

I. Case Reference

Case Citation	: (2022) ibclaw.in 545 NCLAT
Case Name	: Sudip Bijoy Dutta Vs. State Bank of India
Corporate Debtor	: M/s Ess Dee Aluminum Ltd.
Appeal No.	: Company Appeal (AT) (Insolvency) No. 807 of 2021 and 740 of 2022
Judgment Date	: 29-Jul-22
Court/Bench	: NCLAT New Delhi
Present for Appellant(s)	: Mr. Dhruva Mukherjee, Sr. Advocate with Mr. Raja Ratan Bhura and Mr. Shwetank Singh, Advocates.
Present for Respondent(s)	: Mr. Ashwini Kr. Singh, Mr. Joydeep Mukherjee, Advocates for State Bank of India. Ms. Rubina Khan, Advocate with Mr. Prashant Jain for Interim Resolution Professional.
Chairperson	: Mr. Justice Ashok Bhushan
Member (Judicial)	: Mr. Justice M. Satayanarayana Murthy
Member (Technical)	: Mr. Barun Mitra
Impugned Order	: (2022) ibclaw.in 683 NCLT , upheld
Original Judgment	: Download

II. Brief about the decision

Facts of the case

The Appellant(Personal Guarantor) who was Director of the Corporate Debtor - M/s Ess Dee Aluminum Ltd. executed a Deed of Guarantee on **19.10.2015**. The address in the Guarantee Deed of the Appellant was in Mumbai. The Deed of Guarantee notice that Ess Dee Aluminum Limited has been the Borrower with whom the Bank entered into an agreement. The Respondent has issued a recall notice dated **05.03.2018** in respect of the loan given to the Corporate Debtor. Application under Section 7 against the Corporate Debtor - M/s Ess Dee Aluminum Limited has been admitted by the NCLT, Kolkata Bench, Kolkata vide its order dated **14.02.2020** and the Corporate Debtor is already before the Adjudicating Authority facing the insolvency proceedings. The Appellant claims to have acquired citizenship of Singapore on **18.06.2018**.

An application filed under Section 95(1) of the Code by the State Bank of India against the Appellant as Personal Guarantor of the Corporate Debtor – M/s Ess Dee Aluminum Ltd., the Adjudicating Authority appointed Resolution Professional and directed him to make recommendations in writing for acceptance or rejection of the application filed under Section 95(1). Vide order dated **16.06.2022** reported at [\(2022\) ibclaw.in 683 NCLT](#), the Adjudicating Authority

admitted the application filed under Section 95(1) and insolvency resolution process was initiated against the Appellant – Personal Guarantor.

Contention of the parties

Shri Mukherjee submits that the Adjudicating Authority committed error in admitting Section 95(1) application filed by the State Bank of India against the Appellant who is no more within the jurisdiction of the Adjudicating Authority he having obtained the citizenship of Singapore w.e.f. 18.06.2018. It is submitted that the Appellant being a citizen of Singapore, a foreign national, the Code is not applicable. The Code is applicable only on those Personal Guarantors who are Indian citizens and the foreign citizens does not come within the ambit of Personal Guarantors. The intent of legislature has been clarified by Section 234 and 235 of the Code which states that Code to be enforced outside India only when Central Government enters into an agreement with the Government of any country outside India. There is no agreement of Central Government with Government of Singapore so as to initiate insolvency resolution process against the Appellant who is citizen of Singapore.

Questions before Appellate Tribunal

Following issues arise in the present Appeal:

- (i) Whether a Personal Guarantee given by the Appellant by Guarantee Deed dated 19.10.2015 shall extinguish, on Appellant, the Personal Guarantor acquiring citizenship of Singapore w.e.f. 18.06.2018?
- (ii) Whether proceedings under Section 95(1) against the Appellant as a Personal Guarantor could not have been initiated by State Bank of India before the NCLT, Kolkata Bench by filing C.P. (IB) No. 54/KB/2021 due to the reason that Appellant has obtained citizenship of Singapore w.e.f. 18.06.2018 and has gone beyond jurisdiction of the Adjudicating Authority to proceed against him under Section 95(1)?
- (iii) Whether it was necessary for the Central Government to enter into an agreement as required under Section 234-235 of the Code to enable the Adjudicating Authority to proceed against the Appellant, a Singapore citizen' under Section 95(1) where the Appellant has executed Guarantee Deed dated 19.10.2015?

