

Farooq Ali Khan vs Bank Of Baroda on 28 May, 2024

Author: M. Nagaprasanna

Bench: M. Nagaprasanna

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Reserved on : 29.02.2024

Pronounced on : 28.05.2024

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 28TH DAY OF MAY, 2024

BEFORE

THE HON'BLE MR. JUSTICE M. NAGAPRASANNA

WRIT PETITION No.6288 OF 2024 (GM - RES)

BETWEEN:

FAROOQ ALI KHAN
S/O GULZAR ALI KHAN,
AGED ABOUT 57 YEARS,
RESIDING AT: NO.21,
BENSON 'A' CROSS ROAD,
BENSON TOWN POST,
BENGALURU - 560 046
PROMOTER AND
SUSPENDED DIRECTOR,
ASSOCIATE DECOR LIMITED.

... PETITIONER

(BY SRI S.BASAVARAJ, SR.ADVOCATE FOR
SRI SIVARAMAKRISHNAN M.S., ADVOCATE)

AND:

1. BANK OF BARODA
HAVING ITS BRANCH OFFICE AT
BARODA COMPLEX CENTRE C-26,
G BLOCK, BANDRA KURLA COMPLEX,
BANDRA E, MUMBAI - 400 051

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AND ACTING THROUGH
BRANCH OFFICE AT
STRESSED ASSETS MANAGEMENT BRANCH
1ST FLOOR, 17/B,
HOMIJI STREET HORNIMAN CIRCLE
FORT, MUMBAI - 400 001
REPRESENTED BY ITS DGM.

2. PUNJAB NATIONAL BANK
(FORMERLY KNOWN AS
ORIENTAL BANK OF COMMERCE),
HAVING ITS CORPORATE
BANKING BRANCH AT
MAKER TOWER, 'F' WING CUFFE PARADE,
MUMBAI - 400 005
REPRESENTED BY ITS DGM.
3. UNION BANK OF INDIA
STRESSED ASSETS MANAGEMENT
VERTICAL BRANCH,
THE EAGLE'S FLIGHT, 3RD FLOOR,
301-302, SUREN ROAD,
ANDHERI KURLA ROAD, ANDHERI EAST,
MUMBAI 400 093
REPRESENTED BY ITS DGM.
4. RAM RATAN KANOONGO
RESOLUTION PROFESSIONAL
C/O HEADWAY RESOLUTION AND
INSOLVENCY SERVICES PVT. LTD.,
708, RAHEJA CENTRE, 7TH FLOOR,
NARIMAN POINT, MUMBAI - 400 021
IBBI REGISTRATION NO.:
IBBI/IPA-001/IP-P00070/2017-18/10156
AFA VALID TILL 25-10-2024

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EMAIL: rrkanooga@gmail.com

... RESPONDENTS

(BY SRI S.S.NAGANAND, SR.ADVOCATE FOR
SRI LOMESH KIRAN N., SRI SHARAN A. KUKREJA AND
SRI KARAN DHALLA, ADVOCATES FOR R1)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND
227 OF THE CONSTITUTION OF INDIA PRAYING TO A) TO ISSUE A
WRIT OF PROHIBITION OR ANY OTHER WRITS, ORDERS, RULES,

OR DIRECTIONS TO THE NATIONAL COMPANY LAW TRIBUNAL, BENGALURU BENCH TO REFRAIN FROM ENTERTAINING AND FURTHER PROCEEDING WITH CP (IB) NO. 139/BB/2022 (ANNEXURE-B) PENDING ON ITS FILE, AS FILED BY R4 ACTING ON BEHALF OF R1 AND CONSEQUENTLY TO DIRECT THE NATIONAL COMPANY LAW TRIBUNAL, BENGALURU BENCH TO DISMISS THE PROCEEDINGS IN CP (IB) NO. 139/BB/2022 AS NOT MAINTAINABLE AND ETC.,

THIS WRIT PETITION HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 29.02.2024, COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT MADE THE FOLLOWING:-

ORDER

The petitioner is before this Court seeking a writ in the nature of prohibition prohibiting the National Company Law Tribunal, Bengaluru ('the Tribunal' for short) from entertaining proceedings against him in C.P.(IB) 139/BB/2022 pending on its file filed by the 4th respondent acting on behalf of the 1st respondent.

