

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

**Comp. App. (AT) (Ins) No. 863 of 2024 & I.A. No. 3115, 3116,**  
**3117 of 2024**

**IN THE MATTER OF:**

**Dheeraj Wadhawan**

**...Appellant**

**Versus**

**Union Bank of India & Anr.**

**...Respondents**

**Present:**

**For Appellants** : Mr. Mahesh Agrawal, Ankur Saighal,  
Shivam Shukla, Adv.

**For Respondent** : Mr. Sunil Fernandes, Sr. Adv. with  
Anindita Roy Chowdhury, Rajshree  
Chaudhary, Diksha Dadu, Sushrut Garg,  
Adv. for R2

Mr. Abhijeet Sinha, Sr. Adv. Ranak  
Dhillon, Madhavi Khanna, Niharika  
Shukla, Aditya, Angela Dua, Animesh  
Bhist, Anirudh, Adv.

With

**Comp. App. (AT) (Ins) No. 1135 of 2024**

**IN THE MATTER OF:**

**Kapil Wadhawan**

**...Appellant**

**Versus**

**Union Bank of India & Anr.**

**...Respondents**

**Present:**

**For Appellants** : Mr. Mahesh Agrawal, Ankur Saighal,  
Shivam Shukla, Adv.

**For Respondent** : Mr. Sunil Fernandes, Sr. Adv. with  
Anindita Roy Chowdhury, Rajshree  
Chaudhary, Diksha Dadu, Sushrut Garg,  
Adv. for R2

Mr. Abhijeet Sinha, Sr. Adv. Ranak Dhillon, Madhavi Khanna, Niharika Shukla, Aditya, Angela Dua, Animesh Bhist, Anirudh, Adv.

## **ORDER**

**Per: Justice Rakesh Kumar Jain (Oral)**

**14.08.2024:** This order shall decide two appeals bearing Comp. App. (AT) (Ins) No. 863 of 2024 titled as Dheeraj Wadhawan Vs. Union Bank of India & Anr. (hereinafter referred to as the first appeal) and Comp. App. (AT) (Ins) No. 1135 of 2024 titled as Kapil Wadhawan Vs. Union Bank of India & Anr. (hereinafter referred to as the second appeal) as the issue involved in both the appeals is common.

2. In the first appeal, an application was filed under Section 95 of the Insolvency and Bankruptcy Code, 2016 (in short 'Code') read with Rule 7(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtor) Rules, 2019 (in short 'Rules') by Union Bank of India as the Financial Creditor for initiating insolvency process against the Appellant (Dheeraj Wadhawan/Personal Guarantor of the CD, namely, Dewan Housing Finance Corporation Limited 'DHFL') for a default

amount of Rs. 3958,30,48,963.71/- including interest or penalties in relation to credit facilities.

3. The aforesaid application was assigned CP (IB) No. 4/MB/2021 by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench, Court II). A similar application was filed by the same Financial Creditor against another Personal Guarantor (Kapil Wadhawan) before the same AA bearing CP (IB) No. 5/MB/2021.

4. The aforesaid two applications i.e. CP (IB) No. 4/MB/2021 in the first appeal was admitted on 20.03.2024 and CP (IB) No. 5/MB/2021 in the second appeal, was admitted on 02.04.2024. Aggrieved against both the aforesaid orders, the present appeals have been filed by both the personal guarantor of the Corporate Debtor.

5. The brief facts of this case are that Reserve Bank of India (RBI) filed CP (IB) No. 4258/MB/2019 as Financial Creditor against DHFL (CD). The said application was admitted on 03.12.2019 and an Administrator was appointed. The Applicant /UBI filed claim for an amount of Rs. 36,45,56,87,597.83 out of which the claim to the tune of Rs. 35,17,30,39,020/- was admitted by the Administrator.

6. DHFL availed various term loan facilities to the tune of Rs. 450 Cr. and working capital facilities to the tune of Rs. 450 Cr. (term loan facilities and working capital facilities are collectively referred to as 'Credit Facilities').

7. Both the Appellants gave personal guarantee in respect of the Credit Facilities and a joint deed of guarantee was executed on 22.06.2019 by both the Appellants.

8. It is pertinent to mention that the consortium of banks/financial creditors executed four Security Trustee Agreements (STA) starting from 26.06.2012 to 18.06.2015.

9. Union Bank of India (Respondent No. 1) vide its letter dated 10.09.2020 invoked the joint deed of guarantee calling upon the Appellant to make aforesaid outstanding payment.

10. The demand notice dated 07.10.2020 was sent and after the service of the notice, the application under Section 95 (1) of the Code was filed by R1 against the Appellant in December, 2020 for the amount mentioned above.

11. In these proceedings, the AA passed an order on 01.02.2022 by which the Resolution Professional was directed to submit the report for acceptance or rejection of the application.