Decision of the Appellate Tribunal

A. Initiation of insolvency proceedings against Personal Guarantor in case of foreign nationals/citizen

- In the present case, M/s Ess Dee Aluminum Ltd. is the Corporate Person who is the Corporate Debtor. 'Corporate Person' has been defines in Section 3(7). Section 3(23) defines 'person'. Section 3(24) defines 'person resident in India' and Section 3(25) defines 'person resident outside India'.**(p17-19)**
- Definition of expression 'person' is an inclusive definition as the person residing outside India

is also covered by the said definition. Section 2 of the Code provides for application of provisions of the Code. By the virtue of Section 2(e) of the code is fully applicable to Personal Guarantors to Corporate Debtors. The Code specifically has been made applicable on the Personal Guarantors of the Corporate Debtors. Whosoever may be the Personal Guarantors of the Corporate Debtor is covered by Section 2(e) of the Code.(p20-21)

- Section 60(1) categorically provides that the Adjudicating Authority, in relation to insolvency resolution for corporate persons including Corporate Debtors and Personal Guarantors shall be the National Company Law Tribunal having territorial jurisdiction over the place where the registered office of the corporate persons locate. Hence, the insolvency resolution process is to be initiated before the Adjudicating Authority within whose territorial jurisdiction registered office of the Corporate Person is located.(p23)
- **The provision under Section 60(1) makes it clear that the residence of Personal Guarantor is not taken into consideration when proceedings against the Personal Guarantor are initiated. The Personal Guarantor, who is whether residing in India or residing outside India, when an application is filed against the Personal Guarantor the jurisdiction shall be before the Adjudicating Authority in whose territorial jurisdiction the registered office of the Corporate Person is located.** The mere fact that the Appellant now claims to be citizen of Singapore and has given an address of Singapore is wholly irrelevant for initiating proceedings against the Appellant. The registered office of the Corporate Debtor i.e. M/s Ess Dee Aluminum Ltd. being within the territorial jurisdiction of NCLT, Kolkata, application for initiating insolvency proceedings against the Personal Guarantor shall be initiated at NCLT, Kolkata. The learned counsel for the Appellant suggest to read an exception under Section 60(1) in the expression '*personal guarantor*' as the personal guarantors of Indian citizenship.(p23)
- **The '*personal guarantors*' as used under Section 60(1) are personal guarantors irrespective of the fact as to whether they are Indian citizen or foreign nationals. In event for a Corporate Debtor a personal guarantee has been given by a person who is residing outside of India or is a foreign national, in event personal guarantee is accepted, he shall be bound by the personal guarantee.(p23)**
- Further, there is no indication in the statutory scheme that a Personal Guarantor who has given guarantee to a Corporate Debtor can escape from his liability under the Guarantee Deed only for the reason that he has after execution of the Guarantee Deed has obtained citizenship of a foreign country. In event, such Personal Guarantors are allowed to wash off from their obligation under the Guarantee Deed, the easiest way for a Personal Guarantor is to run away out of the country and say that now I am not liable to perform my obligation under the Deed of Guarantee since I am no more Indian citizen.(p24)
- Hon'ble Supreme Court in the matter of *Lalit Kumar Jain vs. Union of India & Ors.* (2021) ibclaw.in 61 SC, had occasion to consider the provisions of Section 2(e) of the Code and has authoritatively laid down that the insolvency process against the Personal Guarantors to Corporate Debtors are to be considered by the same forum i.e. NCLT.(p25)
- The net result of above discussion is that the Deed of Guarantee of the Appellant executed on

19.10.2015 still continues and bind him and he cannot escape his obligation under the Personal Guarantee given by him on mere fact that he has obtained citizenship of Singapore w.e.f. 18.06.2018.(p28)

- **The statutory scheme of the code does not contain any indication that the Personal Guarantor of a Corporate Debtor can escape from its liability under the Personal Guarantee Deed merely on the ground that he is now started residing in another country and acquired citizenship of another country and is no more an Indian citizen.** It is well settled principle of statutory interpretation that such interpretation of a statute should be adopted which makes the statute functional and does not make a statute non-functional.(p30)

B. Section 234, 235 and 235A of the IBC

- The key word in Section 234 of the Code is ***“in relation to assets or property of corporate debtor or debtor, including a personal guarantor of a corporate debtor, as the case may be, situated at any place in a country outside India”***. Applicability of Section 234 arises only in a case where assets or property of personal guarantor are situated at any place in a country outside India. Present is a case where assets of the Personal Guarantor, as claimed in application under Section 95, are not claimed to situate in any place outside India. Present is not a case where CIRP has been initiated with regard to any of the assets of the Personal Guarantor which are situated outside the country, hence, reliance on Section 234 and 235 are wholly misplaced.(p27)

