



**IN THE NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH, COURT - II**

**CP (IB) No. 908/MB/2022**

**AND**

**I.A. No. 3173 of 2024.**

Under Section 95 of the Insolvency and Bankruptcy Code, 2016 read with Rule 7 of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019.

In the main matter between:

**YES Bank Limited**

Having its Branch Office at: Stressed Asset Management Team, Off Western Express Highway, Santacruz (E), Mumbai-400055.

**..... Applicant/Creditor**

**Versus**

**Mr. Kunal Jiwarajka**

**Personal Guarantor of JSK Marketing Ltd.,**

Residing at: - (i.) 161/C, NWC, Grande Parade Apartment, August Kranti Marg, Mumbai-400036.

**..... Personal Guarantor/Respondent**



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**I.A. No. 3173 of 2024:**

**Mr. Kunal Jiwarajka**

**.... Applicant/Org. Respondent**

**Vs.**

**YES Bank Limited**

**....Respondent/Org. Petitioner**

**Order Delivered on :- 07.10.2024.**

***Coram:***

**Shri. Anil Raj Chellan**

**Member (Technical)**

**Mr. Kuldip Kumar Kareer**

**Member (Judicial)**

***Appearances (in Virtual mode):***

For the Petitioner : Adv. Udit Miyan.

For the Personal Guarantor : Adv. Nikita Panhalkar.

**ORDER**

***Per: - Coram.***

1. This is an application filed under Section 95 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “the Code”) read with Rule 7(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 (‘PGIRP Rules’) by **YES Bank Limited** (hereinafter referred to as “the Petitioner” or “the Financial Creditor”) for initiating the Personal Guarantor’s Insolvency Resolution Process



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('PGIRP') against **Mr. Kunal Jiwarajka** (hereinafter referred to as "Personal Guarantor"). As stated in Part III of the Petition, the date on which default on the part of the Personal Guarantor occurred is June 26, 2019 and the amount in default is INR 32,36,25,431.67/- (Rupees Thirty-Two Crores, Thirty-Six Lakhs, Twenty-Five Thousand, Four Hundred and Thirty-One, and Sixty-Seven Paise only).

**Case of the Applicant (in brief):**

2. The Corporate Debtor availed financial assistance from the Applicant for an amount of INR 25,00,00,000/-, out of which the Cash Credit Facility was for INR 10,00,00,000/- and the Working Capital Demand Loan is INR 15,00,00,000/-, under the Master Facility Agreement dated 02<sup>nd</sup> June, 2017.
3. The above credit facilities were secured, *inter-alia*, by the Deed of Personal Guarantee executed by the Respondent/Personal Guarantor in favour of the Applicant on 02<sup>nd</sup> June, 2017.
4. As the Corporate Debtor failed to repay the dues of the Applicant, the accounts of the Corporate Debtor were classified as Non-Performing Asset ('NPA') on 30.06.2019 as per the guidelines of the Reserve Bank of India.
5. In view of the default in debt repayment by the Corporate Debtor and in pursuance of the Deed of Guarantee dated 02.06.2017, the Applicant invoked the personal guarantee executed by the Respondent vide Notice for invocation of Personal Guarantee dated June 18, 2019, whereby the Personal Guarantor was called upon to pay the total outstanding dues of INR 24,76,35,089.55/- together with interest, damages and charges within 7 days of the receipt of the notice.



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6. As the Personal Guarantor failed to repay the debt despite being served with notice, the Applicant herein is constrained to file the above-captioned application seeking initiation of PGIRP of the Personal Guarantor. Hence this application. The Applicant states that this Tribunal initiated liquidation process against the Corporate Debtor vide Order dated 02.12.2021 in I.A. No. 2498 of 2020 in CP(IB) No. 1545/MB/2019.

**I.A. No. 3173 of 2024:**

7. This is an application filed by the Personal Guarantor seeking following reliefs: a) Recall the Order dated 24.08.2023 in which the Resolution Professional was appointed; and b) dismissal of the above-captioned petition, *inter-alia*, on the following grounds:

- i. The Applicant/Creditor has already enforced its security interest of two properties owned by the Personal Guarantor having market value of over Rs. 25 crores which is more than the value of the debt owed by the Personal Guarantor/Corporate Debtor. Thus, the present application is barred by Section 68 of the Transfer of Property Act, 1882 ('TOPA') as the Applicant/Creditor after having taken possession of the mortgaged property cannot again sue the Respondent/Personal Guarantor or the Corporate Debtor for the mortgage money.
- ii. The above-captioned Petition has been filed when the moratorium u/s 96 of the Code was already in force pursuant an application u/s 95 of the Code filed by one M/s. Orix Leasing & Finance India Ltd. against the Respondent herein for an outstanding amount receivable from the Corporate Debtor, namely, M/s. JSK Marketing Ltd, vide CP(IB) No.



210(MB)/2021. Hence, the present application is barred by the moratorium u/s 96(1)(b) of the Code.

