

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT - II**

CP (IB) No. 906/MB/2022

AND

I.A. No. 3244 of 2024.

Under Section 95 of the Insolvency and Bankruptcy Code, 2016 read with Rule 7 of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019.

In the matter of (CP(IB) No. 906(MB)/2022):

YES Bank Limited

Having its Branch Office at: Stressed Asset Management Team, Off Western Express Highway, Santacruz (E), Mumbai-400055.

..... Applicant/Creditor

Versus

Mrs. Sakshi Jiwarajka

Personal Guarantor to JSK Marketing Ltd.,

Residing at: - (i.) 161/C, NWC, Grande Parade Apartment, August Kranti Marg, Mumbai-400036.

..... Personal Guarantor/Respondent

In the matter of (I.A. No. 3244 of 2024):

Mrs. Sakshi Jiwarajka Applicant

Vs.

CP(IB) No. 906 (MB)/2022

& I.A. No. 3244/2024

YES Bank Limited

.... **Respondent**

Order Delivered on :- 07.10.2024.

Coram:

Shri. Anil Raj Chellan

Mr. Kuldip Kumar Kareer

Member (Technical)

Member (Judicial)

Appearances (in Virtual mode):

For the Petitioner : Adv. Udita Miyan.

For the Personal Guarantor : Adv. Nikita Panhalkar.

ORDER

Per: - Coram.

1. This is an application filed under Section 95 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “the Code”) read with Rule 7(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 (‘PGIRP Rules’) by **YES Bank Limited** (hereinafter referred to as “the Petitioner” or “the Financial Creditor”) for initiating the Personal Guarantor’s Insolvency Resolution Process (‘PGIRP’) against **Mrs. Sakshi Jiwarajka** (hereinafter referred to as "Personal Guarantor"). As stated in Part III of the Petition, the date on which default on the part of the Personal Guarantor occurred is June 26, 2019 and the amount in default is INR 32,36,25,431.67/- (Rupees Thirty-

Two Crores, Thirty-Six Lakhs, Twenty-Five Thousand, Four Hundred and Thirty-One, and Sixty-Seven Paise only).

Case of the Applicant (in brief):

2. The Corporate Debtor, namely, JSK Marketing Ltd., availed financial assistance from the Applicant for an amount of INR 25,00,00,000/-, out of which the Cash Credit Facility was for INR 10,00,00,000/- and the Working Capital Demand Loan was INR 15,00,00,000/-, under the Master Facility Agreement dated 02nd June, 2017.
3. The above credit facilities were secured, *inter-alia*, by the Deed of Personal Guarantee executed by the Respondent/Personal Guarantor in favour of the Applicant on 02nd June, 2017.
4. As the Corporate Debtor failed to repay the dues of the Applicant, the accounts of the Corporate Debtor were classified as Non-Performing Asset ('NPA') on 30.06.2019 as per the guidelines of the Reserve Bank of India.
5. In view of the default in debt repayment by the Corporate Debtor and in pursuance of the Deed of Guarantee dated 02.06.2017, the Applicant invoked the personal guarantee executed by the Respondent vide Notice for invocation of Personal Guarantee dated June 18, 2019, whereby the Personal Guarantor was called upon to pay the total outstanding dues of INR 24,76,35,089.55/- together with interest, damages and charges within 7 days of the receipt of the notice.
6. As the Personal Guarantor failed to repay the debt despite being served with notice, the Applicant herein was constrained to file the above-captioned application seeking initiation of PGIRP of the Personal Guarantor. Hence this application. The Applicant states that this Tribunal

initiated liquidation process against the Corporate Debtor vide Order dated 02.12.2021 in I.A. No. 2498 of 2020 in CP(IB) No. 1545/MB/2019.