C. Initiate proceedings u/s 95(1) is independent and special proceeding and can always be invoked despite there being availability of any other forum or proceedings in this context

- Shri Mukherjee, learned senior counsel for the Appellant has submitted that he does not dispute the liability arising from the Deed of Guarantee which does not extinguish but the said liability cannot be enforced by proceedings under Code. He submits that for enforcing the said liability the Bank is at liberty to initiate necessary proceedings for specific performance of the contract or initiate arbitration and raise their claims accordingly. The above submission of Shri Mukherjee is without any substance.(p29)
- **The right given to the Financial Creditor under the Code to initiate proceedings under Section 95(1) is independent and special proceeding which Financial Creditor can always invoke despite there being availability of any other forum or proceedings in this context.** We may refer to the judgment of Hon'ble Supreme Court in the matter of *A. Navinchandra Steels Pvt. Ltd. vs. SREI Equipments Finance Pvt. Ltd.* ([2021\) ibclaw.in 25 SC](#), where Hon'ble Supreme Court laid down that even proceeding of winding-up petition of the High Court shall not preclude the Financial Creditor from initiating proceedings under Section 7.(p29)
- We, thus, do not find substance in the submission of Shri Mukherjee that for enforcing the liability under the Guarantee Deed Bank should initiate proceedings for specific performance of the contract or initiate arbitration.(p30)

D. Decision

- The Adjudicating Authority is well within its jurisdictions to initiate insolvency resolution process against the Appellant, the Personal Guarantor of the Corporate Debtor, in accordance with the scheme of Section 95(1) r/w Section 60 of the Code. In result, both the Appeals are dismissed. Parties shall bear their own costs.(p31)

III. Full text of the judgment

J U D G M E N T

ASHOK BHUSHAN, J.

These two appeals arises out of same proceedings initiated by State Bank of India under Section 95 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I&B Code') against the Appellant as Personal Guarantor of the Corporate Debtor – M/s Ess Dee Aluminum Limited.

2. Company Appeal (AT) (Insolvency) No. 807 of 2021 has been filed against the order dated 03.08.2021 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata in C.P. (IB) No. 54/KB/2020 by which order on an application filed under Section 95 Sub-section (1) of the I&B Code by the State Bank of India, the Adjudicating Authority appointed Mr. Prashant Jain as Resolution Professional and directed him to make recommendations in writing for acceptance or rejection of the application filed under Section 95(1). The Appellant aggrieved by the order dated 03.08.2021 has filed Company Appeal (AT) (Insolvency) No. 807 of 2021. In the appeal, notices were issued on 25.10.2021 but this Tribunal did not grant any kind of interim order.

3. Company Appeal (AT) (Insolvency) No. 740 of 2022 has been filed by the Appellant challenging the order dated 16.06.2022 passed in same company petition being C.P. (IB) No. 54/KB/2020 by which order the Adjudicating Authority admitted the application filed under Section 95(1) and insolvency resolution process was initiated against the Appellant – Personal Guarantor. Aggrieved by the order dated 16.06.2022, Company Appeal (AT) (Insolvency) No. 740 of 2022 has been filed.

4. We have heard Shri Dhruba Mukherjee, learned senior advocate for the Appellant and Shri Ashwini Kr. Singh appearing for the State Bank of India. Ms. Rubina Khan has appeared for the Resolution Professional.

5. Shri Mukherjee challenging the order dated 03.08.2021 submits that the Adjudicating Authority committed error in recording the finding of default contradictory to the Judgment of this Tribunal in "*Ravi Ajit Kulkarni vs. State Bank of India, Company Appeal (AT) (Ins.) No. 316 of 2021*". He further submitted that the Adjudicating Authority mechanically passed the order without considering the provisions of Deed of Guarantee dated 19.10.2015.

6. In support of Company Appeal (AT) (Insolvency) No. 740 of 2022, Shri Mukherjee submits that the Adjudicating Authority committed error in admitting Section 95(1) application filed by the State Bank of India against the Appellant who is no more within the jurisdiction of the Adjudicating Authority he having obtained the citizenship of Singapore w.e.f. 18.06.2018. It is submitted that the Appellant being a citizen of Singapore, a foreign national, the I&B Code is not applicable. The I&B