12. The order dated 01.02.2022 came to be challenged by Dheeraj Wadhawan (Appellant in the first appeal) by way of CA (AT) (Ins.) No. 214 of 2022 before this Appellate Tribunal. The said order was maintained and the appeal was dismissed on 16.03.2022. The matter did not rest here because Dheeraj Wadhawan challenged the aforesaid order dated 16.03.2022 before the Hon'ble Supreme Court in appeal which was also dismissed on 02.09.2022

13. In the present litigation, the Appellant for the first time raised an issue on the basis of clause 43 of the deed of guarantee and 8.5 of the STA to contend that the application filed by R1 alone is not maintainable as it should have been filed either by security trustee or by all the banks. This point was noticed by the AA in its impugned order and returned a finding in Para 21 of the impugned order in the first appeal which read as under:-

"43. Each of the Guarantors agree and confirm that in the event of occurrence of default by the Borrower as specified under the Facility Agreements, the said Banks shall be entitled to proceed against the Guarantors even without exhausting the remedies available with the said Banks against the Borrower."

Furthermore, the Security Trstee Agreement executed by the Banks in favour of Security Trustee provides as under:

"8.5 PERFORMANCE BY THE SAID BANKS

Any duty or obligation of the Security Trustee hereunder or under any Security Document or other agreement, document or instrument contemplated herein or therein may be performed by the said Banks and any such performance shall not be construed as revocation of trust or agency created hereby."

A conjoint reading of the aforementioned clauses make it very clear that the rights of the Banks to enforce the guarantee is concurrent with that of the security trustee and any interpretation restricting the enforcement action only by security trustee goes against the letter and spirit of the deed of guarantee. We are, therefore, not persuaded by the argument that the personal guarantee could not have been invoked by the Bank/Creditor alone."

14. In the second appeal also the AA recorded a finding in this regard in para 37 of the impugned order which read as under:-

"37. Accordingly, a conjoint reading of the aforesaid clauses of the security trustee agreement and deed of guarantee clearly provides that an individual lender can maintain an action against the guarantor and therefore the Petition is maintainable. The Judgement relied on by the Respondent of the Hon'ble NCLAT in Mr. Rakshit Dhirajlal Doshi (supra) cannot be applicable to present case as in the present case the banks, which includes individual bank also as concluded in the earlier paragraphs, have the power to invoke the guarantee dehors security trustee in terms of clause 10 read with clause 43 of the Deed of Guarantee. Further, the said decision of the Hon'ble Appellate Tribunal is distinguishable as in that case the issue was whether the Respondent Creditor could have declared an 'Event of Default' in accordance with inter se agreement of the creditors. However, in the present matter the Petitioner

under clause 43 of Deed of Guarantee clause provides that the said banks shall be entitled to proceed against the guarantor without exhausting remedies available against the principle borrower. We have already clarified in the preceding paragraph that banks in the present case also mean to include each of the bank. Accordingly, the event of default could be declared by an individual bank in the present case.”

15. The appellants in both the appeals being dissatisfied with the aforesaid findings recorded in both the impugned order has reiterated the same issue before us contending that the application at the instance of one of the bank, in the absence of the consent of all the banks, under Section 95 is not maintainable.

16. He has again pressed clauses 43 of the deed of guarantee and 8.5 of STA which are reproduced for ready reference:-

“43. Each of the Guarantors agree and confirm that in the event of occurrence of default by the Borrower as specified under the Facility Agreements, the said Banks shall be entitled to proceed against the Guarantors even without exhausting the remedies available with the said Banks against the Borrower. The Liability of the guarantors shall be immediate. In the event any of the guarantors refuses to comply with the demand made by the said Banks, despite having sufficient means to make payment of the dues, such guarantor would also be treated as a wilful defaulter.”

“8.5 PERFORMANCE BY THE SAID BANKS

Any duty or obligation of the Security Trustee hereunder or under any Security Document or other agreement,

document or instrument contemplated herein or therein may be performed by the said Banks and any such performance shall not be construed as revocation of trust or agency created hereby."

17. In support of his submissions, he has relied upon a decision of this Court rendered in the case of Rakshit Dhirajlal Doshi (one of the suspended directors) Vs. IDBI Bank Ltd. and Ors., 2022 SCC OnLine NCLAT 4524 decided on 15.11.2022.

18. On the other hand, Counsel appearing on behalf of the Respondents i.e. Financial Creditor and the RP, have vehemently contested the stand taken by the Appellants on the ground that firstly, the Appellants cannot take this plea of non-maintainability of application under Section 95 of the Code in the second round of litigation as in the first round of litigation the matter reached up to the Hon'ble Supreme Court and in those proceedings no such plea was taken and the said plea stands closed in terms of Order II Rule 2 of the CPC. Secondly, it is submitted that the decision in the case of Rakshit Dhirajlal (Supra) is not applicable to the facts of this case because in that case the dispute was between the lenders inter se on the issue of filing the application without the consent of the others whereas in the present case none of the lenders has either approached the



Appellants for the purpose of raising this issue nor they have filed any IA to support the case of the Appellant for the purpose of dismissal of the application under Section 95 filed before the Court below on this ground that the application has been filed solely by Union Bank Of India (R1). It is also submitted that in the case of Rakshit Dhirajlal (Supra) the consortium of Banks had given power only to the security trustee to invoke the bank guarantee and also to file application under Section 95 in case of any need and since application was filed by one of the financial creditor, therefore, there was a dispute between the parties which is not the situation in the present case.

