Borrower. Vistra ITCL (India) Ltd. (“Vistra”) filed an Application under Section 95 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the “IBC”) against the Appellant(s)/ Personal Guarantors. CP(IB) No.214/(PB)/2024 has been filed by Vistra against Anita Goel and CP (IB) No.213/(PB)/2024 has been filed by Vistra against Ayush Goel. On 29.04.2024, the Adjudicating Authority appointed Resolution Professional (“RP”) Shri Vikram Bajaj in Application under Section 95. Company Appeal (AT) (Ins.) No.1284 and 1306 of 2024 was filed (by Ayush Goel and Anita Goyal) challenging the order of appointment of RP, which Appeal(s) were dismissed by this Tribunal on 19.07.2024 relying on the judgment of the Hon’ble Supreme Court in ***Dilip B Jiwarajka Vs. Union of India & Ors. - WP (Civil) No.1281 of 2021*** and holding that all issues had to be agitated at the time when the application come for admission/ rejection under Section 100. The Appeal(s) were dismissed with above observations. Subsequent, to the order dated 19.07.2024, the RP submitted a Report recommending admission of Application under Section 95. Objections were filed by the Personal Guarantors. The Adjudicating Authority after considering the Report of the RP and the objections raised by the Personal Guarantor, by an order dated 04.12.2024 admitted CP(IB) No.214/(PB)/2024 and CP (IB) No.213/(PB)/2024 under Section 100 of the IBC and issued direction to

RP to proceed further in accordance with the provisions of the IBC. Aggrieved by the above order dated 04.12.2024, these two Appeal(s) have been filed. It shall be sufficient to refer to the facts and pleadings in Company Appeal (AT) (Ins.) No.2282 of 2024 for deciding both the Appeals.

2. We have heard Shri Virender Ganda, learned Senior Counsel appearing for the Appellant(s); Shri U.K. Chaudhary, learned Senior Counsel has appeared for Financial Creditor; and Shri Abhishek Anand, learned Counsel has appeared for RP.

3. Shri Virender Ganda, learned Senior Counsel for the Appellant challenging the impugned order has raised two submissions namely – (1) The appointment of RP vide order dated 29.04.2024 was not in accordance with Section 97, sub-section (3) of the IBC. The Adjudicating Authority committed error in relying on the Circular dated 21.12.2023 issued by the Insolvency and Bankruptcy Board of India (“**IBBI**”), which cannot override the provision of Section 97, sub-section (3). The Adjudicating Authority was required to direct IBBI to nominate the RP for the insolvency resolution process as mandated by Section 97, sub-section (3); and (2) The NCLT is not the Adjudicating Authority for entertaining an Application initiating insolvency resolution process against the Personal Guarantor. For entertaining the insolvency resolution process against the Personal Guarantor the proper Authority is Debts Recovery Tribunal (“**DRT**”). The order passed by Adjudicating Authority admitting Section 95 Application is without jurisdiction.

4. Dr. U.K. Chaudhary, learned Senior Counsel appearing for Vistra submits that only submission, which was raised before the NCLT, Principal Bench, New Delhi was that appointment of RP was not in accordance with Section 97, sub-section (3). No objection was raised with regard to jurisdiction of NCLT to entertain Section 95 Application and Appellant cannot be allowed to raise any submission regarding the jurisdiction of the NCLT now. It is submitted that RP appointed by Adjudicating Authority was fully eligible and qualified and no disciplinary proceedings are pending against the RP. Learned Senior Counsel for the Respondent, however, contended that NCLT is fully entitled to entertain proceedings under Section 95 for initiation of CIRP against the Personal Guarantor of a Corporate Person by virtue of Section 60, sub-section (1). The Appellant ought not be allowed to raise objection regarding jurisdiction of NCLT in the appellate proceedings. It is submitted that no objection having been taken by the Appellant to the jurisdiction of the NCLT and Appellant having willingly participated in the proceedings, without raising any objection, the Appellant is stopped from raising objections now.

5. Learned Counsel for both the parties have placed reliance on various judgments of Hon'ble Supreme Court, this Tribunal as well as Madras High Court, which we shall refer to while considering the submissions in detail.

6. The first submission, which has been raised by learned Counsel for the Appellant is that the appointment of RP was not in accordance with

Section 97, sub-section (3). Section 97, sub-section (3) on which reliance has been placed by learned Counsel for the Appellant is as follows:

“97(3) Where an application under section 94 or 95 is filed by the debtor or the creditor himself, as the case may be, and not through the resolution professional, the Adjudicating Authority shall direct the Board, within seven days of the filing of such application, to nominate a resolution professional for the insolvency resolution process.”

7. The submission of the Appellant is that the Adjudicating Authority ought to have directed the IBBI to nominate the RP for the insolvency resolution process, which was not done and the Adjudicating Authority relied on a Circular issued by the IBBI. The learned Counsel for the Respondent in support of his submission contends that appointment of RP was in accordance with law and has relied on the judgment in ***Rahul Arunprasad Patel vs. State Bank of India - (2022) SCC OnLine NCLAT 4604***, where challenge to appointment of RP on the ground of violation of Section 97, sub-section (3) was repelled.

8. Rules have been framed in exercise of power conferred by under Section 239 read with clause (e) Section (2) and sub-section (2) and Section 79 of the Insolvency and Bankruptcy Code namely – the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019. We may refer to Rule 8, which provides as follows:

“8. Confirmation or nomination of insolvency professional.– (1)
For the purposes of sub-section (2) of section 97 and sub-section

(5) of section 98, the Board may share the database of the insolvency professionals, including information about disciplinary proceedings against them, with the Adjudicating Authority from time to time.

(2) For the purposes of sub-section (4) of section 97 and sub-section (3) of section 98, the Board may share a panel of insolvency professionals, who may be appointed as resolution professionals, with the Adjudicating Authority.”

9. When we look into Rule 8, it provides a mechanism of nomination by the IBBI. Rule 8 specifically caters Section 97, sub-section (3). The Adjudicating Authority has appointed the RP, relying on Form-C submitted by IRP, where RP has conveyed his consent and certified that there are no disciplinary proceedings are pending against him. The appointment of RP by order dated 29.04.2024, cannot be said to be violative of provision Section 97, sub-section (3). We, thus, do not find any substance in the submission of the Appellant that appointment of RP was not in accordance with Section 97, sub-section (3) of the IBC.

