

ERGO

Analysing developments impacting business

NCLAT: FOREIGN CITIZENSHIP CANNOT FACILITATE AN ESCAPE FROM THE LIABILITY OF A PERSONAL GUARANTOR

12 August 2022

In a recent order passed by the National Company Law Appellate Tribunal, Principal Bench (NCLAT), dismissing two appeals in *Sudip Dutta @ Sudip Bijoy Dutta v. State Bank of India*, Company Appeal (AT)(Insolvency) No. 807 of 2021 and *Sudip Dutta @ Sudip Bijoy Dutta v. State Bank of India & Anr.*, Company Appeal (AT)(Insolvency) No. 740 of 2022 (dated 29 July 2022), it was held that merely by acquiring foreign citizenship after the execution of a deed of guarantee, a personal guarantor cannot escape his/her liability under the guarantee. Further, it was also held that proceedings against such a personal guarantor can be initiated before the adjudicating authority under Section 95(1) of the Insolvency and Bankruptcy Code, 2016 (Code).

BACKGROUND

Sudip Dutta (Appellant), director of Ess Dee Aluminium Limited (Corporate Debtor), executed a deed of guarantee dated 19 October 2015 (Guarantee Deed) in favour of State Bank of India (Respondent) guaranteeing payment in relation to a facility availed by the Corporate Debtor. On 14 February 2020, insolvency application under Section 7 of the Code was admitted by the National Company Law Tribunal, Kolkata Bench (NCLT Kolkata) against the Corporate Debtor.

In the interim, on 18 June 2018, the Appellant acquired the citizenship of Singapore and on those grounds, challenged the application dated 1 February 2020, filed by the Respondent against the Appellant under Section 95(1) of the Code.

In relation to the above, two appeals arose challenging (a) order dated 3 August 2021 passed by the NCLT Kolkata appointing the resolution professional and directing him to recommend whether the application under Section 95(1) of the Code be admitted; and (b) order dated 16 June 2022 passed by the NCLT Kolkata admitting the application under Section 95(1) of the Code.

ISSUES

- Whether the Respondent can initiate proceedings under Section 95(1) of the Code against the Appellant, given that Appellant is a foreign citizen?
- Whether it was necessary for the Central Government to enter into an agreement with the Government of Singapore as is required under Section 234 and 235 of the Code to enable the adjudicating authority to proceed under Section 95(1) of the Code against the Appellant?

FINDINGS OF THE NCLAT

The NCLAT while dismissing the above appeals held as follows:

- Section 3(23) of the Code defines 'person' to include a person resident outside India. Further, section 3(25) of the Code defines 'person resident outside India' as a person other than a person resident in India. Furthermore, Section 2 of the Code which provides for applicability of the Code, extends its applicability to 'personal guarantors to corporate debtors'.
- Section 60(1) of the Code provides that the adjudicating authority in relation to insolvency resolution for corporate persons including personal guarantors shall be the National Company Law Tribunal having territorial jurisdiction over the place where the registered office of the corporate person is located. The mere fact that the Appellant is a citizen of the Republic of Singapore is irrelevant for initiating proceedings against the Appellant as the residence of the personal guarantor is not a relevant factor. Since the registered office of the Corporate Debtor is within the territorial jurisdiction of the NCLT Kolkata, insolvency proceedings could be initiated against the personal guarantor in the same tribunal. Further, the adjudication of disputes related to a personal guarantor under Section 60(1) of the Code does not have any nexus to the personal guarantor's residency status.
- The scheme of the Code does not indicate that a personal guarantor shall be absolved from his liability on the pretext that he has obtained citizenship of a foreign country.
- The Hon'ble Supreme Court of India in *Lalit Kumar Jain v. Union of India & Ors.* (2021) 9 SCC 321, held that insolvency proceedings against a personal guarantor should be considered by the same adjudicating body dealing with the insolvency proceedings of the corporate debtor.
- The applicability of Section 234 of the Code arises if the assets or property of a personal guarantor are situated outside India. In the present case, the assets of the personal guarantor were not situated outside India and the said personal guarantor could not take refuge under Section 234 and 235 of the Code.
- The NCLAT held that "the right given to the financial creditor under the Code to initiate proceedings under Section 95(1) of the Code is independent" and the financial creditor can always invoke special proceedings "despite there being availability of any other forum or proceedings in this context".

JUDGEMENT

The NCLAT dismissed both the appeals and held that the NCLT Kolkata has jurisdiction to initiate insolvency resolution proceedings against the Appellant in accordance with the scheme of Section 95(1) read with Section 60 of the Code even though the Appellant may have obtained citizenship of the Republic of Singapore.

- *Rahul Chakraborti (Partner), Karishma Singh (Senior Associate) & Saumya Agarwal (Associate)*

For any queries please contact: editors@khaitanco.com

We have updated our [Privacy Policy](#), which provides details of how we process your personal data and apply security measures. We will continue to communicate with you based on the information available with us. You may choose to unsubscribe from our communications at any time by clicking [here](#).