I.A. No. 3244 of 2024:

7. This is an application filed by the Personal Guarantor seeking following reliefs: a) Recall the Order dated 24.08.2023 in which the Resolution Professional was appointed; and b) dismissal of the above-captioned petition, *inter-alia*, on the following grounds:
- i. The Applicant/Creditor has already enforced its security interest of two properties owned by the Personal Guarantor having market value of over Rs. 25 crores which is more than the value of the debt owed by the Personal Guarantor/Corporate Debtor. Thus, the present application is barred by Section 68 of the Transfer of Property Act, 1882 ('TOPA') as the Applicant/Creditor after having taken possession of the mortgaged property cannot again sue the Respondent/Personal Guarantor or the Corporate Debtor for the mortgage money. As the Creditor has enforced its security interest, the Deed of Guarantee stands discharged.
 - ii. The Applicant/Creditor is guilty of suppressing the material fact that a civil suit was filed by JSK Marketing Ltd (i.e. the Corporate Debtor) against the alleged illegalities committed by the YES Bank.

Report of the Resolution Professional u/s 99 of the Code:

8. The Resolution Professional ('RP') was appointed by this Bench in the above-captioned Petition vide Order dated 24.08.2023. The learned RP has placed on record his Report dated 09th September, 2023 filed u/s 99 of

the Code. The said Report has recommended for admitting the Respondent-Personal Guarantor into PGIRP. The reasons for recommending admission of the Personal Guarantor into PGIRP which have been stated by the RP in his report are briefly reproduced hereinbelow:

- i. The Applicant/Creditor has served the demand notice dated 30.12.2021 in Form 'B' via registered post to the Personal Guarantor for demanding payment of the amount in default within 14 days from the receipt of the notice. On failure of Personal Guarantor to pay within fourteen days of the service of notice, the Creditor has filed this application u/s 95 of the Code in Form 'C' for initiation of insolvency resolution process of the Personal Guarantor to the Corporate Debtor and the said application is complete in all respects.
- ii. The RP requested the Personal Guarantor to prove repayment vide email and letter dated 01.09.2023, if any, of the debt claimed as unpaid by the Creditor and requested to furnish proof of such repayment on or before 08.09.2023. However, there is no communication from the Personal Guarantor to the RP.
- iii. After considering the Covid extensions/exclusion orders passed by the Hon'ble Supreme Court of India in SMW(C) No. 03/2020, the present petition appears to have been filed within the period of limitation.
- iv. The Creditor has served the copy of the application to the Personal Guarantor vide email dated 27.07.2022.
- v. The Application is rightly filed before this Bench of the Tribunal where liquidation process of the Corporate Debtor is pending.

vi. Hence, it is recommended by the RP that the application for initiation of insolvency resolution process filed by YES Bank (which was later substituted with J.C. Flower Asset Reconstruction Private Limited) against the Personal Guarantor to the Corporate Debtor be hereby admitted under the orders and directions by this Tribunal.

9. Submissions on behalf of the Applicant/Creditor/Petitioner:

a.) Counsel for the Petitioner submits that the contention of the Respondent that the Applicant has suppressed the fundamental fact that it has already enforced security interest of two properties under the SARFAESI Act, 2002, is false and misconceived. Counsel for the Petitioner states that the auction was done under the order of Hon'ble Debts Recovery Tribunal-I, Mumbai; however, the said auction was unsuccessful and as a result, the Applicant/Creditor was not able to realise any amount. It is further submitted that as of today, no recovery has been made from the said auction and, therefore, the Respondent's contention that security interest of two properties has already been enforced is factually incorrect.

b.) Counsel for the Petitioner submits that the objection of Section 68 of the Transfer of Property Act, 1882 ('TOPA') taken by the Respondent is not sustainable in view of Section 238 of the Code by virtue of which the provisions of the Code have over-riding effect over other legislations to the extent of repugnancy. Further, the learned Counsel for the Petitioner submits that the bar u/s 68 of TOPA applies only to debt recovery proceedings and not to the proceedings under the Code which is for initiation of insolvency resolution process against the Personal Guarantor

to the Corporate Debtor. Therefore, there is no merit in this contention either.

c.) Counsel for the Petitioner submits that the Respondent's contention that no guarantee exists as it stands discharged under the Indian Contract Act, 1872 is also incorrect. The learned Counsel for the Petitioner contends that until and unless the debt is discharged or the Creditor themselves absolve the Guarantor from his liability, the guarantee shall not stand extinguished. In the present case, since the auction sale was unsuccessful and no money could be recovered, the guarantee furnished by the Respondent is still valid, subsisting and binding.

