

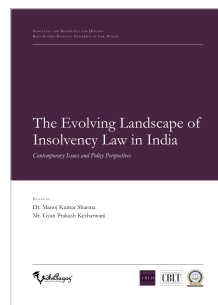
CHAPTER 4

Ambiguous Contours of Personal Guarantors under IBC and the Consequential Implications

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CHAPTER 4

Ambiguous Contours of Personal Guarantors under IBC and the Consequential Implications

YASH SINGH*

The Hon'ble apex court's dictum in Lalit Kumar Jain marked the inclusion of the personal guarantors in the debt resolution and asset maximisation framework of IBC. This paved the way for personal guarantors to institute IRP proceeding against themselves, and for financial creditors and the resolution professionals to initiate IRP proceedings against personal guarantors under Sections 94 and 95 of the IBC. Yet the said framework, despite several judicial clarifications ranging from SBI v. Ramakrishnan to P. Mohanraj case, remains fraught with challenges at multiple stages for personal guarantors under the IBC. The first issue is the ambiguity surrounding the pre-requisite conditions for filing an application under Section 95 of the IBC. This ambiguity arises from the Supreme Court's observation in Mahendra Kumar Jajodia v. SBI which settled the law that CIRP is not a pre-requisite condition for filing a Section 95 application, yet NCLAT in its recent orders, has muddled the effect of the Mahendra Jajodia case by observing that CIRP constitutes an essential condition to invoke the Section 95 application. The second issue concerns the vacuum left by quasi-judicial bodies like NCLT & NCLAT, particularly the inconsistency between the form & manner of invoking the Bank Guarantee and the void created by the absence of the terms and conditions in the Guarantee Deed, thereby creating imminent issues while invoking Section 95(4) IBC in order to institute IRP against the Personal Guarantors. In light of the aforesaid issues, among others, a much-needed clarity is sought by the quasi-judicial and the judicial bodies as well on the potential contradictions that lie between the provisions of IBC and the incidental Regulations and Rules as intended by the law-makers and the interpretation done by NCLT, NCLAT and other judicial forums thereon. Accordingly, the author briefly outlines the judicial underpinnings, and thereby pens comments and sheds some light on the glaring inconsistencies that lie between the provisions of IBC and the judicial precedents with respect to the pre-requisite conditions for filing Section 95 application under IBC, vacuum in the Guarantee Deed and the invocation of Guarantee thereon, the scope of Interim Moratorium under Section 96 IBC.

Keywords: Insolvency, CIRP, Personal Guarantors, Interim Moratorium, Bank and Invocation

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1 INTRODUCTION

Amid India's rising prominence in the industrial and manufacturing sectors, there is an increasing trend of companies being incorporated with the Registrar of Companies under the Companies Act 2013, the backbone of which remains the *promoters* of the corporate persons concerned, and these promoters infuse significant financial capital to the Companies to raise the finances of the Company in order to channelise its incorporation and business. Given that the Indian financial and business ecosystem operates in a manner where *major corporate borrowings and loan transactions are assured by way of 'Personal Guarantees' provided by the Promoters of the company, their family members and close kin, directors, and sometimes individuals within their inner circle of the Promoters*¹, there arose a need to introduce an individual-specific insolvency and bankruptcy framework in the Insolvency and Bankruptcy Code ["IBC"] since, until 2019, the IBC only had the restructuring framework for Corporate Insolvency and guarantee as a result of which, there was a vacuum under Section 5 of IBC², on the restructuring and reorganization of the personal insolvency basis, the guarantees rendered by the Promoters to the Corporate Debtor for the corporate person concerned.

Traditionally, the contract of guarantee was a tripartite agreement between the surety, principal debtor, and the creditor³, where the release of the corporate debtor meant the release of the surety from its contractual obligations⁴. However, a contrasting position was taken in *Maharashtra SEB v. Official Liquidator*⁵ wherein, the Supreme Court held that *the discharge of the principal debtor by operation of law in bankruptcy does not absolve the surety of liability*⁶. In the IBC-led resolution framework, this position was reinforced by the Supreme Court's observation in *State Bank of India v. V Ramakrishnan*⁷ whereby it was clarified that *approval of the resolution plan does not ipso facto discharge the personal guarantor from liability, even though the corporate debtor has been discharged of its contractual obligations*⁸. This marked a significant departure from the traditional concept of the contract of guarantee, leading to the conclusion that the liabilities of the corporate debtor and the personal guarantor, though *co-extensive*, still constitute independent liabilities owed to the creditor.