2. Heard Sri S.Basavaraj, learned senior counsel appearing for the petitioner and Sri S.S.Naganand, learned senior counsel appearing for respondent No.1.

3. The petitioner is a promoter of a Company by name 'Star Panel Boards Limited' which comes to be incorporated as a public Company in 2011 and its name was then changed to Associate Décor Limited ('the Company for short). Later the petitioner was suspended from the Company. Respondents 1 to 3 Banks acting as consortium of Banks enter into term loan agreements with the Company to grant term loan facilities. The loan becomes sticky.

The consortium of Banks later began legal proceedings against the Company initiating proceedings under sub-section (2) of Section 13 of the SARFAESI Act by filing original application before the Debt Recovery Tribunal, Bengaluru in O.A.No.804 of 2017. The 2nd respondent then initiates proceedings under Section 7 of the Insolvency and Bankruptcy Code ('the Code' for short) against the Company and the proceedings under the Code are under progress before the Tribunal. On 11-08-2020, respondent No.1 issues a notice to the petitioner seeking to invoke the personal guarantee executed by the petitioner collectively on 10-07-2014. Despite the reply of the petitioner, demand notices come to be issued under the Code without replying to the defence of the petitioner to the aforesaid notices. On 31-12-2021, the 1st respondent files an Application under Section 95(1) of the Code through the Resolution Professional against the petitioner which is numbered as CP (IB) 139/BB/2022. On 16-02-2024 the Tribunal passes an order under Section 97 of the Code appointing one Ramratan Kanoongo as the Resolution Professional and directed him to submit a report on or before 20th March 2024. The moment the order is passed by the Tribunal, the petitioner has preferred the subject petition.

4. The learned senior counsel Sri S. Basavaraj appearing for the petitioner, would submit that the Tribunal, has no jurisdiction to continue the proceedings against the petitioner as the personal guarantee of the petitioner is not in existence as on the date between the petitioner and the consortium of Banks which had extended the credit facilities to the Company. It is his submission that the proceedings are maliciously instituted under the Code suppressing the fact that the petitioner had been granted a waiver for a portion of the credit facility extended to the Company and with respect to other portion there is no personal guarantee in force.

Therefore, unless the petitioner is a personal guarantor to the Company, proceedings invoking Section 95 of the Code cannot be initiated against the petitioner. The learned senior counsel would further submit that despite noting petitioner's objection that the claim of the 1st respondent was barred by time, and the petitioner was granted waiver in respect of credit facilities, the Tribunal has still proceeded to appoint a Resolution Professional. Therefore, he would seek quashment of the entire proceedings.

5. The learned senior counsel Sri S.S. Naganand representing the 1st respondent would vehemently refute the submissions to contend that the writ petition is premature. What is now challenged is only an order of appointing a Resolution Professional. The Resolution Professional will decide the issue whether the petitioner has any role to play in the existence of personal guarantee against the Company. The writ petition would not be maintainable at this stage, as the proceedings before the Tribunal are strictly in consonance with the judgment of the Apex Court in the case of DILIP B. JIWRAJKA v. UNION OF INDIA¹.

6. The learned senior counsel Sri S.Basavaraj in reply to the submissions would contend that the judgment in the case of DILIP B. JIWRAJKA (supra) does not delve with regard to maintainability of the petition before the Tribunal. Since maintainability cuts at the root of the matter, the petition cannot be dubbed as premature. It is an admitted fact that the petitioner is no longer a personal guarantor and, therefore, the Tribunal would not get jurisdiction is his submission.

7. The learned senior counsel for the respondents would further submit that his submissions be taken as objections to the petition and that is all that he has to say against the petition.

Therefore, though the matter was listed for preliminary hearing, with consent of parties the matter is taken up, and heard for its final disposal.

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8. I have given my anxious consideration to the submissions made by the respective learned senior counsel and have perused the material on record.

9. The afore-narrated facts are not in dispute. The petitioner enters the scene as a guarantor executing a deed of guarantee on 10-07-2014. In the deed of guarantee, the name of the petitioner figures at Sl.No.3 and it reads as follows:

"THIS DEED OF GUARANTEE made and executed at Bangalore on this the 10th Day of July 2014 by

1.

2.

3. MR. FAROOQ ALI KHAN AGE 47 YEARS S/O MR. GULZAR ALI KHAN, AN INDIAN INHABITANT. PRESENTLY RESIDING AT No.21, BENSON A CROSS ROAD, BENSON TOWN POST, BANGALORE- 560 046."

