

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 397 of 2022

[Arising out of Order dated 22.02.2022 passed by the Adjudicating Authority (National Company Law Tribunal), Jaipur Bench in IA No. 229/JPR/2021 in CP No. (IB) – 25/95/JPR/2021]

IN THE MATTER OF:

Shapoorji Pallonji Finance Pvt. Ltd.

SP Centre, Courtyard 10-B,
41/44 Minoo Desai Raod, Colaba,
Mumbai – 400 005.
Maharashtra.

...Appellant

Versus

Rekha Singh

R/o. 201, Kanchan Apartments,
Tilak Nagar, Opp. L.B.S. College,
Raja Park, Jawahar Nagar,
Jaipur – 302 004.

...Respondent

With

Company Appeal (AT) (Insolvency) No. 398 of 2022

[Arising out of Order dated 22.02.2022 passed by the Adjudicating Authority (National Company Law Tribunal), Jaipur Bench in IA No. 227/JPR/2021 in CP No. (IB) – 26/95/JPR/2021]

IN THE MATTER OF:

Shapoorji Pallonji Finance Pvt. Ltd.

SP Centre, Courtyard 10-B,
41/44 Minoo Desai Raod, Colaba,
Mumbai – 400 005.
Maharashtra.

...Appellant

Versus

Siddharth Singh

R/o. 201, Kanchan Apartments,
Tilak Nagar, Opp. L.B.S. College,
Raja Park, Jawahar Nagar,
Jaipur – 302 004.

...Respondent

Cont'd.../

With

Company Appeal (AT) (Insolvency) No. 399 of 2022

[Arising out of Order dated 22.02.2022 passed by the Adjudicating Authority (National Company Law Tribunal), Jaipur Bench in IA No. 226/JPR/2021 in CP No. (IB) – 27/95/JPR/2021]

IN THE MATTER OF:

Shapoorji Pallonji Finance Pvt. Ltd.

SP Centre, Courtyard 10-B,
41/44 Minoo Desai Raod, Colaba,
Mumbai – 400 005.
Maharashtra.

...Appellant

Versus

Ajay Kumar Singh

R/o. 201, Kanchan Apartments,
Tilak Nagar, Opp. L.B.S. College,
Raja Park, Jawahar Nagar,
Jaipur – 302 004.

...Respondent

Present:

For Appellant: Mr. Gaurav Mitra, Mr. Kunal Kanungo, Mr. Ankit Acharya and Ms. Tanushree Sogani, Advocates.

For Respondents: Mr. Amol Vyas, Mr. Amit Agrawal, Ms. Radhika Yadav, Mr. Vivek Sinha and Mr. Vivek Malik, Advocates.

J U D G M E N T

ASHOK BHUSHAN, J.

These three Appeals have been filed against the same order dated 22.02.2022 passed by the Adjudicating Authority (National Company Law Tribunal), Jaipur Bench allowing the I.A. No. 226/JPR/2021, I.A. No.

227/JPR/2021 and I.A. No. 229/JPR/2021 filed by the Respondents in three separate Company Petitions filed by the Appellant. The I.As. filed by the Respondents who were Personal Guarantor have been allowed dismissing the Company Petitions filed by the Appellant under Section 95 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I&B Code'). The Appellant challenging the order impugned has come up in these Appeals. For deciding these Appeals it shall be sufficient to refer to pleadings and materials in Company Appeal (AT) (Ins.) No. 397 of 2022. Brief facts of the case necessary to be noticed for deciding these Appeals are:

- (i) The Appellant - Shapoorji Pallonji Finance Pvt. Ltd. granted a facility in the amount of Rs.25 Crores to one Jumbo Finvest (India) Ltd. (JFIL). The facility was provided pursuant to an agreement dated 27.03.2018 executed between Jumbo Finvest (India) Ltd. (JFIL), a Financial Service Provider and the Appellant, a Non-banking Finance Company. The Facility Agreement provided for security.
- (ii) In pursuance of the Facility Agreement, the Respondents to these Appeals executed a Deed of Personal Guarantee dated 27.03.2018 in favour of the Appellant. All the three Respondents to these Appeals viz. Rekha Singh, Siddharth Singh and Ajay Kumar Singh executed Deeds of Personal Guarantee.

- (iii) An amount of Rs.24,86,50,000/- was disbursed by the Appellant to the JFIL, receipt of which amount was duly confirmed.
- (iv) JFIL delayed repayment of principal and interest instalments. A Recall Notice dated 27.01.2021 was issued by the Appellant to JFIL and all the three Personal Guarantors. By notice dated 27.01.2021, the JFIL as well as all the three Personal Guarantors were called upon to make payment of Rs.11,92,91,681/-. In the month of February, 2021, three cheques given to the Appellant were deposited and returned as being dishonoured. A Demand Notice dated 02.03.2021 was issued to JFIL and all the three Personal Guarantors by the Appellant calling upon the Personal Guarantors to make payment. No payment was made by the Personal Guarantors. Several notices thereafter were issued to the JFIL and Personal Guarantors for making payment but neither the JFIL nor the Respondents – Personal Guarantors made payment towards the facility.
- (v) The Appellant filed three separate Company Petitions dated 03.06.2021 under Section 95 of the I&B Code against the Personal Guarantors i.e. Rekha Singh (CP No. (IB) – 25/95/JPR/2021), Siddharth Singh (CP No. (IB) – 26/95/JPR/2021) and Ajay Kumar Singh (CP No. (IB) – 27/95/JPR/2021). Particulars of debt were given in Part III

which also included total amount due as on 17.05.2021 was mentioned as Rs.11,94,50,226/-. List of documents were also referred to in Part III and attached alongwith the Application.

