* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment Reserved on : 27th October, 2022
Judgment Delivered on :4th November, 2022

\+ CS(COMM) 8/2021 & I.A. 10333/2021 (O-XXXVII R-3(4) of CPC), I.A. 11096/2021 (recall/rectification order dated 16th April 2021), I.A. 11749/2021(of the defendant no.1 u/S 151 CPC), I.A. 12076/2021 (O-XXXVII R-3(4) of CPC), I.A. 5554/2021(of the defendant no.2 u/O-VII R-11(d) of CPC), I.A. 233/2021(u/O-XXXIX R-1 & 2 of CPC), I.A. 13551/2021 (of the defendant no.1 for leave to defend), I.A. 13498/2021(of the defendant no.2 for leave to defend), I.A. No.17487/2022 (of the defendant no.1 u/O-VII R-11(d) of CPC)

AXIS TRUSTEE SERVICES LIMITED ..... Plaintiff

Through: Mr.DayanKrishnan, Senior Advocate with Ms. Misha, Mr.VijayantPaliwal, Ms. Moulshree Shukla, Mr. Sukrit Seth, Mr. Parth Gokhale, Ms. Megha Khandelwal and Mr.DakshKadian, Advocates.

versus

BRIJ BHUSHAN SINGAL & ANR. ..... Defendants

Through: Mr. Sandeep Sethi, Senior Advocate with Ms. Ranajana Roy Gawai, Ms. Vasudha Sen, Ms. Aayushi Singh, Mr. Parminder Singh and Mr. Pranjit K. Bhattacharya, Advocates.

\+ CS(COMM) 20/2021 & I.A. 733/2021(O-XXXIX R-1 & 2 of CPC), I.A. 4996/2021(O-VII R-11(d) of CPC), I.A. 5013/2021(of the defendant no.2 u/S 151 CPC), I.A. 5663/2021(of the defendant no.1 u/S 151 CPC), I.A. 5776/2021 (O-XXXVII R-3(4) of CPC), I.A. 11335/2021(of the defendants O-XXXVII R-3 of CPC), I.A. 15155/2021 (of the defendants u/S 151 of CPC), I.A. 4996/2021(of the defendant no.2 u/O-VII R-11(d) of CPC), I.A. 5013/2021(of the defendant no.2 u/S 151 CPC seeking sine die

adjournment of proceedings), I.A. 5663/2021(of the defendant no.1 u/S 151 CPC seeking sine die adjournment of proceedings), I.A. 11335/2021(of the defendants u/O-XXXVII R-3 of CPC for leave to defend)

NORDDEUTSCHE LANDESBANK GIROZENTRALE ..... Plaintiff

Through: Mr. Dayan Krishnan, Senior Advocate with Ms. Shally Bhasin, Mr. Chaitanya Safaya, Mr. Prateek Yadav and Mr. Prateek Gupta, Advocates.

versus

BRIJ BHUSHAN SINGAL & ANR. ..... Defendants

Through: Mr. Sandeep Sethi, Senior Advocate with Ms. Ranajana Roy Gawai, Ms. Vasudha Sen, Ms. Aayushi Singh, Mr. Parminder Singh and Mr. Pranjit K. Bhattacharya, Advocates.

CORAM:
HON'BLE MR. JUSTICE AMIT BANSAL

JUDGMENT

AMIT BANSAL, J.

1. Detailed submissions on various applications, including applications seeking leave to defend filed on behalf of the defendants, were heard on 10th February, 2022, 25th February, 2022, 17th May, 2022, 7th July, 2022, 18th July, 2022, 23rd August, 2022 and 5th September, 2022, when judgment was reserved and one week's time was granted to the parties to file written

submissions. Written submissions were duly filed on behalf of the parties in both suits.

2. On 11th October, 2022, the matter was mentioned on behalf of counsel for the defendants in order to bring to the knowledge of the Court the subsequent developments regarding insolvency proceedings having been filed against the defendant no.1. Accordingly, the matter was listed for directions on 17th October, 2022. Counsels for the parties sought time to make submissions in respect of the subsequent developments and the matter was posted on 27th October, 2022. On the said date, an additional affidavit and a fresh application, being I.A.17487/2022, under Order VII Rule 11 of the CPC filed on behalf of the defendant no.1, were on record. Submissions on behalf of the parties were heard and the judgment was reserved again.