Clause B thereof indicates that the guarantee is for guaranteeing due repayment by the borrower of the principal sum. The credit facilities appear to have been reviewed/revived at a later point in time. The revival letter is also in terms of an agreement. In the revival document, the petitioner is not a signatory as could be gathered from the document itself which reads as follows:

"I/We confirm the above and make similar acknowledgement in respect of my/our liability under the Deed of guarantee dated 15th day of February, 2010 as modified and/or extended by way of Supplemental dated the 03.12.2010 and 12.10.2011 and 16.06.2012 and 10.07.2014.

Dated the 31st day of MAY Place: MUMBAI.

Sd/-
Mr.Manohar
Satramdas
Agicha

Sd/-
Mr.Mohammed
Farouk
Suleman Darvesh

Mr. Farooq Ali Khan

Sd/-
Mr.Srichand
Satramdas
Agicha

Sd/-
Mrs.Shabana Usman
Darvesh

Sd/-
Mr.Nooruddin Khan

Mr.Ashok
Sunderdas
Agicha"

The column pertaining to the petitioner does not bear his signature.

Another document was executed again for personal guarantee on 31-05-2017. Here again, the petitioner is not a signatory. It reads as follows:

"I/We confirm the above and make similar acknowledgement in respect of my/our liability under the Deed of guarantee dated 15th day of February, 2010 as modified and/or extended by way of Supplemental dated the 03.12.2010 and 12.10.2011 and 16.06.2012 and 10.07.2014.

Dated the 31st day of MAY 2017 Place: MUMBAI.

Sd/- Mr.Manohar Satramdas Agicha	Sd/- Mr.Mohammed Farouk Suleman Darvesh	Mr. Farooq Ali Khan
Sd/- Mr.Srichand Satramdas Agicha	Sd/- Mrs.Shabana Usman Darvesh	Mr.Nooruddin Khan
Mr.Ashok Sunderdas Agicha"		

On 19-05-2016 the Bank of Baroda, one of the consortium of Banks communicates, review of the facility and increase of credit facilities.

It reads as follows:

"M/s. Associate Decor Ltd.

Associate House, 85-A, Victoria Road, Mustafa Bazar, Byculla, Mumbai - 400 010.

Dear Sir, Re: Review with increase of Credit facilities We are pleased to inform you that our higher authorities has sanctioned reviewed with increase following credit facilities for a further period of -12- months i.e. up to 09.05.2017 as per detailed in Annexure A attached herewith.

Please note that any advance granted to you under the aforesaid credit facilities is repayable on demand and the terms and conditions of the same are subject to change without prior notice at the discretion of the Bank.

Please also note that the Bank reserves the right to discontinue the facilities/advances/loans and to withhold/stop any disbursements without giving any notice, In case of non-compliance/breach of any of the terms and conditions stipulated herein and from time to time as also in the relevant documents or any Information/particulars furnished to us found to be incorrect or in case of any

development or situation wherein in the opinion of the Bank its interest will be/is likely to be prejudicially affected by such continuation or disbursements.

You are also requested to note that the credit facilities sanctioned to you are valid up to 09.05.2017 subject to annual review and in case facilities could not be reviewed on or before due date i.e. 09.05.2017 due to non submission of financial data/statements like Balance Sheet, CMA forms etc. well before the due date (-3- months prior to the date of review), we will be compelled to charge penal interest from the due date till the date of fresh sanction/review if the bank decides to continue the facilities beyond the above referred due date.

Kindly return to us a copy of this sanction letter duly signed by Company, its directors and guarantors accept all terms & conditions of the sanction i.e. unconditional acceptance.

Kindly remit processing fees for Term loans and working capital (FB & NFB) facility from un-reviewed period to next review date (13.02.2016 to 09.05.2017) is Rs.19,76,354.00 (Including STax) and processing fees towards fresh corporate loan is Rs. 20,61,000.00 (Including STax) i.e. Total processing charges of Rs. 40,37,354.00 (Including STax)"

Here again, it is Directors and guarantors have given unconditional acceptance. The name of the petitioner does not figure as he has been waived of all the personal guarantees earlier. On 10-12-2018 a communication is made by the Bank of Baroda to the Interim Resolution Professional/Resolution Professional. The Bank of Baroda in the column collateral security mentions as follows:

"Collateral Security:

- Term loan limits are secured by Paripassu second charge on the current assets and the working capital limits by Paripassu second charge on the Fixed Assets of the Company.
- Pledge of 50% of the Promoters share holding in the Company.
- DSRA account of ensuing one quarterly instalment (for the three term loans) and interest shall be deposited within 6 months from the date of COD and to be held as security (The Company has achieved COD on 21.12.2012).
- Personal guarantee of Mr. Manohar Agicha, Mr. Mohammed Farouk Suleman, Darvesh, Mr. Farooq Ali Khan, Mr. Srichand Agicha, Mrs. Shabana Usman Darvesh, Mr. Nooruddin Khan and Mr. Ashok Agicha.

- Personal Guarantee of Mr. Farooq Ali Khan, Mr. Ashok Agicha and Mr. Nooruddin Khan was waived for WCTL limit. (Individual Documentation by Bank of Baroda for CAP sanctioned by Consortium)"

(Emphasis added) The Bank of Baroda clearly indicates that personal guarantee of the petitioner along with several others was waived by individual documentation of Bank of Baroda with the sanction by the consortium. Therefore, the personal guarantee of the petitioner stood waived. The petitioner has instituted certain proceedings before this Court in Writ Petition No.483 of 2023 which may not be germane to be considered at this juncture. The Tribunal on 16-02-2024 passes the following order:

"1. This is a Company Petition filed by the Bank of Baroda ("the Financial Creditor") under Section 95 (1) of the I&B Code, 2016 read with Rule 7(2) of the I&B (Application Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019, seeking to initiate Insolvency Resolution Process in respect of Mr.Farooq Ali Khan ("the Personal Guarantor") for a default of amount of Rs.2,58,60,17,543.61/-.

2. It is stated that the Petitioner has separately filed the recovery application being O.A no.629 of 2021 before the Debt Recovery Tribunal-I Bengaluru and the same is pending. The Personal Guarantor has not paid the outstanding amount and therefore continues to be default till the date of filing of this application.

3. Heard the Ld. Counsel appearing for the Petitioner and Ld. Counsel for the Respondent/Personal Guarantor.

4. During the hearing, the Ld. Counsel for the Personal Guarantor raised objection regarding the limitation and stated that the agreement for the Personal guarantee is not valid, since the Personal Guarantor was released from the Guarantee.

5. In this context, it is to be noted that the Hon'ble Supreme Court in the judgement of Dilip B Jiwrajka vs. Union of India and others in Writ Petition (Civil) No. 1281 of 2021 dated 09th November 2023, at Para- 86 held as under:

"i. No judicial adjudication is involved at the stages envisages in Section 95 to Section 99 of the IBC;

ii.....

iii.....

iv.....

V.....

vi. No judicial determination takes place until the Adjudicating Authority decides under Section 100 whether to accept or reject the application. The report of the resolution professional is only recommendatory in nature and hence does not bind the adjudicatory authority when it exercises its jurisdiction under Section 100.

vii. The adjudicatory authority must observe the principles of natural justice when it exercises jurisdiction under Section 100 to determine whether to accept or reject the application;"

6. Therefore, the issue/objections raised by the Ld. Counsel for the Personal Guarantor will be considered after the submission of the report by the Resolution Professional and response of the Personal Guarantor on the same.

7. Accordingly, we appoint the Shri Ram Ratan Kanoongo, as proposed by the Financial Creditor in Part-IV of the Form-C, who is registered with IBBI as Insolvency Professional having Registration No. IBBI/IPA-001/IP-P00070/ 2017-18/10156, Mobile: 9821031996, email: rrkanoongo@gmail.com as the Resolution Professional in the present matter. Written consent is given by the said RP through Affidavit dated 20.12.2021 which is annexed as Exhibit -18 of the petition. The fee payable to RP shall be in accordance with the IBBI Regulations/Circulars/ Directions issued in this regard.

8. The Resolution Professional shall examine the Application within ten days from the date of his appointment and submit its report to the Adjudicating Authority recommending for approval or rejection of the Application as referred under Section 99(1) of the Code.

9. The interim-moratorium under Section 96(1)(a) of the I&B Code, 2016 has commenced on the date of filing of this Application by the Financial Creditor and will cease to have effect on the date of admission.

10. During such interim-moratorium period -

a. any legal action or proceeding pending in respect of any debt shall be deemed to have been stayed; and b. the creditors of the debtor shall not initiate any legal action or proceedings in respect of any debt.