- (vi) In the Company Petitions notices were issued to the Respondents who were Personal Guarantors. Personal Guarantors appeared before the Adjudicating Authority and filed I.A. No. 229/JPR/2021, I.A. No. 227/JPR/2021 and I.A. No. 226/JPR/2021. In the I.As filed by the Respondents, it was submitted that application filed under Section 95 of I&B Code against the Personal Guarantor is not maintainable. In the application several grounds were taken contending that the Company Petitions are not maintainable. It was contended that Section 3 Sub-section (7) which defines Corporate Person expressly provides that it shall not include Financial Service Provider. JFIL being a Financial Service Provider is not covered within the definition of Corporate Person, hence, Section 95 is not maintainable. It was further submitted that there is no ongoing insolvency process against JFIL, hence, petition filed by the Appellant under Section 95 is not maintainable. Referring to Section 60 of the I&B Code, it was contended that application for insolvency of the Personal Guarantor can be filed before the Adjudicating Authority only if either CIRP or Liquidation proceedings are pending against the Corporate Debtor before the NCLT. No insolvency application being

pending against the JFIL, application under Section 95 is not maintainable.

(vii) The applications filed by the Personal Guarantors was replied by the Appellant. In the reply, it was mentioned that pendency of insolvency resolution process against the Financial Service Providers is not a condition precedent for filing application under Section 95. Other pleas were also taken by the Appellant to oppose the application filed by the Personal Guarantors.

(viii) Rejoinder affidavit was filed by the Personal Guarantors to the Reply of Appellant stating that as per Notification dated 18.11.2019 issued by Ministry of Corporate Affairs, CIRP can only be initiated by the Reserve Bank of India where the asset size of NBFC is of Rs.500 Crore or more, as per last audited balance sheet. The asset size as per Note 17 of the Balance Sheet as on 31.03.2020 is approximately Rs.487 Crores, therefore, no CIRP can be initiated against JFIL. Hence, there was no occasion for filing any application against the Personal Guarantor under Section 95. Relying on the judgment of NCLT Mumbai Bench in *"Insta Capital Private Limited vs. Ketan Vinod Kumar Shah"*, it was submitted that unless and until CIRP has been initiated against the Corporate Debtor, no insolvency application against Personal Guarantor can be filed.

- (ix) The Adjudicating Authority heard the counsel for the parties and referring to the Balance Sheet for year ending 31.03.2020 held that asset size of JFIL is approx. Rs.487 Crore, hence, as per Notification dated 18.11.2019 insolvency proceeding cannot be initiated against the JFIL. Hence, Principal Borrower does not falls within the definition of 'Corporate Person' and the application against the Personal Guarantor under Section 95 is not maintainable. The Adjudicating Authority, however, rejected the contention of the Personal Guarantors that unless and until CIRP against Corporate Debtor is pending, no application under Section 95 can be filed. Conclusions are recorded by the Adjudicating Authority in Para 33 and 34, which are to the following effect:

"33. The critical question to be addressed can thus be concluded as follows:

- i. Application(s) for CIRP can be initiated against any Personal Guarantor(s) to a Corporate Debtor irrespective of CIRP against the Corporate Debtor, which issue is no longer res integra.*
- ii. Insolvency resolution process(es) can be initiated against the Personal Guarantor(s) of a NBFC / FSP irrespective of CIRP against the NBFC, provided that the concerned NBFC falls within the category of those FSPs having asset size of Rs.500 crores or more, thus being included in the definition of Corporate Debtor under IBC and being construed as*

*Financial Service Provider wherever the term **Corporate Debtor** occurs in the Code.*

34. In the present matter at hand, the three guarantors in CP No. (IB) – 27/95/JPR/2021 i.e. Shri Ajay Kumar Singh, CP No. (IB) – 26/95/JPR/2021 i.e. Shri Siddharth Singh, and CP No. (IB) – 25/95/JPR/2021 i.e. Smt. Rekha Singh, entered into respective deed of guarantee on 27.03.2018 in favour of the Financial Creditor/ Non-Applicant. The definition of Personal Guarantors under Section 5(22) of the IBC cogently implies that they can be recognised as Personal Guarantors under IBC, subject to the condition, and only if, that the or entity for whom they have given guarantee is a Corporate Debtor. Therefore, as it is amply clear that Jumbo Finvest (India) Limited is not a Corporate Debtor, the guarantors of the aforesaid company cannot be considered as Personal Guarantors under provisions of IBC. Since consequences of CIRP are drastic and almost penal for any entity, whether corporate or individual, definitions must be strictly construed.”



- (x) In view of the aforesaid conclusions, the Adjudicating Authority allowed the applications filed by the Personal Guarantors and dismissed the three Company Petitions filed by the Appellant under Section 95. Aggrieved by the judgment and order passed by the Adjudicating Authority these Appeals have been filed.

2. Learned counsel for the Appellant challenging the order impugned submits that the Adjudicating Authority committed error in reading the last Balance Sheet of the JFIL. It is submitted that as per the last Balance Sheet of JFIL the total assets were more than Rs.500 Crores and the Adjudicating Authority committed error in only relying on Note 17 to come to the conclusion that asset size of JFIL is only Rs.487 Crores. It is submitted that Note 17 only refer to loan receivables and was not details of the assets of the JFIL. Assets of the JFIL includes both non-current assets and current assets, total of which as per the Balance Sheet is more than Rs.500 Crores. It is submitted that due to above mistake committed by the Adjudicating Authority, the Adjudicating Authority came to the conclusion that JFIL is not covered under the definition of Corporate Person. It is submitted that the total assets being more than Rs.500 Crores as per the last Balance Sheet, application filed under Section 95 against the Personal Guarantors were fully maintainable. It is further submitted that personal guarantee is between the Appellant –Financial Creditor and the Personal Guarantor which can very well be invoked by the Financial Creditor and even as per Notification dated 18.11.2019 issued under Section 227 of the I&B Code, CIRP can very well be initiated against JFIL, hence, applications filed by the Personal Guarantors have been wrongly allowed rejecting the Company Petitions filed by the Appellant.

