

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOCHI BENCH**

IA (IBC)/339/KOB/2023

IN

CP(IBC)/14/KOB/2023

*(Under Section 60(5) of the IBC, 2016 read with Rule
11, NCLT Rules, 2016)*

***In the matter of* FURNACE FABRICA (INDIA)
LIMITED**

MEMO OF PARTIES:

FURNACE FABRICA (INDIA) LIMITED,

Opposite MILMA Dairy, Koonamthai, Edapally,
Kochi 682024.

... Applicant

-Vs-

STATE BANK OF INDIA,

Stressed Asset Management Branch-1, 2nd
Floor, "The Arcade", World Trade Centre, Cuffe
Parade. Colaba, Mumbai-400005

... Respondent

Order delivered on: 01.11.2023

Coram:

Hon'ble Member (Judicial) : TMT. (Retd.) Justice T Krishna Valli

Hon'ble Member (Technical) : Shri. Shyam Babu Gautam

Appearances:

For the Applicant : Mr. Rohan Kumar, Advocate

For the Respondent : Mr. Vinod P V, Advocate

ORDER

Per Coram

1. This Application is filed under Section 60(5) of the IBC, 2016 by Furnace Fabrica (India)Limited, the Corporate Debtor, against State Bank of India, the Financial Creditor to stay the proceedings in CP(IBC)/14/KOB/2023, initiated under section 7, in view of the interim moratorium continuing in the matter of personal insolvency resolution of the guarantors of the Corporate Debtor.

The Brief facts of the case are as follows: -

2. The State Bank of India filed section 7 application against the Corporate Debtor (CD) on 23.05.2023 and considered on 12.07.2023. It is stated that the main CP arises out of the default of credit facilities sanctioned and granted by consortium of banks namely, SBI as the lead bank, EXIM Bank, Axis Bank and Standard Chartered Bank to the CD. As security the credit facility was secured by personal guarantees of individuals. It is stated that one of the creditors', Standard Chartered Bank has already initiated section 95 proceedings against one of the persona guarantors, Mr. Abdul Rehman Basheeruddin in CP(IBC)/12/KOB/2023 on 11.05.2023. It is stated that the petition is allowed and an RP has been appointed for his report. It is stated that the interim moratorium under section 96(1)(a) of the code commences in relation to all debts of the personal guarantor and during such period:-

(a) any legal action or proceeding pending in respect of any debt shall be deemed to have been stayed; and

(b) the creditors of the debtor shall not initiate any legal action or proceedings in respect of any debt.

It is further stated that the definition of debt under section 3(11) means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt. It is stated that the main CP arises from same credit facilities granted by the creditors under same documents and hence it is bound by the interim moratorium under section 96 and consequently section 101 of the IBC.

3. On respondent side, it is stated that it is a settled position of law that simultaneous proceedings can be initiated against the CD and guarantor for the same debt. The respondent state that in ***Laxmi Pat Surana vs. Union Bank of India & Ann***, the Hon'ble Supreme Court held that the right of cause of action would ensure the financial creditor to proceed against the principal borrower and guarantor in equal measure in case of default of debt acting jointly and severally. It is stated that the obligation of guarantor is coterminous and coextensive with that of principal borrower to defray the debt as stated in section 128 of Contract Act. It is further stated that there is no bar on FC to proceed simultaneously as guarantors' liability arises from guarantee agreement and is independent from CD's liability. It is stated that the reference 'all the debts' in section 96 (1)(a) of IBC is with respect to all debts of the particular personal guarantor and not in general which is clear from the language in section 96(1)(b)(ii). Hence the word debt

cannot be stretched to include debt of CD. It is stated that as per section 128 of contract act, the liability of surety is coextensive with that of principal debtor. The respondent relies on ***Lalit Kumar Jain vs Union of India(2021 (9) SCC 321)*** to substantiate that the liability of the debtor arising from guarantee is independent to that of the borrower. The respondent further relies on ***Axis Trustee Services Limited vs Brij Bhushan Singh and Ors. (Delhi High Court)*** to state that section 96 moratorium applies to debts of personal guarantor alone and not to other co guarantors even if arising out of same debt.