11. The Resolution Professional is directed to serve a copy of his report on the Personal Guarantor. List the case for further consideration on 20.03.2024.

Sd/-
(MANOJ KUMAR DUBEY)
MEMBER (TECHNICAL)

Sd/-
(K. BISWAL)
MEMBER (JUDICIAL)"

It is this order that has driven the petitioner to this Court.

10. Whether the proceedings against the petitioner could be maintainable or otherwise is the question that needs consideration.

This issue need not detain this Court for long or delve deep into the matter. This Court in a judgment rendered on 06-03-2024 in the case of M/s MANYATA REALTY v. REGISTRAR, NATIONAL COMPANY LAW TRIBUNAL² has held as follows:

"....

8. I have given my anxious consideration to the submissions made by the respective learned counsel and perused the material on record. In furtherance whereof, the only issue that falls for consideration is, "Whether a petition against a partnership firm or its Directors is fileable and maintainable under Section 95 of the Insolvency and Bankruptcy Code, 2016 before the National Company Law Tribunal?"

9. The afore-narrated facts are a matter of record. The link in the chain of events is as narrated hereinabove are all again a matter of record. It is not in dispute that the petitioners in one of the petitions is a partnership firm and the petitioners in the companion petitions are the directors of the said firm. The respondent/Company and the petitioner- firm generate certain disputes between them. Those disputes are being arbitrated before an Arbitral Tribunal. It is a matter of record, as observed hereinabove, that the proceedings are proceeding before the Arbitral Tribunal. During the subsistence of those proceedings, the respondent/Company file/register a petition before the Tribunal invoking Section 95 of the Code. The issue is, whether it would be maintainable against the petitioners. Alleging that the Tribunal has no jurisdiction even to register a petition under Section 95 of the Code against the petitioners, they are at the doors of this Court.

10. To consider the issue whether registration of a petition under Section 95 of the Code before the Tribunal would be maintainable against the petitioners and the like - partnership firm and the directors of the firm, it becomes necessary to notice certain provisions of the Code. Section 3 of the Code deals with definitions.

W.P.No.26977 of 2023 & connected cases Section 3(7) reads as follows:

"(7) "corporate person" means a company as defined in clause (20) of Section 2 of the Companies Act, 2013 (18 of 2013), a limited liability partnership, as defined in clause (n) of sub-section (1) of Section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009), or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider;"

Section 3(8) reads as follows:

" (8) "corporate debtor" means a corporate person who owes a debt to any person;"

Section 3(7) defines who is a corporate person. A corporate person, under the Code, is the one defined under clause 20 of Section 2 of the Companies Act, 2013. Corporate debtor would mean, a corporate person who owes a debt to any person. Therefore, a corporate person must owe a debt to any person and the said corporate person would mean a Company as defined under clause 20 of Section 2 of the Companies Act, 2013. The Code nowhere brings in a partnership firm or directors who are individuals of the said partnership firm under the ambit of the Code.

11. Part III of the Code deals with 'Insolvency resolution and bankruptcy for individuals and partnership firms'. For partnership firms and individuals the Adjudicating Authority is the Debts Recovery Tribunal and the Appellate Authority is the Debts Recovery Appellate Tribunal. Part III runs from Section 78 to Section 187 in the Code. Therefore, the entire part deals with insolvency resolution and bankruptcy for individuals and partnership firms. The petitioners in one of the petitions is a partnership firm and the other are individuals i.e., the Directors of the partnership firm. The jurisdiction against the said firm or individuals is clearly before the Debts Recovery Tribunal.

12. Certain amendments are brought in by the Government of India to the Code in terms of a notification dated 15-11-2019. The notification reads as follows:

"THE GAZETTE OF INDIA: EXTRAORDINARY [PART-II-

SEC.3(ii) MINISTRY OF CORPORATE AFFAIRS 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."

(Emphasis supplied) The notification, for the first time, draws in a personal guarantor to a corporate debtor to come under the ambit of the Code qua the provisions in the notification. The amendment runs through Section 2 to Section 249 of the Code. It becomes applicable to Section 94 to Section 187 as well inter alia. Therefore, the personal guarantor would come within the Code. This would mean an addition; addition would mean that, there is one more entity/individual that would come within the ambit of the Code apart from the Company who is described to be a corporate person. He or it is "personal guarantor" to the corporate debtor. It is only these which can come within the ambit of the Code.