3. Learned counsel for the Respondent refuting the submissions of learned counsel for the Appellant contends that even if for argument sake it is accepted that asset size of JFIL is more than Rs.500 Crores, asset size

of the Corporate Debtor was reduced from Rs.500 Crores in the next Balance Sheet to the extent of Rs.407 Crores as on 31.03.2021, which was the relevant Balance Sheet on the date when the Adjudicating Authority passed the order i.e. 22.02.2022. It is submitted that the Adjudicating Authority does not possess any jurisdiction as on 22.02.2022 to pass an order on application under Section 95 filed by the Appellant, it having lost jurisdiction due to the fact that asset size of JFIL was reduced to Rs.407 Crores as per last Balance Sheet i.e. Balance Sheet as on 31.03.2021. It is further submitted that the asset size of the JFIL as per the last Balance Sheet as on 31.03.2021 being less than Rs.500 Crores this Appellate Tribunal shall also have no jurisdiction to pass any order in the present Appeal. It is submitted that jurisdiction to consider the application by the Adjudicating Authority should not only exist at the time of entertainment of the application but such jurisdiction should continue till the proceedings are decided. On the date of passing of the order i.e. 22.02.2022 asset size of JFIL as per last Balance Sheet being Rs.407 Crore it had lost jurisdiction, if any, to proceed further. Hence, on this ground also the order passed by the Adjudicating Authority needs no interference. Learned counsel for the Respondent in support of his submission has placed reliance on three judgments of Hon'ble Supreme Court and one judgment of this Tribunal which we shall notice hereinafter.

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

4. Question which needs to be answered in these Appeals is as to whether the applications filed by the Appellant under Section 95 of the I&B Code against the Personal Guarantors – Respondents was maintainable or not maintainable.

5. Before we proceed to enter into the rival submissions of learned counsel for the parties, we may notice the relevant statutory provisions of the I&B Code pertaining to the issued which has arisen in these Appeals. Section 3(7) defines ‘Corporate Person’ and Section 3(8) defines ‘Corporate Debtor’. Section 3(7) and Section 3(8) are as follows:

*“3(7) **“corporate person”** means a company as defined in clause (20) of section 2 of the Companies Act, 2013, a limited liability partnership, as defined in clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008, or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider;*

*3(8) **“corporate debtor”** means a corporate person who owes a debt to any person;”*

6. It is to be noticed that as per Section 3(7) the definition of the ‘Corporate Persons’ is an exhaustive definition which expressly provides that **“shall not include any financial service provider”**. Section 3(17) defines ‘Financial Service Provider’ and Section 5(22) defines ‘Personal Guarantor’, which are to the following effect:

*“3(17)“**financial service provider**” means a person engaged in the business of providing financial services in terms of authorisation issued or registration granted by a financial sector regulator;*

*5(22) “**personal guarantor**” means an individual who is the surety in a contract of guarantee to a corporate debtor;”*

7. We may also notice Section 227 of the I&B Code which provides as follows:

“227. Power of Central Government to notify financial service providers, etc. –

Notwithstanding anything to the contrary¹[contained in this Code] or any other law for the time being in force, the Central Government may, if it considers necessary, in consultation with the appropriate financial sector regulators, notify financial service providers or categories of financial service providers for the purpose of their insolvency and liquidation proceedings, which may be conducted under this Code, in such manner as may be prescribed.

²[Explanation.—For the removal of doubts, it is hereby clarified that the insolvency and liquidation proceedings for financial service providers or categories of financial service providers may be conducted with such modifications and in such manner as may be prescribed.]”

8. Section 227 is part of Part V under the heading Miscellaneous. In exercise of power under Section 227 of the I&B Code, Ministry of Corporate Affairs has issued Notification dated 18.11.2019. It is useful to extract the entire Notification, which is to the following effect:

“MINISTRY OF CORPORATE AFFAIRS

NOTIFICATION

New Delhi, the 18th November, 2019

S.O. 4139(E). – *In exercise of the powers conferred by section 227 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Central Government in consultation with the Reserve Bank of India hereby notifies as under:*

The insolvency resolution and liquidation proceedings of the following categories of financial service providers shall be undertaken in accordance with the provisions of the Insolvency and Bankruptcy Code, 2016 read with the Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019 (in this notification referred to as the ‘Rules’) and the applicable Regulations:

<i>Sl. No.</i>	<i>Category of Financial Service Provider (rule 2 of the Rules)</i>	<i>Appropriate Regulator [clause (a) of sub-rule (1) of rule 3 of the Rules]</i>	<i>Dealing with third-party assets (rule 10 of the Rules)</i>
<i>(1)</i>	<i>(2)</i>	<i>(3)</i>	<i>(4)</i>

1	<i>Non-banking finance (which include housing finance companies companies) with asset size of Rs.500 crore or more, as per last audited balance sheet</i>	<i>Reserve Bank of India</i>	<i>To be notified separately</i>
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[F. No. 30/4/2017-Insolvency Section]

GYANESHWAR KUMAR SINGH, Jt. Secy."

9. The provision of Section 3(7) of the Code provides for exclusion of any Financial Service Provider from the definition of Corporate Person. Thus, any Financial Service Provider cannot be a Corporate Debtor when we read Section 3(7) and 3(8). However, Section 227 dealing with Power of Central Government to notify financial service providers starts with non-obstante clause "*Notwithstanding anything to the contrary contained in this Code*". Thus, Section 227 has been given overriding effect to the provisions contained in the Code itself for a purpose and object. Thus, Financial Service Providers can be brought under the insolvency code for the purpose of their insolvency and liquidation if the Central Government deems fit after consultation with the financial sector regulator. Notification dated 18.11.2019 is within the exercise of power under Section 227 by which Financial Service Providers have been brought into the insolvency and liquidation proceedings. The Notification, however, contains a rider i.e.

“with asset size of Rs.500 crore or more, as per last audited balance sheet”.

Thus, a Financial Service Provider who has asset size of Rs.500 crore or more can only be proceeded for insolvency and liquidation as per law as exist on date. We, thus, have to first examine as to whether “Jumbo Finvest (India) Ltd. (JFIL)” is a Financial Service Provider against which insolvency can be proceeded with under the Notification dated 18.11.2019 which is the question which has been considered by the Adjudicating Authority in the impugned order. The Adjudicating Authority after noticing the provisions and Notification as well as the Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019 came to the conclusion that as per last audited Balance Sheet year ending 31.03.2020 the asset size is approx. Rs.487 Crore. Following is the finding given by the Adjudicating Authority in para 28:

“28. It has been submitted by the Applicant/Personal Guarantors that as per the last audited balance sheet of Jumbo Finvest (India) Limited for year ending on 31.03.2020, the asset size is approx. Rs. 487 crores and as per unaudited figures for the year ending 31.03.2021, the total asset size of Jumbo Finvest (India) Limited is approx. Rs. 407 Crores. Therefore, the abovesaid NBFC i.e. Jumbo Finvest (India) Limited, is excluded from the ambit of the FSP Threshold Notification dated 18.11.2019, which as per Rule 2 of FSP Rules, 2019 classifies/ prescribes applicability of the said Rules for

Insolvency and Liquidation of FSPs having an asset size of Rs. 500 crores or more.”

