

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.4560 OF 2022

Deserve Exim Pvt. Ltd.	}	
Add at Deserve, CST Road Junction	}	
Opposite Mumbai	}	
University, Kalina, Santacruz East	}	
Mumbai-400 098	}	Petitioner

Versus

Yes Bank Ltd.	}	
Registered Off at One International	}	
Centre, Tower II, 15 th Floor, Senapati	}	
Bapat Marg, Elphinstone West	}	
Mumbai-400 013	]	Respondent

Mr. Navroz Seervai, Senior Advocate along with Mr. Shyam Kapadia, Mr. Sanjay Udeshi, Mr. Darshan Ashar, Mr. Mehul Khetia, Mr. Samarth Jaidev and Mr. Netaji Gawade i/b. M/s. Sanjay Udeshi and Co., Advocates for the Petitioner.

Mr. Gaurav Joshi, Senior Advocate along with Ms. Sushmita Gandhi and Ms. Anamika i/b. IndusLaw, Advocates for Respondent.

**CORAM : S. V. GANGAPURWALA &
S. G. DIGE, JJ.**

RESERVED ON : 14th NOVEMBER, 2022.

PRONOUNCED ON : 22nd NOVEMBER 2022

JUDGMENT : (Per : S.G. Dige, J.)

1. Rule. Rule made returnable forthwith. By consent of learned counsel appearing for the respective parties, the matter is heard finally.

2. Heard Mr. Seervai, learned senior counsel for the petitioner and Mr. Joshi, learned senior counsel for the respondent-bank.

3. By this Writ Petition the Petitioner is seeking direction against the National Company Law Tribunal, Bench Mumbai (for short “NCLT”) to decide the pending Interlocutory Application raising the issue of jurisdiction by virtue of Section 10A of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred as “the IBC”) before proceeding to enter upon the merits of the Company Petition No.1191 of 2021.

4. The brief facts of the case are as under:-

The petitioner is a company, it is in the business of slum rehabilitation projects. The respondent is a scheduled commercial Bank, registered under the Reserve Bank of India Act, 1934. The respondent had lent money to Radius and Deserve Builders LLP (“Borrower-1”) and Raghuleela Builders Pvt. Ltd. (“Borrower-2”) together with (the “Borrowers”). The petitioner had executed a

corporate guarantee (Guarantee-1) dated 2nd June, 2015 in respect of term loan of INR 500 crores advanced to Borrower-1. The petitioner had also executed a corporate guarantee (Guarantee-2) dated 2nd June, 2015 in respect of term loan of INR 300 crores advance to Borrower-2. Both guarantees contained identical terms. Both the guarantees were on demand in as much as the guarantors (including the petitioner herein) had unconditionally and irrevocably guaranteed due repayment of the respective term loans to the respondent on demand.

Both the borrowers defaulted the term loan and were declared as NPA. The respondent has claimed an outstanding amount of approximately INR 888.95 crores towards amounts lent to the borrowers. On account of the aforesaid defaults, the respondent invoked Guarantee-1 on 7th August, 2020 and the petitioner was called upon to pay the amount of INR 506,70,15,583/- within seven days of receipt of the invocation. The respondent invoked Guarantee-2 on 26th June, 2020 and the petitioner was called upon to pay an amount of INR 365,45,44,006/- immediately on receipt of the invocation.

On or around 3rd October, 2020, the respondent filed the company petition, being an application under Section 7 of the IBC.

This was premised on the petitioner's position as guarantor under Guarantee-1 and Guarantee-2. The company petition specifically set out the date of invocation of Guarantee-1 and Guarantee-2 to being 7th August, 2020 and 26th June, 2020 respectively.

The petitioner filed an interlocutory application seeking dismissal of the company petition on the ground of Section 10A of IBC but the NCLT after hearing on interlocutory application has indicated that it would proceed to hear the matter on merit before rendering a finding on jurisdiction. Against it, this writ petition.

5. It is the contention of Mr.Seervai, learned senior counsel for the petitioner that NCLT has gravely erred in seeking to proceed with hearing the matter on merit despite it not having decided whether or not it has the jurisdiction to do so. The NCLT has no jurisdiction in light of Section 10A of the IBC. The NCLT has ignored the settled legal position that an issue of jurisdiction must be determined at the outset and before proceeding to examine the matter on merit, for otherwise it can amount to erroneous assumption of a jurisdiction that it does not possess. Mr. Seervai further submits that a substantial amount of time has already been spent on hearing the jurisdiction issue and both the parties have

completed their submissions thereon, written submissions have already been filed by both the parties but the NCLT is now insisting to proceed with the merit of the case without disposing the interlocutory application. It is required to decide the interlocutory application first on the jurisdictional issue. Mr. Seervai relied upon **Ramesh Kymal versus Siemens Gamesa Renewable Power Private Limited (2021) 3 SCC 224.**

6. It is the contention of Mr. Joshi, learned senior counsel for the respondent that the petitioner is the guarantor to the loan of the borrowers. The borrowers are declared as defaulters. Hence, the respondent filed a petition before the NCLT against the petitioner and borrowers. Though the petitioner is challenging the jurisdiction of the NCLT, the NCLT has taken a proper view to decide all the issues together. The issue of jurisdiction is a mixed question of law and facts. In that case, as per the settled principle of law, a case has to be decided on all issues. He relied on the following decisions:

- (1) S.K. Gupta and anr. Versus K. P. Jain and anr. (1979) 3 SCC 54;
- (2) Islamic Academy of Education and anr. Versus State of Karnataka and ors. (2003) 6 SCC 697;

- (3) M/s.Amar Nath Om Prakash and ors. Versus State of Punjab and ors. (1985) 1 SCC 345;
- (4) Sathyanath and anr. Versus Sarojamani (2022) 7 SCC 644;
- (5) Maharashi Dayanand University versus Anand Coop. L/C. Society Ltd. and anr. (2007) 5 SCC 295;
- (6) Krishna Kumar Birla versus Rajendra Singh Lodha and ors. (2008) 4 SCC 300.

7. We have heard both learned Senior Counsel. Admittedly the Petitioner has filed the interlocutory application before NCLT challenging its jurisdiction under section 10A of the IBC. It is pending there, the NCLT has heard both parties on said application for ten dates, written submissions are also filed by both the parties on that issue. Mr.Seervai and Mr.Joshi are ad idem on one point that is the NCLT has already heard the lawyers extensively on the aspect of jurisdiction viz on interlocutory application filed by the Petitioners, written submissions are also filed. Much time and energy is spent by the NCLT on hearing on the interlocutory application. In view of that it would be appropriate for the NCLT to decide the interlocutory application before proceeding to deal with the other issues. The Hon'ble Apex Court in the case of Ramesh

Kymal (Supra) has dealt with the issue of Section 10A of IBC. As the NCLT has extensively heard both the parties on interlocutory application, hence in our view the NCLT shall decide it before dealing with other issues. We have gone through the case law's cited by learned counsel for Respondent's, facts of cited case and case at hand are different. In present case in view of judgment of Hon'ble Apex Court, the Petitioner have challenged the jurisdiction of NCLT and the NCLT has heard both parties on interlocutory application extensively.

8. In view of above, we pass following order:

ORDER

- (i) The Petition is allowed.
- (ii) The NCLT shall decide pending interlocutory application No.609 of 2022 before deciding other issues, on its own merit.
- (iii) Rule made absolute.
- (iv) No order as to costs.

(S. G. DIGE, J.)

(S. V. GANGAPURWALA, J.)