While a catena of cases has established that the corporate creditors have joint and independent remedies against the corporate debtors and their personal guarantors, IBC lacked

¹ ANANT MERATHIA, *DEFAULTER'S PARADISE LOST: DEMYSTIFYING THE INSOLVENCY AND BANKRUPTCY CODE*, 2016 219 (1st ed. 2023).

² Insolvency and Bankruptcy Code, 2016, § 5.

³ Indian Contract Act, 1872, § 126.

⁴ *Id.* § 134.

⁵ *Maharashtra SEB v. Official Liquidator*, (1982) 3 SCC 358.

⁶ *Id.* ¶ 7.

⁷ *State Bank of India v. V Ramakrishnan*, (2018) 7 SCC 394.

⁸ *Id.* ¶ 25.

a statutory framework for the insolvency of individuals and partnership firms (commonly referred to as ‘personal insolvency’), and thereby, the law on personal insolvency was introduced by the Ministry of Corporate Affairs *vide* its Notification dated 15th November 2019⁹, thereby giving legal sanctity to the provisions governing the insolvency and bankruptcy of individuals and partnership firms [insolvency resolution process or “IRP”], i.e., Part III of the IBC. Subsequent thereto, it received judicial approval from the Supreme Court in *Lalit Kumar Jain v. Union of India*¹⁰ which placed reliance on *V. Ramakrishnan* case and held that, “the release or discharge of the Corporate Debtor by an involuntary process, i.e., by liquidation or insolvency proceeding, does not absolve the surety/guarantor of his/her liability, which arises out of an independent contract.”¹¹

With the 2019 notification providing statutory recognition to the Personal Insolvency framework under IBC, and introducing delegated rules, such as the *Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019* [“2019 Rules”] and *Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Regulations, 2019* [“2019 Regulations”], the personal insolvency framework is still fraught with challenges in terms of the manner of invocation of bank guarantees qua Form B demand notice under the 2019 Regulations, the inconsistent approach between pending corporate insolvency resolution process [“CIRP”] and the institution of the IRP against the Personal Guarantors thereon, the scope of the interim moratorium on the rights of secured creditors under the personal insolvency framework and the glaring inconsistencies with the enforcement and recovery actions under the other statutes, such as the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 [“SARFAESI Act 2002”].

In light of the above, the author aims to introduce the statutory framework on these persistent issues, highlight the lacunae in the statutory provisions along with the inconsistencies between the judicial precedents, and suggest plausible solutions that could be taken note of to ensure that the legislative scheme of the IBC achieves its objectives, i.e., maximising the value of assets and balancing the interests of all the stakeholders including the personal guarantors, corporate debtors and the corporate creditors concerned.

⁹ Ministry of Corporate Affairs, S.O. 4126(E) (Nov. 15, 2019).

¹⁰ *Lalit Kumar Jain v. Union of India*, (2021) 9 SCC 321.

¹¹ *Id.* ¶ 125.

2 MAINTAINABILITY OF PERSONAL INSOLVENCY APPLICATIONS QUA CIRP PROCEEDINGS

2.1 Understanding the Legislative Scheme

With the issuance of the *notification dated 15 November 2019*, personal insolvency has been brought in line with the corporate insolvency process, which has been further bolstered by the Supreme Court's dictum in the *Lalit Kumar Jain* case. The position is reflected in *Section 60(2) of the IBC*, which provides for the adjudication of CIRP and personal insolvency proceedings under the same adjudicatory authority, i.e., NCLT¹², and further in *Section 60(3) of the IBC*, which provides for the transfer of pending proceedings and establishes the jurisdiction of the NCLT as the competent jurisdiction to adjudicate such disputes, be it pending CIRP or personal insolvency proceedings, within a single forum¹³.

To elaborate on the legislative scheme, *Sections 94 (Insolvency Application by the Guarantor) & 95 (Insolvency Application by the Creditor)*, IBC are the guiding stipulations for instituting insolvency applications against a guarantor as a personal debtor, which allow both creditors and guarantors, as individual debtors, to institute a personal insolvency application before the adjudicatory authority, i.e., NCLT. While in the ordinary recourse, the competent jurisdiction to adjudicate insolvency proceedings against the personal guarantors lies with the Debt Recovery Tribunals ["DRT"] under *Section 179 IBC*¹⁴, a conjoint reading of Sections 60 and 179 of the IBC makes it evidently clear that the legislative structure of the IBC provides for a scheme of provisions where there can be *simultaneous proceedings against both the personal guarantor and the corporate debtor, either by the same or different corporate creditors*¹⁵.