10. The Adjudicating Authority has relied on the last audited Balance Sheet of JFIL for year ending 31.03.2020, which Balance Sheet has been brought on record alongwith the Appeal as Annexure A-7. It is useful to notice the first page of Annexure A-7 which contains the details of assets of JFIL which is to the following effect:

JUMBO FINVEST (INDIA) LIMITED			
CIN: U65923RJ1998PLC014961			
BALANCE SHEET AS AT 31st March, 2020			
in Rs.			
Particulars	Note No.	As at 31st March 2020	As at 31st March 2019
<u>EQUITY AND LIABILITIES</u>			
Shareholder's Funds			
Share Capital	2	41,12,60,550	35,76,89,130
Reserves & Surplus	3	<u>(9,02,41,308)</u>	<u>1,13,97,20,517</u>
Sub Total		<u>32,10,39,242</u>	<u>1,49,74,09,647</u>
Non-Current Liabilities			
Long-Term Borrowings	4	2,26,49,06,852	3,82,03,97,539
Deferred Tax Liabilities	5	-	46,84,997
Other Long-Term Liabilities and Provisions	6	93,99,365	2,93,15,575
Sub Total		<u>2,27,43,06,217</u>	<u>3,85,45,98,111</u>
Current Liabilities			
Short-Term Borrowings	7	95,91,92,605	80,84,78,252
Other Current Liabilities	8	1,97,58,30,870	3,05,54,96,725
Short-Term Provisions	9	50,88,79,104	6,95,79,525
Sub Total		<u>3,44,39,02,579</u>	<u>3,93,35,54,502</u>
TOTAL		<u>6,03,92,28,038</u>	<u>9,28,55,62,260</u>
<u>ASSETS</u>			
Non-Current Assets			
Fixed Assets			
Tangible Assets	10	33,83,39,291	40,79,18,929
Intangible Assets	10	6,71,740	12,23,917
Capital work in Process	10	-	-
Non-Current Investments	11	100	100
Deferred Tax Assets	12	11,26,58,632	-
Security Deposits	13	50,86,505	54,40,333
Other Non-Current Assets	14	<u>4,08,16,67,503</u>	<u>5,21,53,74,430</u>
Sub Total		<u>4,53,84,23,791</u>	<u>5,62,99,87,709</u>
Current Assets			
Current Investments	15	20,92,175	20,97,173
Inventories	16	-	8,60,23,435
Loans & Advances	17	99,40,33,213	2,67,02,81,769
Cash and Bank Balances	18	39,28,57,467	80,12,81,913
Short Term Loans and Advances	19	<u>11,18,16,393</u>	<u>9,59,20,259</u>

Sub Total 1,50,08,04,248 3,65,56,04,551

TOTAL 6,03,92,28,038 9,28,55,62,260

Significant Accounting Policies and Notes on Accounts loan as Integral part of Financial Statements 1-2g

As per our report of even date **For AGARWAL MUKESH & ASSOCIATES** Chartered Accountants Firm Reg. No. 020042C
For and on behalf of the Board of Directors of **JUMBO FIVEST (INDIA) LIMITED**

(MUKESH KUMAR AGARWAL) Partner M No. 407130 Place: Jaipur Date: 09-12-2020
(AJAY KUMAR SINGH) Chairman & Whole-Time Director DIN:00742286
(SIDDHARTH AJAY SINGH) Managing Director & CEO DIN:05366253

(RAJESH KUMAR SONI) Chief Financial Officer PAN.....
(PREETI SHARMA) Company Secretary PAN.....

11. We may notice that under the heading 'current assets' in the above Balance Sheet there is reference of Note 17. Note 17 is part of the Balance Sheet, which is to the following effect:

Note 17: Loans Receivables

Particulars	As at 31 st March 2020		As at 31 st March 2019	
	Current	Non-current	Current	Non-current
Standard Advances				
Finance Against Loan Agreement	1,02,64,99,020	3,07,88,79,344	3,98,31,84,715	7,15,13,44,058
Less: Provision for un-accrued Interest	(53,70,93,978)	(1,27,23,98,587)	(1,33,97,97,122)	(2,51,95,72,510)
MRR for Securitization	64,72,690	9,11,58,195	66,17,069	3,82,18,978
Non Performing Advances				
Sub-Standard Assets	23,67,07,460	92,02,81,073	39,47,764	73,79,046
Doubtful Assets	26,14,48,021	1,06,60,89,364	1,63,29,343	7,59,02,387
Total	99,40,33,213	3,88,39,89,388	2,47,02,81,769	4,75,32,71,959

12. In Note 17, when we add current and non-current assets, the total comes to Rs.487,80,22,601/-. The Adjudicating Authority has relied on this figure of Rs.487,80,22,601/- which is details of loan receivables. Now, the question to be considered is as to whether the expression used in the Notification dated 18.11.2019 "asset size of Rs.500 crore or more" can be

