$~109 to112

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Date of Decision: 14th May, 2024***

\+ W.P.(C) 6864/2024 & CM APPL. 28644/2024, CM APPL. 28645/2024, CM APPL. 28646/2024

SAMIKSHA MAHAJAN ..... Petitioner

Through: Mr. Abhinav Mukharji, Sr. Advocate with Mr. Nakul Mohta, Mr. Vinayak Bhandari, Ms. Vidhi Gupta, Ms. Riya Dhingra, Mr. Jaisal Singh and Ms. Teesta Mishra, Advocates
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versus

INDIAN BANK & ANR. ..... Respondents

Through: Mr. Rajesh Kumar Gautam, Mr. Anant Gautam, Ms. Anani Achumi, Mr. Dinesh Sharma, Ms. Shivani Sagar, Ms. Likivi Jakhalu, Advocates
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\+ W.P.(C) 6865/2024 & CM APPL. 28648/2024, CM APPL. 28649/2024, CM APPL. 28650/2024

BRIJ MOHAN MAHAJAN ..... Petitioner

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versus

INDIAN BANK (ERSTWHILE ALLAHABAD BANK) & ANR.
..... Respondents

Through: Mr. Rajesh Kumar Gautam, Mr. Anant Gautam, Ms. Anani Achumi, Mr. Dinesh Sharma, Ms. Shivani Sagar, Ms. Likivi Jakhalu, Advocates
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\+ W.P.(C) 6866/2024 & CM APPL. 28651/2024, CM APPL. 28652/2024, CM APPL. 28653/2024

SANJEEV MAHAJAN ..... Petitioner

Through: Mr. Abhinav Mukharji, Sr. Advocate with Mr. Nakul Mohta, Ms. Vidhi Gupta and Ms. Riya Dhingra, Advocates.
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versus

INDIAN BANK (ERSTWHILE ALLAHABAD BANK) & ANR.
..... Respondents

Through: Mr. Rajesh Kumar Gautam, Mr. Anant Gautam, Ms. Anani Achumi, Mr. Dinesh Sharma, Ms. Shivani Sagar, Ms. Likivi Jakhalu, Advocates
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\+ W.P.(C) 6867/2024 & CM APPL. 28656/2024, CM APPL. 28657/2024, CM APPL. 28658/2024

NIMIT MAHAJAN ..... Petitioner

Through: Mr. Abhinav Mukharji, Sr. Advocate

with Mr. Nakul Mohta, Mr. Amulya, Mr. Anurag Singh, Mr. Zain. A. Khan, Ms. Vidhi Gupta and Ms. Riya Dhingra, Advocates.
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versus

INDIAN BANK (ERSTWHILE ALLAHABAD BANK) & ANR.
..... Respondents

Through: Mr. Rajesh Kumar Gautam, Mr. Anant Gautam, Ms. Anani Achumi, Mr. Dinesh Sharma, Ms. Shivani Sagar, Ms. Likivi Jakhalu, Advocates
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CORAM:
HON'BLE MS. JUSTICE MINI PUSHKARNA

MINI PUSHKARNA, J: *(ORAL)*

CM APPL. 28645/2024 &CM APPL. 28646/2024, CM APPL. 28649/2024, CM APPL. 28650/2024, CM APPL. 28652/2024, CM APPL. 28653/2024, CM APPL. 28657/2024, CM APPL. 28658/2024 (For Exemptions)

1. Exemptions allowed, subject to just exceptions.

2. Applications are disposed of.

W.P.(C) 6864/2024 & CM APPL. 28644/2024
W.P.(C) 6865/2024 & CM APPL. 28648/2024
W.P.(C) 6866/2024 & CM APPL. 28651/2024
W.P.(C) 6867/2024 & CM APPL. 28656/2024

3. The present petitions have been filed by the petitioners, who are the

personal guarantors to the Corporate Debtor. The present petitions challenge the order dated 07th May, 2024 passed by the learned Adjudicating Authority, i.e., National Company Law Tribunal ("NCLT") in *C.P.(IB) No. 490/ND/2023*, and other connected matters, whereby, the learned Adjudicating Authority has appointed a Resolution Professional ("RP") upon an application under Section 95 of the Insolvency and Bankruptcy Code ("IBC"), 2016, in personal insolvency proceedings initiated against the petitioners, i.e., the personal guarantors .

