NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 697 of 2024

(Arising out of Order dated 21.02.2024 passed by the Adjudicating Authority (National Company Law Tribunal), Court Room No.1, Mumbai Bench in I.A. No.5501/2023 in C.P. (IB)/420(MB)2022)

IN THE MATTER OF:

Central Bank of India
Stressed Asset Management Branch-II
2nd floor, NCL Building,
Plot No.6, E-Block,
Bandra-Kurla Complex, Bandra (East),
Mumbai - 400051 …Appellant

Versus

Deepen Arun Parekh
residing at 85, Navrang,
8th Floor, Pedder Road,
Mumbai - 400026 …Respondent

Present:

For Appellant	:	**Mr. Ravi Raghunath, Ms. Aakashi Lodha, Mrs. Rathina Maravarman, Advocates.**
For Respondents	:	**Mr. Krishnendu Dutta, Sr. Advocate with Mr. Rohit Gupta, Mr. Punit Damodar, Ms. Nikita H. Vardhan, Mr. C. George Thomas, Ms. Alina Mathew, Ms. Nidhi Pathak and Mr. Ansh Mittal, Advocates.**

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal by the Financial Creditor has been filed challenging order dated 21.02.2024 passed by National Company Law Tribunal, Court No1, Mumbai Bench in IA 5501 of 2023 in CP(IB)/420(MB)2022, by which order the Adjudicating Authority allowed IA No.5501 of 2023 filed by Personal Guarantor (Respondent herein) and dismissed Section 95 application filed by the Appellant – Central Bank of India.

2. Brief facts of the case necessary to be noticed for deciding the Appeal are:

(i) Central Bank of India sanctioned Cash Credit Facility of Rs.75 crores to the Corporate Debtor - M/s. Parekh Aluminex Ltd. A restructuring package to the Corporate Debtor was approved by the Corporate Debts Restructure ("**CDR**") Empowered Group on 24.06.2013 and 25.07.2013 and consequently the Appellant sanctioned Working Capital Facilities to the Corporate Debtor. A Master Restructuring Agreement dated 23.09.2013 was executed. On 30.09.2013, the Appellant approved the CDR package for credit facilities of the Corporate Debtor of Rs.134.74 crores. The Respondent – Personal Guarantor executed a Deed of Guarantee dated 10.04.2014 and guaranteed the repayment of the credit facility availed by the Corporate Debtor from the Appellant as well as the other lenders.

(ii) Corporate Debtor committed default in repayment, hence, the Appellant classified loan account of the Corporate Debtor as NPA on 31.12.2015. The Respondent claimed to have resigned as a Director of the Corporate Debtor on 28.04.2016.

(iii) On 23.11.2017, the Adjudicating Authority admitted a Section 7 Application against the Corporate Debtor. An order of liquidation was passed on 07.10.2023 against the Corporate Debtor. Notice under Section 13(2) under the SARFAESI Act, 2002 was issued on 18.05.2016, calling upon the Corporate

Debtor and its Guarantors. A Demand Notice in Form-B was issued to the Respondent on 18.12.2020 and called up on him to pay a sum of Rs.354,09,04,055/-.

(iv) An application under Section 95 was filed by the Appellant on 14.12.2021 against the Personal Guarantor for financial debt of Rs.354,09,05,055/- as on 18.12.2020. The Adjudicating Authority on 25.09.2023, directed the Appellant to serve a copy of the application to Respondent. On 30.10.2023, the Respondent appeared before the Adjudicating Authority and submitted that they intend to contest the petition under Section 95 on the ground of limitation. The Adjudicating Authority adjourned the petition on 04.12.2023 for hearing.

(v) On 27.11.2023, the Personal Guarantor filed IA No.5501 of 2023 praying for dismissal of Section 95 application raising various grounds, including that Respondent was not the debtor or guarantor.

(vi) On 04.12.2023, Adjudicating Authority passed an order directing the Appellant to file an affidavit of service, showing proof of service of Demand Notice on the Respondent. In the order dated 04.12.2023, the Adjudicating Authority noticed IA No.5501 of 2023 and the grounds raised therein. The matter was adjourned to 02.01.2024 for further consideration and hearing. On 04.12.2023, no one appeared on behalf of the Appellant. On 02.01.2024, the Appellant prayed for time to file rejoinder affidavit. Parties were directed to exchange

pleadings and 24.01.2024 was fixed for hearing. The matter was heard thereafter and by the impugned order dated 21.02.2024, the Adjudicating Authority dismissed the Company Petition (IB)/420(MB)2022 and allowed IA No.5501 of 2023. This Appeal by Central Bank of India has been filed challenging the said order.

3. We have heard Shri Ravi Raghunath, learned Counsel appearing for the Appellant and Shri Krishnendu Datta, learned Senior Counsel appearing for the Respondent – Personal Guarantor.