10. Now, we come to the submission of the learned Counsel for the Appellant that NCLT has no jurisdiction to entertain Section 95 Application filed by the Financial Creditor and the Application ought to have been filed before the DRT. Although learned Counsel for the Respondent has contended that the objection regarding jurisdiction having not been raised before the NCLT, we proceed to examine the contention on merit. The issue raised by the Appellant needs consideration and answer in these Appeal(s) to clarify the law on the subject.

11. The submission which has been pressed by the Counsel for the Appellant is that NCLT shall be the Adjudicating Authority for Personal Guarantor only when proceeding of insolvency resolution process is ongoing against the Corporate Debtor have been initiated and are pending before the NCLT. Reliance has been placed by learned Counsel for the Appellant on Section 60, sub-section (2). It is contended that in the present case, no CIRP or liquidation is going on against the Corporate Debtor, hence, the jurisdiction to entertain Application under Section 95 lies with DRT. Learned Counsel for the Appellant has also relied on Section 79 and 179 of the IBC to support his submission. Learned Counsel for the Appellant also relied on judgment of the Madras High Court in ***Rohit Nath vs. KEB Hana Bank Ltd.***, decided on 30.03.2023 as well as two judgments of NCLT, Kolkata in ***Aditya Birla Finance Ltd. vs. Sarita Mishra - IA (IB) No.356/KB/2024*** in ***Company Petition (IB) No.67 of 2023***; and ***Tata Capital Financial Services Ltd. vs. Arjun Agarwal - IA. (IB) 1670/KB/2024*** in ***C.P.(IB)51/KB/2024***. Learned Counsel for the Appellant has referred to judgments of the Hon'ble Supreme Court in ***Lalit Kumar Jain vs. Union of India - (2021) 9 SCC 321*** and ***State Bank of India vs. V. Ramakrishnan & Anr. - Civil Appeal No.3595 of 2018***.

12. Refuting the submissions of learned Counsel for the Appellant, learned Counsel for the Respondent submits that IBC having been made applicable against the Personal Guarantors and provision of Section 60, sub-section (1), insolvency resolution process against Personal

Guarantors of a Corporate Person, can be initiated before NCLT, which is Adjudicating Authority. It is submitted that the issue has already been answered by this Appellate Tribunal in ***State Bank of India vs. Mahendra Kumar Jajodia - (2022) SCC OnLine NCLAT 58*** and ***Mahendra Kumar Agarwal vs. PTC India Financial Services Ltd. - (2023) SCC OnLine NCLAT 421***, where this Tribunal relying on Section 60, sub-section (1) has held that even if no insolvency resolution process or liquidation is pending against the Corporate Debtor, Application under Section 95 is maintainable before NCLT for initiation insolvency resolution process. Coming to the judgment of the NCLT, Kolkata in ***Tata Capital Financial Services Ltd. vs. Arjun Agarwal and Aditya Birla Finance Ltd. vs. Sarita Mishra***, it is submitted that the orders passed by NCLT, Kolkata Bench are directly contrary to the binding decisions of Hon'ble Supreme Court and this Tribunal in ***Mahendra Kumar Agarwal vs. PTC India Financial Services Ltd.*** and ***State Bank of India vs. Mahendra Kumar Jajodia***. It is also contended that Section 7 Application is pending against Allied Strips Ltd. being C.P.(IB) 731/ND/2024 before NCLT, New Delhi. It is submitted that Nivaya Allied Strips Pvt. Ltd., who has issued the debentures, is a SPV that was incorporated with the sole objective of financing the resolution of Allied Strips Ltd., therefore Corporate Borrower, for all intents and purpose is Allied Strips Ltd.

13. We have considered the submissions of learned Counsel for the parties and have perused the record.

14. Before we enter into the rival submissions of the parties, it is necessary to notice certain statutory provisions of the IBC and the rules framed thereunder to find out the legislative Scheme. Section 2, which deals with applicability of provisions of the Code, by an amendment made by Act 8 of 2018 w.e.f. 23.11.2017, sub-clause (e) in Section 2 was inserted, which is as follows:

“2. Application. – The provisions of this Code shall apply to—

(e) personal guarantors to corporate debtors;”

15. Section 5, sub-section (1), defines the ‘Adjudicating Authority’, which is as follows:

“5.(1) “Adjudicating Authority”, for the purposes of this Part, means National Company Law Tribunal constituted under section 408 of the Companies Act, 2013 (18 of 2013);”

16. Section 5, sub-section (22) defines ‘Personal Guarantor’, is as follows:

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

17. Part-II of the Code, contain Section 60. Section 60, as amended by Act 26 of 2018 on 06.06.2018, provides 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 Tribunal having territorial jurisdiction over the place where the registered office of a 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 or liquidation proceeding of a corporate debtor is pending before a National Company Law Tribunal, an application relating to the insolvency resolution or [liquidation or bankruptcy of a corporate guarantor or personal guarantor, as the case may be, of such corporate debtor] shall be filed before the 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 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 subsection (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.”

18. Part-III of the Code deals with “Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms”. Section 78 provides as follows:

“78. Application. –

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

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

19. Section 79, sub-section (1) defines “Adjudicating Authority”, which is as follows:

“79. Definitions. – In this Part, unless the context otherwise requires, -

(1) “Adjudicating Authority” means the Debt Recovery Tribunal constituted under subsection (1) of section 3 of the Recovery of Debts Due to Banks and Financial Institution Act, 1993 (51 of 1993);”

20. Section 179, which is under Chapter-VI of Part-II, which contains heading “*Adjudicating Authority for individuals and partnership firms*”. Section 179 provides as follows:

“179. Adjudicating Authority for individuals and partnership firms. –

(1) Subject to the provisions of section 60, the Adjudicating Authority, in relation to insolvency matters of individuals and firms

shall be the Debt Recovery Tribunal having territorial jurisdiction over the place where the individual debtor actually and voluntarily resides or carries on business or personally works for gain and can entertain an application under this Code regarding such person.

(2) The Debt Recovery Tribunal shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain or dispose of –

(a) any suit or proceeding by or against the individual debtor;

(b) any claim made by or against the individual debtor;

(c) any question of priorities or any other question whether of law or facts, arising out of or in relation to insolvency and bankruptcy of the individual debtor or firm under this Code.

(3) Notwithstanding anything contained in the Limitation Act, 1963 (14 of 1963) or in any other law for the time being in force, in computing the period of limitation specified for any suit or application in the name and on behalf of a debtor for which an order of moratorium has been made under this Part, the period during which such moratorium is in place shall be excluded.”