confined to the loan receivables only or asset shall include non-current and current assets. We have noticed that in the Balance Sheet as on 31.03.2020 under the heading 'Assets' both 'non-current assets' and 'current assets' have been included. Word 'asset size' indicate that what is meant is total assets. When total assets are looked into, as are given under heading 'Assets', the amount comes to more than Rs.600 Crores in the Balance Sheet as on 31.03.2020. The Adjudicating Authority has committed an apparent error in only considering the loan receivables. A Financial Service Provider admittedly have loan receivables but what is meant by asset size in Notification dated 18.11.2019 cannot be confined to loan receivables. We, thus, are of the view that the Adjudicating Authority committed error in applying the Notification dated 18.11.2019 by taking the figure of only loan receivables as referred to in Note 17 but has ignored the details of the Assets as given in the Balance Sheet as on 31.03.2020, as extracted above. Due to the above, the Adjudicating Authority incorrectly came to the conclusion that JFIL cannot be included in the definition of 'Corporate Person' so as to become Principal Borrower. On the above premise, the Adjudicating Authority jumped to the conclusion that application filed under Section 95 against the Personal Guarantor(s) is not maintainable since the JFIL cannot be treated to be Corporate Debtor. Had the finding of Adjudicating Authority that asset size of JFIL is Rs.487 Crore been correct, the conclusions recorded by the Adjudicating Authority could have been flawless but as noted above, the Adjudicating Authority committed error in taking figure of only loan receivables i.e. Rs.487 Crores

and not considered the figure of assets as contained in Balance Sheet as on 31.03.2020 as required by the Notification dated 18.11.2019. The very basis of the Adjudicating Authority for allowing the applications filed by the Personal Guarantors being unfounded, the ultimate decision suffers from error.

13. Now, we may note the submission of learned counsel for the Respondent that in view of the fact that in the next Balance Sheet as on 31.03.2021 the asset size of the JFIL i.e. became Rs.407 Crores, the Adjudicating Authority who might have jurisdiction initially to pass order lost its jurisdiction and there was no jurisdiction in the Adjudicating Authority on 22.02.2022, when it passed the order to hold that JFIL can be Corporate Debtor. The Adjudicating Authority in para 28 has noticed the unaudited figures for the year ending 31.03.2021, where total assets are approx. Rs.407 Crores.

14. For argument sake, we proceed on the premise that on 31.03.2021 the asset size of the JFIL became Rs.407 Crores. The application under Section 95 was filed by Financial Creditor on 03.06.2021 on which date last audited Balance Sheet was only the Balance Sheet as on 31.03.2020. Last Balance Sheet referred to in the Notification dated 18.11.2019 has to be treated as last audited Balance Sheet from the date the application can be filed. In event, the Balance Sheet as on 31.03.2021 was audited after filing of the application and let us assume that the asset size is reduced to less than Rs.500 Crores, what will be the consequence, whether the

Adjudicating Authority who has jurisdiction to proceed with the application, shall not be having any more jurisdiction to proceed with the application is the question which needs to be answered. It is submission of learned counsel for both the parties that jurisdiction to proceed against the Personal Guarantors under Section 95 shall be dependent on entitlement to proceed against the Financial Service Provider i.e. JFIL and in event there is no jurisdiction to proceed against the Financial Service Provider, there is no jurisdiction to proceed against the Personal Guarantors. We, thus, have to proceed to examine the issue as per above submission of learned counsel for the parties.

15. We may, as observed above, for argument sake if we take a case where asset size of the Financial Service Provider which on the date of filing the application as per last Balance Sheet was more than Rs.500 Crore and if it is reduced from Rs.500 Crore during the pendency of the application as per any further audited Balance Sheet available, whether the Adjudicating Authority shall lose jurisdiction is the question to be answered.

16. We may first notice the judgement of Hon'ble Supreme Court in the matter of ***"Mafatlal Industries Ltd. & Ors. vs. Union of India & Ors., (1997) 5 SCC 536"*** relied by learned counsel for the Respondent. In the above judgment the Hon'ble Supreme Court Constitutional Bench was examining the issue as to when application for refund of illegal or unauthorized levy of tax is necessarily required to be made in accordance

with the provisions of the Central Excises and Salt Act, 1944 and when the remedy of suit or proceeding under Article 226 shall be available to an assessee for refund. The majority judgment was delivered by Hon'ble Justice Jeevan Reddy laying down the proposition as to when the jurisdiction of the Civil Court and High Court under Section 226 shall be ousted for seeking refund. Learned counsel for the Respondent has placed reliance on the Para 334 of the judgment which is judgment delivered by Justice Paripoornan. Justice Paripoornan in Para 334 has examined the question pertaining to jurisdiction and jurisdictional error. Para 334 on which reliance has been placed by learned counsel for the Respondent provides:

"334. Opinions may differ as to when it can be said that in the "public law" domain, the entire proceeding before the appropriate authority is illegal and without jurisdiction or the defect or infirmity in the order goes to lar root of the matter and makes it in law invalid or void (referred to in Illuri Subbayya Chetty case¹² and approved in Dhulabhai case¹). The matter may have to be considered in the light of the provisions of the particular statute in question and the fact-situation obtaining in each case. It is difficult to visualise all situations hypothetically and provide an answer. Be that as it may, the question that frequently arises for consideration, is, in what situation/cases the non-compliance or error or mistake, committed by the statutory authority or tribunal, makes the decision rendered ultra vires

*or a nullity or one without jurisdiction? If the decision is without jurisdiction, notwithstanding the provisions for obtaining reliefs contained in the Act and the "ouster clauses", the jurisdiction of the ordinary court is not excluded. So, the matter assumes significance. Since the landmark decision in *Anisminic Ltd. v. Foreign Compensation Commission*⁹⁹ the legal world seems to have accepted that any "jurisdictional error" as understood in the liberal or modern approach, laid down therein, makes a decision ultra vires or a nullity or without jurisdiction and the "ouster clauses" are construed restrictively, and such provisions whatever their stringent language be, have been held, not to prevent challenge on the ground that the decision is ultra vires and being a complete nullity, it is not a decision within the meaning of the Act. The concept of jurisdiction has acquired "new dimensions". The original or pure theory of jurisdiction means "the authority to decide", and it is determinable at the commencement and not at the conclusion of the enquiry. The said approach has been given a go-by in *Anisminic case*⁹⁹ as we shall see from the discussion hereinafter [see *De Smith, Woolf and Jowell - Judicial Review of Administrative Action* (1995 Edn.) p. 238; *Halsbury's Laws of England* (4th Edn.) p. 114, para 67, footnote (9)]. As Sir William Wade observes in his book, *Administrative Law* (7th Edn.), 1994, at p. 299;*

"The tribunal must not only have jurisdiction at the outset, but must retain

it unimpaired until it has discharged its task."