3. Since similar issues arise in both the suits, they are being decided by way of a common judgment.

FACTUAL MATRIX

4. **Brief facts in CS(COMM) 8/2021 are set out below**.

4.1. CS(COMM) 8/2021 is a summary suit filed on behalf of Axis Trustee Services Limited under Order XXXVII of the CPC seeking recovery of EUR 64,751,108.73 from the defendants no.1 and 2. Defendants no.1 and 2 are the ex-promoters of Bhushan Steel Limited (renamed as Tata Steel BSL Limited)/the borrower [hereinafter "Bhushan Steel"].

4.2. A Facility Agreement dated 14th April, 2011 [hereinafter "Facility Agreement"] was executed between Bhushan Steel and various financial creditors. Pursuant to the said Facility Agreement, the

plaintiff was appointed as the security agent vide Security Agent Agreement dated 18th May, 2011 to look after the beneficial interest of the lenders. The repayment obligations of Bhushan Steel were secured by way of a personal guarantee given jointly by the guarantors, being the defendants no.1 and 2.

4.3. Bhushan Steel defaulted in repayment of the principal installments under the Facility Agreement from 30th April, 2015 as also on the payment of interest. Upon default, personal guarantee was invoked by the plaintiff acting in his capacity as a security agent vide Invocation Notice dated 8th November, 2017.

4.4. The Corporate Insolvency Resolution Process (CIRP) was initiated against Bhushan Steel before the Principal Bench of the National Company Law Tribunal (NCLT) vide order dated 26th July, 2017. In the said proceedings, the Financial Creditors filed a claim for the outstanding amounts in terms of the Facility Agreement. An amount of EUR 156,929,177.43 was admitted by the Resolution Professional of Bhushan Steel as the financial debt owed to the Financial Creditor. As a part of the Resolution Plan dated 3rd February, 2018, approved by the NCLT on 15th May, 2018, a total amount of EUR 92,178,068.70 was received by the Financial Creditor on 29th and 30th May, 2018. In terms of Clause 8.7.3(vi) of the approved Resolution Plan, Financial Creditors of Bhushan Steel were given right to recover any unresolved financial debt, owed by the borrower, from the guarantors in terms of the personal guarantee issued by them. Pursuant thereto, vide a Demand Notice dated 20th October, 2020, the financial creditors demanded payment of EUR 64,751,108.73/- from

the defendants (guarantors). No reply to the said notice was received, nor was the due amount paid to the financial creditors. Accordingly, the present suit has been filed seeking recovery of EUR 64,751,108.73.

4.5. Summons in CS(COMM) 8/2021 were issued on 16th April, 2021 and were accepted in Court by the counsel appearing on behalf of the defendants no.1 and 2. On the said date, counsel for the defendants submitted that insolvency proceedings against the defendant no.2 have been initiated before the NCLT and therefore, the suit cannot proceed against the defendant no.2. Taking note of the aforesaid submission, the defendant no.1 was directed to maintain status quo in respect of his immovable properties and no orders were passed against the defendant no.2.

5. **Brief facts in CS(COMM) 20/2021 are set out below**.

5.1. CS(COMM) 20/2021 is a summary suit filed on behalf of Norddeutsche Landesbank under Order XXXVII of the CPC seeking recovery of EUR 44,102,086.02/- from the defendants, being personal guarantors, in respect of three Guarantee Agreements executed in favour of the plaintiff for securing payment of amounts under three separate Facility Agreements executed in favour of Bhushan Steel/the borrower. As on 29th May, 2018, the total claim of the plaintiff was EUR 103,331,481.86/-with applicable interest, out of which EUR 60,769,146.46/- was admitted and received by the plaintiff in the CIRP. The total outstanding amount as on 18th November, 2020 and accordingly claimed in the suit is EUR 44,102,086.02/-, which includes applicable interest.

5.2. Summons in the suit were issued on 15th January, 2021 and the defendants were directed to maintain status quo in respect of their movable and immovable assets. The defendants were further directed to file affidavits within two weeks giving details of their assets and the status of the said assets. An appeal was filed against the orders dated 15th January, 2021 and 16th December, 2021 in CS(COMM) 20/2021. The said appeal is pending before the Division Bench.

6. In view of insolvency proceedings having been initiated against both the defendants no.1 and 2, the first issue to be decided is whether the present suits can proceed against the defendants in view of applications having been filed under Section 95 of the IBC against both the defendants.