4. Shri Ravi Raghunath, learned Counsel for the Appellant challenging the order submits that Adjudicating Authority erred in adjudicating various issued raised by the Personal Guarantor in IA No.5501 of 2023 on the merits of the application, which was not the stage of adjudication. In Section 95 application filed by the Appellant, the Adjudicating Authority was required to appoint a Resolution Professional ("**RP**") under Section 97 of the IBC and without appointing the RP and without giving an opportunity to RP to submit a Report as contemplated under Section 99 of the IBC, the Adjudicating Authority ought not to have proceeded to adjudicate various issues raised by the Personal Guarantor. It is submitted that IA No.5501 of 2023 was filed by the Personal Guarantor on 27.11.2023, i.e., subsequent to judgment of the Hon'ble Supreme Court in ***Dilip B. Jiwrajka v. Union of India – (2024) SCC 5 SC 435*** decided on 09.11.2023. The Hon'ble Supreme Court in **Dilip B. Jiwrajka's** case has laid down that adjudicatory issues in Section 95 application had to be undertaken by the Adjudicating Authority only at the stage of hearing of

the application of Section 100. The provisions of Section 95 to 100 have been elaborately dealt by the Hon'ble Supreme Court. The process adopted by the Adjudicating Authority, while rejecting Section 95 application filed by the Appellant is clearly contrary to the law laid down by the Hon'ble Supreme Court in **Dilip B. Jiwrajka**'s case. In the facts of the present case, there was no question of applicability of 'principle of wavier' in respect of the Appellant. The Appellant filed the reply to IA 5501 of 2023 as directed by the Adjudicating Authority. The order passed by the Adjudicating Authority is clearly against the scheme of the IBC and in the teeth of judgment of the Hon'ble Supreme Court in **Dilip B. Jiwrajka** and deserve to be set aside.

5. Shri Krishnendu Datta, learned Senior Counsel appearing for the Respondent – Personal Guarantor submits that the Central Bank of India had not raised any objection regarding jurisdiction of Adjudicating Authority in the reply filed to IA No.5501 of 2023. When the Central Bank of India had not raised any objection with respect to the jurisdiction of the Adjudicating Authority, it has waived its right to raise any objection on the basis of law laid down by the Hon'ble Supreme Court in **Dilip B. Jiwrajka**'s case. It is submitted that the Bank neither cited the **Dilip B. Jiwrajka**'s case nor raised any objection, hence, the issues raised against the Personal Guarantor need not be considered at this stage. It is submitted that when the Appellant has waived its right to raise objection, it cannot be allowed to challenge the order on the ground, which were available to the Appellant and were to be raised in reply to the application filed by Personal

Guarantor. It is submitted that Deed of Guarantee dated 10.04.2024 executed by Personal Guarantor in favour of the Consortium of Bank, including the Central Bank was a conditional/ contingent guarantee. The guarantee could become effective only if the CDR package was sanctioned and implemented in full. The Deed of Guarantee never came into force. It is further submitted that Personal Guarantor has already filed a suit in the Bombay High Court being Comm. Suit (L) No.3324 of 2024 seeking a declaration, in which suit orders were also reserved on 23.09.2024. In event any favourable order is obtained by Respondent in interim application, pending before the Bombay High Court in the commercial suit, the Respondent shall be prejudiced in event, if the matter is remanded to the NCLT.

6. We have considered the submissions of learned Counsel for the parties and have perused the records.

7. While noticing the facts and events, we have noticed that Application under Section 95 was filed by the Appellant on 14.12.2021 and direction was passed on 25.09.2023 by the Adjudicating Authority to the Appellant to serve copy of the petition on Respondent and matter was adjourned to 30.10.2023. On 30.10.2023, the Respondent appeared. The Adjudicating Authority passed following order on 30.10.2023:

> "1. Mr. V. K. Nair, Advocate appeared for the Petitioner.
>
> 2. Mr. Rohit Gupta, Advocate a/w Ms. Nikita Vardhan, Mr. Vishal Tiwari, Advocates i/b Kanga & Co. appeared for the Respondent.
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> 3. Learned Counsel for the Personal Guarantor seeks some time to contest this petition on the limitation aspect.

4. Time granted.

5. List this matter on 04.12.2023 for hearing.”

8. Before the matter could be heard on next date, the Hon’ble Supreme Court passed judgment in **Dilip B. Jiwrajka**’s case on 09.11.2023. On 27.11.2023, IA No.5501 of 2023 was filed by the Personal Guarantor before the Adjudicating Authority praying for dismissal of Company Petition. In IA No.5501 of 2023, following prayers were made:

> “a) That this Hon’ble Tribunal be pleased to pass an Order dismissing the Company Petition filed by the Petitioner against the Applicant/ Respondent since the Applicant/ Respondent is not a debtor or a guarantor of the Petitioner as required under section 95 of the Code;
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> b) For costs;
>
> c) For such other and further reliefs as this Hon’ble Tribunal may deem fit and proper.”

9. The application came for consideration on 04.12.2023, on which date no one appeared on behalf of the Appellant. The learned Counsel for the Respondent made various submissions and submitted that Demand Notice has not been served. The Appellant was directed to file affidavit of service. The Adjudicating Authority noticed IA No.5501 of 2023 filed by Personal Guarantor challenging the maintainability and the argument of the Personal Guarantor that the guarantee was also contingent. The matter was adjourned to 02.01.2024. The order dated 04.12.2023 is as follows:

> “**<u>IA 5501/2023 in C.P. (IB)/420(MB)2022</u>**
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> 1) None present for the Petitioner, when the matter is called out. Mr. Rohit Gupta, Ld. Counsel for the Respondent, Personal Guarantor is present.

2) Ld. Counsel for the Respondent submits that Demand Notice has not been served upon the Respondent. In that view of the matter, Petitioner is directed to file and place on record Affidavit of Service showing proof of service of Demand Notice on the Respondent, well before the adjourned date.

3) The Interlocutory Application bearing IA No. 5501 of 2023 has been filed by the Respondent, Personal Guarantor, challenging the maintainability of the Company Petition on the ground of Limitation and also contending that the Guarantee is also contingent.

4) Accordingly, stand over to 02.01.2024, for further consideration and hearing."