10. **Submissions on behalf of the Respondent/Personal Guarantor:**

a. Counsel for the Respondent stated that the cardinal rule of law is that no individual should be sued more than once for the same cause. Counsel for the Respondent/Personal Guarantor submits that the Petitioner is estopped u/s 68 of the TOPA from enforcing its claim under the captioned proceedings as it has already enforced its security interest qua two properties of the Respondent having market value of more than Rs. 25 crores, which is more than the value of the debt owed by the Corporate Debtor to the Creditor.

b. Counsel for the Respondent submits that in spite of being fully cognizant of the civil suit having been filed by the Corporate Debtor and a march of litigation before the Hon'ble Bombay High Court in W.P. (L) No. 5375 of 2021 to which the Petitioner Bank was a party, has surreptitiously proceeded with the captioned proceedings behind the back of the Personal Guarantor.

c. Counsel for the Respondent contends that the contract of guarantee stands discharged in terms of Section 133 of the Indian Contract Act, 1872 as the debt has been assigned by the Creditor to J.C. Flower Asset Reconstruction Company Private Limited behind the back of the Personal Guarantor without obtaining her consent.

FINDINGS

11. We have heard the learned counsels for the Petitioner and the Respondent/Personal Guarantor and we have perused the records.
12. On perusal of records, we find that the Creditor had sanctioned a Cash Credit Facility of Rs. 25 crores and a Working Capital Demand Loan of Rs. 15 crores to the Corporate Debtor, in relation to which the personal guarantee was furnished by the Personal Guarantor herein along with other personal guarantors, namely, Mr. Kunal Jiwarajka and Ms. Laxmi Devi Jiwarajka, by executing the Deed of Guarantee dated 02nd June, 2017 in favour of the Applicant/Creditor. Thus, existence of debt due by the Respondent to the Applicant is satisfactorily established from the records.
13. We further find that owing to the default by the Corporate Debtor in repaying the above-sanctioned loans, the Applicant/Creditor herein recalled the credit facilities vide Recall Notice dated June 18, 2019 calling upon the Corporate Debtor to pay the outstanding amount of INR 24,76,35,089.55/- due as on June 12, 2019. Simultaneously, the Applicant/Creditor also invoked the personal guarantee furnished by the Respondent herein by issuing the Notice for Invocation of Personal

Guarantee dated June 18, 2019 to the Respondent/Personal Guarantor. The Respondent/Personal Guarantor has not denied the facts that the credit facilities were recalled and the personal guarantee was invoked by the Applicant on June 18, 2019. Thus, it is an admitted and undisputed fact that the credit facilities were recalled and the personal guarantee was invoked by the Applicant. By virtue of the Notice for Invocation of Personal Guarantee dated June 18, 2019, the Respondent/Personal Guarantor was called upon to pay the outstanding demand of INR 24,76,35,089.55/- to the Creditor within seven days from the date of receipt of the notice. Thus, we find that the default is committed by the Personal Guarantor in honouring her personal guarantee obligation towards the Creditor somewhere in or around the month of June, 2019.

14. However, since the default on the part of the Personal Guarantor persisted despite invocation of personal guarantee, the Applicant herein issued a Demand Notice dated December 30, 2021 in Form 'B' calling upon the Personal Guarantor to honour the personal guarantee furnished by her and make good the default within 14 days of the receipt of the notice, failing which the Applicant shall initiate the insolvency resolution process against the Personal Guarantor. The Personal Guarantor herein, through her advocates, replied to the aforesaid Demand Notice vide Reply dated January 10, 2022. Thus, the service of Demand Notice in Form 'B' by the Applicant on the Respondent stands proved on record. In her reply, the Respondent merely asked the Applicant to give inspection of the documents stated therein. However, despite the service of demand notice referred-to-above, the Personal Guarantor failed to honour her personal guarantee obligations towards the Creditor which led to filing of the

above-captioned Petition by the Applicant/Creditor u/s 95 of the Code seeking initiation of insolvency resolution process against her.