7. In this regard, counsel for the defendants has made the following submissions:

i. Insolvency proceedings were initiated against the defendant no.2 by L&T Finance Limited before the NCLT, Delhi on 4th March, 2020 and therefore, in light of Section 96 of the IBC, the interim moratorium would come into effect and the present suits would not be maintainable against the defendant no.2.

ii. The NCLT is the appropriate forum for adjudicating the personal insolvency of the defendants. Reliance is placed on Section 179 read with Section 60 of the IBC to submit that insolvency proceedings in respect of personal guarantors of a corporate debtor would lie before the NCLT and not a Debt Recovery Tribunal (DRT). Reliance is also placed on the judgment of the Supreme Court in ***Embassy Property Development Pvt. Ltd.*** **v.** ***State of Karnataka &Ors.***, (2020) 13 SCC 308.

iii. The moratorium under Section 96 of the IBC is 'debt centric'. Therefore, it would be applicable to both the defendants no.1 and 2, who are co-guarantors, as the debt is common to both of them and is not separable. Reliance in this regard is placed on the judgment of the Supreme Court in ***State Bank of India* v. *V. Ramakrishnan and Anr.***, (2018) 17 SCC 394.

iv. In any event, in view of the insolvency proceedings being initiated against the defendant no.1 on 28th May, 2022, the present suits cannot proceed against the defendant no.1. The relevant date for the interim moratorium under Section 96 is the date of filing of an application under Section 94/95 of the IBC.

v. Without prejudice to the above, even if the date, when the insolvency application against the defendant no.1 was registered i.e. 3rd October, 2022, is considered, the present suits still cannot proceed any further as the judgment was yet to be pronounced on the said date and the suits were pending. Reliance in this regard is placed on the judgments in ***State Bank of India and Others* v. *S.N. Goyal***, (2008) 8 SCC 92 and ***Stichting Doen-postcode Loterij* v. *Vin Poly Recyclers Pvt. Ltd. & Ors.***, 2010 (115) DRJ 708 (DB).

8. On the other hand, senior counsel appearing on behalf of the plaintiffs has made the following submissions:

i. The insolvency resolution process and bankruptcy for individuals is governed under Part III of the IBC. In terms of Sections 78 and 79, the adjudicating authority for personal insolvency matter is the DRT and not the NCLT. Therefore, the defendants cannot claim any moratorium on the basis of an application filed under Section 95 of

the IBC before the NCLT, which has no jurisdiction to entertain the same.

ii. Section 60 only contemplates a situation where the CIRP in respect of the corporate debtor is pending. Otherwise, for the purposes of Part III of the IBC, the DRT alone is the adjudicating authority vested with the power to deal with an application under Section 95 of the IBC. In view of the fact that the CIRP in respect of the corporate debtor, Bhushan Steel stands concluded, the insolvency proceedings against the defendants could not have been filed before the NCLT. Resultantly, the benefit of Section 96 of IBC is not available to the defendants.

iii. The defendant no.2 himself has objected to the maintainability of the application filed against him under Section 95 of the IBC on the ground that the NCLT does not have the jurisdiction. Therefore, the defendant no.2 cannot be permitted to approbate and reprobate.

iv. Without prejudice to the above, the effect of the interim moratorium under Section 96 of the IBC would apply against all debts of a particular individual and not of any other person or a co-guarantor.

v. Under the Personal Guarantee dated 19th May, 2011, both the defendants no.1 and 2 are jointly and severally liable towards the plaintiff. Legal incapacity of the defendant no.2 cannot impact the remedies against the other guarantor.

vi. Though the application under Section 95 in respect of the defendant no.1 was filed on 28th May, 2022, it was registered only on 3rd

October, 2022, when the judgment had been reserved in the present cases. Once the judgment has been reserved in a matter, the subsequent developments in the matter cannot come in the way of the court pronouncing the judgment. Therefore, the interim moratorium under Section 96 of the IBC in respect of the defendant no.1 cannot come in the way of the Court pronouncing its judgment in the present suits.

vii. The effect of a moratorium has to be assessed by the court and the court cannot take a blinkered approach. The pronouncement of judgment in the present proceedings would not have an effect of diminishing the assets of the defendants. Reliance in this regard is placed on the judgment in ***SSMP Industries Ltd.*** **v.** ***Perkan Food Processors Pvt. Ltd.***,(2019) SCC OnLine Delhi 9339.