10. On 02.01.2024, Counsel for the Financial Creditor sought time to place on record affidavit in rejoinder. Parties were directed to complete and exchange the pleadings well before the adjourned date and 24.01.2024 was fixed for further consideration and hearing. The Appellant has also filed reply to the IA No.5501 of 2023 contesting the grounds raised in the IA for dismissal of the Application. Company Petition was listed on 21.02.2024, on which date Adjudicating Authority heard the parties and passed the impugned order.

11. Before proceeding further, we need to notice the provisions of the IBC and the scheme of the IBC for consideration of application under Section 95. Section 95 of the IBC provides for an application by a creditor to initiate insolvency resolution process. Section 96 provides for interim- moratorium and Section 97 deals with appointment of RP. Section 97 of the IBC is as follows:

"**97. Appointment of resolution professional. -** (1) If the application under section 94 or 95 is filed through a resolution professional, the Adjudicating Authority shall direct the Board within seven days of the date of the application to confirm that there are no disciplinary proceedings pending against resolution professional.

(2) The Board shall within seven days of receipt of directions under sub-section (1) communicate to the Adjudicating Authority in writing either –

(a) confirming the appointment of the resolution professional; or

(b) rejecting the appointment of the resolution professional and nominating another resolution professional for the insolvency resolution process.

(3) Where an application under section 94 or 95 is filed by the debtor or the creditor himself, as the case may be, and not through the resolution professional, the Adjudicating Authority shall direct the Board, within seven days of the filing of such application, to nominate a resolution professional for the insolvency resolution process.

(4) The Board shall nominate a resolution professional within ten days of receiving the direction issued by the Adjudicating Authority under sub-section (3).

(5) The Adjudicating Authority shall by order appoint the resolution professional recommended under sub-section (2) or as nominated by the Board under sub-section (4).

(6) A resolution professional appointed by the Adjudicating Authority under subsection (5) shall be provided a copy of the application for insolvency resolution process."

12. Section 98 deals with replacement of RP and Section 99 provides for submission of report by RP. Section 99 is as follows:

"**99. Submission of report by resolution professional. -** (1) The resolution professional shall examine the application referred to in section 94 or section 95, as the case may be, within ten days of his appointment, and submit a report to the Adjudicating Authority recommending for approval or rejection of the application.

(2) Where the application has been filed under section 95, the resolution professional may require the debtor to prove repayment of the debt claimed as unpaid by the creditor by furnishing –

(a) evidence of electronic transfer of the unpaid amount from the bank account of the debtor;

(b) evidence of encashment of a cheque issued by the debtor; or

(c) a signed acknowledgment by the creditor accepting receipt of dues.

(3) Where the debt for which an application has been filed by a creditor is registered with the information utility, the debtor shall not be entitled to dispute the validity of such debt.

(4) For the purposes of examining an application, the resolution professional may seek such further information or explanation in connection with the application as may be required from the debtor or the creditor or any other person who, in the opinion of the resolution professional, may provide such information.

(5) The person from whom information or explanation is sought under sub-section (4) shall furnish such information or explanation within seven days of receipt of the request.

(6) The resolution professional shall examine the application and ascertain that –

(a) the application satisfies the requirements set out in section 94 or 95;

(b) the applicant has provided information and given explanation sought by the resolution professional under sub-section (4).

(7) After examination of the application under sub-section (6), he may recommend acceptance or rejection of the application in his report.

(8) Where the resolution professional finds that the debtor is eligible for a fresh start under Chapter II, the resolution professional shall submit a report recommending that the application by the debtor under section 94 be treated as an application under section 81 by the Adjudicating Authority.

(9) The resolution professional shall record the reasons for recommending the acceptance or rejection of the application in the report under sub-section (7).

(10) The resolution professional shall give a copy of the report under sub-section (7) to the debtor or the creditor, as the case may be."

13. Section 100 provides for admission or rejection of application, which provision is as follows:

"**100. Admission or rejection of application. - (**1) The Adjudicating Authority shall, within fourteen days from the date of submission of the report under section 99 pass an order either admitting or rejecting the application referred to in section 94 or 95, as the case may be.

(2) Where the Adjudicating Authority admits an application under sub-section (1), it may, on the request of the resolution professional, issue instructions for the purpose of conducting negotiations between the debtor and creditors and for arriving at a repayment plan.

(3) The Adjudicating Authority shall provide a copy of the order passed under subsection (1) along with the report of the resolution professional and the application referred to in section 94 or 95, as the case may be, to the creditors within seven days from the date of the said order.

(4) If the application referred to in section 94 or 95, as the case may be, is rejected by the Adjudicating Authority on the basis

> of report submitted by the resolution professional or that the application was made with the intention to defraud his creditors or the resolution professional, the order under sub-section (1) shall record that the creditor is entitled to file for a bankruptcy order under Chapter IV."

14. From the sequence of events, it is clear that after service of the notice on the Personal Guarantor, 30.10.2023 was the first date on which date Counsel for the Personal Guarantor appeared and prayed for some time to contest the petition on the limitation aspect and it was thereafter on 27.11.2023, IA No.5501 of 2023 was filed praying for dismissal of Section 85 application. IA No.5501 of 2023 was filed on 27.11.2023, which was noticed in the order dated 04.12.2023 and the next date fixed was 02.01.2024. On 04.12.2023, no one appeared on behalf of the Appellant and the Adjudicating Authority adjourned Section 95 application as well as IA No.5501 of 2023 on 02.01.2024.