4. Heard the submissions and perused the documents on record. The point fell for consideration here is whether the interim moratorium under section 96 pertaining to personal insolvency proceedings will bar the proceedings under section 7. To answer this point it is profitable to look into the moratorium under section 96 which is as follows:-

“(1) When an application is filed under section 94 or section 95—

(a) an interim-moratorium shall commence on the date of the application in relation to all the debts and shall cease to have effect on the date of admission of such application; and

(b) during the interim-moratorium period—

(i) any legal action or proceeding pending in respect of any debt shall be deemed to have been stayed; and

(ii) the creditors of the debtor shall not initiate any legal action or proceedings in respect of any debt.

(2) xxxxx

(3) *The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.”*

Now the we see the definition of ‘debt’ which means “*a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;*”

By the plain language of the section, the moratorium shall be in existence w.r.t to all debts, which is any liability or obligation in respect of a claim due from the debtor, in this case, the personal guarantor, and also, any legal proceedings which are pending with respect to such debt is deemed to be stayed and no further action shall lie. Hence it is clear that the moratorium will only affect the debts of the personal guarantor. But here the debts of personal guarantor are not exclusively the debt of guarantor but arising out of the debts of the CD. The contract of guarantee is a secondary contract emerging out of primary contract which is loan agreement. The debt and default to be considered are primarily the debt of the Corporate Debtor which is a company or a body corporate having a separate legal existence from the investors or its agents. As laid by Companies Act, the CD can enter into contracts and litigate in its own name as it has separate legal status. Though the CD acts through its alter ego agents who may or may not be its directors or shareholders, its status is an independent legal person in eyes of law. In this matter, the FC has filed the section 7 application against the CD for default of loan arising out of its

agreement with CD and not the personal guarantor. The CD who is the principal borrower is liable to pay the principal and interest and for default. As per section 128 of the Indian contract act, the liability of the surety or the guarantor is co extensive, meaning guarantor is liable as much and in equal terms as the principal is liable. But it does not mean that one cause of action will extinguish the other cause of action. The cause of action for section 7 is the default in loan repayment by CD whereas the cause of action of section 95 is the non-payment of debt on invocation of guarantee. Both are separate contracts governed under the contract act and remedy under one contract shall not extinguish the other in law. The word “in relation to” and “any” which is the primary contention of the applicant cannot be stretched to mean that the debt of guarantor which are also debts of the CD in first instance, and all the proceedings which arise out of these debts come under moratorium. All it means is that any action against the particular guarantor/debtor pertaining to these debts shall be in moratorium. It does not curtail the right of cause of action from separate contractual arrangements. Admittedly the moratorium under section 96 is having larger scope than moratorium under section 14 but the liability falls from different persons in the eye of law.

Now it is profitable to look into the scheme of IBC, 2016. On going through the IBC, it is seen that nowhere in the code, it is mentioned that the moratorium in section 96 shall affect the proceedings under section 7 or 9 or 10. Infact there are 2 moratoriums one which comes after admission under section 7 or 9 or 10 and