Code is applicable only on those Personal Guarantors who are Indian citizens and the foreign citizens does not come within the ambit of Personal Guarantors. The intent of legislature has been clarified by Section 234 and 235 of the Code which states that Code to be enforced outside India only when Central Government enters into an agreement with the Government of any country outside India. There is no agreement of Central Government with Government of Singapore so as to initiate insolvency resolution process against the Appellant who is citizen of Singapore. The Adjudicating Authority has acted beyond the scope of the Code and its action of admitting the Section 95(1) application is ultra vires. It is submitted that for the execution of the Deed of Guarantee, the Respondent is at liberty to initiate necessary proceedings for specific performance of the contract or initiate arbitration and raise their claims accordingly. However, resort to the I&B Code cannot be taken since the Adjudicating Authority has no jurisdiction to entertain petition against a foreign citizen. While the liability arising from the Deed of Guarantee does not extinguish but the said liability cannot be enforced by way of proceedings under I&B Code.

7. Shri Ashwini Kumar Singh, learned counsel appearing for State Bank of India submits that the Company Appeal (AT) (Insolvency) No. 807 of 2021 has become infructuous in view of the subsequent order passed by the Adjudicating Authority dated 16.06.2022. It is submitted that the Appellant was given due opportunity by the Adjudicating Authority and notice was issued to the Appellant by the Adjudicating Authority before passing the impugned order dated 03.08.2021. He submitted that Application under Section 7 has already been admitted by the Adjudicating Authority i.e. National Company Law Tribunal, Kolkata Bench against the Corporate Debtor – ‘M/s Ess Dee Aluminum Limited’ by order dated 14.02.2020. Refuting the submission of Shri Mukherjee, learned counsel for the Respondent submits that the Adjudicating Authority has rightly admitted the application under Section 95(1) filed by the State Bank of India. It is submitted that Appellant is fully bound by the Deed of Guarantee dated 19.10.2015 given by him. The fact that subsequently the Appellant has obtained citizenship of Singapore is inconsequential. The Appellant is bound by the contract of guarantee and cannot contend that he is out of the jurisdiction of the Adjudicating Authority. It is submitted that the properties/assets of the Appellant are situated within India, hence, Section 234 and 235 of the Code are not attracted. A person who is residing outside India is also covered by definition of ‘person’ within the meaning of Section 3(23) of the Code. The Appellant, who was Director of the Corporate Debtor, is bound by the guarantee given by Deed of Guarantee dated 19.10.2015. The Appellant as Personal Guarantor of the Corporate Debtor has agreed to pay Principal Amount, not exceeding Rs.50 Crore together with interest, cost and expenses. The application under Section 95(1) filed by the Bank has rightly been admitted by the Adjudicating Authority. There is no merit in the Appeal which deserves to be dismissed.

8. We have considered submissions of learned counsel for the parties and perused the record.

9. We may first notice the contentions of the parties in Company Appeal (AT) (Insolvency) No. 807 of 2021. The order dated 03.08.2021 which has been impugned in the said appeal has been passed on application under Section 95(1) filed by the State Bank of India against the Personal Guarantor. By the Impugned order the Adjudicating Authority has appointed the Resolution Professional and

directed him to make recommendations. Principal challenge to the impugned order by the Appellant is that the Adjudicating Authority has returned finding of default in the order by appointing the Resolution Professional which is not permissible in view of the judgment of this Tribunal in *'Ravi Ajit Kulkarni' (Supra)*.

10. We have perused the impugned order dated 03.08.2021, Para 7 of the judgment which is alleged to contain finding of default reads as follows:-

"7. The applicant has clearly brought it out in its application coupled with admissible evidence that the personal guarantor has committed default in making payment of the cash credit facility along with interest to the Applicant for which he has given the personal guarantee to the Applicant on behalf of EDAL."

11. In Para 7 of the judgment of Adjudicating Authority only noticed the contents of the application, what has been noticed is that the applicant i.e. State Bank of India has clearly brought it out in its application that personal guarantor has committed default in making the payment of the cash credit facility. The said para cannot be read as recording any finding by the Tribunal regarding default. When the Adjudicating Authority has appointed Resolution Professional who has to make recommendations, no finding can be recorded regarding default before appointing Resolution Professional since it is the Resolution Professional who after examining the relevant material shall make recommendations. Para 7 of the impugned judgment thus has to be read only to the effect that said para contains the averments of the applicant so as to proceed further in the matter in accordance with the provisions of the Code.