15. From the above, it is clear that Adjudicating Authority has not appointed even the RP as contemplated under Section 97 in the IBC and proceeded to hear the objections raised by Personal Guarantor in IA No.5501 of 2023 and dismissed Section 95 application. We need to first notice the judgment of the Hon'ble Supreme Court in **Dilip B. Jiwrajka**'s case delivered on 09.11.2023, i.e. much before filing of IA No.5501 of 2023. The law declared by the Hon'ble Supreme Court in **Dilip B. Jiwrajka**'s on 09.11.2023 deals with entire statutory process and the nature of jurisdiction of the Adjudicating Authority to be exercised in proceedings of personal insolvency. The judgment in **Dilip B. Jiwrajka** was delivered by

the Hon'ble Supreme Court in a batch of writ petitions, in which writ petitions, various provisions of the IBC from Sections 95 to 100 were challenged. In the above context, the Hon'ble Supreme Court had occasion to deal with scheme of the IBC; the submissions made on behalf of the parties and analysis of IBC and principles of natural justice. The arguments advanced before the Hon'ble Supreme Court in the writ petitions that at the time when Adjudicating Authority appoint the RP under Section 97, sub-section (5), the Adjudicating Authority should be required to decide the jurisdictional questions. The said argument has been noticed by the Hon'ble Supreme Court in paragraph 68 of the judgment, which is as follows:

> "**68.** The submission which has been urged on behalf of the petitioners, however, is that Section 97(5) contemplates a role for the adjudicating authority in the appointment of a resolution professional anterior to the stage which is contemplated during the course of adjudication under Section 100. It has been urged that when the adjudicating authority appoints a resolution professional under Section 97(5), the adjudicating authority should be required to decide the jurisdictional questions on the basis of which the provisions of Part III are implicated. In other words, it is urged that, at that stage, it would be necessary for the adjudicating authority to apply its mind as to whether : (*i*) a debt subsists; and (*ii*) the relationship of creditor and debtor subsists. This is similar to the UNCITRAL Guide which emphasises the need for the insolvency court to evaluate commencement criteria before admitting insolvency proceedings, ensuring a fair hearing for the parties involved. [*UNCITRAL Legislative Guide on Insolvency, 2004*, Part 2(I), paras 56, 57.]"

16. After considering the aforesaid submissions, the Hon'ble Supreme Court rejected the above argument noticing that the adjudicatory role

should be interposed at the stage of Section 97. The Hon'ble Supreme Court clearly held that bearing in mind the statutory scheme, it would be impermissible for this Court to allow for the adjudicatory intervention of the Adjudicating Authority in adjudicating what is described as jurisdictional question at the stage of Section 97(5). In paragraphs 72 to 74, following was laid down:

> "**72.** We are of the view that the submission that an adjudicatory role should be interposed at the stage of Section 97(5) cannot be accepted. The power which is conferred on the adjudicating authority at the stage of filing of an application is to appoint a resolution professional. The appointment of a resolution professional is for the purpose of a facilitative exercise which is contemplated by Section 99 which, as we have noted, eventually ends in a report either recommending the acceptance or rejection of the application. Bearing in mind the statutory scheme, it would be impermissible for this Court to allow for the adjudicatory intervention of the adjudicating authority in adjudicating what is described as a jurisdictional question at the stage of Section 97(5).
>
> ***2. Role of the adjudicatory authority***
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> **73.** Section 100(1) stipulates that the adjudicating authority must issue an order within fourteen days of receiving the report, either admitting or rejecting the application filed under Sections 94 or 95, depending on the circumstances. Importantly, the adjudicating authority does not mechanically accept or reject applications based solely on the resolution professional's report. Instead, it must actively engage in a fair process, affording the debtor a fair opportunity to present their case. The adjudicating authority arrives at its determination by considering arguments supported by relevant material particulars. In essence, the adjudicating authority conducts an independent assessment, not solely relying on the resolution professional's report, to decide the fate of applications under Section 94 or 95 IBC.

74. The true adjudicatory function of the authority commences under Section 100 after the submission of the report. Another reason why we are not inclined to accept the submission is that what is described as a jurisdictional question by the petitioners may not be a simple matter to be decided as a question of law. The jurisdictional questions of the nature which have been suggested by the petitioners, namely, on whether there is a subsisting debt or whether the relationship of debtor and creditor subsists, would involve a decision on mixed questions of law and fact. The entire scheme of Sections 99 and 100 implicates timelines which have been laid down by Parliament. The entire process of implementing these timelines would be rendered nugatory if an adjudicatory role were to be read into the provisions of Section 97(5). The final reason which would militate against accepting the submission is that the provisions of Section 99 do not as such implicate any adverse civil consequences particularly if those provisions are read in the manner in which we now propose to elucidate."

17. The Hon'ble Supreme Court has recorded its conclusion in paragraph 86. Paragraph 86.1, 86.2, 86.3 and 86.6 are as follows:

"**86.1.** No judicial adjudication is involved at the stages envisaged in Section 95 to Section 99 IBC;

86.2. The resolution professional appointed under Section 97 serves a facilitative role of collating all the facts relevant to the examination of the application for the commencement of the insolvency resolution process which has been preferred under Section 94 or Section 95. The report to be submitted to the adjudicatory authority is recommendatory in nature on whether to accept or reject the application;

86.3. The submission that a hearing should be conducted by the adjudicatory authority for the purpose of determining "jurisdictional facts" at the stage when it appoints a resolution professional under Section 97(5) IBC is rejected. No such adjudicatory function is contemplated at that stage. To read in such a requirement at that

stage would be to rewrite the statute which is impermissible in the exercise of judicial review;