another which comes on initiation of personal insolvency process. Both are governed by separate parts in IBC and hence the legislature has provided separate action for different situations. The structure of the IBC is such that moratorium under section 14 comes out of the primary debt of CD and the moratorium under section 96 or 101 comes out of the secondary debt i.e default of guarantee. If moratorium under section 96 or 101 is meant to prohibit section 7 proceedings then what it means is to essentially invalidate the primary contract which cannot be the object of IBC. Section 14 also does not put a bar on proceedings under section 95 against the personal guarantor. The code is complete and as per rule of harmonious construction, it should be read as a whole and construed harmoniously. The adjudicating authority for action under personal insolvency is DRT except when the debt arises out of personal guarantor agreements for CD which is NCLT. Also, the object of a guarantor agreement itself is that the liability shall fall into both the guarantor and CD. If section 96 is read to having a moratorium effect on other cause of action, it will defeat the purpose of IBC and even the contract of guarantee itself. The object of IBC in Part 1 is the resolution of the corporate debtor and not a process of recovery of money and that is the object of moratorium i.e, to stop any legal impediment against successful resolution process hindering the CIRP or PIRP. The resolution process of CD and personal guarantor are separate process and that is resolution of CD through a resolution plan does not absolve the liability of a guarantor by any chance. The liability exists long until the debt is

fully paid by CD or by personal guarantor or both. Hence, the FC has the right to move against either or both the CD and personal guarantor simultaneously, independently or jointly. Any other interpretation of the word 'moratorium' will defeat the purpose envisaged in IBC.

5. Now we take look at the various cases which can give finality to this matter:

Laxmi Pat Surana vs. Union Bank of India & Ann,

“19. Indubitably, a right or cause of action would ensure to the lender (Financial creditor) to proceed against the principle borrower, as well as the guarantor in equal measure in case they commit default in repayment of the amount of debt acting jointly and severally It would still be a case of default borrower fails to discharge his obligation in respect of amount of debt. For, the obligation of the guarantor is coextensive and conterminous with that of the principle borrower to defray the debt, as predicated in Section 128 of the Contract Act. As a consequence of such default the status of the guarantor metamorphizes in to a debtor or a corporate Debtor if it happens to be a corporate person, within the meaning of Section 3(8) of the Code. For as aforesaid, expression “default” has also been defined in Section 3(12) of the Code to mean non-payment of debt when whole or any part or instalment of the amount of debt has become due or payable and is not paid by the debtor or the corporate debtor as the case may be”

Lalit Kumar Jain vs. Union of India & Ors (2021 (9) SCC 321)

“111. In view of the above discussion, it is held that approval of a resolution plan does not ipso facto discharge a personal guarantor (of a corporate debtor) of her or his liabilities under the contract of guarantee. As held by this. court, the release or discharge of a principal borrower from the debt owed by it to its creditor, by an involuntary process, i. e., by operation of law, or due to liquidation or insolvency proceeding, does not absolve the surety/guarantor of his or her liability, which arises out of an independent contract.”

Axis Trustee Services Limited vs Brij Bhushan Singh and Ors

“34. Before the insolvency applications were filed against the defendant no. 1, counsel for the defendants had also contended

that the interim moratorium in respect of one of the co-guarantors would also apply to the other co-guarantor for the same debt as the liability of both the co-guarantors arise from the same debt. Reliance is placed on the words 'any debt' occurring in Section 96(1)(b) of the IBC. Though I need not delve into this submission in view of the fact that insolvency proceedings. have subsequently been filed against the defendant no. 1, however, since I have heard the counsels for the parties extensively on this issue, I propose to address the same

35. In my view the language of Section 96(1) of the IBC cannot be stretched so as to include all co-guarantors within the ambit of the interim moratorium. The reference to 'all the debts' in Section 96(1)(a) has to be in respect of all debts of a particular debtor. This is clear from the language used in Section 96(1)(b)(ii) to the effect

that 'the creditors of the debtor shall not initiate any legal action or proceedings in respect of any debt.' Therefore, the effect of the ' interim moratorium is only in respect of the debts of a particular debtor. By no stretch of imagination can it be said to include other independent guarantors in respect of the same debt of a corporate debtor. Merely because an interim moratorium under Section 96 is operable in respect of one of the co-guarantors, the same would not apply to the other co-guarantor(s)

36. Counsel for the defendants has relied on the following paragraphs of the judgment in V. Ramakrishna (supra):

"26. We are also of the opinion that Sections 96 and 101, when contrasted with Section 14, would show that Section 14 cannot possibly apply to a personal guarantor. When an application is filed under Part III, an interim-moratorium or a moratorium is applicable in respect of any debt due. First and foremost, this is a separate moratorium, applicable separately in the case of personal guarantors against whom insolvency resolution processes may be initiated under Part III. Secondly, 'the protection of the moratorium under these sections is far greater than that of Section 14 in those pending legal proceedings in respect of the debt and not the debtor is stayed. The difference in language between Sections 14 and 101 is for a reason.