19. It is further submitted that even a petition under Section 95 of the Code can be filed either by himself, or jointly with other creditors, or through a resolution professional. It is therefore, submitted that once the law permits to file the petition by one of the creditors without joining the other creditors who have not raised any objection in the present case, it does not lie in the mouth of the Appellant at this stage when a round of litigation has already taken place upto the Hon'ble Supreme Court to contend that the application under Section 95 is not maintainable because it has not been filed by the Banks but filed

by one of the Banks. They have also relied upon a decision of this Court rendered in the case of Shri Prem Prakash Bansal Vs. M/s IDBI Bank Limited, CA (AT) (Ins) No. 1541 of 2022 decided on 10.04.2024 in which one of issue was that “the Respondent No. 1 could not have initiated the action of its own of filing Section 7 application without the formal meeting held with other lenders and their consent and authorisation”. It is submitted that this issue has been decided by this Court in the following manner “the allegation of the Appellant regarding want of support of other three bankers to the Respondent No. 1 are also found baseless as the proposed intervenors for three other lenders supported the CIRP proceedings of the Corporate Debtor and confirm the same during hearing before us and the same has been mentioned in their intervention applications filed in the present appeal. Thus, the contention of the Appellant on this ground stand rejected.”

20. In rebuttal, Counsel for the Appellant has submitted that argument raised by the Respondents is that this issue cannot be raised in the second round as alleged is totally misplaced because at the time when first round of litigation reached up to the Hon’ble Supreme Court and concluded, STA did not come into being, therefore there was no occasion to raise the issue.

21. In respect of the other arguments raised by Respondents that Section 95(1) of the Code itself permits to file the petition either by a single creditor or by the creditors collectively or by RP cannot be looked into because of the specific agreement between the parties. He has also submitted that the decision in the case of Rakshit Dhirajlal Doshi (Supra) shall apply to this case because no consent of the other lenders has been taken.

22. We have heard Counsel for the parties and perused the record with their able assistance.

23. Since the facts are not in dispute, therefore, while recording our findings, we need not to refer the facts again for the sake of brevity but it would suffice to mention that it is a case where the petition under Section 7 stands admitted against the principal borrower. It is also pertinent to mention that both the appellants, who happened to be the brothers, gave personal guarantee in respect of the credit facilities taken by the principal borrower. The issue raised in the first round of litigation about the non-service of notice came to be decided against both the Appellants by this Court which has been upheld by the Hon'ble Supreme Court holding that guarantee was rightly invoked and demand notice was served. The question would thus arise that

who had invoked the guarantee. The guarantee was invoked by Respondent No. 1 and the demand notice was also issued by Respondent No. 1. The Appellant cannot be allowed to agitate now that it is not within his knowledge that the demand notice could not have been issued or the application under Section 95 could not have been filed by one of the members of the consortium because this plea, in our considered opinion was available to the Appellant at the time of first round of litigation which could have been taken and in the second round of litigation, this plea cannot be allowed to be taken otherwise there would be no end to this type of objection being taken in respect of maintainability of the application. It is also well settled that the objection regarding the maintainability of the application or suit/petition has to be raised at the threshold and cannot be taken at the fagend of the matter when the application was about to be admitted. Having observed the aforesaid, we are also amazed to know as to how the Appellant is an aggrieved person. The decision in the case of Rakshit Dhirajlal (Supra) which is solely relied upon by the Appellant is contrary to the facts of this case because in that case, the authority was given to the security trustee by all the members of the banks whereas the application

was filed by Bank despite the said authority and therefore, there was a dispute inter se of the members of consortium. In the present case, this is not a situation because all the members of consortium stands together in support of R1 (referred to as lead bank) and have not raised any objection either before the AA in respect of its authority to file Section 95 or before this Court by filing any application as intervenor to support the case of the Appellant.

24. Thus, in our considered opinion the Appellant in fact has no case for the purpose of maintaining the appeal under Section 61 of the Code as it is not found to be an aggrieved party.

25. As far as Section 95 is concerned, it is categorically provided that application can file either by himself, or jointly with other creditors, or through a resolution professional but it is nowhere provided that if there are more financial creditors then all have to file the same collectively. The provisions which have been mentioned by the Appellant i.e clauses 43 of the deed of guarantee and 8.5 of the STA are for the consortium of bank and have nothing to do with the Appellants.

26. No other point has been raised.

27. Thus, in view of the aforesaid facts and circumstances, we hardly find any merit in the present appeals for the purpose of interference in the impugned orders. Thus, both appeals fails and are dismissed as such. No costs.

**[Justice Rakesh Kumar Jain]**  
**Member (Judicial)**

**[Mr. Naresh Salecha]**  
**Member (Technical)**

**(Mr. Indevar Pandey)**  
**Member (Technical)**

*Sheetal/Ravi*