

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Ins) No. 1344 & 1345 of 2022

IN THE MATTER OF:

Monica Jajoo **...Appellant**
Having office at:
68, Okhla Phase III, Okhla Industrial Area,
Delhi-110020.

Versus

PHL Fininvest Pvt. Ltd. **...Respondent No.**
Having registered address at **1**
4th Floor, Piramal tower,
Peninsula Corporate Park
Ganpatrao Kadam Marg,
Lower Parel, Mumbai-400013.

Mr. Jayant Prakash, **...Respondent No. 2**
Interim Resolution Professional,
Having office at:
15/775, Vasundhara, Ghaziabad,
Uttar Pradesh – 201012.

Present:

For Appellant : Mr. Vikas Dutta, Mr. Siddharth Silwal, Ms. Nivedita Grover, Advocates
For Respondents : Mr. Krishnendu Datta, Sr. Advocate with Mr. Toyesh Tewari, Mr. Rajat Sinha, Advocates for R1.
Mr. Jayant Prakash, Advocate for R2.

Judgment
(Date: 21.7.2023)

[Per.: Dr. Alok Srivastava, Member (Technical)]

1. The present appeal is filed under section 61 of the Insolvency and Bankruptcy Code, 2016 (in short “IBC”) assailing order dated 29.08.2022 (in short “Impugned Order-I”) in IB No. 381 (ND) of 2021 and order dated 16.9.2022 (in short “Impugned Order-II”) in IA No. 4447/ND/2022 and IB No. 381(ND)/2021 both passed by the Adjudicating Authority (NCLT, New Delhi, Court-IV).

2. Briefly, the case of the Appellant is that a Facility Agreement dated 20.7.2017 was entered into by Piramal Finance Limited (“PFL”) with the corporate debtor Hema Engineering Industries Ltd (“HEIL”). Later in pursuance to order of NCLT, Mumbai Bench dated 6.4.2019 and under the scheme of amalgamation, PFL (original lender) and Piramal Capital Ltd. (“PCL”) were amalgamated with Piramal Housing Finance Limited (“PHFL”), whose name was later changed to Piramal Capital & Housing Finance Limited (“PCHFL”). By an Assignment Agreement dated 22.3.2019, the loan on account of Facility Agreement dated 20.7.2017 entered into between PFL and HEIL was assigned in favour of PHL Fininvest Private Limited (Respondent No. 1 in the present appeal).

3. The Appellant has further stated that R-1 issued a demand notice in Form B under Rule 7(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process of Personal Guarantors to Corporate Debtors) Rules, 2019 seeking repayment of alleged outstanding of Rs. 443,36,21,727/- (Rupees Four Hundred and Forty Three Crores Thirty Six Lacs Twenty One Thousand Seven Hundred and Twenty Seven Only) and subsequently R-1 filed an application under section 95(1) of the IBC seeking initiation of personal insolvency against the Appellant Monica Jajoo who is the Personal Guarantor of the loan on 21.6.2021. The Appellant has further stated that the application under section 95 (1) of the IBC was heard by Court-IV of NCLT, New Delhi and vide order dated 29.8.2022 (Impugned Order-I) personal insolvency against the Appellant was initiated and Mr. Jayesh Natvarlal Sanghrajka was appointed as Resolution Professional.

4. The Appellant has further submitted after the appointment of Mr. Jayesh Natvarlal Sanghrajka as Resolution Professional information regarding a show cause notice having been issued to Mr. Sanghrajka was received by R-1, and consequently application bearing IA No. 4447/ND/2022 was filed by R-1 under section 98(1) of the IBC for replacement of the Resolution Professional, which

was decided by the Adjudicating Authority (NCLT, Mumbai, Court-IV) vide order dated 16.9.2022 (Impugned Order-II) replacing the erstwhile Resolution Professional with Mr. Jayant Prakash as Resolution Professional, who is R-2 in the present appeal. The Appellant has stated that he filed the present appeal as the procedure followed by the Learned Adjudicating Authority in adjudicating the section 95 application vide Impugned Order-I and for replacement of the Resolution Professional vide Impugned Order-II was against the procedure prescribed under the IBC.

5. We heard the arguments advanced by the Learned Counsel for Appellant, Learned Senior Counsel for R-1 and R-2 (in person), the Resolution Professional Mr. Jayant Prakash and perused the record with their able assistance.

6. The Learned Counsel for Appellant has argued that the appointment/replacement of the Resolution Professional was done without following the due procedure provided under section 98 of the IBC. Expanding on his argument, the Learned Counsel for Appellant has referred to section 98(2) of the IBC, which mandates that the Adjudicating Authority must refer to the Insolvency and Bankruptcy Board of India (“IBBI”) at the time of replacement of the Resolution Professional. This stipulation is ‘mandatory’ and

not 'directory' in nature and could not have been overlooked by the Adjudicating Authority. He has clarified that the use of the word 'shall' in section 98(2) of the IBC makes the provision 'mandatory' and the Adjudicating Authority could not have deviated from the said procedure stipulated under the IBC.