15. 1. As regards limitation, it has been observed that the default was committed by the Personal Guarantor somewhere in or around the month of June, 2019, the Petition u/s 95 of the Code ought to have been filed against her within 3 years from the date of default as per the provision of Article 137 of the Schedule to the Limitation Act, 1963. However, as per the orders of the Hon'ble Supreme Court of India dated January 10, 2022 in M.A. No. 21 of 2022 in *Suo Motu Writ Petition (Civil) No. 3 of 2020*, the period from 15.03.2020 till 28.02.2022 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings and consequently, the balance period of limitation, if any, shall become available with effect from 01.03.2022.

15.2. In the present case, the period lapsed from 18.06.2019 to 14.03.2020 is 271 days and therefore, the balance period of limitation of 824 days (365days*3years-271 days) shall be available from 01.03.2022. Therefore, the period of limitation under Article 137 of the Schedule to the Limitation Act, 1963 read with the Apex Court orders dated 10.01.2022, expires on June 02, 2024. Since the captioned Petition u/s 95 of the Code was filed on 27th July 2022, we hold that the captioned Petition is not barred by limitation.

16. Counsel for the Respondent submits that the Petitioner is estopped under section 68 of the Transfer of Property Act, 1882 from enforcing its claim under the captioned proceedings as it has already secured its claim under the SARFAESI Act, 2002 by enforcing its security interest in two

properties (viz. Flat Nos. 701 and 801 situated on 10th floor and 11th floor respectively at Santacruz Satyashraya- Palazzo Landmark CHSL, West Avenue, Santacruz West, Mumbai-400054) having market value of more than Rs. 25 crores. Counsel for the Respondent places reliance on the provisions of Section 68 of the Transfer of Property Act, 1882 to contend that once a mortgagee has taken possession of the property undisturbed and undamaged, and where the security is not insufficient, the mortgagee cannot again sue for the mortgage money. However, we are unable to agree with the aforesaid contention for the reason that bar u/s 68 of the Transfer of Property Act, 1882 applies to suits or proceedings for mortgage money; whereas the proceedings under IBC cannot equated with a suit or a proceeding for recovering the mortgage money from the debtor. It is trite to say that proceedings under Section 95 of the Code is for insolvency resolution of the Personal Guarantor to the Corporate Debtor and not for mere recovery of debt by the creditor. Therefore, the bar u/s 68 which applies to suits for mortgage money, cannot be extended to proceedings u/s 95 of the Code as the debt recovery proceedings and the insolvency resolution process stand on totally different footing. Further, merely because a secured creditor has taken action to realise/enforce its security interest in the mortgaged property, the secured creditor is not precluded from initiating insolvency resolution process of the Personal Guarantor unless of course the debt is recovered in full. In the present matter, the learned Counsel for the Petitioner has submitted that the Applicant/Creditor has not been able to realise any amount from the auction of the two properties to which the Respondent is referring. Further, we observe that the Respondent/Personal Guarantor has not brought anything on record to show that after enforcing the security

interest in the two mortgaged properties, it has recovered the debts due from the Corporate Debtor in full. Besides, as discussed above, mere initiation of proceedings under the SARFAESI Act, 2002 for enforcement of security interest would not preclude the Applicant/Creditor from filing an application u/s 95 of the Code seeking initiation of insolvency resolution process of the Personal Guarantor. Hence, we dismiss the aforesaid contentions of the Counsel for the Respondent.

17. Counsel for the Respondent contends that since the debt has been assigned to J.C. Flower Asset Reconstruction Pvt Ltd behind the back of the Personal Guarantor, this is a variance in terms of contract between the Creditor and the Principal Borrower (i.e. the Corporate Debtor) without obtaining the consent of the Surety (i.e. the Personal Guarantor), hence, the Surety/Personal Guarantor stands discharged u/s 133 of the Indian Contract Act, 1872. However, in our considered view, mere assignment of debt cannot be said to be a variance in the terms of the contract between the principal debtor and the creditor. After assignment of debt, the assignee steps into the shoes of the creditor and exercises the same rights under the contract which the assignor/erstwhile creditor had against the debtor. Even otherwise, in view of Section 5 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, the aforesaid contention of the learned Counsel for the Respondent cannot be entertained.