ANALYSIS & FINDINGS

9. I shall now proceed to deal with the rival contentions raised by the counsels appearing on behalf of the parties.

10. To appreciate the aforesaid submissions, a reference may be made to the relevant provisions of the IBC. Part II of the IBC deals with "INVOLVENCY RESOLUTION AND LIQUIDATION FOR COPORATE PERSONS" and Section 60 of the IB Coccurs 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 thereof***

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).”

11. The term “personal guarantor” has been defined in Section 5(22) of the IBC, which is as under:

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

12. Part III of the IBC deals with “INSOLVENCY RESOLUTION AND BANKRUPTCY FOR INDIVIDUALS AND PARTNERSHIP FIRMS” and the relevant portions of Sections 78 and 79 of the IBC, which are a part of Chapter I of Part III are set out below:

> *“78. 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.

79. In this Part, unless the context otherwise requires,—

(1) "Adjudicating Authority" means the Debt Recovery Tribunal constituted under sub-section (1) of section 3 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993;"

13. Next, a reference may be made to relevant portions of Sections 95 and 96 of the IBC, which occur in Chapter III of Part III of the IBC:

"95. (1) A creditor may apply either by himself, or jointly with other creditors, or through a resolution professional to the Adjudicating Authority for initiating an insolvency resolution process under this section by submitting an application.

96. (1) When an application is filed under section 94 or section 95—

(a) an interim-moratorium shall commence on the date of the application in relation to all the debts and shall cease to have effect on the date of admission of such application; and

(b) during the interim-moratorium period—

(i) any legal action or proceeding pending in respect of any debt shall be deemed to have been stayed; and

(ii) the creditors of the debtor shall not initiate any legal action or proceedings in respect of any debt."

14. 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."

15. 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 sub-section (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 sub-section (2) of Section 60 uses the phrase "notwithstanding anything to the contrary contained in this Code."

16. The NCLAT in its judgement 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. The relevant observations of the NCLAT are set out below:

"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."*

17. 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.

18. 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.

19. 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 sub-section (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.

20. 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.

21. 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 and Others* v. *N. Murugesan and Others***, (2022) 2 SCC 25 would not be of any assistance to the plaintiffs in the present case.

22. 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.

23. The insolvency proceedings against the defendant no.2 under Section 95 of the IBC were initiated before the NCLT on 4thMarch, 2020, before filing of the present suits and in view thereof, the interim moratorium under Section 96 would be operable insofar as the defendant no.2 is concerned.

24. Now, I shall examine the effect of insolvency proceedings initiated against the defendant no.1. As per the additional affidavit filed on behalf of the defendant no.1, an insolvency application, being (IB)-710(PB)/2022, was filed against the defendant no.1 by State Bank of India before the NCLT, New Delhi on 28th May, 2022. The same was registered on 3rd October, 2022. The application was listed before the NCLT on 7th October, 2022 and the matter was adjourned to 4th November, 2022. A reading of Section 96 of the IBC makes it clear that the relevant date for the interim moratorium to come into effect is the date *"when an application is* ***filed*** *under Section 94/95"*. When the legislature has specifically used the word *"filed"* in respect of an application under Section 94/95, the court cannot read the same to mean the date when the application is "registered", as is sought to be contended on behalf of the plaintiffs.

25. The very same submission made on behalf of the plaintiffs, that the relevant date for purposes of interim moratorium under Section 96 should be the date when the application is registered and not the date of filing, came up for consideration before the NCLAT. The NCLAT in the judgment dated 6th June, 2022 in Company Appeal (AT) (Insolvency) No.724/2022 titled ***Dinesh Kumar Basia*** **v.** ***State Bank of India*** held that an application under Section 95 is treated to be filed when it is filed in the office of the Registry at the filing counter. The submission of the appellant therein that the application cannot be held to be filed unless it is numbered by the Registry was rejected. The relevant observations of the NCLAT are set out below:

> *"**13. Section 96 of the Code uses the expression – "when an application is filed under Section 94 and 95". What is the meaning of filing an Application under Section 94 and 95 is***

the question to be answered in these Appeal(s). Rule 2, sub-rule (14) of the NCLT Rules itself defines the word 'filed', which is to the following effect:

"(14) "filed" means filed in the office of the Registry of the Tribunal;"

14. When we read Rule 2 (14) along with Rule 23 of NCLT Rules, it is clear that Application is treated to be filed when it is filed in the Office of the Registry at the filing counter. Thus, filing on behalf of the Appellant/ Applicant is complete as soon as the Application is presented at the filing counter of the Office of the Registry. *What is required to be done by the Applicant by filing an Application is provided in Rules 22 to 24 and 26, which the Applicant has to comply with while submitting the Application. The submission, which has been pressed by the learned Counsel for the Appellant is that the Application cannot be held to be filed unless it is numbered by the Registry, that is, only when the Application is found defect free and accorded a numbering by the Registry. Thus, a filing within the meaning of 2019 Rules read with NCLT Rules, is the filing at the filing counter or the filing is to be treated to be filing only when it is numbered by the Office of the Registry, is a question to be answered.*

…

16. The expression 'filing' is defined in several statutes. We may first notice the dictionary meaning of filing. In P Ramanatha Aiyar – Advanced Law lexicon (6th Edition Vol. 2, D-1) defines the 'filing' as follows:

"Filing. Delivery of a paper to the proper officer to be kept on file; placing and leaving a paper among the files; placing a paper in the proper official custody; presenting a paper at the proper office and leaving it there, deposited with the papers in such office; placing a paper in the proper official's custody by the party charged with this duty, and the making of the proper indorsement by the officer."

…

18. When as per Rule 10, sub-rule (2), when an electronic facility is available and an Application is filed in electronic form, the filing is complete as soon as it is registered electronically, we do not find any support from the statutory scheme to the submission of learned Counsel for the Appellant that petition would be treated as filed when it is numbered by the Registry. Numbering of an Application by Registry is a process, which is undertaken by the Registry as per the relevant rules and instructions. Several consequences ensue on filing of the Application in the Registry, if it is accepted that the filing shall be dependent on numbering of the Application by the Registry. It will lead to uncertainty regarding date of filing. When statutory consequences are provided, there has to be certainty regarding such consequences. We cannot accept any interpretation, which may lead to uncertainty regarding the date of filing, resulting in uncertainty, regarding enforcement of the Interim Moratorium. Interim Moratorium has serious consequences, which consequences flow immediately after filing of the Application. If we accept the submission of the Appellant that filing is postponed till it is numbered, it will lead to uncertainty and allow the Guarantors and other Respondents to delay the moratorium by pleading that filing is not complete, since the Application has not yet numbered. The statutory scheme, thus, does not in any manner support the submission of learned Counsel for the Appellant. Numbering of Application is essential for different purpose and cannot be equated with the filing as contemplated by the Rules."

26. In the present case, the application against the defendant no.1 has been filed under Section 95 of the IBC by State Bank of India on 28th May, 2022, as a creditor of the corporate debtor/borrower for whom the defendant no.1 stood as a guarantor. Therefore, in my view, the relevant date on which the interim moratorium under Section 96 would kick in would be 28th May, 2022.

27. It is not the case of the plaintiffs that the application filed by State Bank of India under Section 95 of the IBC against the defendant no.1 was collusive. State Bank of India is placed in a similar situation as the plaintiffs herein and is seeking to recover from the defendant no.1 the unresolved debt in respect of the corporate debtor, Bhushan Steel. In fact, as is evident from the application filed on behalf of State Bank of India, the debt of State Bank of India is several times over the combined debt owed to the plaintiffs herein. Therefore, this is not a case where the insolvency application has been filed with a *mala fide* intention by a debtor/guarantor himself so as to take the benefit of the interim moratorium under Section 96 of the IBC.

28. Even if it is assumed that the relevant date for the interim moratorium under Section 96 of the IBC to come into effect is 3rd October, 2022 i.e. the date on which the application filed by State Bank of India under Section 95 of the IBC was registered, it would make no difference as the judgment was yet to be pronounced on the said date. A matter is said to be pending before a court till the time judgment is pronounced, signed and dated. The pronouncement of judgment in a case is a part of the proceedings in a suit. Therefore, till the time a judgment is pronounced in a suit, the parties are free to bring to the attention of the court any subsequent development that may have occurred after the judgment was reserved in the matter, which could have a bearing on the judgment to be delivered by the court. It is then for the court to determine whether it is necessary to take cognizance of such subsequent developments and whether any further hearing is required in the matter before rendering the judgment. Reference may be made to the judgment in ***State Bank of India and Others* v. *S.N. Goyal***, (2008) 8 SCC

92, wherein the Supreme Court has held that a Judge becomes *functus officio* only after judgment is pronounced, signed and dated.