7. The Learned Counsel for Appellant has also referred to the Interim Resolution Professionals, Liquidators, Resolution Professionals and Bankruptcy Trustees (Recommendations) Guidelines, 2022 ("Guidelines 2022"), which provides the detailed guidance and guidelines about the appointment of Resolution Professional. He has further argued that these guidelines refer to a Panel, which is to be made available to the Adjudicating Authority by IBBI, which should be referred to at the time of appointment/replacement of Resolution Professional. He has further argued that a perusal of the Impugned Order-II does not indicate that the Adjudicating Authority perused and used a name in the Panel made available to it by the IBBI or referred to it at the time of replacement of Resolution Professional because the Impugned Order does not state so. He has further argued that the "Guidelines 2022" in Guideline No. 9 very clearly lays down that once the zone-wise Panel of Insolvency Professionals, is available with the Adjudicating Authority, the Adjudicating Authority ought

to have kept in mind that the Resolution Professional, who was being appointed after replacement, should have the address of his registered office, located in the same zone as per entry in the list. He has argued that such is not the case here, because the address of the Resolution Professional Mr. Jayant Prakash, who has been appointed after the replacement, is of District Ghaziabad, Uttar Pradesh, whereas the personal guarantor's address is of Delhi, which falls in a different zone.

8. The Learned Counsel for Appellant has also referred to the provisions in the Insolvency and Bankruptcy Application to the Adjudicating Authority for Insolvency Resolution Process Personal Guarantor of the Corporate Debtor Rules, 2019 ("Appointment of RP Rules") which are consonant with the guidelines, and the guidelines have been formulated with respect to the legal provision about the appointment of Resolution Professional included in section 16 of IBC and the appointment of RP Rules.

9. The Learned Counsel for the Appellant has further contended that the Adjudicating Authority, while recording submissions made by the Appellant in Impugned Order-I and Impugned Order-II has not followed the principles of natural justice and not given adjudication on the contentions raised by the

Appellant. He has claimed that Bench-IV of NCLT, New Delhi had no jurisdiction to pass both Impugned Order-I and Impugned Order-II, since liquidation proceedings of the Corporate Debtor HEIL were pending before the Bench-III of NCLT, New Delhi, and therefore, as per sub-sections (2) and (3) section 60, an application relating to insolvency resolution or liquidation or bankruptcy of the corporate debtor's personal guarantor should have been considered and heard by the same bench which was considering the application of insolvency resolution or liquidation of the corporate debtor. In support, he has cited the judgment of this Tribunal in the matter of **State Bank of India, Stressed Asset Management Branch vs. Mahendra Kumar Jajodia, Personal Guarantor to Corporate Debtor [CA(AT) Insolvency No. 60 of 2022]**, wherein it was held that the application filed under section 95(1) should have been heard by the same Bench which was considering the insolvency resolution or liquidation proceedings of the corporate debtor.

10. The Learned Counsel for Appellant has also referred to the judgment of this Tribunal in the matter of **Schweitzer Systemtek India Pvt. Ltd. vs. Phoenix ARC Pvt. Ltd. & Ors. [CA(AT) (Insolvency) No. 129 of 2017]** in support of the contention that the Impugned Order should be set aside because section 95

application and further proceedings in IA No. 4447/2022 should have been considered and heard by the same Bench of NCLT, New Delhi, which was considering the liquidation proceedings with regard to the same corporate debtor.

11. The Learned Counsel for Appellant has further submitted that the constitutional validity of sections 95 to 100 of the IBC is under challenge, although in connection with a different matter, before the Hon'ble Supreme Court and therefore, the Adjudicating Authority after being informed of this development, should have stayed further proceedings in the case. The Learned Counsel of Appellant has finally pointed out that the Assignment Agreement only provides certain rights to R-1, but the R-1 is not the original lender and therefore there is no privity of contract between the personal guarantor and R-1. Hence, proceedings initiated by R-1 under Section 95 of the IBC were clearly not maintainable because of non-joinder/misjoinder of parties.