86.6. No judicial determination takes place until the adjudicating authority decides under Section 100 whether to accept or reject the application. The report of the resolution professional is only recommendatory in nature and hence does not bind the adjudicatory authority when it exercises its jurisdiction under Section 100;"

18. The above law laid down by the Hon'ble Supreme Court, thus, clearly indicate that Adjudicating Authority is not to exercise its adjudicatory function at any stage prior to hearing of the application under Section 100. Hearing of the application under Section 100 is contemplated after, report is received from the RP, who is a facilitator of the entire process. In the present case, the Adjudicating Authority has not even appointed the RP and the order impugned has been passed before the stage of appointment of RP and before even any Report could be called. The objections raised by Personal Guarantor in its IA No.5501 of 2023 were considered and findings has been returned by the Adjudicating Authority under the headings 'Findings and Observations of this Bench' from paragraphs 3.6.7 to 3.6.9 are as follows:

"**Findings and Observations of this Bench:**

3.6.7. Clause 12 r/w Clause L of the recital of the Deed of Guarantee dt. 10.04.2014 makes it clear that this Guarantee was to come into force only upon implementation of CDR package in full and signed by all the lenders in terms of LOA issued. Ld. Counsel for the Personal Guarantor place on record a letter dt. 23.03.2016 having reference No BY.CDR(DAP)No. 749/2015-16, stating that the Company M/s Parekh

Aluminex Limited stands exited from the CDR mechanism as failure.

3.6.8. As regards contention that the said Petition is time barred, we find that the Financial Creditor invoked the Guarantee on 18.05.2016 by Notice u/s 13(2) of SARFAESI Act, 2002 and the Corporate Debtor came to be admitted into CIRP on 01.02.2019. Since, we have already returned the finding that this Guarantee had not become effective on account of failure in implementation of CDR Package, we are not dealing with the issue of limitation any further.

3.6.9. In view thereof, the Company Petition bearing CP (IB) No.420 of 2022, is disposed of as dismissed. In view of the dismissal of the Company Petition, all pending Applications including IA No.5501 of 2023, stands closed."

19. The Adjudicating Authority held that since it has returned a finding that guarantee had not become effective on account of failure in implementation of CDR Package, even the issue of limitation was not gone into.

20. Learned Counsel for the Appellant has also contended that even prior to judgment of the Hon'ble Supreme Court in **Dilip B. Jiwrajka,** the judgment of this Tribunal in **Ravi Ajit Kulkarni vs. State Bank of India – (2021) SCC OnLine NCLAT 641**, this Tribunal after examining the scheme of Section 95 to 100 in paragraph 44, this Tribunal held that before the stage of appointment of the RP, the Code or Rules and Regulations, do not provide for any hearing as such to be given to the Debtor. Following have been held by this Tribunal in paragraphs 44 to 47:

"**44.** It has been argued that although in the present matter the Creditor had served a copy of the application after it was filed and a

copy of amended application also afterit was filed to the Appellant but the notice through Court was not served. We find from the scheme, as discussed above, the requirement is only to the extent that the application will be filed after serving a notice in terms of 'Form B' of the Rules and when the application is filed in Form C the same would be served on the Personal Guarantor. This acts as a notice to the Personal Guarantor who would be given opportunity by the Resolution Professional while examining the application in terms of Section 99 of IBC to submit material as mentioned. Before the stage of appointment of the Resolution Professional, the Code or Rules and Regulations do not provide for any hearing as such to be given to the Debtor. Undertone of Section 97(5) also is to bind Adjudicating Authority to appoint Resolution Professional as nominated by the Board. Thus, once application under Section 95 is "filed" the next step for Adjudicating Authority is to appoint the Resolution Professional.

45. However, considering the judgment of the Hon'ble Supreme Court in the matter of 'Swiss Ribbons', it appears to us that keeping principles of natural justice in view, limited notice of the application should be given to the Personal Guarantors of the Corporate Debtors. The limited notice has to be only to secure presence of the Personal Guarantor referring to the Interim Moratorium which has commenced. Before appointment of the Resolution Professional no hearing as such is contemplated and before appointment of the Resolution Professional the Debtor cannot be allowed to raise disputes for which the stage would be Section 100. Under NCLT Rule 11, Adjudicating Authority is duty bound to pass orders to prevent abuse of process. As such, limited notice to appear may be given to the Personal Guarantors so that when Resolution Professional is appointed, he may provide material as per Section 99(2) of IBC. Till the stage of Section 100, the process is of collecting necessary evidence.

46. The Appellant is himself criticizing the impugned order claiming that the Adjudicating Authority has already recorded finding that the Personal Guarantor has committed a default and

thus the Resolution Professional cannot while examining the application under Section 99 give a contrary opinion. At the same time, the Learned Senior Counsel for the Appellant has tried to submit that before appointment of Resolution Professional the Personal Guarantor should be able to show that the debt is not due or that it is not payable. This is contradiction. In our view, the stage for examining merits of the Application would be Section 100 of IBC. To prevent abuse of process of double hearings, first on merit before appointment of Resolution Professional and again at the stage of Section 100 which will defeat the objects of IBC by protracted disputes, after limited notice to appear has been issued even if Debtor raises disputes on merit, the same may be adjudicated only after receipt of report from Resolution Professional under Section 99. Before that point of time the process is more of filing of application and collecting of evidence through a professional person like Resolution Professional.