**Report of the Resolution Professional u/s 99 of the Code:**

8. The Resolution Professional ('RP') was appointed by this Bench in the above-captioned Petition vide Order dated 24.08.2023. The learned RP has placed on record his Report dated 09<sup>th</sup> September, 2023 filed u/s 99 of the Code. The said Report has recommended for admitting the Respondent-Personal Guarantor into PGIRP.

**9. Submissions on behalf of the Applicant/Creditor/Petitioner:**

a. Counsel for the Petitioner submits that though the Applicant/Creditor enforced its security interest over the two properties as stated by the Applicant, under the order of the Hon'ble Debts Recovery Tribunal-I, Mumbai; however, the said auction was unsuccessful and the Applicant/Creditor was unable to realise any amount and as of today, no recovery has been made. Hence, the averment/pleading of the Personal Guarantor that the Applicant/Creditor has enforced its security interest and therefore the instant application is not maintainable, is devoid of any substance and merit.

b. In so far as the bar u/s 68 of TOPA is concerned, the learned Counsel for the Petitioner submits that the said provision applies only to debt recovery proceedings and not to the above-captioned application which seeks to initiate insolvency resolution process of the Personal Guarantor. The learned Counsel for the Applicant/Creditor further submits that even otherwise, the provisions of the Code will have an overriding effect over the provisions of TOPA by virtue of Section 238 of the Code. Therefore,



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the learned Counsel for the Applicant argues that there is no merit in the aforesaid contention of the Personal Guarantor.

c. Counsel for the Petitioner further contends that the instant application against the Personal Guarantor is not barred by Section 96(1)(b) of the Code. In the opinion of the learned Counsel, the interim moratorium u/s 96(1) of the Code only bars the other creditors from initiating debt recovery proceedings against the Personal Guarantor and the same cannot be extended to proceedings for insolvency resolution of the Personal Guarantor filed by the Applicant/Creditor.

10. **Submissions on behalf of the Respondent/Personal Guarantor:**

a. Counsel for the Respondent/Personal Guarantor submits that the present petition is barred by an interim-moratorium imposed under Section 96(1)(b) of the Code since an application u/s 95 of the Code vide CP(IB) No. 210(MB)/2021, was already filed by M/s. Orix Leasing & Finance India Ltd against the Personal Guarantor prior to lodging of the current petition. Counsel for the Personal Guarantor submits that during the interim moratorium period, no legal action or proceedings can be instituted by any creditor and that any action or proceedings for recovery of any debt shall be deemed to have been stayed.

**FINDINGS**

11. We have heard the learned counsels for the Petitioner and the Respondent/Personal Guarantor and we have perused the records.

12. This is an application filed by the Creditor against the Personal Guarantor u/s 95 of the Code as the Personal Guarantor has failed to



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honour his personal guarantee obligations towards the Creditor despite invocation of guarantee. It is the case of the Applicant that the Respondent had given the personal guarantee in relation to the debts of M/s. JSK Marketing Ltd., which is currently under liquidation process before this Tribunal. Hence, the Counsel for the Petitioner submits that this Tribunal has jurisdiction to try this case u/s 60(2) of the Code.

13. Counsel for the Petitioner does not dispute the fact that CP(IB) No. 210(MB)/2021 was filed by one M/s. Orix Leasing & Finance India Limited against the Personal Guarantor herein i.e. Mr. Kunal Jiwarajka, u/s 95 of the Code, prior to filing of the above-captioned application by the Applicant. However, the learned Counsel for the Petitioner contends that the interim-moratorium u/s 96 of the Code only bars debt-recovery proceedings and not insolvency resolution proceedings against the Personal Guarantor.
14. Before dealing with the aforesaid contention of the learned Counsel for the Petitioner, it is necessary for us to go through the provisions contained in Section 96 of the Code, which is reproduced verbatim hereinbelow:

**Section 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*



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*(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.*

15. Thus, on perusal of Section 96 of the Code, it is clear that during the interim moratorium period, any legal action or proceeding pending in respect of any debt shall be deemed to have been stayed; and the creditors of the debtor shall not initiate any legal action or proceedings in respect of any debt. The scheme of Code does not contemplate manifold applications against the same Personal Guarantor by different lenders. Multiplicity of applications against the same Personal Guarantor is not contemplated under Chapter III. The scheme contemplated in Chapter III of the Code is that after admission of application under Section 100, moratorium commences in relation to all the debts under Section 101 and thereafter, public notice is issued and claims from creditors are invited under Section 102. Section 103 provides for registering of claims by creditors. Section 104 provides for preparation list of creditors and thereafter repayment plan is contemplated under Section 105. Thus, when an insolvency resolution process commences against the Personal Guarantor all creditors of the Personal Guarantor are taken care of in the proceedings under Chapter-III. Further, creditors of the Personal Guarantors who are unable to file an application due to enforcement of interim moratorium under Section 96 can very well avail the benefit of period during which the interim





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moratorium continues, hence, due to interim moratorium enforced by Section 96, the creditors like YES Bank and other creditors of the Personal Guarantor are in no manner prejudiced. If they have not filed any application during moratorium period, they have every right to file application and for computation of the period of limitation, period during which moratorium is in place is to be excluded.

