

IA(IBC)/170/KOB/2021

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IA(IBC)/171/KOB/2021

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IA(IBC)/172/KOB/2021

IN THE NATIONAL COMPANY LAW TRIBUNAL

KOCHI BENCH, KERALA

IA(IBC)/170/KOB/2021

IN

IBA/44/KOB/2020

&

IA(IBC)/171/KOB/2021

IN

IBA/43/KOB/2020

&

IA(IBC)/172/KOB/2021

IN

IBA/45/KOB/2020

(Under Rule 11 of the National Company Law Tribunal Rules, 2016)

Order delivered on: 21st January, 2022

Coram:

Hon'ble Mr. Ashok Kumar Borah, Member (Judicial)

Hon'ble Mr. Shyam Babu Gautam , Member (Technical)

IA(IBC)/170/KOB/2021 IN IBA/44/KOB/2020

E.Iqbal,
Mullaserry House,
Sesthamvattom,
Perunkuzhi, Trivandrum-690 305.

... Applicant

Versus

State Bank of India
Stressed Asset Resoluion Branch (SARB),
Ernakulam, 7th Floor, Vankarath Tower
Palarivattom , Bypass Junction,
Ernakulam-682024.

... Respondent

IA(IBC)/171/KOB/2021 IN IBA/43/KOB/2020

Zaheer E.N
TC-4/1240
Padiyath House, 66, RPD Marg
Kuravankonam,
Kowdiar (PO), Trivandrum-695003

... Applicant.

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Versus

State Bank of India
Stressed Asset Resolution Branch (SARB),
Ernakulam, 7th Floor, Vankarath Tower,
Palarivattom , Bypass Junction
Ernakulam-682024.

... Respondent.

IA(IBC)/172/KOB/2021 IN IBA/45/KOB/2020

E.M Najeeb
6D, Kowdiar Manor,
Jawahar Nagar,
Thiruvananthapuram-695041

... Applicant

Versus

State Bank of India
Stressed Asset Resolution Branch (SARB),
Ernakulam, 7th Floor, Vankarath Tower
Palarivattom , Bypass Junction
Ernakulam-682024.

... Respondent

Parties/Counsel present (through video conference)

For Applicants ... Shri. K. S. Ravi Chandran, PCS.

For Respondent ... Shri Vinod P.V., Advocate.

O R D E R

Per: Shyam Babu Gautam, Member (T)

Since common issues and laws are involved in all the applications, they have been taken up together and a common order is passed in these cases.

2. These applications have been filed under Rule 11 of NCLT Rules, 2016 by the Personal Guarantors of M/s. Green Gateway Leisure Limited seeking the following reliefs: -

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- a) To declare that pursuant to the Hon'ble NCLAT vide its order and decision dated 09th September 2021 setting aside of the Order dated 15th October 2020 commencing Corporate Insolvency Resolution Process in the Corporate Debtor, the order of this Adjudicating Authority dated 15th October 2020 has

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become non-est in the eyes of law and all proceedings initiated under the same have also become infructuous;

- b) To recall the order passed by this Tribunal in IBA/44/KOB/2020, on 06th October 2021 admitting the application filed against the Applicants/ Personal Guarantors and consequently pass an order rejecting the report if any filed by the learned Resolution Professional in pursuance of the above order.

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- a) To declare that pursuant to the Hon'ble NCLAT vide its order and decision dated 09th September 2021 setting aside of the Order dated 15th October 2020 commencing Corporate Insolvency Resolution Process in the Corporate Debtor, the order of this Adjudicating Authority dated 15th October 2020 has become non-est in the eyes of law and all proceedings initiated under the same have also become infructuous;
- b) To recall the order passed by this Tribunal in IBA/43/KOB/2020, on 06th October 2021 admitting the application filed against the Applicants/ Personal Guarantors and consequently pass an order rejecting the report if any filed by the learned Resolution Professional in pursuance of the above order.