4. Learned Senior Counsel appearing for the petitioners submits that the impugned order is a non-speaking, un-reasoned order, and has been passed without any application of mind. It is submitted that the impugned order has been passed without dealing with the preliminary objections of the petitioners on the maintainability of the Section 95 IBC application, on the ground that the said application was *ex-facie* time barred, and thus, not maintainable. It is submitted that the impugned order does not deal with the pleadings and as well as the arguments made on behalf of the petitioners and the judgments cited by the petitioners.

4.1 It is submitted that the right to sue accrues only from the date of default. In the present case, the insolvency proceedings initiated against the petitioners are barred by limitation, in terms of Article 137 of the Schedule of the Limitation Act, 1963.

4.2 Learned Senior Counsel appearing for the petitioners has drawn the attention of this Court to the fact that in the Section 95 IBC Application filed before the NCLT itself, the respondent-bank has clearly specified that the date of default is 31st August, 2014. Thus, it is submitted that by virtue of Article 137 of the Limitation Act, the said application filed before the NCLT is barred by limitation.

4.3 Learned Senior Counsel appearing for the petitioners submits that the present case is covered by the decision of the High Court of Odisha in the case of *Sandeep Jajodia Versus IDBI Bank*, in *W.P.(C) No. 49/2022*, wherein, the order passed by the learned Adjudicating Authority therein under Section 95 of the IBC, by which Insolvency Resolution Professional had been appointed, was set aside on the ground of being time barred. Thus, it is submitted that the said judgment by the Odisha High Court is squarely applicable to the present petition, and the present writ petition would be maintainable before this Court.

4.4 It is further submitted that the judgment of Supreme Court dated 09th November, 2023 passed in *W.P.(C) No. 1281/2021,* in the case of *Dilip B. Jiwarika Versus Union of India and Others*, as relied by the learned Adjudicating Authority in the impugned order, is not applicable to the facts and circumstances of the present case. It is submitted that the Supreme Court has merely observed in the said case that the issues such as existence of a creditor-debtor relationship, and whether the debt is outstanding or settled, need not be looked into at the stage of appointing RP. Thus, he submits that the said judgment does not state that the issue of limitation cannot be looked into or that Section 3 of the Limitation Act, 1963 ("Limitation Act") is not applicable at the stage, where the Adjudicating Authority is discharging its functions under Section 95 of IBC. Thus, it is submitted that the learned Adjudicating Authority is not precluded from looking into the issue of limitation as a foundational issue at this stage.

4.5 Learned Senior Counsel appearing for the petitioners further submits that the petitioners have no alternate efficacious remedy under the IBC, in as much as, the impugned order has been passed in Section 95 proceedings initiated under Part III of the IBC. He submits that the provision for appeal under the IBC, i.e., Section 61, falls under Part II of the IBC. Thus, he submits that in view of Section 61 of the IBC, 2016, no appeal can be filed by the petitioners before the National Company Law Appellate Tribunal ("NCLAT"), against an order passed under Section 95 of the IBC.

4.6 Learned Senior Counsel appearing for the petitioners has also relied upon the judgment in the case of ***Gaurav Hargovindbhai Dave Versus Asset Reconstruction Company (India) Limited and Another, (2019) 10 SCC 572,*** to contend that the Supreme Court has categorically held that Article 137 of the Limitation Act, shall be applicable to the proceedings under the IBC. Thus, it submitted that the said issue of limitation, which was raised on behalf of the petitioners before the learned Adjudicating Authority, ought to have been considered by the said Authority. It is submitted that the impugned order dated 07th May, 2024 is bad in law, as the plea of the petitioners on the aspect of limitation and application under Section 95 of the IBC not being maintainable against the petitioners herein, was not considered by the learned Adjudicating Authority.