13. A petition before the Tribunal can be filed invoking Section 95 of the Code by a creditor against a debtor, a corporate debtor. This was the tenor till 15-11-2019. The addition is, the personal guarantor to the corporate debtor, as observed hereinabove. Therefore, it becomes germane to notice Section 95 and the aftermath of registration of a petition under Section 95 of the Code before the Tribunal. The aftermath is found in Sections 96 and 97 of the Code. All the three run as follows:

"95. Application by creditor to initiate insolvency resolution process.--(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.

(2) A creditor may apply under sub-section (1) in relation to any partnership debt owed to him for initiating an insolvency resolution process against--

(a) any one or more partners of the firm; or

(b) the firm.

(3) Where an application has been made against one partner in a firm, any other application against another partner in the same firm shall be presented in or transferred to the Adjudicating Authority in which the first mentioned application is pending for adjudication and such Adjudicating Authority may give such directions for consolidating the proceedings under the applications as it thinks just.

(4) An application under sub-section (1) shall be accompanied with details and documents relating to--

(a) the debts owed by the debtor to the creditor or creditors submitting the application for insolvency resolution process as on the date of application;

(b) the failure by the debtor to pay the debt within a period of fourteen days of the service of the notice of demand; and

(c) relevant evidence of such default or non-repayment of debt.

(5) The creditor shall also provide a copy of the application made under sub-section (1) to the debtor.

(6) The application referred to in sub-section (1) shall be in such form and manner and accompanied by such fee as may be prescribed.

(7) The details and documents required to be submitted under sub-section (4) shall be such as may be specified."

(Emphasis supplied) Section 95 deals with application by the creditor to initiate insolvency resolution process and when an application is filed under Section 94 or 95, Section 96 kicks in. Section 96 deals with interim moratorium. Section 96 reads as follows:

"96. Interim-moratorium.--(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.

(2) Where the application has been made in relation to a firm, the interim-moratorium under sub-

section (1) shall operate against all the partners of the firm as on the date of the application.

(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator."

(Emphasis supplied) So kicks in Section 97 of the Code. It reads as follows:

"97. Appointment of resolution professional.--(1) If the application under Section 94 or 95 is filed through a resolution professional, the Adjudicating Authority shall direct the Board within seven days of the date of the application to confirm that there are no disciplinary proceedings pending against resolution professional.

(2) The Board shall within seven days of receipt of directions under sub-section (1) communicate to the Adjudicating Authority in writing either--

(a) confirming the appointment of the resolution professional; or

(b) rejecting the appointment of the resolution professional and nominating another resolution professional for the insolvency resolution process.

(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.

(4) The Board shall nominate a resolution professional within ten days of receiving the direction issued by the Adjudicating Authority under sub-section (3).

(5) The Adjudicating Authority shall by order appoint the resolution professional recommended under sub-section (2) or as nominated by the Board under sub-section (4).

(6) A resolution professional appointed by the Adjudicating Authority under sub-section (5) shall be provided a copy of the application for insolvency resolution process."

The effect of filing of a petition under Sections 94 or 95 of the Code is the immediate kicking in of Section 96 of the Code. Section 96 supra has some serious consequences. The moment a petition is filed under Section 95 of the Code, interim moratorium is axiomatic. Interim moratorium places any corporate debtor in a state of stillness, as found in 96(1)(b) of the Code. Section 96(2) of the Code mandates that when an application is made under Section 95, it shall operate against all the partners of the firm as on the date of the application. Yet another axiomatic consequence of a petition being registered is, appointment of a Resolution Professional. The moment an application is filed, the proceedings are immediately placed before the Resolution Professional and he would commence his functions of summoning of documents to submit a report within 10 days of his appointment. These are the consequences of filing an application before the Tribunal. I would emphasize that it is a consequence of filing the application and not entertaining the application by the Tribunal. The Tribunal that is empowered to entertain in part III is the Debts Recovery Tribunal and not the 1st respondent Tribunal.

14. If it were to be a case of consideration of a jurisdiction, when an application is entertained by the Tribunal, it would have been an altogether a different circumstance. The Code is worded in such a way and hedged with such conditions that it leaves not play in the joints, once the petition is registered before the Tribunal. The statutory functions, its effect would immediately begin to flow.