12. In Company Appeal (AT) (Insolvency) No. 807 of 2021 reply has been filed by the Bank, where it has been stated that application under Section 95(1) against the Appellant was filed on 01.12.2020. Copy of the application was also served on the Appellant by email dated 01.12.2020. Adjudicating Authority vide order dated 25.02.2021 has issued notice to the Appellant fixing 14.04.2021 as next date before the Adjudicating Authority. We, thus, are satisfied that procedure as laid down in the judgment of this Tribunal in *'Ravi Ajit Kulkarni'* has been followed and there is no error in the order passed by the Adjudicating Authority dated 03.08.2021 appointing the Resolution Professional in the application under Section 95(1). No grounds have been made out to interfere with the order dated 03.08.2021.

13. Now, we come to Company Appeal (AT) (Insolvency) No. 740 of 2022. While noticing the facts of the case, we have noted that the Appellant who was Director of the Corporate Debtor - 'M/s Ess Dee Aluminum Limited' executed a Deed of Guarantee on 19.10.2015. The address in the Guarantee Deed of the Appellant was 2502-A, Oberoi Sky Heights Building No.1, Plot No. 120, Lokhandwala Complex, Andheri (W), Mumbai. The Deed of Guarantee notice that Ess Dee Aluminum Limited has been 'the Borrower' with whom the Bank entered into an agreement. Appellant as Personal Guarantor has agreed and given guarantee as follows:-

"NOW THIS INDENTURE WITNESSETH that in consideration of the above premises it is hereby

covenanted and agreed (the Guarantors covenanting and agreeing jointly and severally) as follows:

1. If at any time default shall be made by the Borrower in payment of the principal sum (not exceeding Rs.50,00,00,000) together with interest, costs, charges, expenses and/or other monies for the time being due to the Bank in respect of or under the aforesaid credit facilities or any of them the Guarantors shall forthwith on demand pay to the Bank the whole of such principal sum (not exceeding Rs.50,00,00,000) together with interest, costs, charges, expenses and/or any other monies as may be then due to the Bank in respect of the aforesaid credit facilities and shall indemnify and keep indemnified the Bank against all losses of the said principal sum, interest or other monies due and all costs charges and expenses whatsoever which the Bank may incur by reason of any default on the part of the Borrower.”

14. The Respondent further has issued a recall notice dated 05.03.2018 in respect of the loan given to the Corporate Debtor. Application under Section 7 against the Corporate Debtor - ‘M/s Ess Dee Aluminum Limited’ has been admitted by the NCLT, Kolkata Bench, Kolkata vide its order dated 14.02.2020 and the Corporate Debtor is already before the Adjudicating Authority facing the insolvency proceedings. The Appellant claims to have acquired citizenship of Singapore on 18.06.2018.

15. From the submissions of learned counsel for the parties following issues arise in the present Appeal:

(i) Whether a Personal Guarantee given by the Appellant by Guarantee Deed dated 19.10.2015 shall extinguish, on Appellant, the Personal Guarantor acquiring citizenship of Singapore w.e.f. 18.06.2018?

(ii) Whether proceedings under Section 95(1) against the Appellant as a Personal Guarantor could not have been initiated by State Bank of India before the NCLT, Kolkata Bench by filing C.P. (IB) No. 54/KB/2021 due to the reason that Appellant has obtained citizenship of Singapore w.e.f. 18.06.2018 and has gone beyond jurisdiction of the Adjudicating Authority to proceed against him under Section 95(1)?

(iii) Whether it was necessary for the Central Government to enter into an agreement as required under Section 234-235 of the Code to enable the Adjudicating Authority to proceed against the Appellant, a Singapore citizen’ under Section 95(1) where the Appellant has executed Guarantee Deed dated 19.10.2015?

16. Issues No. 1, 2 and 3 are all interrelated, hence, are being taken together.

17. The Appellant, Director/ Managing Director of the Corporate Debtor has executed the Guarantee Deed dated 19.10.2015. Under the orders of the Adjudicating Authority, the Bank has produced the original Guarantee Deed dated 19.10.2015 before the Adjudicating Authority, who after perusing the original Deed of Guarantee was satisfied that the deed has been executed by the Appellant. In the Reply, which has been filed before the Adjudicating Authority on behalf of the Appellant there was clear admission of accepting guarantee of liability of Rs.50 Crores.