18. 1. It is also not out of place to state that in the present case, J.C. Flowers Asset Reconstruction Private Limited (i.e. the assignee) had filed an application vide I.A. No. 922/2023 in the captioned Petition seeking its substitution in place of the Petitioner herein. The aforesaid IA was allowed

by this Bench vide Order dated 15.03.2023. Since no amendments were carried by the assignee despite the aforesaid order, the Petitioner continues to remain on record. However, on this technical ground alone, we are not inclined to dismiss this petition when debt and default on the part of the Personal Guarantor have been satisfactorily established from the records. In this regard, guidance may be taken from Order 22, Rule 10 of the Code of Civil Procedure, 1908 which are reproduced hereunder:

Order 22 Rules 10

“10. Procedure in case of assignment before final order in suit. –

(1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved.

(2) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub rule (1).”

18.2. A bare reading of the provisions of Order 22 Rule 10 makes it clear that the legislature has not envisaged the penalty of dismissal of the suit or appeal on account of failure of the assignee to move an application for impleadment and to continue the proceedings. While interpreting Order 22, Rule 10, the Hon’ble Supreme Court of India in **Sharadamma Vs. Mohammed Pyrejan (Dead) through Legal representatives and Another [2016(1) SCC 730]** held as follows:

“5. A bare reading of the provisions of Order 22 Rule 10 makes it clear that the legislature has not envisaged the penalty of dismissal of the suit or appeal on account of failure of the assignee to move an application for

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*impleadment and to continue the proceedings. Thus, there cannot be dismissal of the suit or appeal, as the case may be, on account of failure of the assignee to file an application to continue to proceedings. **It would be open to the assignor to continue the proceedings notwithstanding the fact that he ceased to have any interest in the subject-matter of dispute. He can continue the proceedings for the benefit of assignee.***”
(Emphasis Supplied)

18.3. Though we are conscious of the settled position that the provisions of the Code of Civil Procedure, 1908 ('CPC') do not stricto sensu apply to the proceedings before the Adjudicating Authority under the Insolvency & Bankruptcy Code, 2016; however, when there is no specific provision in Part III of the Code, nothing precludes the Adjudicating Authority from being guided by the procedures and the principles laid down in CPC. The Hon'ble NCLAT too referred to the above-cited judgment of the Hon'ble Apex Court while disposing *CA(AT)(Insolvency) No. 179/2023 in Surender Singh v. Yes Bank Ltd. & Anr.* vide Order dated 16.02.2023.

18.4. Thus, in the given case, there cannot be dismissal of the insolvency proceedings initiated by the Petitioner herein merely on account of failure of the assignee to make necessary amendments to the cause title and the captioned Petition to continue to proceedings especially when the substitution application was already allowed by this Court. Therefore, now, it would be open to the assignor (i.e. the Applicant/Creditor herein) to continue the proceedings notwithstanding the fact that he ceased to have any interest in the subject-matter of dispute on account of assignment of debt. In view of the above discussions, we are of the firm view that the Petitioner/Applicant/Creditor herein can continue the proceedings for the benefit of assignee.

19. Counsel for the Respondent submits that the Applicant is guilty of suppressio veri as the Applicant has not disclosed the fact that a civil suit was filed against it by the Corporate Debtor in the Bombay City Civil Court vide S.C. Suit (Stamp) No. 3811 of 2020. However, we observe that the above-referred suit was filed by the Corporate Debtor and Mr. Kunal Jiwarajka against, *inter-alia*, the Original Petitioner (Financial Creditor) in CP(IB) No. 1545/MB/2019 and the Petitioner herein impugning the initiation of CIRP against the Corporate Debtor and the same has no relevance or impact on the merits of this case. Hence, we dismiss the plea of suppressio veri taken by the Respondent against the Applicant.
20. No other contentions have been raised on behalf of the Personal Guarantor/Respondent.
21. The learned RP has in his Report u/s 99 of the Code has recommended for the admission of the Personal Guarantor into the insolvency resolution process. The learned RP in his report has confirmed the service of demand notice and non-payment of debt by the Respondent despite the invocation of personal guarantee. The learned RP has further stated that the petition appears to have been filed within period of limitation.
22. In view of the foregoing findings, analysis and discussion, we are of the considered view that the debt and default on the part of the Personal Guarantor have been satisfactorily established from the records and also since the Petition is held to have been filed within period of limitation, we are inclined to allow the same and dismiss the captioned IA filed by the Personal Guarantor. Accordingly, we pass the following orders:

ORDER

- I. Initiate Insolvency Resolution Process against the Respondent/Personal Guarantor named **Mrs. Sakshi Jiwarajka** and moratorium in relation to all the debts is declared, from today i.e. date of admission of the application and shall cease to have effect at the end of the period of 180 days, or this Tribunal passes order on the repayment plan under Section 114, whichever is earlier, as provided under Sec 101 of IBC, 2016. During the moratorium period, a) Any pending legal action or proceeding against the Respondent/Personal Guarantor in respect of any debt shall be deemed to have been stayed; b) The creditors of the personal guarantor shall not initiate any legal action or proceedings in respect of any debt; and c) The Personal Guarantor shall not transfer, alienate, encumber, or dispose of any of his assets or his legal rights or beneficial interest therein.

- II. The Resolution Professional viz., **Mr. Prakul Thadi** (having Registration No. IBBI/IPA-002/IP-N01149/2021-2022/13806, email: prakulthadi@hotmail.com), who was appointed vide Order dated 24.08.2023, is directed to cause a public notice to be published on behalf of the Adjudicating Authority within 7 days of uploading of this order on the website of NCLT, inviting claims from all Creditors within 21 days of such issue. The notice under Sub Section (1) of Section 102(2) shall include: -
 - a) details of the order admitting the application;

- b) particulars of the resolution professional with whom the claims are to be registered; and
 - c) the last date for submission of claims.
- III. The Petitioner is directed to deposit an advance payment of INR **3,00,000/- (Rupees Three Lakhs only)** to the bank account of Resolution Professional within one week, so as to initiate the process. This shall be adjusted towards the fee and expenses payable to the Resolution Professional.
- IV. The publication of notice shall be made in two newspapers, one in English and other in Vernacular, which are in circulation in the state where the Personal Guarantor resides. The Resolution Professional shall furnish two spare copies of the notice to the Registry for the record.
- V. The Resolution Professional in exercise of the powers conferred under Section 104 shall prepare a list of creditors on the basis of:
- a. the information disclosed in the application filed by the Petitioner under Section 95 and
 - b. claims received by the Resolution Professional under Section 102 within 30 days from the date of the notice.
- VI. The Personal Guarantor shall prepare a repayment plan under Section 105, in consultation with the Resolution Professional, containing a proposal to the Creditors for restructuring of his debts or affairs. The Resolution Professional shall submit the repayment plan along with his report on the plan to this Authority within a

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period of 21 days from the last date of submission of claims, as provided under Section 106.

- VII. The meeting of the creditors shall be conducted in accordance with Sections 108, 109, 110 & 111 of IBC, 2016. The Resolution Professional shall prepare a report of the meeting of the creditors on repayment plan with all details as provided under Section 112 of IBC, 2016 and submit the same to this Tribunal, copies of which shall be provided to the Debtor and the Creditors. It is made clear that the Resolution Professional shall perform his functions and duties in compliance with the Code of Conduct provided under Section 208 of IBC, 2016.
- VIII. The Registry is directed to communicate a copy of order to the Petitioner, the Respondent and the Resolution Professional within three working days from the date of uploading of this order.
- IX. In terms of the above, **CP(IB) No. 906/MB/2022** filed under Section 95 of the IBC, 2016 **is hereby admitted** and the Insolvency Resolution Process stands initiated against the Applicant/Personal Guarantor. **I.A. No. 3244/2024 is hereby dismissed.**

Sd/-

ANIL RAJ CHELLAN
(MEMBER TECHNICAL)

Sd/-

KULDIP KUMAR KAREER
(MEMBER JUDICIAL)