17. Learned senior counsel Sri S. Basavaraj representing the respondent/Company has again strenuously contended that the agreements entered into between the petitioners and the would clearly indicate that it is tacit guarantee that they have stood for. Merely because they are a partnership firm, the jurisdiction of the Tribunal cannot be taken away. The submission is again unacceptable, on a plain reading of the agreement. The relevant clauses of the agreement reads as follows:

V. NOW THIS AGREEMENT WITNESSES AS
FOLLOWS:

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2) As the said sum of Rs.40,00,00,000/= (Rupees Forty Crores only) was paid in advance having been treated as Interest bearing refundable deposits from the Developer to the Owners with effect from 1st January 2011, and shall carry simple interest at the rate of 24% per month which is payable by the Owners commencing from 1st January 2011 the time of actual amount of Rs. 183,50,00,000/- (Rupees One Hundred and Eighty-three Crores Fifty lakhs only) become due and payable under Principal Agreement and the Owners complying with all the conditions precedent set out herein below:

(a) Denotification of lands for the survey numbers which are notified, from acquisition proceedings initiated by the Bangalore Development Authority;

(b) Obtaining conversion orders for the lands wherever the same is not obtained for the survey numbers listed in the Schedule 'A' of the said Memorandum of Understanding and the Principal Agreement

(c) Obtaining transfer of katha with regard to all the Lands which are listed in the Schedule 'A' of the said Memorandum of Understanding and the Principal Agreement to the name of the present owners in the records of the Bruhat Bangalore Mahanagara Palike

(d) Making out good and marketable title with regard to the Properties mentioned in Schedule 'A' to the Memorandum of Understanding dated 23.12.2009 and Joint Development Agreements dated 29/10/2010, 31/3/2011 & 26/8/2010 to the satisfaction of the Purchaser,

3) The Owner acquiring additional 11 plus Acres of lands detailed in the annexure-1 attached hereto to make a contiguous single parcel of land.

4) For purpose of clause 2 compliance of the conditions precedent on part of the Owner shall be treated to be 15 days from the date of the Owners proving such compliance of the condition precedent to the Second Party by furnishing documentary evidence of the same.

5) In the event of failure on the part of the Owner in complying with the conditions precedent in terms of clause 2 above before 31st March 2013, then in such event, the Second Party shall become entitled to seek repayment of the amounts treated as Interest bearing refundable deposits under this agreement forthwith without any further delay and the Owner shall be liable to repay forthwith to the Developer, the entire sum of Rs.40,00,00,000/- (Rupees Forty Crores only) alongwith interest due and payable as on that day;

6) This Agreement shall be read in conjointly with the Memorandum of Understanding dated 23.12.2009 and Joint Development Agreements dated 29/10/2010, 31/3/2011 & 26/8/2010 and save and except what has been agreed

herein, all the other terms and conditions of the Memorandum of Understanding dated 23.12.2009 and Joint Development Agreements dated 29/10/2010, 31/3/2011 & 26/8/2010 shall continue to be binding:

IN WITNESS WHEREOF, the PARTIES have executed this AGREEMENT in the presence of the Witnesses attesting hereunder:

Far Manyata Instruclare Developments (P) Ltd.

Sd/-

Managing Director For Manyata Reallty Sd/-

Managing partner WITNESSES:

1) sd/-

OWNER

2) sd/-

For Mantri Technology constellations pvt. Ltd., DEVELOPER Sd/-

Director/Authorised Signatory."

Nowhere the Directors have stood as personal guarantee to any of the problems of the firm. Therefore, it cannot be said that the proceedings before the Tribunal are maintainable.

18. Learned senior counsel representing the respondent - company has sought to place reliance upon several judgments rendered by the Apex Court in the case of DILIP B. JIWRAJKA VS. UNION OF INDIA reported in 2023 SCC OnLine SC 1530 and a constitutional Court of the High Court of Judicature at Madras in the case of GOVERNMENT OF TAMIL NADU AND OTHERS VS.

M/S.KAKKERA BROTHERS AND ANOTHER reported in 2006-3-L.W.676. The said judgments would not lend any support to the case projected by the learned senior counsel for the respondent - company as none of them considered the purport of Section 95 of the Code qua entertainment of a petition against the petitioner and the like. The said judgments are inapplicable to the facts of the case at hand.