21. Section 179, thus provides for individuals and partnership firms, it is Debt Recovery Tribunal, which is Adjudicating Authority. However, Section 179, sub-section (1) begins with wording “Subject to the provisions of section 60,...”. The submission which has been pressed by the Appellant is that NCLT shall be Adjudicating Authority only in cases where insolvency resolution process or liquidation proceedings are pending before it and not in case, where no insolvency resolution process or liquidation is pending against the Corporate Debtor, the NCLT shall not be the Adjudicating Authority for insolvency resolution process of

Personal Guarantor. Thus, the main ground of the Appellant to challenge the jurisdiction of NCLT is that if no insolvency resolution process is pending against the Corporate Debtor, Section 95 Application before the NCLT is not maintainable and it ought to have been filed before the DRT as per Section 79 and 179.

22. For answering the issue raised in the Appeal(s) we need to first notice the ambit and scope of Section 60, which is the basis of the submission. We need to notice the Report of Insolvency Law Committee, March 2018, which noticed that Section 60 create a link between the insolvency resolution or bankruptcy process of the Corporate Debtor and the Personal Guarantor and the matters relating to same debt are dealt in the same Tribunal. The Committee recommended for certain amendments. Paragraph 23 of the Report provides as follows:

“23. LINKING PROCEEDINGS OF CORPORATE GUARANTOR WITH CORPORATE DEBTOR

23.1 Section 60 of the Code requires that the Adjudicating Authority for the corporate debtor and personal guarantors should be the NCLT which has territorial jurisdiction over the place where the registered office of the corporate debtor is located. This creates a link between the insolvency resolution or bankruptcy processes of the corporate debtor and the personal guarantor such that the matters relating to the same debt are dealt in the same tribunal. However, no such link is present between the insolvency resolution or liquidation processes of the corporate debtor and the corporate guarantor. It was decided that section 60 may be suitably amended to provide for the same NCLT to deal with the insolvency resolution or liquidation processes of the corporate debtor and its corporate guarantor. For this purpose, the term “corporate guarantor” will also be defined.”

23. There is no dispute with regard to interpretation of Section 60, sub-section (2), which provides that where a CIRP or liquidation proceedings of a Corporate Debtor is pending before a NCLT, an application relating to the insolvency resolution or liquidation or bankruptcy of a corporate guarantor or personal guarantor, shall be filed before such NCLT. The question to be answered is as to whether when no CIRP or liquidation proceedings of a Corporate Debtor is pending before the NCLT, whether an Application for personal insolvency against a Personal Guarantor has to be filed before the NCLT. Sub-section (2) of Section 60 begins with the expression “*Without prejudice to sub-section (1)*”. Thus, the provision of sub-section (2) are without prejudice to provisions of sub-section (1) of Section 60. The expression “without prejudice”, came for consideration before the Hon’ble Supreme Court in large number of cases. We may refer to judgment of the Hon’ble Supreme Court in **(1970) 2 SCC 567 – Shri Shiv Kripal Singh vs. Shri V.V. Giri**, where the Hon’ble Supreme Court held that the expression “without prejudice is to the generality of the provisions of sub-section (i)”. It is well settled that when this expression is used anything contained in the provisions following this expression is not intended to cut down the generality of the meaning of provision. Paragraph 37 of the above judgment of the Hon’ble Supreme Court is as follows:

“37. We do not think that the Legislature, while framing Chapter IX-A of the Code ever contemplated such a dichotomy or intended to give such a narrow meaning to the freedom of franchise essential in a representative system of Government. In our opinion the argument mentioned above is fallacious. It completely disregards

the structure and the provisions of Section 171-C. Section 171-C is enacted in three parts. The first sub-section contains the definition of “undue influence”. This is in wide terms and renders a person voluntarily interfering or attempting to interfere with the free exercise of any electoral right guilty of committing undue influence. That this is very wide is indicated by the opening sentence of sub-section (2), i.e. “without prejudice to the generality of the provisions of sub-section (1)”. It is well settled that when this expression is used anything contained in the provisions following this expression is not intended to cut down the generality of the meaning of the preceding provision. This was so held by the Privy Council in *King-Emperor v. Sibnath Banerji* [(1945) FCR 195].”

24. When expression “without prejudice” is used in sub-section (2), the provisions of sub-section (2) in no manner is cutting down the applicability of provisions of sub-section (1) of Section 60. Section 60, sub-section (1) clearly lays down that Adjudicating Authority in addition to insolvency resolution and liquidation for Personal Guarantors, shall be the NCLT having territorial jurisdiction over the place where the registered office of a Corporate Person is located. The issue which has arisen in the present case, came for consideration before this Tribunal in several cases. Two judgments have been relied by learned Counsel for the Respondent, which need to be noticed. The first judgment, which has been relied by learned Counsel for Respondent is ***State Bank of India vs. Mahendra Kumar Jajodia - (2022) SCC OnLine NCLAT 58***, in which case, an Application under Section 95 was filed by the State Bank of India before NCLT, Kolkata Bench, seeking initiation of CIRP against Personal Guarantor, which Application came to be rejected by the Adjudicating Authority as premature relying on Section 60, sub-section (2) and holding

that for an insolvency resolution process to be initiated against the guarantor there must be CIRP or liquidation process pending against the principal borrower/ Corporate Debtor. The said order of the Adjudicating Authority was challenged by the State Bank of India in this tribunal and this Tribunal noted the order of the Adjudicating Authority in paragraph 2 to the following effect:

“2. This Appeal has been filed against the Order dated 05th October, 2021 passed by National Company Law Tribunal, Kolkata Bench, Kolkata. The State Bank of India has filed an Application under Section 95(1) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as ‘Code’) seeking initiation of Corporate Insolvency Resolution Process against the Guarantor. The Application came to be rejected by the Adjudicating Authority as premature by order dated 05th October, 2021. The reason given in for rejection of the Application as pre-mature is in paragraph 2 of the Impugned Order which is to the following effect:

“This is an application filed by the petitioner/financial creditor u/s. 95(1) of the Insolvency and Bankruptcy Code, 2016 seeking initiation of Insolvency Resolution Process against the guarantor. As on date no CIRP or Liquidation Process is pending against the Corporate Debtor because of approval of the Resolution Plan. Section 60(2) of the Code requires that for an insolvency Resolution Process to be initiated against the guarantor there must be CIRP or Liquidation Process is pending against the principal borrower/Corporate Debtor. Since, that requirement is not satisfied in the present case, at this point of time CP(IB)/230/KB/2021 is premature and is dismissed as such.””

25. After noticing Section 60, sub-sections (1) and (2), this Tribunal laid down following in paragraph 7:

7. 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 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.