29. In the present case, there was a significant development that came to the knowledge of the defendants after the judgment was reserved, which is filing of the insolvency application against the defendant no.1. This was brought to the attention of the Court by filing an additional affidavit as well as I.A. No.17487/2022. Taking cognizance of the aforesaid developments, the submissions of the parties were heard.

30. The mandate of Section 96 of the IBC is clear. The interim moratorium under Section 96 of the IBC kicks in as soon as an application is filed under Section 94/95 of the IBC and the effect of such interim moratorium is that all pending legal proceedings are deemed to have been stayed. This is in contrast to the moratorium under Section 14 of the IBC, whereby the moratorium comes into effect only upon an order being passed by the NCLT declaring a moratorium.

31. A Division Bench of this Court in ***Stichting Doen-postcode Loterij* v. *Vin Poly Recyclers Pvt. Ltd. & Ors.***, 2010 (115) DRJ 708 (DB) was seized of a similar issue in a case where judgment was reserved on the leave to defend application filed on behalf of the defendant herein. After the judgment was reserved, the defendant/respondent therein made a reference to BIFR that was registered under Section 22 of the erstwhile Sick Industrial Companies (Special Provisions) Act, 1985 (SICA). The issue before the Division Bench was whether the judgment could be pronounced in view of the bar contained in Section 22 of SICA. The Division Bench held that the judgment could not be pronounced in view of the bar contained under

Section 22. The relevant observations of the Division Bench as contained in para 8 of the judgment are set out below:

> *"**8. We cannot but wonder, whether all the aforesaid steps required by law to be taken in the event of the judgment being reserved would not fall in "proceedings". The literal meaning of the language of Section 22 of the Act is that the status as prevailing on the date of applicability of Section 22 is to remain unless the permission of BIFR to proceed further is obtained. It would have been open to the counsel for the appellant/plaintiff to contend that such bar would not affect pronouncement of the judgment only if no further proceedings were required to be undertaken by the court thereafter and only if the action of the Court of pronouncement of judgment was to relate back to the date of hearing. However, it is not so in law. In the existing state of affairs, to differentiate between the proceedings required to be taken for pronouncement of the judgment and the proceeding required to be undertaken for taking any other steps in the suit has no rational nexus. The purport of Section 22 was to protect a sick company from the legal proceedings of the nature mentioned in Section 22. Prior to amendment thereof, suits were not included and the bar applied only to execution proceedings. However, after the amendment in the year 1994, the legislature deemed it appropriate to bar the institution of as well as proceeding further with all the suits against such sick companies.** If it were to be held that the judgment could be pronounced, then we see no reason why other proceedings in the suit, save a coercive proceedings qua the assets of the sick company, could also not be proceeded with further."*

32. The dicta of the aforesaid judgement is squarely applicable in the present case. In view of the fact that the judgement was yet to be pronounced, the legal proceedings in the present suits remained pending when the interim moratorium with respect to the defendant no.1 under Section 96 of the IBC came into effect. Therefore, the proceedings in the present suits are liable to be stayed and judgment in respect of applications seeking leave to defend cannot be pronounced.

33. In ***SSMP Industries*** (supra) relied upon by the plaintiffs, the court was faced with a situation when a counter claim was filed by the defendant against the plaintiff/corporate debtor. It was in that situation that the court noted that it would create a piquant situation if there is a moratorium in respect of the counter claim and the suit continues to proceed in respect of the claims of the plaintiff against the defendant. There would be a possibility of conflicting views in respect of the same transaction as the suit in respect of the original claim of the plaintiff would be adjudicated by this Court and the counter claim against the plaintiff would be adjudicated by the NCLT. Faced with such a situation, the court did not apply the moratorium in respect of the counter claim. This is not the situation here and therefore, the observations of the court in the aforesaid case would not be of assistance to the plaintiffs in the present case.