16. In the matter of **Bhavesh Gandhi v. Central Bank of India [citation: (2023) ibclaw.in 112 NCLAT]**, the issue which arose up for consideration before the Hon'ble National Company Law Appellate Tribunal ('NCLAT') was whether when an application is filed against the Personal Guarantor whether another Lender of same transaction can proceed against the Personal Guarantor by filing another application under Section 95 of the I&B Code. In the above-referred matter, an application u/s 95 of the Code was already filed by the State Bank of India against the personal guarantor named Mr. Bhavesh Gandhi, vide CP(IB) No. 50(AHM)/2021. While the above-referred application was pending for admission and the interim moratorium was in force, another application u/s 95 of the Code against the above-named personal guarantor was filed by Central Bank of India vide CP(IB) No. 93(AHM)/2022 wherein the Adjudicating Authority, despite being aware of the above-referred application filed by the State Bank of India against the same personal guarantor, passed an order dated 13.06.2022 directing the resolution professional therein to submit a report u/s 99 of the Code within two weeks. The said order dated 13.06.2022 was impugned before the Appellate Authority u/s 61 of the Code. While allowing the appeal and setting-aside the impugned order dated 13.06.2022, the Hon'ble NCLAT *inter-alia*, held as follows:



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*“14. As noted above, by order dated 21.06.2021, interim moratorium was commenced from the date of application. Section 96(1)(a) provides that an interim-moratorium shall commence on the date of the application in relation to all the debts. Further, Section 96(1)(b) provides that during the 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. The use of expression ‘**creditors of the debtor**’ obviously refers to other creditors of the debtor apart from the creditor on whose application interim moratorium has commenced. In the present case, the date on which application was filed by the Central Bank of India under Section 95 is 12.04.2021 i.e. after the commencement of the interim moratorium, as noted in the order dated 21.06.2021. The interim moratorium under Section 96 (1)(b)(ii) creates a prohibition on the creditors of the debtor from initiating any legal action in respect of any debt. The use of expression ‘**any debt**’ also clearly indicate that debt on basis of which moratorium has commenced is not contemplated by the expression ‘any debt’. With regard to all debts of debtor i.e. Personal Guarantor in the present case, no proceeding can be initiated by virtue of Section 96(1)(b). The application filed by the Central Bank of India on 12.10.2021, thus, was clearly hit by Section 96(1)(b)(ii) and the Adjudicating Authority could not have proceeded with the said application and appointed the Resolution Professional. The order dated 13.06.2022 impugned in this Appeal is clearly unsustainable.” (Emphasis Supplied)*



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17. Therefore, in view of the foregoing discussions, we are unable to appreciate the contention of the Counsel for the Petitioner that interim-moratorium u/s 96 of the Code does not bar the insolvency applications against the Personal Guarantor. Further, since we are finally deciding and disposing of the above-captioned Company Petition filed by the Creditor, we're of the opinion that at this stage, recalling the Order dated 24.08.2023 is wholly unnecessary as also meaningless.
18. According to the information available on the National Company Law Tribunal (NCLT) website, CP(IB) No. 210(MB)/2021 was filed against the Personal Guarantor on January 22, 2021. The aforesaid petition is currently pending admission before Court No. V of the NCLT, Mumbai Bench. Consequently, an interim moratorium under Section 96(1)(b) of the Insolvency and Bankruptcy Code (the "Code") commenced on January 22, 2021, and remains in effect. Therefore, the Petition filed by the Applicant/Creditor under Section 95 of the Code against the Personal Guarantor/Respondent on July 22, 2022, is clearly barred by the interim moratorium pursuant to Section 96(1)(b)(ii) of the Code. Hence, while we dismiss the above-captioned Petition, we are not offering any comments on the merits of this case.
19. In light of the foregoing findings, analysis, and discussion, we unequivocally hold that the above-captioned Company Petition filed by the Applicant/Creditor against the Personal Guarantor is barred by the interim moratorium under Section 96(1)(b)(ii) of the Code. As a result, the petition is liable to be dismissed. Therefore, we hereby issue the following orders:



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**ORDER**

- i. **I.A. No. 3173 of 2024 is partly allowed.**
- ii. **CP(IB) No. 908 (MB)/2022 is hereby dismissed.**
- iii. However, in the event CP(IB) No. 210(MB)/2021 is dismissed, the Applicant herein shall be at liberty to either revive this Petition or file a fresh application against the Respondent/Personal Guarantor u/s 95 of the Code subject of course to the law of limitation.
- iv. Parties to bear their own costs.
- v. The above-captioned Company Petition and the IA stand disposed of on above terms.
- vi. Let the file be closed and consigned to records.

**Sd/-**

**ANIL RAJ CHELLAN**  
**(MEMBER TECHNICAL)**

**Sd/-**

**KULDIP KUMAR KAREER**  
**(MEMBER JUDICIAL)**