8. The use of words 'a' and 'such' before National Company Law Tribunal clearly indicates that Section 60(2) was applicable only when a CIRP or Liquidation Proceeding of a Corporate Debtor is pending before NCLT. The object is that when a CIRP or Liquidation Proceeding of a Corporate Debtor is pending before 'a' NCLT the application relating to Insolvency Process of a Corporate Guarantor or Personal Guarantor should be filed before the same NCLT. This was to avoid two different NCLT to take up CIRP of Corporate Guarantor. Section 60(2) is applicable only when CIRP or Liquidation Proceeding of a Corporate Debtor is pending, when CIRP or Liquidation Proceeding are not pending with regard to the Corporate Debtor there is no applicability of Section 60(2).

9. Section 60(2) begins with expression 'Without prejudice to sub-section (1)' thus provision of Section 60(2) are without prejudice to Section 60(1) and are supplemental to sub-section (1) of Section 60.

10. Sub-Section 1 of Section 60 provides that Adjudicating Authority in relation to Insolvency or Liquidation for Corporate

Debtor including Corporate Guarantor or Personal Guarantor shall be the NCLT having territorial jurisdiction over the place where the Registered Office of the Corporate Person is located. The substantive provision for an Adjudicating Authority is Section 60, sub-Section (1), when a particular case is not covered under Section 60(2) the Application as referred to in sub-section (1) of Section 60 can be very well filed in the NCLT having territorial jurisdiction over the place where the Registered Office of corporate Person is located.

11. The Adjudicating Authority erred in holding that since no CIRP or Liquidation Proceeding of the Corporate Debtor are pending the application under Section 95(1) filed by the Appellant is not maintainable. The Application having been filed under Section 95(1) and the Adjudicating Authority for application under Section 95(1) as referred in Section 60(1) being the NCLT, the Application filed by the Appellant was fully maintainable and could not have been rejected only on the ground that no CIRP or Liquidation Proceeding of the Corporate Debtor are pending before the NCLT. In result, we set aside the order dated 05th October, 2021 passed by the Adjudicating Authority. The Application filed by the Appellant under Section 95(1) of the Code is revived before the NCLT which may be proceeded in accordance with the law.”

26. This Tribunal held that sub-section (2) of Section 60, does not in any manner prohibit filing of proceeding under Section 95 of the Code, even if no proceedings are pending before NCLT. The order of Adjudicating Authority was set aside and the Application under Section 95(1) was revived before the NCLT Kolkata bench. The above judgment clearly covers the issue, which has been raised in the present Appeal and this Tribunal has also answered the said issue holding that even if no CIRP or liquidation is pending against the Corporate Debtor, Application under Section 95 can be filed before the NCLT.

27. Another judgment of this Tribunal relied by the Respondent is **Mahendra Kumar Agarwal** (supra), which was also a case where Personal Guarantor has challenged the order passed by NCLT Hyderabad, where NCLT, in proceedings under Section 95, has appointed an RP, which order was challenged before the Chennai Bench of this Tribunal. The Personal Guarantor contended before the Appellate Tribunal that Application filed under Section 95 is not maintainable, which ought to have been filed before the DRT. The Appellate Tribunal has noticed elaborately the submissions advanced before it by both the parties and also referred to the various judgments and citations relied by both the parties. The Chennai Bench of this Tribunal has also referred to and relied the judgment of this Tribunal in **State Bank of India vs. Mahendra Kumar Jajodia** (supra). The Chennai Bench of this Tribunal has laid down that CIRP against the Corporate Debtor is not a condition precedent for initiation of insolvency resolution process against the Personal Guarantor. In paragraph 76, 77 and 79, following was laid down:

“76. It is well settled by now, that the ‘Insolvency Proceedings’, can be initiated against the ‘Personal Guarantor’, even when ‘no proceedings’, are pending against the ‘Corporate Debtor’.

77. Going by the ingredients of Section 60 (1) of the I & B Code, 2016, it is quite clear, that for ‘Insolvency Resolution’ and ‘Liquidation’, for ‘Corporate Persons’, including ‘Corporate Debtors’ and ‘Personal Guarantors’, the ‘National Company Law Tribunal’ (‘Adjudicating Authority’), having ‘territorial jurisdiction’, over the place, where the ‘Registered Office’ of the ‘Corporate Person’, is located, and in the instant case, in the ‘State of Telangana’, the ‘Corporate Debtor's Registered Office’, is situated, which comes within the ‘ambit of territorial jurisdiction’ of the ‘Adjudicating

Authority' ('National Company Law Tribunal', Bench - I, Hyderabad).

79. Be that as it may, in view of the detailed foregoing qualitative discussions, this 'Tribunal', keeping in mind the respective contentions advanced on either side, and considering the facts and circumstances of the instant case, in a conspectus manner, comes to a resultant conclusion that the 'Adjudicating Authority'/ 'Tribunal', has 'jurisdiction', to 'entertain'/'initiate', the 'Insolvency Proceedings' of the 'Personal Guarantors', even when 'no Corporate Insolvency Resolution Process' proceedings, is 'pending', against the 'Corporate Debtor', and in any event, the 'Corporate Insolvency Resolution Process' proceedings, is pending, and continued to be pending, against the 'Corporate Debtor'. Viewed in that perspective, the 'impugned order', dated 21.07.2022, in CP (IB) No. 335/95/HDB/2020, passed by the 'Adjudicating Authority' ('National Company Law Tribunal', Bench - I, Hyderabad), is free from any 'Legal Flaws'. Resultantly, the instant 'Appeal' fails."

28. The above judgment clearly lays down the law by this Tribunal that it is not a precondition that CIRP or liquidation has to be pending before NCLT. The Application filed under Section 95 was held to be maintainable. It is further relevant to notice that judgment of this Tribunal in **Mahendra Kumar Jajodia** case decided by this Tribunal was also challenged before the Hon'ble Supreme Court in Civil Appeal No.1871-1872 of 2022. The Hon'ble Supreme Court vide its judgment dated 06.05.2022 dismissed the Appeal. The order passed by Hon'ble Supreme Court on 06.05.2022 is as follows:

"We have heard learned Solicitor General and learned senior counsel for the parties and perused the record. We do not see any cogent reason to entertain the Appeals. The judgment impugned does not warrant any interference. The Appeals are dismissed."

29. From the above it is clear that with regard to maintainability of Application under Section 95 by a Financial Creditor against a Personal Guarantor, even if no insolvency resolution process or liquidation proceedings of a Corporate Debtor is pending, has been held to be maintainable and the view taken by this Appellate Tribunal in **Mahendra Kumar Jajodia** has also received the approval of the Hon'ble Supreme Court.