17. In the above paragraph, there has been an observation quoted which laid down that the Tribunal which has jurisdiction at the outset must retain it until it has discharged its task.

18. Learned counsel for the Appellant has also relied on the judgment of Hon'ble Supreme Court in "***Arun Kumar & Ors. Vs. Union of India, (2007) 1 SCC 732***", where the Hon'ble Supreme Court laid down that jurisdictional fact is a fact which must exist before a court, tribunal or any authority assumes jurisdiction over a particular matter. In Para 74 to 76 following has been laid down:

"74. A "jurisdictional fact" is a fact which must exist before a Court, Tribunal or an Authority assumes jurisdiction over a particular matter. A jurisdictional fact is one on existence or non-existence of which depends jurisdiction of a court, a tribunal or an authority. It is the fact upon which an administrative agency's power to act depends. If the jurisdictional fact does not exist, the court, authority or officer cannot act. If a Court or authority wrongly assumes the existence of such fact, the order can be questioned by a writ of certiorari. The underlying principle is that by erroneously assuming existence of such jurisdictional fact, no authority can confer upon itself jurisdiction which it otherwise does not possess.

75. *In Halsbury's Laws of England, it has been stated:*

"Where the jurisdiction of a tribunal is dependent on the existence of a particular state of affairs, that state of affairs may be described as preliminary to, or collateral to the merits of, the issue. If, at the inception of an inquiry by an inferior tribunal, a challenge is made to its jurisdiction, the tribunal has to make up its mind whether to act or not and can give a ruling on the preliminary or collateral issue; but that ruling is not conclusive".

76. *The existence of jurisdictional fact is thus sine qua non or condition precedent for the exercise of power by a court of limited jurisdiction."*

19. There can be no quarrel to the proposition laid down by Hon'ble Supreme Court in "Mafatlal" (supra) and "Arun Kumar" (supra). When there is statutory pre-condition for exercise of jurisdiction that pre-condition must be fulfilled before the jurisdiction is exercised by the Tribunal. We, thus, have to proceed on the premise that the Adjudicating Authority before whom the application under Section 95 was filed had to retain jurisdiction to decide the application till the application is finally decided.

20. As noted above, consequent to asset size going down during pendency of the application is the basis of the contention of the Respondent that Adjudicating Authority shall lose jurisdiction to proceed with the application. For answering this question, we need to notice the objective

and purpose of the I&B Code. Hon'ble Supreme Court in "**Swiss Ribbons Pvt. Ltd. & Anr. vs. Union of India & Ors., (2019) 4 SCC 17**" had occasion to notice the purpose and objective of the I&B Code under the heading "The raison d'être for the Insolvency and Bankruptcy Code". The Hon'ble Supreme Court had noticed statement of objects and reasons of the I&B Code, its preamble and thereafter laid down that timelines within which the resolution process is to take place is for protecting the Corporate Debtor's assets from further dilution. In Para 28 following observations have been made by the Hon'ble Supreme Court:

"28. It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors. The interests of the corporate debtor have, therefore, been bifurcated and separated from that of its promoters / those who are in management. Thus, the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests. The moratorium imposed by Section 14 is in the interest of the corporate debtor itself, thereby preserving the assets of the corporate debtor during the resolution process. The timelines within which the resolution process is to take place again protects the corporate debtor's assets from further

dilution, and also protects all its creditors and workers by seeing that the resolution process goes through as fast as possible so that another management can, through its entrepreneurial skills, resuscitate the corporate debtor to achieve all these ends.”

21. The Statement of Objects and Reasons of the Code has been noticed by the Hon’ble Supreme Court in the above judgement in which Para 2 of the statement of object is as follows:

“25(2). The objective of the Insolvency and Bankruptcy Code, 2015 is to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time-bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the priority of payment of government dues and to establish an Insolvency and Bankruptcy Fund, and matters connected therewith or incidental thereto. An effective legal framework for timely resolution of insolvency and bankruptcy would support development of credit markets and encourage entrepreneurship. It would also improve Ease of Doing Business, and facilitate more investments leading to higher economic growth and development.”

22. The Insolvency and Bankruptcy Law Report has also been noticed wherein it is stated that delays cause value destruction. BLRC Report has been quoted in Para 15 of the judgment which is to the following effect:

“15. The BLRC went on to state:

“[.....] India is one of the youngest republics in the world, with a high concentration of the most dynamic entrepreneurs. Yet these game changers and growth drivers are crippled by an environment that takes some of the longest times and highest costs by world standards to resolve any problems that arise while repaying dues on debt. This problem leads to grave consequences: India has some of the lowest credit compared to the size of the economy. This is a troublesome state to be in, particularly for a young emerging economy with the entrepreneurial dynamism of India.

Speed is of essence for the working of the bankruptcy code, for two reasons. First, while the ‘calm period’ can help keep an organization afloat, without the full clarity of ownership and control, significant decisions cannot be made. Without effective leadership, the firm will tend to atrophy and fail. The longer the delay, the more likely it is that liquidation will be the only answer. Second, the liquidation value tends to go down with time as many assets suffer from a high economic rate of depreciation.

From the viewpoint of creditors, a good realization can generally be obtained if the firm is sold as a going concern. Hence, when delays induce liquidation, there is value destruction. Further, even in liquidation, the realization is lower when there are delays. Hence, delays cause value destruction. Thus, achieving a high recovery rate is primarily about identifying and combating the sources of delay.

This same idea is found in FSLRC's (Financial Sector Legislative Reforms Commission) treatment of the failure of financial firms. The most important objective in designing a legal framework for dealing with firm failure is the need for speed.""