IA(IBC)/172/KOB/2021 IN IBA/45/KOB/2020

- a) To declare that pursuant to the Hon'ble NCLAT vide its order and decision dated 09th September 2021 setting aside of the Order dated 15th October 2020 commencing Corporate Insolvency Resolution Process in the Corporate Debtor, the order of this Adjudicating Authority dated 15th October 2020 has become non-est in the eyes of law and all proceedings initiated under the same have also become infructuous;
- b) To recall the order passed by this Tribunal in IBA/45/KOB/2020, on 06th October 2021 admitting the application filed against the Applicants/ Personal Guarantors and consequently pass an order rejecting the report if any filed by the learned Resolution Professional in pursuance of the above order.
The facts in brief are as under: -

3. The basis for commencement of CIRP against M/s. Green Gateway Leisure Limited was occurred when IBA/01/KOB/2020 filed by the Union Bank of India has been admitted by this Tribunal on 15th October 2020 declaring moratorium. The said Order was challenged before the National Company Law Appellate Tribunal (Hon'ble NCLAT) filing Appeal No.993 of 2020 and by an order dated 09th September 2021. The Hon'ble NCLAT set aside the order of this Tribunal dated

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15th October 2020. As a result of which the CIRP and all matters connected with after the order of this Tribunal dated 15th October 2020 had ended, as if the order dated 15th October 2020 had never been passed. Pursuant to closure of CIRP the Corporate Debtor has come under the management of its directors and the Corporate powers of Board of Directors have been restored automatically from the date of the order of the Hon'ble NCLAT.

4. It is stated by the Applicants herein that in the meantime, on the basis of the orders of this Tribunal dated 15th October 2020 the State Bank of India, one of the Financial Creditors had issued demand notice on 17th November 2020 invoking the provisions of Rule 7 of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process of Personal Guarantors to the Corporate Debtor) Rules 2019.
5. It is further stated that in IBA/45/KOB/2020 filed by the State Bank of India invoked the personal guarantee granted by Mr.E.M.Najeeb, in IBA 43/KOB/2020 filed by the State Bank of India invoked the personal guarantee granted by Mr.Zaheer E.N. and in IBA 44/KOB/2020 filed by the State Bank of India invoked the personal guarantee granted by Mr.E.lqbal.
6. After filing of the aforesaid IBAs, this Tribunal vide Order dated 06.10.2021 allowed the IBAs and appointed a Resolution Professional, who filed a report recommending *the acceptance of the application filed under Section 95(1) of the Insolvency and Bankruptcy Code 2016 by the Applicant State Bank of India against the Personal Guarantors.*
7. It is stated that under Section 95 of the Insolvency and Bankruptcy Code, 2016 read with Section 2(e) of the IB Code read with Notification SO No.4126(E) dated

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15th November 2019 invoking the jurisdiction of this Tribunal as against the personal guarantors of Corporate Debtor was brought into force. To that extend, Section 60(1), 60(2).60(3) also got activated as against personal guarantors to Corporate Debtors.

8. It is stated by the Applicants that the provisions of Section 60(2) and Section 60(3) says that in order to invoke the jurisdiction of this Tribunal, there must be pending proceedings before the Adjudicating Authority either in the CIRP or liquidation of a Corporate Debtor. The power conferred upon the Adjudicating Authority under Section 60(1) of the IB Code to order Insolvency Resolution Process against personal guarantors to Corporate Debtors is wedded to the existence of either the CIRP or the liquidation proceedings.
9. It is stated that the State Bank of India filed the IBAs relying the order of this Tribunal dated 15th October, 2020, without which the application under Section 95(1) of the 1B Code could not have been invoked at all. Since the Hon'ble NCLAT by its order dated 09th September, 2021 set aside the order passed by this Tribunal, there is no CIRP or Liquidation applications pending for adjudication before this Tribunal.
10. It is also stated that in view of the above order of Hon'ble NCLAT, the Order passed by this Tribunal on 15.10.2020 has become non-est in the eyes of law and that the Order dated 6th October 2021 allowing the IBAs and appointing RP is liable to be recalled duly taking note of the legal effect of the order dated 15th October 2020 of Hon'ble NCLAT passed on 09th September 2021.