30. Central Government has issued Notification dated 15.11.2019 by which provisions pertaining to various provisions of the IBC were enforced with effect from 01.12.2019. Notification issued by the Government of India, Ministry of Corporate Affairs on 15.11.2019 is as follows:

"NOTIFICATION

New Delhi. the 15th November, 2019

S.O. 4126(E). In exercise of the powers conferred by sub-section (3) of section 1 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Central Government hereby appoints the 1st day of December,2019 as the date on which the following provisions of the said Code only in so far as they relate to personal guarantors to corporate debtors. shall come into force:

- (1) clause (e) of section 2;
- (2) section 78 (except with regard to fresh start process) and section 79;
- (3) sections 94 to 187 (both inclusive);
- (4) clause (g) to clause (i) of sub-section (2) of section 239;
- (5) clause (m) to clause (zc) of sub-section (2) of section 239;

- (6) clause (zn) to clause (zs) of sub-section (2) of section 240; and
- (7) Section 249.

[F. No. 30/21/2018-Insolvency Section]
GYANESHWAR KUMAR SINGH, Jt. Secy."

31. The above Notification dated 15.11.2019 came to be challenged before the Hon'ble Supreme Court in ***Lalit Kumar Jain vs. Union of India & Ors. (Transferred Case (Civil) No.245/2020)***. One of the grounds to challenge the notification was whether provisions of IBC against Personal Guarantors have been enforced, which is discriminatory and is violative of Article 14 of the Constitution of India. In reference to challenge to the aforesaid Notification, the Hon'ble Supreme Court had occasion to consider the Scheme of IBC. The Hon'ble Supreme Court noticed the 2018 amendment and the Report of the Insolvency Law Committee. In paragraph 92 of the judgment, the Hon'ble Supreme Court made following observation:

"92. As noticed earlier, Section 60 had previously, under the original Code, designated the NCLT as the adjudicating authority in relation to two categories: corporate debtors and personal guarantors to corporate debtors. The 2018 amendment added another category: corporate guarantors to corporate debtors. The amendment seen in the background of the report, as indeed the scheme of the Code (i.e., Section 2 (e), Section 5 (22), Section 29A, and Section 60), clearly show that all matters that *were likely to impact, or have a bearing on a corporate debtor's insolvency process, were sought to be clubbed together and brought before the same forum*. Section 5 (22) which is found in Part II (insolvency process provisions in respect of corporate debtors) as it was originally,

defined personal guarantor to say that it “*means an individual who is the surety in a contract of guarantee to a corporate debtor.*” ...”

32. In paragraph 96 of the judgment, following has been held by the Hon’ble Supreme Court:

“96. This court in V. Ramakrishnan (supra), noticed why an application under Section 60(2) could not be allowed. At that stage, neither Part III of the Code nor Section 243 had not been notified. This meant that proceedings against personal guarantors stood outside the NCLT and the Code. The non-obstante provision under Section 238 gives the Code overriding effect over other prevailing enactments. This is perhaps the rationale for not notifying Section 243 as far as personal guarantors to corporate persons are concerned. Section 243(2) saves pending proceedings under the Acts repealed (PIA and PTI Act) to be undertaken in accordance with those enactments. As of now, Section 243 has not been notified. In the event Section 243 is notified and those two Acts repealed, then, the present notification would not have had the effect of covering pending proceedings against individuals, such as personal guarantors in other forums, and would bring them under the provisions of the Code pertaining to insolvency and bankruptcy of personal guarantors. The impugned notification, as a consequence of the *non obstante* clause in Section 238, has the result that if any proceeding were to be initiated against personal guarantors it would be under the Code.

33. The observation by the Hon’ble Supreme Court in the last line is relevant which reads “The impugned notification, as a consequence of the *non obstante* clause in Section 238, has the result that if any proceeding were to be initiated against personal guarantors it would be under the Code”. The Hon’ble Supreme Court further held that Parliamentary intent was to treat personal guarantors differently from other categories of

individuals. The intimate connection between such individuals and corporate entities to whom they stood guarantee, as well as the possibility of the two separate processes being carried on in different forums, with its attendant uncertain outcomes, led to carving out personal guarantors as a separate *species* of individuals, from whom the Adjudicating authority was common with the corporate debtor to whom they had stood guarantee. In paragraphs 100 and 101, following was laid down:

“100. It is clear from the above analysis that Parliamentary intent was to treat personal guarantors differently from other categories of individuals. The intimate connection between such individuals and corporate entities to whom they stood guarantee, as well as the possibility of two separate processes being carried on in different forums, with its attendant uncertain outcomes, led to carving out personal guarantors as a separate species of individuals, for whom the Adjudicating authority was common with the corporate debtor to whom they had stood guarantee. The fact that the process of insolvency in Part III is to be applied to individuals, whereas the process in relation to corporate debtors, set out in Part II is to be applied to such corporate persons, does not lead to incongruity. On the other hand, there appear to be sound reasons why the forum for adjudicating insolvency processes – the provisions of which are disparate- is to be common, i.e through the NCLT. As was emphasized during the hearing, the NCLT would be able to consider the whole picture, as it were, about the nature of the assets available, either during the corporate debtor’s insolvency process, or even later; this would facilitate the CoC in framing realistic plans, keeping in mind the prospect of realizing some part of the creditors’ dues from personal guarantors.

101. In view of the above discussion, it is held that the impugned notification is not an instance of legislative exercise, or amounting to impermissible and selective application of provisions of the Code. There is no compulsion in the Code that it should, at the same time, be made applicable to all individuals, (including personal guarantors) or not at all. There is sufficient indication in the Code- by Section 2(e), Section 5(22), Section 60 and Section 179 indicating that personal guarantors, though forming part of the larger grouping of individuals, were to be, in view of their intrinsic connection with corporate debtors, dealt with differently, through the same adjudicatory process and by the same forum (though not insolvency provisions) as such corporate debtors. The notifications under Section 1(3), (issued before the impugned notification was issued) disclose that the Code was brought into force in stages, regard being had to the categories of persons to whom its provisions were to be applied. The impugned notification, similarly inter alia makes the provisions of the Code applicable in respect of personal guarantors to corporate debtors, as another such category of persons to whom the Code has been extended. It is held that the impugned notification was issued within the power granted by Parliament, and in valid exercise of it. The exercise of power in issuing the impugned notification under Section 1(3) is therefore, not *ultra vires*; the notification is valid.”