23. The I&B Code is founded on the premise that delay in the insolvency process shall diminish the value of the Corporate Debtor, hence, it should be done with fast speed to maximize the value and to protect the value of the Corporate Debtor. After noticing the above objective of the I&B Code, if we accept the submission of learned counsel for the Respondent that after commencement of the insolvency process if the value of Corporate Debtor reduced down, the whole process will go out of the jurisdiction of the Adjudicating Authority, the said submission runs contrary to the whole object and purpose of the I&B Code, as noticed above. We take a hypothetical case that CIRP is against the Financial Service Provider in the year 2021 and in year 2022 when the proceedings were pending asset size is reduced, the application cannot be rejected on the ground that the Adjudicating Authority has now lost jurisdiction to proceed further, since

it is natural phenomena that by delay value of assets is reduced and proceedings are initiated to resolve the insolvency of the Corporate Debtor and to protect its assets and their value. Thus, acceptance of submission of learned counsel for the Respondent that subsequent devaluation of the assets shall take away jurisdiction of the Adjudicating Authority will be contrary to whole purpose of insolvency.

24. The devaluation of assets of a Corporate Debtor by passing time is well accepted phenomena. The I&B Code, thus, provide for strict timeline to resolve insolvency with speed. To accept the submission that Corporate Debtor who is in red and further deteriorate by passing of time be taken out of insolvency process is to completely act against the statutory scheme.

25. Learned counsel for the Respondent has also relied on judgment of Hon'ble Supreme Court in ***“Embassy Property Developments Pvt. Ltd. vs. State of Karnataka & Ors., (2020) 13 SCC 308”***. In the above case the Hon'ble Supreme Court was considering the jurisdiction of NCLT qua an order passed by Government of Karnataka under the MMDR Act, 1957, rejecting the proposal for deemed extension of the lease. Question arose as to whether the Adjudicating Authority has jurisdiction to consider challenge to said order of the State Government and in the above reference, Hon'ble Supreme Court has laid down that the Adjudicating Authority has no jurisdiction to entertain the challenge to order of the Government. In Para 37 and 41 following has been laid down:

“37. From a combined reading of Sub•section (4) and Sub• section (2) of Section 60 with Section 179, it is clear that none of them hold the key to the question as to whether NCLT would have jurisdiction over a decision taken by the government under the provisions of MMDR Act, 1957 and the Rules issued there•under. The only provision which can probably throw light on this question would be Sub•section (5) of Section 60, as it speaks about the jurisdiction of the NCLT. Clause (c) of Sub•section (5) of Section 60 is very broad in its sweep, in that it speaks about any question of law or fact, arising out of or in relation to insolvency resolution. But a decision taken by the government or a statutory authority in relation to a matter which is in the realm of public law, cannot, by any stretch of imagination, be brought within the fold of the phrase “arising out of or in relation to the insolvency resolution” appearing in Clause (c) of Sub•section (5). Let us take for instance a case where a corporate debtor had suffered an order at the hands of the Income Tax Appellate Tribunal, at the time of initiation of CIRP. If Section 60(5)(c) of IBC is interpreted to include all questions of law or facts under the sky, an Interim Resolution Professional/Resolution Professional will then claim a right to challenge the order of the Income Tax Appellate Tribunal before the NCLT, instead of moving a statutory appeal under Section 260A of the Income Tax Act, 1961. Therefore the jurisdiction of the NCLT delineated in Section 60(5) cannot be stretched so far as to bring absurd

results. [It will be a different matter, if proceedings under statutes like Income Tax Act had attained finality, fastening a liability upon the corporate debtor, since, in such cases, the dues payable to the Government would come within the meaning of the expression “operational debt” under Section 5(21), making the Government an “operational creditor” in terms of Section 5(20). The moment the dues to the Government are crystallised and what remains is only payment, the claim of the Government will have to be adjudicated and paid only in a manner prescribed in the resolution plan as approved by the Adjudicating Authority, namely the NCLT.]”

“41. Therefore in the light of the statutory scheme as culled out from various provisions of the IBC, 2016 it is clear that wherever the corporate debtor has to exercise a right that falls outside the purview of the IBC, 2016 especially in the realm of the public law, they cannot, through the resolution professional, take a bypass and go before NCLT for the enforcement of such a right.”

26. The above judgment has absolutely no application in the present case. Present is a case where question of jurisdiction to initiate insolvency proceeding against Financial Service Provider as per Section 227 and Notification dated 18.11.2019 as well of maintainability of Section 95 application was under consideration, which is very well within the jurisdiction of the Adjudicating Authority.

27. Learned counsel for the Respondent has also placed reliance on recent judgment of this Tribunal being judgment in ***“Company Appeal (AT) (Ins.) No. 983 of 2019, Nirmal Kumar Agarwal vs. State Bank of India & Ors., decided on 19.12.2022”***. In the above case, an application was filed by the State Bank of India for initiation of insolvency against Sungrowth Share and Stocks Limited as a Corporate Guarantor who was a Financial Service Provider whose registration continued till 11.07.2018. Application under Section 7 was filed against Sungrowth Share and Stocks Limited as a Corporate Guarantor which was admitted by the Adjudicating Authority at instance of State Bank of India which was the Financial Creditor which order was under challenge before this Tribunal. This Tribunal noticed that the application under Section 7 was filed on 08.06.2018 on which date Sungrowth Share and Stocks Limited was registered as Financial Service Provider and no application could have been entertained against Financial Service Provider by virtue of provision of Section 3(7) r/w Section 3(8). In Paras 10 and 11 following has been laid down:

“10. Section 3(7) defines corporate person. It categorically states that it will not include any financial service provider. Section 3(8) defines corporate debtor, which means a corporate person. Meaning thereby in order to become corporate debtor entity has to be a corporate person but a financial service provider is not a corporate person. The financial service provider is defined in Section 3(17) which says that any person to whom

registration is granted by a financial sector regulator. Section 3(18) defines financial sector regulator which includes the Reserve Bank of India. Financial service is defined under Section 3(16) which according to the decision of this court in the case of Housing Development Finance Corporation Ltd. (Supra) is inclusive and not limited to one which is provided in the said provision.