12. The Learned Senior Counsel for R-1 has argued that the composite scheme of arrangement filed before NCLT, Mumbai under sections 230-232 of the Companies Act, 2013 provides under clause 36(2) that the amalgamated company, which is R-1 in the appeal, will take over all legal and other proceedings

imitated by or against the amalgamated company, and the amalgamated company is required to make application in this regard. He has thus rebutted the argument of the Appellant that company petition before NCLT was not maintainable on account of the fact that there was no privity of contract between R-1 and Appellant. He has also argued that section 98(2) of the IBC requires the NCLT to make a reference to IBBI obtaining name for replacement of the Resolution Professional, where in pursuance of section 98(1), the debtor or the creditor has filed an application seeking replacement of the Resolution Professional already appointed. Thereafter, under section 98(3) of the IBC, the IBBI is required to recommend name of a Resolution Professional, against whom no disciplinary proceedings are pending, within ten days of the receipt of the reference from the Adjudicating authority under section 98(2) of the IBC.

13. The Learned Senior Counsel for R-1 has further referred to Rule 8 of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019, according to which IBBI shares a Panel of Insolvency Professionals with the Adjudicating Authorities, who are eligible to be appointed as Resolution Professionals for the purpose of section 98(3) of the *Company Appeal (AT) (Ins) No. 1344 & 1345 of 2022*

IBC. He has further referred to the “Guidelines, 2022”, which came into force in July, 2022 and which provide that the insolvency professional, whose name is included in the overall Panel, irrespective of whichever zone she/he may be listed under, can be appointed as Resolution Professional at the sole discretion of the Adjudicating Authority. He has also pointed out that the “Appointment of RP Rules” do not provide for picking up a name of Resolution Professional from the zone-wise list and any name from the overall panel communicated by IBBI to the Adjudicating Authority can be picked up for appointment/replacement as Resolution Professional, which is the discretion and judgment of the Adjudicating Authority.

14. The Learned Counsel for R-1 has cited the judgment of this Tribunal in the matter of **L. Ramalakshamma vs. State Bank of India Through Resolution Professional, 20221 SCC OnLine NCLAT 619**, wherein it is observed that the word “shall” under Section 97 (1) of the IBC is only ‘directory’ and not ‘mandatory’ and in the light of Rule 8(1) of the Appointment of RP Rules, 2019, the Adjudicating Authority could pick up any name from the overall panel for appointment as RIP/RP and Bankruptcy Trustee, and confining to names in the zone-wise Panel is not at all necessary or

required and it was not necessary for the Adjudicating Authority to seek name of an eligible RP from the IBBI in every single case.

15. The Learned Counsel for R-1 has also placed reliance on the decision of the Adjudicating Authority (NCLT, New Delhi) in the case of **Innovsource (P) Ltd. v. Getit Grocery (P) Ltd. (IB)-295(PB)/2017**, in which NCLT, New Delhi has observed that the Panel of recommended Insolvency Professionals is to only assist the Adjudicating Authority in picking up a name from the said Panel for making appointment of IRP/RP which would be reduce time taken in such appointment and help in meeting the timelines stipulated in the IBC and avoid unnecessary wastage of time.

16. The Learned Counsel for R-1 has also pointed out that the vires of section 95 to 100 of the IBC has been challenged in the matter of **Mr. Sanjay Singhal vs. Union of India, WP(C) No. 510/2022** before Hon'ble Supreme Court, but there is no stay order in this matter, and therefore the present appeal can be heard and adjudicated upon. He has further argued that the matter relating to insolvency resolution of the personal guarantor has not finally been adjudicated upon and therefore, the issue of different benches of NCLT hearing the insolvency resolution/liquidation

petition and the section 95 and section 98 applications is mere technicality.

17. The Learned Resolution Professional Mr. Jayant Prakash, who appeared in person, has adopted the arguments put forward by the Learned Counsel for R-1. He has also pointed out that his address is of District Ghaziabad, Uttar Pradesh and therefore, he is well-positioned to work as Resolution Professional in connection with a corporate debtor or personal/corporate guarantor who is located in New Delhi, as the address of the corporate debtor/personal guarantor is in the National Capital Region which is in the same geographical area/region and situated quite close to each other.

18. The first and foremost issue that is necessary to be seen in this appeal is whether the Company Petition (IB) 381/ND/2021 was heard and the two Impugned Orders dated 29.8.2022 and 16.9.2022 passed by different benches of the NCLT, New Delhi, when a different bench was considering insolvency proceedings against HEIL on the application filed by M/s P.R. Rolling Mills Ltd.

19. The Appellant has claimed that it had brought the issue of a different bench, namely Bench No. III of the of the NCLT, New
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Delhi, considering the insolvency proceedings relating to the corporate debtor HEIL, and it also filed a transfer petition before the Bench No. IV of NCLT, New Delhi for transfer of proceedings under sections 95 and 98 to Bench No. III of NCLT, New Delhi. The Appellant has claimed that despite such a request and transfer petition no. TA(IBC)/36 (PR)/2022 being filed, while Bench No. IV took notice of such an application, it did not decide on the transfer application nor transfer the CP (IB) 381/ND/2021 to Bench-III which should have been done as required by law. He has also shown from the Impugned Order-I that his submission regarding the insolvency proceedings having been initiated against HEIL was noted by the Bench-IV of NCLT, New Delhi. We note that the following is recorded in Impugned Order-I of Bench IV of NCLT, New Delhi:-

“5. The Applicant further submits that insolvency proceedings have already been initiated against HEIL by NCLT, New Delhi in an application filed by M/s. P.R. Rolling Mills private Limited.”