34. The above judgment of the Hon’ble Supreme Court also clearly emphasized that Personal Guarantor of the Corporate Debtor has been treated as a separate *species* of individuals. Hence, provision regarding Personal Guarantor of the Corporate Debtor have been enforced and when we read Section 60, sub-sections (1) and (2), the conclusion is inescapable

that for insolvency resolution process of personal guarantor, the jurisdiction is with the NCLT.

35. Now, we come to the judgment, which has been relied by learned Counsel for the Appellant, i.e., the judgment of Madras High Court in **C.R.P. No.2513 of 2022 – Rohit Nath vs. KDB Hana Bank Ltd.** The question, which came for consideration in the above judgment was noted in paragraph-A, which is as follows:

“A. The Question :

We are called upon to decide the question as to whether the bankruptcy proceedings, pending on the file of the Debt Recovery Tribunal (hereinafter referred to as 'DRT') against the petitioner / personal guarantor has to be transferred to the file of the National Company Law Tribunal (hereinafter referred to as 'NCLT') in view of the subsequent institution and pendency of an insolvency resolution process of the corporate debtor?”

36. The Madras High Court framed two questions for consideration in the above case, which were noticed in paragraph D, which are as follows:

“D. Points for consideration :

4. We have heard the rival submissions made on behalf of either side and perused the material records of the case. Upon consideration of the same, the following points arise for consideration:-

(i) Whether NCLT alone has jurisdiction in matters of insolvency resolution and bankruptcy process for personal guarantors (to corporate debtors) in view of Section 60(1) of The IBC?

(ii) Whether in view of the filing of the insolvency resolution process against the corporate

debtor, the pending proceedings in I.B.C.No.1 of 2022 before the DRT is to be transferred to the NCLT in view of Section 60(3) of The IBC?

37. The Madras High Court answered the Question No.1 in negative holding that NCLT alone has no jurisdiction in a matter of insolvency resolution. The Madras High Court has relied on the judgment of the Hon'ble Supreme Court in **State Bank of India vs. V. Ramakrishnan and Anr.**, Civil Appeal No. 3595 of 2018 with Civil Appeal No.4553 of 2018. The issue which came for consideration before the Hon'ble Supreme Court of India was as to whether after enforcement of moratorium under Section 14 of the IBC, will the moratorium shall also be applicable to the Personal Guarantors. The Adjudicating Authority in the said case has held that after declaring the moratorium under Section 14, the moratorium shall also apply to Personal Guarantor. Paragraph 22, which has been relied by Madras High Court was in reference to reliance by Respondent to the applicability of moratorium to Personal Guarantors. Observation made in paragraph 22 by the Hon'ble Supreme Court, as extracted by Madras High Court is as follows:

“22. We are afraid that such arguments have to be turned down on a careful reading of the sections relied upon. Section 60 of the Code, in sub-section (1) thereof, refers to insolvency resolution and liquidation for both corporate debtors and personal guarantors, the adjudicating authority for which shall be the National Company Law Tribunal, having territorial jurisdiction over the place where the registered office of the corporate person is located. This sub-section is only important in that it locates the Tribunal which has territorial jurisdiction in insolvency resolution

processes against corporate debtors. So far as personal guarantors are concerned, we have seen that Part III has not been brought into force, and neither has Section 243, which repeals the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920. The net result of this is that so far as individual personal guarantors are concerned, they will continue to be proceeded against under the aforesaid two Insolvency Acts and not under the Code. Indeed, by a Press Release dated 28-8-2017, the Government of India, through the Ministry of Finance, cautioned that Section 243 of the Code, which provides for the repeal of the said enactments, has not been notified till date, and further, that the provisions relating to insolvency resolution and bankruptcy for individuals and partnerships as contained in Part III of the Code are yet to be notified. Hence, it was advised that stakeholders who intend to pursue their insolvency cases may approach the appropriate authority/court under the existing enactments, instead of approaching the Debts Recovery Tribunals."

(emphasis supplied)"

38. The above judgment of the Hon'ble Supreme Court in **State Bank of India vs. V. Ramakrishnan and Anr.** was dealing with entirely different issue and cannot be said to be laying down any such law that unless proceedings of insolvency resolution process are pending against the Corporate Debtor, Section 95 Application cannot be filed before the NCLT. We, thus, are of the view that reliance on the said judgment cannot be held to be a precedent on the issue, which has arisen. The Madras High Court has relied on earlier judgment of the Madras High Court dated 28.07.2021, where the Madras High Court has rejected the submission that proceeding against Personal Guarantor can only be

before the NCLT. We need to notice the judgment of Madras High Court dated 28.07.2021, which was in C.R.P. (PD) No.1289 of 2021, where the Personal Guarantor has challenged the proceeding under Section 95(1) initiated before the DRT. The questions which arose for consideration were noted in paragraph D, which we have extracted above. The contention of the petitioner has been noted in paragraph 5(iv) and for interpreting Section 60, sub-section (2) of the IBC, the Madras High Court has extracted paragraph 22 of C.R.P. (PD) No.1289 of 2021. The Division Bench while deciding the proceeding in C.R.P. No.2513 of 2022 felt bound by the earlier judgment, which has become final between the parties. Thus, the reasons, which was relied by the Madras High Court was the finality of its earlier judgment dated 28.07.2021, which was applicable to the facts of earlier proceedings. The observations were made in paragraph 5 (iv) and (v) are as follows:

“5.(iv) The specific contention has been raised by the petitioner that even in the absence of the proceedings against the corporate debtor, the proceedings against the personal guarantor can only be before the NCLT in C.R.P.(PD).No.1289 of 2021 and by a judgment, dated 28.07.2021, the said contention has been rejected and it is essential to extract paragraph No.22 of the said judgment which reads as follows:-

“22. The text of Section 60(2) discloses that Section 60 of the Code would apply to an individual only if there is a corporate insolvency resolution process pertaining to the corporate entity which is the principal debtor, that has been filed or commenced. In other words, in case of company ‘A’ being the principal debtor and an individual ‘P’ the guarantor promising repayment of the credit facilities

obtained by 'A', if a corporate insolvency resolution process is initiated under the provisions of the Code pertaining to company 'A', the insolvency resolution process pertaining to guarantor 'P' would per force be before the same adjudicating authority, viz., the National Company Law Tribunal. But, where there is no corporate insolvency resolution process initiated in respect of company 'A', insolvency proceedings pertaining to guarantor 'P' must necessarily be carried only to the jurisdictional Debts Recovery Tribunal and not to any other forum. To repeat, the provisions of the Acts of 1909 and 1920 will have no manner of application to guarantors who have furnished guarantees in connection with credit facilities obtained by corporate entities."