19. The maintainability of the petition before the Tribunal cuts at the root of the matter, as it relates to jurisdiction, to entertain the petition by the Tribunal. The Code does not permit it. If that be so, even a speck of paper cannot move before a fora that has no jurisdiction. It is ununderstandable as to how and why the petitioners have to go before the Tribunal and tell the Tribunal that it has no jurisdiction to entertain the petition. The very acceptance of filing by the Tribunal is contrary to

Therefore, if the petitioner is no longer a personal guarantor, proceedings before the Tribunal against him, depicting him to be a personal guarantor would not be maintainable.

V. Conclusion:

(i) No judicial adjudication is involved at the stages envisaged in sections 95 to 99 of the Insolvency and Bankruptcy Code;

(ii) The resolution professional appointed under section 97 serves a facilitative role of collating all the facts relevant to the examination of the application for the commencement of the insolvency resolution process which has been preferred under section 94 or section 95. The report to be submitted to the adjudicatory authority is recommendatory in nature on whether to accept or reject the application;

(iii) The submission that a hearing should be conducted by the adjudicatory authority for the purpose of determining "jurisdictional facts" at the stage when it appoints a resolution professional under section 97(5) of the Insolvency and Bankruptcy Code is rejected. No such adjudicatory function is contemplated at that stage. To read in such a requirement at that stage would be to rewrite the statute which is impermissible in the exercise of judicial review;

(iv) The resolution professional may exercise the powers vested under section 99(4) of the Insolvency and Bankruptcy Code for the purpose of examining the application for insolvency resolution and to seek information on matters relevant to the application in order to facilitate the submission of the report recommending the acceptance or rejection of the application;

(v) There is no violation of natural justice under section 95 to section 100 of the Insolvency and Bankruptcy Code as the debtor is not deprived of an opportunity to participate in the process of the examination of the application by the resolution professional;

(vi) No judicial determination takes place until the Adjudicating Authority decides under section 100 whether to accept or reject the application. The report of the resolution professional is only recommendatory in nature and hence does not bind the adjudicatory authority when it exercises its jurisdiction under section 100;

(vii) The adjudicatory authority must observe the principles of natural justice when it exercises jurisdiction under section 100 for the purpose of determining whether to accept or reject the application;

(viii) The purpose of the interim-moratorium under section 96 is to protect the debtor from further legal proceedings; and

(ix) The provisions of section 95 to section 100 of the Insolvency and Bankruptcy Code are not unconstitutional as they do not violate article 14 and article 21 of the Constitution."

The Apex Court holds that no judicial adjudication is involved at the stages envisaged in Sections 95 to 99 of the Code. The Resolution Professional is appointed under Section 97 and serves in a facilitative role. There is no violation of natural justice under Sections 95 to 100 of the Code and the report of the Resolution Professional is only a recommendatory and does not bind the adjudicating authority. The purpose of interim moratorium under Section 96 is to protect the debtor from further legal proceedings.

Therefore, the provisions i.e., Sections 95 to 100 of the Code were held to be not unconstitutional in a challenge to the constitutional validity. There can be no qualm about the principles laid down by the Apex Court as to the issue whether the petition would even be maintainable before the Tribunal. The Apex Court was not considering a petition that was not maintainable before the Tribunal, as only under two circumstances this Court has considered whether the proceedings before the Tribunal would be maintainable.

Non-maintainability of it would cut at the root of the matter.

13. The judgment in the case of DILIP B. JIWRAJKA or the judgment in the cases of (i) STATE BANK OF INDIA v. V. RAMAKRISHNAN³, and (ii) BANK OF BIHAR LIMITED v.

DAMODAR PRASAD⁴ would not become applicable to the facts of the case. A caveat - This Court has considered maintainability of a (2018) 17 SCC 394 AIR 1969 SC 297 petition before the Tribunal and not before any other fora.

Proceedings before any other fora is not the scope of the present petition.

14. For the aforesaid reasons, the following:

ORDER

(i) Writ Petition is allowed and the order dated 16-02-2024 passed by the National Law Company Tribunal, Bengaluru in CP (IB) No.139/BB/2022 stands quashed qua the petitioner.

(ii) It is declared that the petition before the National Law Company Tribunal in CP(IB) No.139/BB/2022 is not maintainable qua the petitioner.

(iii) It is made clear that the observations made during the course of this order are only for the purpose of consideration of the case of the petitioner and the same would not bind any proceedings pending against the petitioner before any other fora.

Sd/-

JUDGE bkp CT:MJ