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Submission by the Respondent/ Financial Creditor

11. The Financial Creditor State Bank of India filed a counter/reply statement stating that the personal guarantor to Corporate Debtor is a separate class of creditors having independent existence under the Code. The Parliament with an intention to implement Part -III of the Code, amended Section 2 of the Code by introducing a separate category of individuals i.e., "personal guarantors to Corporate Debtor" as Section 2 (e) of the Code, Subs. by Act No. 8 of 2018, (with effect from 23-11- 2017). The amendment was brought based on the BLRC recommendation that since DRT in India is overburdened with large number of cases, implementation of Part II may pose significant administrative burden on the Adjudicating Authority. Hence working group to ensure effective implementation of Part-III of the Code decided to notify personal guarantor to the Corporate Debtor as a separate category. (BLRC Report March 2019 at Para 6).
12. The Central Government by notification dated 15.11.2019 has notified Section 2(e) with effect from 1st day of December 2019 which is reproduced below:-
- "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;*

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(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.”

13. In order to understand the amendment Section 2 of IBC is quoted below: -

Section 2: Application.

**2. The provisions of this Code shall apply to—*

(a) any company incorporated under the Companies Act, 2013 or under any previous company law;

(b) any other company governed by any special Act for the time being in force, except in so far as the said provisions are inconsistent with the provisions of such special Act;

(c) any Limited Liability Partnership incorporated under the Limited Liability Partnership Act, 2008;

*(d) such other body incorporated under any law for the time being in force, as the Central Government may, by notification, specify in this behalf; 1[***]*

2[(e) personal guarantors to corporate debtors;

(f) partnership firms and proprietorship firms; and

(g) individuals, other than persons referred to in clause (e).]

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in relation to their insolvency, liquidation, voluntary liquidation or

bankruptcy, as the case may be.

14. On the basis of the aforesaid amendment, a debtor may file an application to initiate Insolvency Resolution Process under Section 94 and creditor may apply under Section 95 of the Act under Chapter -II of Part -III of the Code.
15. It is stated by them that either the working Committee Report or the provisions of the Code mandate that initiating CIRP against Corporate Debtor is pre-condition for filing an application under Section 94 and Section 95 of the Code. Section 2(e) is a sperate and distinct category under the Code, by which either creditor or the debtor can independently proceed for initiating Insolvency Resolution Process. If the proposition that, if a Personal Guarantor cannot be brought under Insolvency Resolution Process without initiating CIRP against the Corporate Debtor under Section 7, 9 and 10 is accepted, in view of Section 2(e) read with Section 94 and 95, CIRP also cannot be initiated against the Corporate Debtor under Section 7,9 and 10 without prior or simultaneously initiating Corporate Insolvency Resolution Process against Personal Guarantors under Section 94 and 95. Therefore, when the statute gives right to the debtor and creditor to initiate Insolvency Resolution Process by filing an application under the Code, non-acceptance of the same shall violate the Fundamental Rights of the Creditor/ Debtor to approach the appropriate Forum to enforce the statutory remedies.
16. It is also stated that the Rules framed under Sub Section (e) of Section 2, does not contain any requirement to provide any details of CIRP initiated against the Corporate Debtor before instituting an application under Sections 94 and 95 of the Code. Further either the FORM -A application by guarantor or FORM-C application