18. We may now first notice relevant provisions of the Code which comes for consideration in the present appeal. 'Corporate Person' has been defined in Section 3 Subsection (7). In the present case, 'M/s Ess Dee Aluminum Limited' is the Corporate Person who is the Corporate Debtor. Section 3(23) defines 'person', which is to the following effect:-

3(23) "person" includes—

- (a) an individual;*
- (b) a Hindu Undivided Family;*
- (c) a company;*
- (d) a trust;*
- (e) a partnership;*
- (f) a limited liability partnership; and*
- (g) any other entity established under a statute,*

and includes a person resident outside India;

19. Section 3(24) defines 'person resident in India' and Section 3(25) defines 'person resident outside India', which are to the following effect:-

"3(24) "person resident in India" shall have the meaning assigned to such term in clause (v) of section 2 of the Foreign Exchange Management Act, 1999;

3(25) "person resident outside India" means a person other than a person resident in India;"

20. Definition of expression 'person' is an inclusive definition as the person residing outside India is also covered by the said definition. Section 2 of the Code provides for application of provisions of the Code. By the virtue of Section 2 Sub-clause (e) the code is fully applicable to Personal Guarantors to Corporate Debtors. Section 2(e) provides as follows:-

"2. The provisions of this Code shall apply to—

x x x

(e) personal guarantors to corporate debtors;"

21. The Code specifically has been made applicable on the Personal Guarantors of the Corporate Debtors. Whosoever may be the Personal Guarantors of the Corporate Debtor is covered by Section 2(e) of the Code.

22. Now, we come to Section 60 which deals with Adjudicating Authority for Corporate Persons. Section 60(1), (2) and (3) are to the following effect:-

"60(1) The Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the National

Company Law Tribunal having territorial jurisdiction over the place where the registered office of the corporate 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 1[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.

(3) An insolvency resolution process or 2[liquidation or bankruptcy proceeding of a corporate guarantor or personal guarantor, as the case may be, of the corporate debtor] pending in any court or tribunal shall stand transferred to the Adjudicating Authority dealing with insolvency resolution process or liquidation proceeding of such corporate debtor.”

23. Section 60(1) categorically provides that the Adjudicating Authority, in relation to insolvency resolution for corporate persons including Corporate Debtors and Personal Guarantors shall be the National Company Law Tribunal having territorial jurisdiction over the place where the registered office of the corporate persons locate. Hence, the insolvency resolution process is to be initiated before the Adjudicating Authority within whose territorial jurisdiction registered office of the Corporate Person is located. The provision under Section 60(1) makes it clear that the residence of Personal Guarantor is not taken into consideration when proceedings against the Personal Guarantor are initiated. The Personal Guarantor, who is whether residing in India or residing outside India, when an application is filed against the Personal Guarantor the jurisdiction shall be before the Adjudicating Authority in whose territorial jurisdiction the registered office of the Corporate Person is located. The mere fact that the Appellant now claims to be citizen of Singapore and has given an address of Singapore is wholly irrelevant for initiating proceedings against the Appellant. The registered office of the Corporate Debtor i.e. ‘M/s Ess Dee Aluminum Limited’ being within the territorial jurisdiction of NCLT, Kolkata, application for initiating insolvency proceedings against the Personal Guarantor shall be initiated at NCLT, Kolkata. The learned counsel for the Appellant suggest to read an exception under Section 60(1) in the expression ‘personal guarantor’ as the personal guarantors of Indian citizenship. The ‘personal guarantors’ as used under Section 60(1) are personal guarantors irrespective of the fact as to whether they are Indian citizen or foreign nationals. In event for a Corporate Debtor a personal guarantee has been given by a person who is residing outside of India or is a foreign national, in event personal guarantee is accepted, he shall be bound by the personal guarantee.

24. Further, there is no indication in the statutory scheme that a Personal Guarantor who has given guarantee to a Corporate Debtor can escape from his liability under the Guarantee Deed only for the reason that he has after execution of the Guarantee Deed has obtained citizenship of a foreign country. In event, such Personal Guarantors are allowed to wash off from their obligation under the Guarantee Deed, the easiest way for a Personal Guarantor is to run away out of the country and say

that now I am not liable to perform my obligation under the Deed of Guarantee since I am no more Indian citizen. The Adjudicating Authority in the impugned order has very rightly made following observations in above regard:-

“ex-facie sans rationale, provisions and legislative intent of the Code. If this plea of respondent is accepted, it shall mean allowing a subterfuge to get away without discharge of financial obligations incurred in India. Give a Bank Guarantee for obtaining loan in India, renounce Indian citizen ship and upon being asked to discharge obligation of repayment/face CIRP, simply state ‘Catch me if you can’ after becoming Citizen of any other Country. No law or policy can be interpreted to give it such an absurd interpretation.

In considering and taking a decision to the plea of respondent, reliance is also placed on judgment of Hon’ble Super Court, 1994 SCC (3) 440, where it has been held:

“It is permissible for courts to have functional approaches and look into the legislative intention and sometimes it may be even necessary to go behind the words and enactment and take other factors into consideration to give effect to the legislative intention and to the purpose and spirit of the enactment so that no absurdity or practical inconvenience may result and the legislative exercise and its scope and object may not become futile”.