34. Before the insolvency applications were filed against the defendant no.1, counsel for the defendants had also contended that the interim moratorium in respect of one of the co-guarantors would also apply to the other co-guarantor for the same debt as the liability of both the co-guarantors arise from the same debt. Reliance is placed on the words 'any debt' occurring in Section 96(1)(b) of the IBC. Though I need not delve into this submission in view of the fact that insolvency proceedings have subsequently been filed against the defendant no.1, however, since I have heard the counsels for the parties extensively on this issue, I propose to address the same.

35. In my view, the language of Section 96(1) of the IBC cannot be stretched so as to include all co-guarantors within the ambit of the interim

moratorium. The reference to 'all the debts' in Section 96(1)(a) has to be in respect of all debts of a particular debtor. This is clear from the language used in Section 96(1)(b)(ii) to the effect that ***'the creditors of the debtor shall not initiate any legal action or proceedings in respect of any debt.'*** Therefore, the effect of the interim moratorium is only in respect of the debts of a particular debtor. By no stretch of imagination can it be said to include other independent guarantors in respect of the same debt of a corporate debtor. Merely because an interim moratorium under Section 96 is operable in respect of one of the co-guarantors, the same would not apply to the other co-guarantor(s).

36. Counsel for the defendants has relied on the following paragraphs of the judgment in ***V. Ramakrishna*** (supra):

> *"26.* ***We are also of the opinion that Sections 96 and 101, when contrasted with Section 14, would show that Section 14 cannot possibly apply to a personal guarantor. When an application is filed under Part III, an interim-moratorium or a moratorium is applicable in respect of any debt due. First and foremost, this is a separate moratorium, applicable separately in the case of personal guarantors against whom insolvency resolution processes may be initiated under Part III. <u>Secondly, the protection of the moratorium under these sections is far greater than that of Section 14 in that pending legal proceedings in respect of the debt and not the debtor are stayed.</u> The difference in language between Sections 14 and 101 is for a reason.***
>
> *26.1. Section 14 refers only to debts due by corporate debtors, who are limited liability companies, and it is clear that in the vast majority of cases, personal guarantees are given by Directors who are in management of the companies. The object*

of the Code is not to allow such guarantors to escape from an independent and co-extensive liability to pay off the entire outstanding debt, which is why Section 14 is not applied to them. However, insofar as firms and individuals are concerned, guarantees are given in respect of individual debts by persons who have unlimited liability to pay them. And such guarantors may be complete strangers to the debtor — often it could be a personal friend. It is for this reason that the moratorium mentioned in Section 101 would cover such persons, as such moratorium is in relation to the debt and not the debtor.

26.2. We may hasten to add that it is open to us to mark the difference in language between Sections 14 and 96 and 101, even though Sections 96 and 101 have not yet been brought into force. This is for the reason, as has been held in State of Kerala v. Mar Appraem Kuri Co. Ltd. [State of Kerala v. Mar Appraem Kuri Co. Ltd., (2012) 7 SCC 106 : (2012) 4 SCC (Civ) 69] , that a law "made" by the legislature is a law on the statute book even though it may not have been brought into force."

37. In the aforesaid judgment, the observations made by the Supreme Court were in the context of moratorium under Section 101 applying to guarantors of debts of individuals and firms. In the present case, the defendant no.1 is not the guarantor in respect of the debt of the defendant no.2. They are both independent guarantors in respect of the corporate debtor, with joint and several liability. Therefore, the reliance placed on the aforesaid judgment is misplaced. Creditors would have an independent recourse against either of the guarantors and the inability to recover against one of the guarantors would not come in the way of making recoveries against the other guarantors. Even in terms of Section 43 of the Indian Contract Act, a plaintiff can choose to proceed against one of the co-promisors. Further, Sections 44 and 138 of the Contract Act provide that

discharge of one of the parties/sureties does not amount to discharge of the other party/surety. Therefore, I am of the considered view that the interim moratorium under Section 96 in respect of one of the guarantors would not *ipso facto* apply against a co-guarantor.

38. In view of the discussion above and the clear statutory mandate under Section 96 of the IBC, the proceedings in the present suit are stayed against both the defendants.

39. Accordingly, I.A. 5554/2021 and I.A. No.17487/2022 in CS(COMM) 8/2021 and I.A. 4996/2021, I.A. 5013/2021 and I.A. 5663/2021 in CS(COMM) 20/2021 stand disposed of.

AMIT BANSAL, J.

NOVEMBER 04, 2022
dk/sr