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by Creditor does not have any requirement to provide details of CIRP initiated against the Corporate Debtor. However, there is specific requirement to give the name and details of the Corporate Debtor in the said Form. Therefore, when the amendment was brought, legislature was very clear that not to impose any pre-condition to initiate CIRP against Corporate Debtor before invoking application under Part-III. It is also stated that under Sub-Regulation 1(e) of Regulation 4 of IBBI (Insolvency Resolution Process for personal guarantor to Corporate Debtors) Regulations, 2019 also emphasis the above submission when legislature choose to have different insolvency professional for conducting CIRP under Part II and Resolution/bankruptcy Process under Part-III. The Regulation states that an Insolvency Resolution Professional, who is an IRP and RP of the Corporate Debtor cannot be a Resolution Professional for personal guarantor to the Corporate Debtor. Therefore, the statute is plain and unambiguous that personal guarantor to Corporate Debtor under Sub Section (e) of Section 2 is separate and distinct category and has an independent existence like applications of the Code to other categories under Section 2. When the statute is clear a different interpretation cannot be given contrary to the intention of the legislature.

17. We have heard the learned counsel for the Applicants/ Personal Guarantors as also the learned counsel for the Creditor through video conferencing and have gone through the materials placed on record. It is seen from the records that the Hon'ble NCLAT passed an order setting aside the order of admission of CIRP against the Corporate Debtor vide order dated 09.09.2021 granting time to the Corporate Debtor to settle the dues of **Union Bank of India** within six months, and liberty to proceed with Insolvency Resolution Process against the Corporate Debtor in the event of

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default. Since the debt of the Respondent/Creditor herein was not cleared they have filed application under Section 7 of IBC before this Tribunal against the Corporate Debtor and the same is now pending before this Tribunal as CP(IB)/43/KOB/2021. Hence, as far as the Creditor SBI is concerned, there is a CIRP pending against the Corporate Debtor.

18. In order to reach a clear picture in the matter, we had gone through the decision of the Hon'ble Supreme Court in **Lalit Kumar Jain Vs. Union of India and Ors** (LL2021 SC LiveLaw), wherein in para 101, it is stated as under:-

*“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*

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impugned notification under Section 1(3) is therefore, not ultra vires; the notification is valid.”

19. From the above, it is clear that the Hon’ble Supreme Court upheld the constitutional validity of the notification by which Section 2(e) was inserted. It was categorically held that personal guarantors, in view of their intrinsic connection with Corporate Debtors shall be dealt differently through same adjudicating process as Corporate Debtor. 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.
20. Moreover, the State Bank of India who filed the IBAs under consideration already filed CP(IB)/43/KOB/2021 which is pending adjudication. The Hon’ble NCLAT only set aside the Order passed in favour of the Union Bank of India against the Corporate Debtor. The Guarantors of the Corporate Debtor may be the same in both Insolvency Applications, but as per the decision of the Hon’ble Supreme Court, the Personal Guarantors are different entities and the Creditors may initiate Insolvency Resolution Process against them. In the Report of RP, it is very clearly stated that he recommends *the acceptance of the application filed under Section 95(1) of the Insolvency and Bankruptcy Code, 2016 by the applicant State Bank of India against the Personal Guarantors.*
21. Hence, we conclude that in a situation where Application(s) in relation to the Corporate Debtor for initiation of CIRP is pending at National Company Law Tribunal (NCLT) then, initiation of CIRP of the Corporate Debtor is not a prerequisite for maintainability of an application under Section 95 of the IBC, 2016 filed for

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initiating Insolvency Resolution Process against the Personal Guarantor of that Corporate Debtor before the NCLT.

22. Therefore, we are of the considered opinion that the Interlocutory Applications filed by the Personal Guarantors of the Corporate Debtor for recalling the Order passed by this Tribunal in IBA/43/KOB/2020, IBA/44/KOB/2020 and IBA/45/KOB/2020 and to reject the report of the Resolution Professional cannot be accepted as the same was done for the sake of objecting to the initiation of CIRP against them being the Personal Guarantors of the Corporate Debtor. Accordingly, IA(IBC)/170 (KOB)/2021, IA(IBC)/171 (KOB)/2021, and IA(IBC)/172(KOB)/2021 are dismissed, without costs.

Dated this the 21st day of January, 2022

Sd/-
(Shyam Babu Gautam)
Member (Technical)

Sd/-
(Ashok Kumar Borah)
Member (Judicial)

Rajasree