(emphasis supplied)"

The said judgment has become final and binding between the parties.

(v) Factually also, that stage has crossed and now insolvency resolution proceedings are pending before the NCLT and therefore, the only question which has to be gone into is to whether the proceedings are liable to be transferred under Section 60(3) of The IBC."

39. From the above, it is clear that Division Bench of Madras High Court has held that stage has crossed and now insolvency resolution proceedings are pending before the NCLT and therefore, the only question which has to be gone into is to whether the proceedings are liable to be transferred under Section 60, sub-section (3) of the IBC.

40. This Tribunal in its judgment in **Mahendra Kumar Agarwal** has noticed the judgment of the Delhi High Court in ***Axis Trustee Services***

Ltd. vs. Brij Bhushan Singal - (2022) SCC OnLine Del., where the Delhi High Court had occasion to consider Section 60 of the IBC. After considering Section 60 and 179 of the IBC, the Delhi High Court held that NCLT will be the Adjudicating Authority in respect of insolvency proceedings against Personal Guarantors. It is useful to extract paragraph 54 of the judgment of this Tribunal in **Mahendra Kumar Agarwal**, where Delhi High Court has noticed following:

“54. The Learned Counsel for the 1st Respondent, relies on the decision of the Hon'ble High Court of Delhi in *Axis Trustee Services Limited v. Brij Bhushan Singal*, reported in (2022) SCC OnLine Del. 3634, wherein, at paragraphs 17, 21 to 29, it is observed as under:

17. “To appreciate the aforesaid submissions, a reference may be made to the relevant provisions of the IBC. Part II of the IBC deals with “INSOLVENCY RESOLUTION AND LIQUIDATION FOR COPORATE PERSONS” and Section 60 of the IBC occurs in Chapter VI of Part II of the IBC titled “ADJUDICATING AUTHORITY FOR CORPORATE PERSONS.” The relevant portion of Section 60 of the IBC is set out below:

60. (1) The Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors shall be the National Company Law 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 or liquidation proceeding of a corporate debtor is pending before a National Company Law

Tribunal, an application relating to the insolvency resolution or bankruptcy of a personal guarantor of such corporate debtor shall be filed before such National Company Law Tribunal.

(3) An insolvency resolution process or bankruptcy proceeding of a personal guarantor 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).” ...

21. A reference may also be made to Section 179 of the IBC, which is a part of Chapter VI of the IBC dealing with “ADJUDICATING AUTHORITY FOR INDIVIDUALS AND PARTNERSHIP FIRMS“:

“179. (1) Subject to the provisions of section 60, the Adjudicating Authority, in relation to insolvency matters of individuals and firms shall be the Debt Recovery Tribunal having territorial jurisdiction over the place where the individual debtor actually and voluntarily resides or carries on business or personally works for gain and can entertain an application under this Code regarding such person.”

22. The interplay between Section 60 and Section 179 of the IBC came up for consideration before the Supreme Court in Embassy Property Development (supra), wherein the Supreme Court observed that in respect of personal guarantors of corporate persons, the NCLT would be the adjudicating authority. The relevant observations of the Supreme Court are set out below.

“33. Sub-section (4) of Section 60 of the IBC, 2016 states that the NCLT will have all the powers of the DRT as contemplated under Part III of the Code for the purposes of sub-section (2). Sub-section (2) deals with a situation where the insolvency resolution or liquidation or bankruptcy of a corporate guarantor or personal guarantor of a corporate debtor is taken up, when CIRP or liquidation proceeding of such a corporate debtor is already pending before NCLT. The object of sub-section (2) is to group together (A) the CIRP or liquidation proceeding of a corporate debtor, and (B) the insolvency resolution or liquidation or bankruptcy of a corporate guarantor or personal guarantor of the very same corporate debtor, so that a single forum may deal with both. This is to ensure that the CIRP of a corporate debtor and the insolvency resolution of the individual guarantors of the very same corporate debtor do not proceed on different tracks, before different fora, leading to conflict of interests, situations or decisions.

34. If the object of sub-section (2) of Section 60 is to ensure that the insolvency resolutions of the corporate debtor and its guarantors are dealt with together, then the question that arises is as to why there should be a reference to the powers of the DRT in sub-section (4). The answer to this question is to be found in Section 179 of the IBC, 2016. Under Section 179(1), it is the DRT which is the adjudicating authority in relation to insolvency matters of individuals and firms. This is in contrast to Section 60(1) which names the NCLT as the adjudicating authority in relation to insolvency resolution and liquidation of corporate persons including corporate debtors and personal guarantors. The expression “personal guarantor” is defined in Section 5(22) to



mean an individual who is the surety in a contract of guarantee to a corporate debtor. Therefore the object of subsection (2) of Section 60 is to avoid any confusion that may arise on account of Section 179(1) and to ensure that whenever a CIRP is initiated against a corporate debtor, NCLT will be the adjudicating authority not only in respect of such corporate debtor but also in respect of the individual who stood as surety to such corporate debtor, notwithstanding the naming of the DRT under Section 179(1) as the adjudicating authority for the insolvency resolution of individuals. This is also why subsection (2) of Section 60 uses the phrase “notwithstanding anything to the contrary contained in this Code.”

23. The NCLAT in its judgment dated 27th January, 2022 in Company Appeal (AT) Insolvency No. 60/2022 titled State Bank of India, Stressed Asset Management Branch v. Mahendra Kumar Jajodia discussed the provisions of Section 60 of the IBC and held that even if the CIRP in respect of the corporate debtor is not pending before the NCLT, the NCLT would be the appropriate forum for adjudicating an application under Section 95 in respect of a personal guarantor. ...

24. The statutory appeal, being Civil Appeal No(s).1871-1872/2022, filed against the aforesaid order of the NCLAT, was dismissed by the Supreme Court vide order dated 6th May, 2022.

25. In view of the legal position elucidated above, it clear that Section 179(1), which provides the jurisdiction for the DRT with respect to insolvency matters of individuals and firms, is subject to Section 60 of the IBC. Sub-section (1) of Section 60 of the IBC provides that in relation to insolvency resolution for corporate persons, including corporate debtors and personal guarantors, the Adjudicating Authority shall be the NCLT. Sub-section (2) of Section 60

provides that where the CIRP of a corporate debtor is pending before an NCLT, an application relating to the insolvency of a personal guarantor of such corporate debtor shall be filed before the same NCLT. Sub-section (3) of Section 60 further provides that the insolvency resolution process in respect of a personal guarantor pending in any Court or Tribunal, shall stand transferred to the adjudicating authority dealing with the insolvency resolution process of the corporate debtor.