47. In substance, once the application is "filed" (as per Section 95, 96 read with Rule 10) the Adjudicating Authority has to act on it, and following principles of natural justice, give limited notice to Personal Guarantor to appear referring to the Interim Moratorium that has commenced as per terms of Section 96. Then the next stage is of appointing Resolution Professional as per Section 97 read with Rules and Regulations. Third stage will be Resolution Professional acting in terms of Section 99 and submitting Report. At the fourth stage comes in adjudication of the application under Section 100 which ought to be decided by giving hearing to parties keeping in view Application, evidence collected and report under Section 99."

(underlined by us)

21. The entire statutory scheme of Sections 95 to 100 having been authoritatively explained and laid down by the Hon'ble Supreme Court in **Dilip B. Jiwrajka**, the judgment of the Hon'ble Supreme Court is binding on all, including the Appellant and Respondent and the Adjudicating

Authority had to act in accordance with judgment of the Hon'ble Supreme Court.

22. The submission of learned Senior Counsel for the Respondent that judgment of the Hon'ble Supreme Court in **Dilip B. Jiwrajka** was not cited by the Appellant before the Adjudicating Authority, does not appeal to us. Law declared by the Hon'ble Supreme Court is law of the land, which needs to be followed by all concerned, even if the judgment was not cited before the Adjudicating Authority, the Appellant can very well rely on the judgment in the present Appeal, which has been filed challenging the impugned order.

23. Shri Krishnendu Datta, learned Senior Counsel for the Personal Guarantor has vehemently argued that Appellant having not raised any objection at the time of hearing of application IA No.5501 of 2023 before the Adjudicating Authority and having taken chances, cannot be allowed to contend that Adjudicating Authority ought not to have proceeded to hear the objections raised by the Personal Guarantor at the present stage. It is submitted that in the reply, which was filed in IA 5501 of 2023, no objection was raised by the Appellant that Adjudicating Authority ought not to hear the objections at that stage. It is submitted that Appellant has once waived its right to raise any objection and on principle of waiver, he cannot be allowed to raise this objection in the present Appeal to challenge the jurisdiction of the Adjudicating Authority to decide the question on merits.

24. In the present case, there is no question of lack of jurisdiction by Adjudicating Authority to decide the application under Section 95. It is the

Adjudicating Authority, who has jurisdiction to decide Section 95 application. However, Section 95 application has to be decided in accordance with statutory scheme as delineated by Sections 95 to 100. The learned Senior Counsel for the Respondent has submitted that Appellant has waived its right to raise objection and applying principles of waiver, it should not be allowed to raise objection with regard to lack of jurisdiction. It is submitted that Adjudicating Authority had jurisdiction to decide the issue, event on merits and rejection of the application on merits, thus, cannot be questioned.

25. Shri Krishnendu Datta in support of his submission contends that on principle of waiver, no objection can be allowed to be raised by the Appellant. Learned Senior Counsel has relied on various judgments of the Hon'ble Supreme Court. We need to notice the judgments, which have been relied by Mr. Datta in support of his submissions. Reliance has been placed on judgment of the Hon'ble Supreme Court in ***Hira Lal Patni vs. Sri Kali Nath – (1961) SCC OnLine SC 42***. The above was a case, where a decree was passed in a suit filed in the original side of the High Court of judicature at Bombay and decree was put in execution at Agra in the state of Uttar Pradesh. An objection was raised before the executing Court that there was inherent lack of jurisdiction in the Bombay High Court. The Hon'ble Supreme Court held that defendant agreed to refer the matter to the arbitration through Court, he would be deemed to have waived his objection to the territorial jurisdiction to the Court, raised by him in his

written statement. Following was held by Hon'ble Supreme Court in paragraph 4:

> "**4.** The only ground on which the decision of the High Court is challenged is that the suit instituted on the original side of the Bombay High Court was wholly incompetent for want of territorial jurisdiction and that, therefore, the award that followed on the reference between the parties and the decree of Court, under execution, were all null and void. Strong reliance was placed upon the decision of the Privy Council in the case of *Ledgard* v. *Bull* [13 Indian Appeals 134] . In our opinion, there is no substance in this contention. There was no inherent lack of jurisdiction in the Bombay High Court where the suit was instituted by the plaintiff-decree holder. The plaint had been filed after obtaining the necessary leave of the High Court under clause 12 of the Letters Patent. Whether the leave obtained had been rightly obtained or wrongly obtained is not a matter which can be agitated at the execution stage. The validity of a decree can be challenged in execution proceedings only on the ground that the court which passed the decree was lacking in inherent jurisdiction in the sense that it could not have seisin of the case because the subject-matter was wholly foreign to its jurisdiction or that the defendant was dead at the time the suit had been instituted or decree passed, or some such other ground which could have the effect of rendering the court entirely lacking in jurisdiction in respect of the subject-matter of the suit or over the parties to it. But in the instant case there was no such inherent lack of jurisdiction. The decision of the Privy Council in the case of *Ledgard* v. *Bull* [13 Indian Appeals 134] is an authority for the proposition that consent or waiver can cure defect of jurisdiction but cannot cure inherent lack of jurisdiction. In that case, the suit had been instituted in the Court of the Subordinate Judge, who was incompetent to try it. By consent of the parties, the case was transferred to the Court of the District Judge for convenience of trial. It was laid down by the Privy Council that as the court in which the suit had been originally instituted was entirely lacking in