Emphasis supplied.”

25. Hon’ble Supreme Court in the matter of “*Lalit Kumar Jain vs. Union of India & Ors. - (2021) 9 SCC 321*”, had occasion to consider the provisions of Section 2(e) of the I&B Code and has authoritatively laid down that the insolvency process against the Personal Guarantors to Corporate Debtors are to be considered by the same forum i.e. NCLT. Para 95 and 96 of the judgment provides as follows:-

“95. As discussed in a previous part of this judgment, insolvency proceedings relating to individuals is regulated by Part III of the Code. Before the amendment of 2018, all individuals (personal guarantors to corporate debtors, partners of firms, partnership firms and other partners as well as individuals who were either partners or personal guarantors to corporate debtors) fell under one descriptive description under the unamended Section 2(e). The unamended Section 60 contemplated that the adjudicating authority in respect of personal guarantors was to be NCLT. Yet, having regard to the fact that Section 2 brought all three categories of individuals within one umbrella class as it were, it would have been difficult for the Central Government to selectively bring into force the provisions of Part III only in respect of personal guarantors. It was here that the Central Government heeded the reports of expert bodies which recommended that personal guarantors to corporate debtors facing insolvency process should also be involved in proceedings by the same adjudicator and for this, necessary amendments were required. Consequently, the 2018 Amendment Act altered Section 2(e) and subcategorized three categories of individuals, resulting in Sections 2(e), (f) and (g). Given that the earlier Notification of 30-11-2016 had brought the Code into force in relation to entities covered under Sections 2(a) to 2(d), the Amendment Act of 2018

provided the necessary statutory backing for the Central Government to apply the Code, in such a manner as to achieve the objective of the amendment, i.e. to ensure that adjudicating body dealing with insolvency of corporate debtors also had before it the insolvency proceedings of personal guarantors to such corporate debtors.

96. The amendment of 2018 also altered Section 60 in that insolvency and bankruptcy processes relating to liquidation and bankruptcy in respect of three categories i.e. corporate debtors, corporate guarantors of corporate debtors and personal guarantors to corporate debtors were to be considered by the same forum i.e. NCLT.”

26. At this juncture, we may also notice provisions of Section 234 and 235 of the I&B Code, which are to the following effect:-

“234. Agreements with foreign countries. – (1) The Central Government may enter into an agreement with the Government of any country outside India for enforcing the provisions of this Code.

(2) The Central Government may, by notification in the Official Gazette, direct that the application of provisions of this Code in relation to assets or property of corporate debtor or debtor, including a personal guarantor of a corporate debtor, as the case may be, situated at any place in a country outside India with which reciprocal arrangements have been made, shall be subject to such conditions as may be specified.

235. Letter of request to a country outside India in certain cases. – (1) Notwithstanding anything contained in this Code or any law for the time being in force if, in the course of insolvency resolution process, or liquidation or bankruptcy proceedings, as the case may be, under this Code, the resolution professional, liquidator or bankruptcy trustee, as the case may be, is of the opinion that assets of the corporate debtor or debtor, including a personal guarantor of a corporate debtor, are situated in a country outside India with which reciprocal arrangements have been made under section 234, he may make an application to the Adjudicating Authority that evidence or action relating to such assets is required in connection with such process or proceeding.

(2) The Adjudicating Authority on receipt of an application under sub-section (1) and, on being satisfied that evidence or action relating to assets under sub-section (1) is required in connection with insolvency resolution process or liquidation or bankruptcy proceeding, may issue a letter of request to a court or an authority of such country competent to deal with such request.

1[235-A. Punishment where no specific penalty or punishment is provided. – If any person contravenes any of the provisions of this Code or the rules or regulations made thereunder for which no penalty or punishment is provided in this Code, such person shall be punishable with fine which shall not be less than one lakh rupees but which may extend to two crore rupees.]