26.1. Section 14 refers only to debts due by- corporate debtors, who are limited liability companies, and it is clear that in the vast majority of cases, personal guarantees are given by Directors who

are in management of the companies. The object of the Code is not to allow such guarantors to escape from an independent and co-extensive liability to pay off the entire outstanding debt, which is why Section 14 is not applied to them. However, insofar as firms and individuals are concerned, guarantees are given in respect of individual debts by persons who have unlimited liability to pay them. And such guarantors may be complete strangers to the debtor — often it could be a personal friend. It is for this reason that the moratorium mentioned in Section 101 would cover such persons, as such moratorium is in relation to the debt and not the debtor.

*26.2. We may hasten to add that it is open to us to mark the difference in language between Sections 14 and 96 and 101, even though Sections 96 and 101 have not yet been brought into force. This is for the reason, as has been held in *State of Kerala v. Mar Appraem Kuri Co. Ltd.* MANU/SC/0445/2012: (2012) 7 SCC 106: (2012) 4 SCC (Civ) 69], that a law "made" by the legislature is a law on the statute book even though it may not have been brought into force. "*

37. In the aforesaid judgment, the observations made by the Supreme Court were in the context of moratorium under Section 101 applying to guarantors of debts of individuals and firms. In the present case, the defendant no.1 is not the guarantor in respect of the debt of the defendant no.2. They are both independent guarantors in respect of the corporate debtor, with joint and several liability. Therefore, the

reliance placed on the aforesaid judgment is misplaced. Creditors would have an independent recourse against either of the guarantors and the inability to recover against one of the guarantors would not come in the way of making recoveries against the other guarantors. Even in terms of Section 43 of the Indian Contract Act, a plaintiff can choose to proceed against one of the co-promisors. Further, Sections 44 and 138 of the Contract Act provide that discharge of one of the parties/sureties does not amount to discharge of the other party/surety. Therefore, I am of the considered view that the interim moratorium under Section 96 in respect of one of the guarantors would not ipso facto apply against a co-guarantor.”

We also perused through the decisions of Hon’ble NCLAT in **Bhavesh Gandhi vs Central Bank of India (Company Appeal (AT)(Ins) no. 923 od 2022)** and **Ashok Mahindru and Ors. Vs Vivek Parti (Company Appeal (AT)(Ins) no. 1324 od 2022)**.

6. On the conjoint reading of the provisions of the code, in line with the judgements referred above, we are of opinion that the moratorium under section 96 and 101 of the code cannot be meant to prohibit the right to action under section 7 or 9 or 10 of IBC which lie against a company or body corporate and not against an individual as under PIRP. It is our view that the word ‘in relation to debt’ should be read in harmony with the other parts of the code and after giving due importance to the purpose and terms of a contract of guarantee and loan agreements. Hence, we deem it fit that no stay can be granted in this matter.

7. In result, IA (IBC)/339/KOB/2023 is, therefore, dismissed and disposed of, accordingly.
8. The Registry is directed to send e-mail copies of the order forthwith to all the parties inclusive of the Counsel.
9. Urgent certified copy of this order, if applied for, be issued upon compliance with all requisite formalities.
10. File be consigned to records.

SHYAM BABU GAUTAM
(MEMBER TECHNICAL)

T KRISHNA VALLI
(MEMBER JUDICIAL)

Signed on this, the 1st day of November, 2023.

Rohit/LRA