jurisdiction, in the sense that it was incompetent to try it, whatever happened subsequently was null and void because consent of parties could not operate to confer jurisdiction on a court which was incompetent to try the suit. That decision has no relevance to a case like the present where there could be no question of inherent lack of jurisdiction in the sense that the Bombay High Court was incompetent to try a suit of that kind. The objection to its territorial jurisdiction is one which does not go to the competence of the court and can, therefore, be waived. In the instant case, when the plaintiff obtained the leave of the Bombay High Court on the original side, under clause 12 of the Letters Patent, the correctness of the procedure or of the order granting the leave could be questioned by the defendant or the objection could be waived by him. When he agreed to refer the matter to arbitration through court, he would be deemed to have waived his objection to the territorial jurisdiction of the court, raised by him in his written statement. It is well settled that the objection as to local jurisdiction of a court does not stand on the same footing as an objection to the competence of a court to try a case. Competence of a court to try a case goes to the very root of the jurisdiction, and where it is lacking, it is a case of inherent lack of jurisdiction. On the other hand, an objection as to the local jurisdiction of a court can be waived and this principle has been given a statutory recognition by enactments like Section 21 of the Code of Civil Procedure. Having consented to have the controversy between the parties resolved by reference to arbitration through court, the defendant deprived himself of the right to question the authority of the court to refer the matter to arbitration or of the arbitrator to render the award. It is clear, therefore, that the defendant is stopped from challenging the jurisdiction of the Bombay High Court to entertain the suit and to make the reference to the arbitrator. He is equally stopped from challenging the authority of the arbitrator to render the award. In our opinion, this conclusion is sufficient to dispose of the appeal. It is not, therefore, necessary to determine the other points in controversy, including the question whether the Decrees and Orders Validating Act, 1936

> (Act 5 of 1936) had the effect of validating what otherwise may have been invalid."

26. The above judgment was a case where there was an issue raised regarding the lack of jurisdiction by the Court granting the decree. The present is not a case where either of the parties are raising any issue regarding lack of jurisdiction of the Adjudicating Authority in deciding Section 95 application. The Adjudicating Authority has jurisdiction to decide Section 95 application as per the scheme of the IBC. The question of waiver with regard to jurisdiction of Adjudicating Authority to decide the application cannot be pressed into service in the present case.

27. The learned Senior Counsel for the Respondent relied on another judgment of the Hon'ble Supreme Court in ***(2004) 8 SCC 229 – Krishna Bahadur vs. Purna Theatre and Ors***. In the above case, the question of principle of waiver was examined in reference to proceedings initiated before the Industrial Tribunal. In the above context, following was laid down by the Hon'ble Supreme Court in paragraph 9:

> "**9.** The principle of waiver although is akin to the principle of estoppel; the difference between the two, however, is that whereas estoppel is not a cause of action; it is a rule of evidence; waiver is contractual and may constitute a cause of action; it is an agreement between the parties and a party fully knowing of its rights has agreed not to assert a right for a consideration."

28. When we look into the ratio of above judgment, the Hon'ble Supreme Court laid down that "*waiver is contractual and may constitute a cause of action; it is an agreement between the parties and a party fully knowing of*

its rights has agreed not to assert a right for a consideration". The principle of waiver is to be put in service in reference to contract between the parties, where one party waives its right for a consideration. In the facts of the present case and sequence of events, we do not find that the Appellant has waived any of its rights in reference to Section 95 application. Filing of the application – IA No.5501 of 2023 was an act of Personal Guarantor and it was the Personal Guarantor, who raised objection to section 95 application, without even appointment of RP. When the Adjudicating Authority directed the Financial Creditor to file a reply to the application, filing of the reply by the Appellant to IA No.5501 of 2023, cannot be termed as a waiver of any of its rights. The definition of waiver, which has been quoted with approval by the Hon'ble Supreme Court in ***Inderpreet Singh Kahlon and Ors. vs. State of Punjab and Ors. (2006) 11 SCC 356***, paragraph 133 of which is as follows:

> "**133.** In Vol. 45, Halsbury's Laws (4th Edn.), para 1269, the meaning of the word "waiver" has been described as follows:
>
> > *"1269. Waiver is the abandonment of a right, and thus is a defence against its subsequent enforcement. Waiver may be express or, where there is knowledge of the right, may be implied from conduct which is inconsistent with the continuance of the right. A mere statement of an intention not to insist on a right does not suffice in the absence of consideration; but a deliberate election not to insist on full rights, although made without first obtaining full disclosure of material facts, and to come to a settlement on that basis, will be binding."*

29. In the present case, the Financial Creditor has not abandoned any of its rights either by a conduct or by any writing.

30. Another judgment relied by learned Senior Counsel for the Respondent is ***(2022) 2 SCC 221 – Arce Polymers Pvt. Ltd. vs. Alphine Pharmaceuticals Pvt. Ltd. and Ors***. The Hon'ble Supreme Court in the above case has held that waiver is an intentional relinquishment of a known right. In paragraph 16 of the judgment, following has been laid down:

> "**16.** Waiver is an intentional relinquishment of a known right. Waiver applies when a party knows the material facts and is cognizant of the legal rights in that matter, and yet for some consideration consciously abandons the existing legal right, advantage, benefit, claim or privilege. Waiver can be contractual or by express conduct in consideration of some compromise. However, a statutory right may also be waived by implied conduct, like, by wanting to take a chance of a favourable decision. The fact that the other side has acted on it, is sufficient consideration."

31. Waiver is always related to some consideration on the basis of which a party consciously abandons the existing legal right. In the present case, neither any consideration is proved, nor there is any conscious abandonment of any of its rights by the Appellant. Hence, the submission of learned Senior Counsel for the Respondent that Appellant is precluded to raise the ground to challenge the order of the Adjudicating Authority on the ground of waiver, is misconceived.