26. On behalf of the plaintiff, reliance has been placed on sub-section (2) of Section 60 to contend that insolvency proceedings in respect of a personal guarantor of a corporate debtor shall be filed in the NCLT only if the CIRP is pending in respect of corporate debtor before the NCLT. In view of the fact that the CIRP in respect of corporate debtor, Bhushan Steel already stands concluded, insolvency proceedings in respect of its guarantors have to be filed before the DRT and not the NCLT. The aforesaid submission overlooks the fact that sub-section (2) of Section 60, IBC starts with words without prejudice to sub-section (1)'. Clearly, sub-section (2) of Section 60 is supplemental to subsection (1) of Section 60 and has to be read along with sub-section (1) of Section 60. A harmonious reading of the aforesaid provisions would lead to the conclusion that sub-section (1) of Section 60 applies in respect of insolvency proceedings in respect of personal guarantors of corporate debtors irrespective of the fact whether CIRP is pending against the corporate debtor. The objective of sub-sections (2) and (3) is that where proceedings in respect of a corporate debtor have been initiated in one NCLT and those against a guarantor before another NCLT or another court or tribunal while the CIRP is pending in respect of the corporate debtor before a particular NCLT, the proceedings against the personal guarantor should also be before the same NCLT.

27. It may also be relevant to mention here that in term of Rule 3(1)(a) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors), Rules, 2019, it has specifically been provided that the adjudicating authority for the purposes of Section 60 would be the NCLT. No distinction has been made under different sub-sections of Section 60 of the IBC in this Rule with regard to the competent adjudicating authority.

28. On behalf of the plaintiffs, it was further contended that the defendant no. 2 himself had objected to the maintainability of the aforesaid application filed against the defendant no. 2 under Section 95 of the IBC on the ground that the NCLT does not have jurisdiction. In my view, even if such a stand has been taken by the defendant no. 2, the same would not constitute an estoppel against the defendant no. 2 as it was a legal objection taken by the defendant no. 2 and an admission in law cannot be held to be binding against a party. An estoppel can be in respect of admissions made on facts, however, there can be no estoppel on admissions based on law. In any event, the legal position has emerged only after the dismissal of the appeal by the Supreme Court in Mahendra Kumar Jajodia (supra). Therefore, the judgment in Union of India v. N. Murugesan (2022) 2 SCC 25 would not be of any assistance to the plaintiffs in the present case.

29. In view of the discussion above, I am of the view that the NCLT would be the appropriate adjudicating authority in respect of insolvency proceedings initiated against the defendants in their capacity as personal guarantors for the corporate debtor, Bhushan Steel.””

41. The above judgment of the Delhi High Court relied on judgment of this Tribunal in **State Bank of India vs. Mahendra Kumar Jajodia**. The

above judgment of the Delhi High Court is, thus, clearly have a different view from one which has been taken by the Madras High Court. It is well settled that judgment of the High Court has persuasive value as precedent. However, when judgments of this tribunal in **State Bank of India vs. Mahendra Kumar Jajodia** and **Mahendra Kumar Agarwal vs. PTC India Financial Services** has answered the same very issue, which has arisen for consideration, we feel ourselves bound by the judgment and we are not persuaded to take any different view to which one was taken by this Tribunal in **State Bank of India vs. Mahendra Kumar Jajodia's** case.

42. Learned Counsel for the Appellant has relied on judgment of NCLT Kolkata Bench in **Aditya Birla Finance Ltd. vs. Sarita Mishra** and **Tata Capital Financial Services Ltd. vs. Arjun Agarwal**. Coming to the judgment of NCLT in **Aditya Birla Finance Ltd. vs. Sarita Mishra**, the said proceeding was initiated by Financial Creditor against Personal Guarantor under Section 95, sub-section (1). The Application came to be rejected by NCLT Kolkata Bench, holding that NCLT shall have jurisdiction only when the proceedings for insolvency resolution or liquidation is pending against the Corporate Debtor and the Application under Section 95 filed by the Financial Creditor was dismissed. It is relevant to notice that NCLT Kolkata Bench had noticed the judgments of this Tribunal in **State Bank of India vs. Mahendra Kumar Jajodia** as well as **Mahendra Kumar Agarwal vs. PTC India Financial Services** case, but NCLT proceeded to distinguish the said judgments without there

being any real distinction in the issue, which has arisen for consideration. To the similar effect is another judgment of NCLT Kolkata Bench in **Tata Capital Financial Services Ltd. vs. Arjun Agarwal** decided on 20.12.2024, i.e., on the same date, on which judgment of **Aditya Birla Finance Ltd.** was delivered. In the said judgment also the same view was taken by the NCLT Kolkata Bench while dismissing Section 95 Application filed by the Financial Creditor. The above two judgments, delivered by NCLT Kolkata Bench are in teeth of binding judgments of **State Bank of India vs. Mahendra Kumar Jajodia** and **Mahendra Kumar Agarwal vs. PTC India Financial Services** (supra) and artificial distinction, which is sought to be drawn by NCLT Kolkata Bench is illusory and without any basis. The NCLT Kolkata Bench was clearly bound by the precedent declared by this Tribunal, especially when judgment of this Tribunal in **State Bank of India vs. Mahendra Kumar Jajodia** was affirmed by the Hon'ble Supreme Court by its order dated 06.05.2022 as noticed above. In view of the law laid down by this Tribunal in **State Bank of India vs. Mahendra Kumar Jajodia** where the Application filed by Financial Creditor without there being any pending proceeding against Corporate Debtor, was held to be fully maintainable, both the judgments of NCLT do not lay down correct law and are *per incuriam*. The above judgments relied by Appellant, thus, cannot support the submissions advanced by the Appellant that NCLT has no jurisdiction to entertain Section 95 Application filed by the Financial Creditor.

43. In view of the foregoing discussions, we are not proceeded to accept the submissions of the Appellant that NCLT Delhi has no jurisdiction to entertain Section 95 Application filed by the Financial Creditor against the Personal Guarantor for initiating insolvency resolution process. We do not find any substance in any of the submissions raised by the Appellant. There is no merit in the any of the Appeal(s). Both the Appeal(s) are dismissed accordingly. There shall be no order as to costs.

**[Justice Ashok Bhushan]
Chairperson**



LEGALERA
BY THE PEOPLE. FOR THE PEOPLE. OF THE PEOPLE

**[Arun Baroka]
Member (Technical)**

NEW DELHI

23rd January, 2025

Ashwani