20. The provision under section 60 of the IBC, which is relevant to the present issue, is reproduced hereunder for ready reference:-

“Section 60: Adjudicating Authority for corporate persons.

(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 persons 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 [liquidation or bankruptcy of a corporate guarantor or personal guarantor, as the case may be, of such corporate debtor] shall be filed before such National Company Law Tribunal.”

21. The issue about the relevance of section 60(2) of IBC was considered by this Tribunal in the matter of **State Bank of India, Stressed Asset Management Branch (supra)**, wherein the following is held:-

“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 4 Company Appeal (AT) Ins. No. 60 and 61 of 2022 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)."

22. We also note that the Appellant had raised the issue of the liquidation proceedings pending before the Bench-IV of NCLT, New Delhi, and his contention that Bench-IV could not have passed the Impugned Orders. We also note claim of the Appellant that in the hearings on 28.9.2022 and 11.9.2022, the Learned Adjudicating Authority (Bench-IV) was informed about the filing and listing of transfer petition filed by the Appellant before the Adjudicating Authority even though the impugned orders do not explicitly mention so.

23. As noted above, the transfer petition bearing No. TA(IBC)-36(PB)/2022 was filed before the Adjudicating Authority. It is also a fact that even though this application was filed before the Adjudicating Authority (Bench-IV), it did not take the transfer application into consideration before passing both the Impugned Orders, which is a requirement of law as per section 60(1) and (2) of the IBC. Sub sections (1) and (2) of section 60 lay down a requirement of law, which stipulates and mandates that an application relating to insolvency resolution or liquidation of corporate guarantor of a corporate debtor shall be filed before

‘such’ NCLT, where a CIRP or liquidation proceedings of the ‘same’ corporate debtor is pending. This requirement of law has also been noted in the matter of **State Bank of India, Stressed Asset Management Branch (supra)** of this Tribunal.

24. We are, therefore, of the view that Bench-IV of NCLT, New Delhi could not have heard and adjudicated upon the application under section 95 and thereafter application for replacement of the RP under section 98 and it should have transferred these applications to Bench-III which was already considering the liquidation proceedings of the corporate debtor under the IBC.

25. Since we have considered and decided that the issue of jurisdiction of Bench No. III in considering and adjudicating section 95 application bearing No. (IB) 381/ND/2021 and also IA 4447/ND/2022 was not in accordance with law, we do not think it necessary to consider and adjudicate the other issues of maintainability and replacement of Resolution Professional.

26. We note that the Adjudicating Authority has not referred to the filing TA No. TA(IBC)-36(PB)/2022 in Impugned Order-I. In Impugned Order-II too, there is no mention of the Transfer Application. As per judicial record, the said Transfer Application

was pending before NCLT, New Delhi (Bench-IV) when Impugned Order-I and Impugned Order-II were passed and was decided by Bench-IV at a much later date.

27. In view of the fact that an insolvency resolution application was filed against the corporate debtor HEIL, which was being considered by a different bench of NCLT, New Delhi and that this fact was brought to the notice of Bench-IV of the NCLT, New Delhi, which was considering CA (IB) – 381/ND/2021 which related to section 95 application against Ms. Monica Jajoo, personal guarantor of the loan which was given to PHL Fininvest Pvt. Ltd., we are clear that the requirement of law has not been kept in mind while considering the section 95 application and later an application under section 98 for replacement of Resolution Professional.

28. In such a situation, we are left with no option but to set aside both Impugned Order-I and Impugned Order-II. We further direct that the CA (IB) 381/ND/2021 filed by the financial creditor PHL Fininvest Pvt. Ltd. against Ms. Monica Jajoo, Personal Guarantor be heard afresh and decided by the same bench of NCLT, New Delhi, which considered the insolvency and liquidation application filed by M/s. P.R. Rolling Mills Pvt. Ltd. against HEIL.

Needless to say, this consideration of the section 95 application and any later applications in the matter, shall not be influenced by Impugned Order-I and Impugned Order-II and the matter under section 95 application and other issues which may arise thereafter shall be decided with the contentions of rival parties being kept open.

29. With the above stated directions, we set aside Impugned Order-I and Impugned Order-II and allow the appeal.

30. There is no order as to costs.

[Justice Rakesh Kumar]
Member (Judicial)

[Dr. Alok Srivastava]
Member (Technical)

New Delhi

21st July, 2023

/aks/