32. We also need to notice the judgment relied by learned Counsel for the Appellant in support of his submissions. Reliance has been placed on

(1999) 3 SCC 422 – Babu Varghese & Ors. vs. Bar Council of Kerala & Ors., where the Hon'ble Supreme Court held that if the manner of doing a particular act is prescribed under any statute, the act must be done in that manner or not at all. In paragraphs 31 and 32, following have been laid down:

> "**31.** It is the basic principle of law long settled that if the manner of doing a particular act is prescribed under any statute, the act must be done in that manner or not at all. The origin of this rule is traceable to the decision in Taylor v. Taylor [(1875) 1 Ch D 426 : 45 LJCh 373] which was followed by Lord Roche in Nazir Ahmad v. King Emperor [(1936) 63 IA 372 : AIR 1936 PC 253] who stated as under:
>
> > "[W]here a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all."
>
> **32.** This rule has since been approved by this Court in Rao Shiv Bahadur Singh v. State of V.P. [AIR 1954 SC 322 : 1954 SCR 1098] and again in Deep Chand v. State of Rajasthan [AIR 1961 SC 1527 : (1962) 1 SCR 662] . These cases were considered by a three-Judge Bench of this Court in State of U.P. v. Singhara Singh [AIR 1964 SC 358 : (1964) 1 SCWR 57] and the rule laid down in Nazir Ahmad case [(1936) 63 IA 372 : AIR 1936 PC 253] was again upheld. This rule has since been applied to the exercise of jurisdiction by courts and has also been recognised as a salutary principle of administrative law."

33. Another judgment relied by learned Counsel for the Appellant is ***State of Uttar Pradesh vs. Singhara Singh & Ors. – (1963) SCC OnLine SC 23***, where in paragraph 8, following was laid down:

> "**8.** The rule adopted in *Taylor* v. *Taylor* [(1875) 1 Ch D 426, 431] is well recognised and is founded on sound principle. Its result is that

if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted. A Magistrate, therefore, cannot in the course of investigation record a confession except in the manner laid down in Section 164. The power to record the confession had obviously been given so that the confession might be proved by the record of it made in the manner laid down. If proof of the confession by other means was permissible, the whole provision of Section 164 including the safeguards contained in it for the protection of accused persons would be rendered nugatory. The section, therefore, by conferring on Magistrates the power to record statements or confessions, by necessary implication, prohibited a Magistrate from giving oral evidence of the statements or confessions made to him."

34. Another judgment relied by the learned Counsel for the Appellant is ***(2015) 11 SCC 628 – Tata Chemicals Ltd. vs. Commissioner of Customs (Preventive) Jamnagar***. The Hon'ble Supreme Court in the above judgment has laid down that there can be no estoppel against law, if the law requires that something be done in a particular manner. In paragraph 18 of the judgment, following was held:

"**18.** The Tribunal's judgment has proceeded on the basis that even though the samples were drawn contrary to law, the appellants would be estopped because their representative was present when the samples were drawn and they did not object immediately. This is a completely perverse finding both on fact and law. On fact, it has been more than amply proved that no representative of the appellant was, in fact, present at the time the Customs Inspector took the samples. Shri K.M. Jani who was allegedly present not only stated that he did not represent the clearing agent of the appellants in that he was not their employee but also stated that he was not present

> when the samples were taken. In fact, therefore, there was no representative of the appellants when the samples were taken. In law equally the Tribunal ought to have realised that there can be no estoppel against law. If the law requires that something be done in a particular manner, it must be done in that manner, and if not done in that manner has no existence in the eye of the law at all. The Customs Authorities are not absolved from following the law depending upon the acts of a particular assessee. Something that is illegal cannot convert itself into something legal by the act of a third person."

35. Insofar as submission of learned Senior Counsel for the Respondent on the basis of Comm. Suit (L) filed in the Bombay High Court, the said proceedings could not have in any manner operated as estoppel on the Adjudicating Authority to proceed to decide the application under Section 95 in accordance with law. It is always open for the Respondent to place before the Court, if any order is passed by the Bombay High Court in the suit filed by the Respondent and it is for the Adjudicating Authority to examine the effect and consequence of any such order.

36. In view of the foregoing discussions, we are of the considered opinion that Adjudicating Authority committed error in considering the objections raised by the Respondent on the merits of the application under Section 95 filed by the Central Bank of India at the stage when RP was not even appointed. The Adjudicating Authority proceeded to enter into adjudicatory issues, which can be taken by the Adjudicating Authority only at the time of hearing of section 95 application under Section 100, as is now the law declared by the Hon'ble Supreme Court in **Dilip B. Jiwrajka**'s case, as noted above.

37. We, thus, are unable to upheld the order of the Adjudicating Authority dated 21.02.2024. We, however, make it clear that we are not expressing any opinion on the merits of objections raised by the Respondent – Personal Guarantor, which were considered by the Adjudicating Authority in the impugned order and we are not expressing any opinion on the merits of the application. It is for the Adjudicating Authority to consider the objections at the time of hearing of application under Section 100 in accordance with law. In result, the Appeal is allowed. The order passed by Adjudicating Authority in IA 5501 of 2023 praying for dismissal of C.P. (IB)/420(MB)/ 2022 is set aside. However, rejection of IA 5501 of 2023 shall not preclude the Personal Guarantor to raise any objection in the reply, which may be filed by the Personal Guarantor, in reply to the Report of the RP. The Appeal is allowed, subject to observations as made above.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

[Arun Baroka]
Member (Technical)

NEW DELHI

11th November, 2024

Ashwani