11. Admittedly, the present proceedings have been initiated against Sungrowth as a corporate guarantor. Section 5A defines Corporate Guarantor which means a corporate person. Corporate person, we have already explained that it would not include a financial service provider. Thus, looking from any angle, Sungrowth having the registration in terms of Section 3(17) as financial service provider by the financial service regulator in terms of Section 3(18) by RBI as on 28.03.2001 which continued up to 09.07.2018/11.07.2018 cannot in any case be called a banking institution. It has to be called a non-banking financial institution and in such scenario the application filed under Section 7 of the Code on 08.06.2018 was not maintainable on that date and therefore, the Adjudicating Authority had no jurisdiction to invoke its power for the purpose of initiation of CIRP proceedings. Similar situation arises in the case of Randhiraj Thakur (Supra) as well as Housing Development Finance Corporation Ltd. (Supra). Thus, looking from any angle, it is a

case in which the Adjudicating Authority has committed an error in initiating the proceedings under Section 7 of the Code though it was not apprised of the facts that Sungrowth (Corporate Guarantor) was a financial service provider.”

28. In the above case this Tribunal held that the application filed under Section 7 is not maintainable since the Sungrowth Share and Stocks Limited was registered as Financial Service Provider on date when application was filed. The above case has no application in the present case since in the case before us, the issue is applicability of the Notification dated 18.11.2019 which was issued under Section 227. No question pertaining to Notification dated 18.11.2019 was involved in **Nirmal Kumar Agarwal's** case, hence, said case has no applicability in the facts of the present case.

29. In view of the foregoing discussion, we are of the view that submission of learned counsel for the Respondent that since the asset size of JFIL became less than Rs.500 Crore as on 31.03.2021, the Adjudicating Authority shall lose jurisdiction to proceed further and this Tribunal shall also have no jurisdiction to proceed in the matter, cannot be accepted. We are of the view that jurisdiction will be there with the Adjudicating Authority, as per Notification dated 18.11.2019, which has to exercise on the date when application can be filed against the Financial Service Provider for insolvency. As a corollary, an application under section 95 can

be filed against the Personal Guarantor only when on the same date insolvency can be commenced against the Financial Service Provider.

30. The objection of the Respondent that application filed by the Financial Creditor under Section 95 is not maintainable since no insolvency proceedings are pending against the Principal Borrower has already been overruled by the Adjudicating Authority. The issue is fully covered by judgment of this Tribunal in ***“Company Appeal (AT) (Ins.) No. 60 of 2022, State Bank of India vs. Mahendra Kumar Jajodia, decided on 27.01.2022”***, where interpreting Section 60(2) of the Code following was laid down in Paras 8, 9, 10 and 11:

“8. The use of words ‘a’ and ‘such’ before National Company Law Tribunal clearly indicates that Section 60(2) was applicable only when a CIRP or Liquidation Proceeding of a Corporate Debtor is pending before NCLT. The object is that when a CIRP or Liquidation Proceeding of a Corporate Debtor is pending before ‘a’ NCLT the application relating to Insolvency Process of a Corporate Guarantor or Personal Guarantor should be filed before the same NCLT. This was to avoid two different NCLT to take up CIRP of Corporate Guarantor. Section 60(2) is applicable only when CIRP or Liquidation Proceeding of a Corporate Debtor is pending, when CIRP or Liquidation Proceeding are not pending with regard to the Corporate Debtor there is no applicability of Section 60(2).

9. Section 60(2) begins with expression 'Without prejudice to sub-section (1)' thus provision of Section 60(2) are without prejudice to Section 60(1) and are supplemental to sub-section (1) of Section 60.

10. Sub-Section 1 of Section 60 provides that Adjudicating Authority in relation to Insolvency or Liquidation for Corporate Debtor including Corporate Guarantor or Personal Guarantor shall be the NCLT having territorial jurisdiction over the place where the Registered Office of the Corporate Person is located. The substantive provision for an Adjudicating Authority is Section 60, sub-Section (1), when a particular case is not covered under Section 60(2) the Application as referred to in sub-section (1) of Section 60 can be very well filed in the NCLT having territorial jurisdiction over the place where the Registered Office of corporate Person is located.

11. The Adjudicating Authority erred in holding that since no CIRP or Liquidation Proceeding of the Corporate Debtor are pending the application under Section 95(1) filed by the Appellant is not maintainable. The Application having been filed under Section 95(1) and the Adjudicating Authority for application under Section 95(1) as referred in Section 60(1) being the NCLT, the Application filed by the Appellant was fully maintainable and could not have been rejected only on the ground that no CIRP or Liquidation Proceeding of the Corporate Debtor are pending before the NCLT. In result, we

set aside the order dated 05th October, 2021 passed by the Adjudicating Authority. The Application filed by the Appellant under Section 95(1) of the Code is revived before the NCLT which may be proceeded in accordance with the law.”

31. It is further noted that the above judgment of this Tribunal dated 27.01.2022 was appealed before the Hon’ble Supreme Court by means of **“Civil Appeal No. 1871-1872/2022, Mahendra Kumar Jajodia vs. State Bank of India Stressed Asset Management Branch”**, which Appeal has been dismissed by order dated 06.05.2022, which is to the following effect:

“O R D E R

We have heard learned Solicitor General and learned senior counsel for the parties and perused the record. We do not see any cogent reason to entertain the Appeals. The judgment impugned does not warrant any interference.

The Appeals are dismissed.”

32. The question is as to whether the Section 95 application which was filed by the Financial Creditor against the Personal Guarantor was maintainable or not.

33. We having held that on the date when application was filed under Section 95 by the Financial Creditor against the Personal Guarantor an application could have filed against the Financial Service Provider on the

basis of last Balance Sheet which had asset size of more than Rs.500, the application filed by the Financial Creditor against the Personal Guarantor was fully maintainable.

34. In view of the foregoing discussion, we hold that the Adjudicating Authority has committed error in allowing the applications filed by the Personal Guarantors and dismissing the Company Petitions. All the Appeals are allowed. Order of the Adjudicating Authority dated 22.02.2022 is set aside. The Company Petitions CP No. (IB) – 25/95/JPR/2021, CP No. (IB) – 26/95/JPR/2021 and CP No. (IB) – 27/95/JPR/2021 are held maintainable and are revived before the Adjudicating Authority to be proceeded in accordance with law.



LEGALERA
BY THE PEOPLE. FOR THE PEOPLE.

**[Justice Ashok Bhushan]
Chairperson**

**[Barun Mitra]
Member (Technical)**

NEW DELHI

18th January, 2023

Archana