4.7 Learned Senior Counsel further relies upon the order dated 10th April, 2024 passed by the NCLT, Ahmedabad in the case of ***Mrs. Laxmidevi Ansukumar Baid Versus ICICI Bank***, in *C.P.(IB) No. 145/AHM/2024,* to submit that even at the stage of appointment of RP, various objections as raised by the personal guarantors have been entertained, which has not been done in the impugned order passed by the learned Adjudicating Authority, in the present case.

4.8 Learned Senior Counsel also relies upon the judgment in the case of

Babulal Vardharji Gurjar Versus Veer Gurjar Aluminium Industries Private Limited and Another, (2020) 15 SCC 1, to submit that mere One Time Settlement ("OTS") or entry in the balance sheet, will not be deemed to be an acknowledgement, and cannot be considered for the purposes of extending the period of limitation.

4.9 Learned Senior Counsel further relies upon the judgment in the case of ***Godrej Sara Lee Ltd. Versus Excise and Taxation Officer-cum-Assessing Authority and Others, (2023) SCC OnLine SC 95***, to state that merely because an alternative remedy is available, it cannot be held that the writ petition is not maintainable before High Court, and that the High Court has the power to issue prerogative writs under Article 226 of the Constitution, in cases where an alternate remedy is available.

5. Per contra, learned counsel appearing for the respondent no.1/Indian Bank submits that no doubt that Article 137 of the Limitation Act will be applicable even in IBC proceedings, however, in present cases, the proceedings initiated by the respondent-bank are within limitation.

5.1 He submits that the proceedings against the Corporate Debtor are pending before the NCLT since the year 2019, being *(IB)-1913(ND)/2019*.

5.2 He further submits that the petitioners, being the personal guarantors, have submitted eight OTS proposals. Thus, it is submitted that when the corporate liability is persisting, the liability of the petitioners as personal guarantors, will also subsist.

5.3 Learned counsel for respondent no.1-bank has further relied upon the Revival Letter dated 30th October, 2018, which has been given by the personal guarantor. Thus, it is submitted that the limitation period of three years will begin from this day, i.e. 30th October, 2018. He further submits that by counting three years from 30th October, 2018, the period of limitation is till 30th October, 2021. He further relies upon the judgment of the Supreme Court in the case of *Suo Moto Writ Petition 3/2020*, whereby, the Supreme Court had excluded the period from 15th March, 2021 till 20th March, 2022, from the limitation period. Thus, learned counsel appearing for the respondent submits that till 15th March, 2020, when the period of limitation was suspended by virtue of the order of the Supreme Court in the aforesaid case, the limitation period of only one year five months and fifteen days was over, in respect of the present cases. He submits that after 28th February, 2022, the remaining period of limitation which the respondents had, was one year seven months. Therefore, the respondents had time till 20th September, 2023 to file Section 95 IBC applications against the petitioners.

5.4 He further draws the attention of this Court to the demand notice dated 04th February, 2023, which was issued against the petitioners. Thus, he submits that the Section 95 IBC application, which was filed on 15th July, 2023, was within the period of limitation.

5.5 He has also drawn the attention of this Court to the deed of personal guarantee dated 22nd March, 2019, which is part of the documents that have been filed under Section 95 IBC application, before the NCLT.

5.6 Learned Counsel has also relied upon the revised Settlement Proposal Letter dated 21st March, 2023 submitted by the corporate debtor, which has been signed by Mr. Sanjeev Mahajan, one of the personal guarantors, who is one of the petitioners before this Court. By referring to the said revised proposal, it is submitted that it has been admitted that part-payments have been made to the respondent-bank.