27. The key word in Section 234 of the Code is **“in relation to assets or property of corporate debtor or debtor, including a personal guarantor of a corporate debtor, as the case may be, situated at any place in a country outside India”**. Applicability of Section 234 arises only in a case where assets or property of

personal guarantor are situated at any place in a country outside India. Present is a case where assets of the Personal Guarantor, as claimed in application under Section 95, are not claimed to situate in any place outside India. Present is not a case where CIRP has been initiated with regard to any of the assets of the Personal Guarantor which are situated outside the country, hence, reliance on Section 234 and 235 are wholly misplaced. In the judgment of '*Lalit Kumar Jain*' (*Supra*) after noticing Sections 234 and 235, Hon'ble Supreme Court stated following in Para 106:-

"These two provisions also reveal that the scheme of the Code always contemplated that overseas assets of a corporate debtor or its personal guarantor could be dealt with in an identical manner during insolvency proceedings, including by issuing letters of request to courts or authorities in other countries for the purpose of dealing with such assets located within their jurisdiction"

28. The net result of above discussion is that the Deed of Guarantee of the Appellant executed on 19.10.2015 still continues and bind him and he cannot escape his obligation under the Personal Guarantee given by him on mere fact that he has obtained citizenship of Singapore w.e.f. 18.06.2018.

29. Shri Mukherjee, learned senior counsel for the Appellant has submitted that he does not dispute the liability arising from the Deed of Guarantee which does not extinguish but the said liability cannot be enforced by proceedings under I&B Code. He submits that for enforcing the said liability the Bank is at liberty to initiate necessary proceedings for specific performance of the contract or initiate arbitration and raise their claims accordingly. The above submission of Shri Mukherjee is without any substance. The right given to the Financial Creditor under the I&B Code to initiate proceedings under Section 95(1) is independent and special proceeding which Financial Creditor can always invoke despite there being availability of any other forum or proceedings in this context. We may refer to the judgment of Hon'ble Supreme Court in the matter of "*A. Navinchandra Steels Pvt. Ltd. vs. SREI Equipments Finance Pvt. Ltd. - (2021) 4 SCC 435*", where Hon'ble Supreme Court laid down that even proceeding of winding-up petition of the High Court shall not preclude the Financial Creditor from initiating proceedings under Section 7. Following has been laid down in Paras 25 and 29 of the judgment:-

"25. A conspectus of the aforesaid authorities would show that a petition either under Section 7 or Section 9 IBC is an independent proceeding which is unaffected by winding-up proceedings that may be filed qua the same company. Given the object sought to be achieved by the IBC, it is clear that only where a company in winding up is near corporate death that no transfer of the winding-up proceeding would then take place to NCLT to be tried as a proceeding under the IBC. Short of an irresistible conclusion that corporate death is inevitable, every effort should be made to resuscitate the corporate debtor in the larger public interest, which includes not only the workmen of the corporate debtor, but also its creditors and the goods it produces in the larger interest of the economy of the country. It is, thus, not possible to accede to the argument on behalf of the appellant that given Section 446 of the Companies Act, 1956/Section 279 of the Companies Act, 2013, once a winding-up petition is admitted, the winding-up petition should trump any

subsequent attempt at revival of the company through a Section 7 or Section 9 petition filed under the IBC.....”

30. We, thus, do not find substance in the submission of Shri Mukherjee that for enforcing the liability under the Guarantee Deed Bank should initiate proceedings for specific performance of the contract or initiate arbitration. The statutory scheme of the code does not contain any indication that the Personal Guarantor of a Corporate Debtor can escape from its liability under the Personal Guarantee Deed merely on the ground that he is now started residing in another country and acquired citizenship of another country and is no more an Indian citizen. It is well settled principle of statutory interpretation that such interpretation of a statute should be adopted which makes the statute functional and does not make a statute non-functional. Accepting the submission of Shri Mukherjee shall lead to interpretation which shall defeat the object and purpose of the Code.

31. The submission of Shri Mukherjee that the Adjudicating Authority has acted beyond the scope of the Code and its action is ultra vires cannot be accepted. The Adjudicating Authority is well within its jurisdictions to initiate insolvency resolution process against the Appellant, the Personal Guarantor of the Corporate Debtor, in accordance with the scheme of Section 95(1) r/w Section 60 of the Code. The Adjudicating Authority in its order dated 16.06.2022 has taken note of the facts and submissions of the Appellant and after considering submissions of the parties has rightly rejected the submission raised on behalf of the Appellant while admitting the application under Section 95(1). The direction issued in Para 29 of the order are consequential to admission of application under Section 95(1). We, thus, are of the view that no grounds have been made out by the Appellant to hold that Adjudicating Authority by the impugned order acted beyond the jurisdiction or committed error in admitting application under Section 95(1) of the Code. There is no merit in this Appeal.

In result, both the Appeals are dismissed. Parties shall bear their own costs.

[Justice Ashok Bhushan]
Chairperson

[Justice M. Satyanarayana Murthy]
Member (Judicial)

[Barun Mitra]
Member (Technical)

NEW DELHI
29th July, 2022