5.7 He further submits that, thus, there is acknowledgment of debt by the petitioners from time to time. Since the corporate liability still exists, the liability of the petitioners, being personal guarantors, is co-extensive with the liability of the corporate debtor.

5.8 Learned counsel appearing for the respondents further disputes the submission made by learned Senior Counsel for the petitioners that no efficacious remedy is available to the petitioners. He submits that the petitioners have efficacious remedy to file an appeal under Section 421 of the Companies Act, 2013 before the National Company Law Appellate Tribunal ("NCLAT"). He submits that as far as Corporate Debtor is concerned, an appeal can be filed under Section 61 of the IBC, however, the personal guarantors have the right to file an appeal under Section 421 of the Companies Act, 2013 before the NCLAT. Thus, it is submitted that the petitioners have an alternative efficacious remedy of filing the appeal before the NCLAT, and that the present petition would not be maintainable.

5.9 Learned counsel for the respondents further submits that there are subsequent judgments passed by the Supreme Court, wherein, the Supreme Court has categorically held, that OTS and entry in the balance sheets, will be considered as an admission, by the debtor or a guarantor. For this purpose, he relies upon the judgment dated 04th August, 2021 passed in *C.A. No. 1650/2020*, titled as *Dena Bank Versus C. Shiva Kumar Reddy and Another*.

6. At this stage, learned Senior Counsel, appearing for the petitioners submits, that he would be satisfied, if directions are issued to the learned Adjudicating Authority of the NCLT, to consider all the issues that have been raised by the petitioners with respect to limitation, in the first instance.

7. For this purpose learned Senior Counsel relies upon the order dated 23rd August, 2023 passed by the NCLT, which reads as under:

*"**IN THE NATIONAL COMPANY LAW TRIBUNAL: NEW DELHI SPECIAL BENCH (COURT – II)***

Item No.-302
IB-490/ND/2023

IN THE MATTER OF:
Indian Bank *…..**Applicant/Petitioner***
Vs.
Smt. Samiksha Mahajan *…..**Respondent***

Under Section: 95(1) of IBC, 2016

Order delivered on 23.08.2023

CORAM:
SH. ASHOK KUMAR BHARDWAJ, HON'BLE MEMBER (J)
SH. L. N. GUPTA, HON'BLE MEMBER (T)

PRESENT:
For the Applicant : Adv. Kanishka Pandey (Proxy) for Reema Khurana
For the Respondent : Sr. Adv. P. Nagesh, Adv. Zain & Adv. Nakul Mohta

ORDER

Mr. P. Nagesh, Ld. Senior Counsel appearing on behalf of the PG submitted that an advance copy of the petition has not been served upon the Personal Guarantor and therefore, the petition is not maintainable. Confronted with the plea, the Ld. Proxy Counsel appearing for the Applicant prayed for a short adjournment. At his request, the hearing in the captioned petition is deferred to 26.09.2023.

List on 26.09.2023.

Sd/-
(L. N. GUPTA)
MEMBER (T)

Sd/-
(ASHOK KUMAR BHARDWAJ)
MEMBER (J)"

8. By relying upon the aforesaid order, he submits that the NCLT itself has been going into the issue of maintainability of the petition. He further submits that even the NCLT, Ahmedabad, in the case of ***Mrs. Laxmidevi Anusukumar Baid (Supra)***, had dealt with various preliminary issues, at the time of appointment of the RP.

9. He again refers to the order dated 10th April, 2024, passed by the NCLT, Ahmedabad in the case of ***Mrs. Laxmidevi Anusukumar Baid (Supra)***, relevant portions of which read as under:

> *"xxx xxx xxx*
>
> *3. However, the Applicant has filed copy of the Demand Notice dated 07.06.2023 issued by the Respondent/ICICI Bank U/s 13(2) of SARFAESI Act, 2002 and Possession Notice dated 20.09.2023 issued U/s 13(4) of SARFAESI Act, 2002 read with Rule 8(1) of the Security Interest (Enforcement) Rules, 2002 which are annexed as* **Annexure-D and E** *with the application.*
>
> *4. On perusal of these notices issued by the Respondent/ICICI Bank, it is observed that said notices are issued only for the purpose of enforcing security interest and not to invoke any Personal Guarantee.*
>
> *5. The learned Counsel for the Applicant may be right in his submission that by virtue of Demand Notice dated 07.06.2023 issued U/s 13(2) of the SARFAESI Act, 2002, the Applicant was also asked to make the payment of dues. But there is neither anything on record to show that any other notice has been issued by Respondent Bank to the Applicant in the capacity of Personal Guarantor to invoke the Personal Guarantee nor any steps have been taken by the Respondent Bank to recover the dues from the Applicant by sale of personal assets except secured assets.*
>
> *6. The Hon'ble NCLAT in its decision in the matter of Amanjyot Singh Vs. Navneet Kumar Jain & Ors. (Company Appeal (AT) (Insolvency) No. 961 of 2022) has upheld the view taken by NCLT, Delhi dismissing an application filed by the Appellant under section 94. The relevant para of the said order is reproduced below:-*
>
> > *"7. Notice under Section 13, sub-section (2) is issued by the Bank for enforcing the security interest. Section 13, sub-section (1) and (2) of the SARFAESI Act is as follows:-*

"13. Enforcement of security interest.--(1) Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act.

(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4).

Provided that—
(i) the requirement of classification of secured debt as non-performing asset under this subsection shall not apply to a borrower who has raised funds through issue of debt securities; and

(ii) in the event of default, the debenture trustee shall be entitled to enforce security interest in the same manner as provided under this section with such modifications as may be necessary and in accordance with the terms and conditions of Company Appeal (AT) (Insolvency) No. 961 of 2022 6 security documents executed in favour of the debenture trustee."

8. The definition of 'borrower' given in SARFAESI Act under Section-2 (f) is wide enough to include a Guarantor also. Section 13 is for enforcement of security interest. The borrower within the meaning of Section 13, subsection (2) shall obviously include the Guarantor also. ....
12. We, thus, are satisfied that foundation which was laid down by the Appellant for initiating the CIRP against the Appellant, was not sufficient to admit Section 94 Application and initiate the CIRP against the Appellant. We may further notice that Section 10 Application against the Corporate Debtor has already been admitted and CIRP against the Corporate Debtor had been initiated. The case taken up by the Bank being categorical and

clear that no steps have been taken by the Bank against the Appellant, there is no cause for the Appellant to pray for initiation of CIRP against the Appellant – the Personal Guarantor. We, thus, do not find any good ground to interfere with the impugned order in this Appeal. The Appeal is accordingly dismissed. No costs."

7. In the present case no document is annexed with the application which suggests that guarantee is invoked by the Respondent Bank. Therefore, by looking at the facts of the present case and relying on the decision of Hon'ble NCLAT supra we are of the view that the present application is filed without any cause and is premature. Hence, CP/IB/145/AHM/2024 stands dismissed with liberty."

10. Considering the submissions made before this Court, and without interfering with the impugned order dated 07th May, 2024, wherein, RP has been appointed, the matter is remanded back to the NCLT, to consider the various objections raised by the petitioners on the aspect of limitation and maintainability of the Section 95 IBC application, filed by the respondent no.1 herein, before the NCLT.

11. Rights and contentions of both the parties are left open, which shall be considered by the learned Adjudicating Authority of the NCLT, on its merits.

12. It is clarified that this Court has not made any observation on the merits of the submissions made by any of the parties. It is further clarified that the proceedings before the NCLT, shall continue.

13. With the aforesaid directions, the present petitions are disposed of, along with the pending applications.

MINI PUSHKARNA, J

MAY 14, 2024/kr

Signature Not Verified
Digitally Signed By:CHARU CHAUDHARY
Signing Date:27.05.2024 13:01:45