2.2 Is Pending CIRP a Mandatory Pre-Condition for Instituting Section 95 Application?

A reading of the judgments mentioned above and the provisions suggests that the liability of the corporate debtor and the personal guarantor to the corporate creditor is joint and independent, thereby allowing the corporate creditor to initiate independent proceedings against the Corporate Debtor and the Personal Guarantor. To buttress this argument, reliance may be placed upon several decisions of the NCLAT which have allowed applications under Section 95 IBC despite there being no pending CIRP proceedings against the

¹² Insolvency and Bankruptcy Code, 2016, § 60(2).

¹³ *Id.* § 60(3).

¹⁴ *Id.* § 179.

¹⁵ INSOLVENCY AND BANKRUPTCY BOARD OF INDIA, PERSONAL GUARANTORS UNDER IBC: UNLOCKING THE VALUE 3 (2023), <https://ibbi.gov.in/uploads/whatsnew/eed07a9e474cf8da4bf6338a54953ebb.pdf>.

corporate debtor concerned. In *State Bank of India v. Mahendra Kumar Jajodia*¹⁶, NCLAT held that *Section 60(2) IBC is a secondary provision (applicable where a CIRP or Liquidation proceeding is pending) and is supplemental to the substantive provision, i.e., Section 60(1) IBC, and that, to move a Section 95 application, the existence of pending CIRP or Liquidation proceedings, is not a necessary prerequisite*¹⁷ (The decision was upheld in appeal by the Supreme Court¹⁸). In *Mahendra Kumar Agarwal v. PTC India Financial Services Ltd.*¹⁹, while ruling that a pending CIRP proceeding is not mandatory in order to move a Section 95 Application, the NCLAT explained the concept of ‘guarantee’ in the realm of IBC, held as follows:

“In Law, ‘Guarantee’, is an independent obligation of the Guarantor, which is evident from the ‘Personal Guarantee’, and that there is no requirement’, enabling a Person, to exhaust, any remedy, against a Corporate Debtor, prior to the issuance of ‘Demand’, in terms of Personal Guarantee and in the present case, Clauses 3, 4 and 6 of the Personal Guarantee, cannot be lost sight off. In reality, Section 60 of the Code provides for only a ‘Single Fora’, in respect of an adjudication of Insolvency Proceedings, against both the Corporate Debtor and the Personal Guarantor of the Corporate Debtor, Viz. Adjudicating Authority/ Tribunal.”²⁰

Further, NCLAT in *Anita Goyal v. Vistra ITCL (India) Ltd.*²¹, while relying on the Delhi High Court’s decision in *Axis Trustee Services Ltd. v. Brij Bhushan Singal*²², has held that a Section 95 application can be initiated by the creditor despite there being no pending CIRP proceeding. The Supreme Court adopted a similar approach in *BRS Ventures Investments Ltd. v. SREI Infrastructure Finance Ltd.*²³ and held that the Creditor can proceed against the personal guarantor without exhausting its remedies against the corporate debtor. In addition to the above, NCLAT in *State Bank of India v. Gourishankar Poddar*²⁴ has held that *mere approval of the Resolution Plan does not ipso facto release the guarantor from liability, as the obligations arise from the terms of the guarantee deed*²⁵. Additionally, the NCLAT, in *TATA Capital Ltd. v. Arjun Agarwal*²⁶ while placing its reliance upon the *Anita Goyal* case, has held that a pending CIRP proceeding is not a condition precedent to move a Section 95 Application.

¹⁶ *State Bank of India v. Mahendra Kumar Jajodia*, 2022 SCC OnLine NCLAT 58.

¹⁷ *Id.* ¶¶ 10, 11.

¹⁸ *Mahendra Kumar Jajodia v. State Bank of India*, Civil Appeal Nos. 1871–1872 of 2022.

¹⁹ *Mahendra Kumar Agarwal v. PTC India Fin. Servs. Ltd.*, Company Appeal (AT) (CH) (INS.) No. 08 of 2023 (NCLAT).

²⁰ *Id.* ¶ 74.

²¹ *Anita Goyal v. Vistra ITCL (India) Ltd.*, Company Appeal (AT) (Insolvency) No. 2282 of 2024 (NCLAT).

²² *Axis Trustee Servs. Ltd. v. Brij Bhushan Singal*, 2022 SCC OnLine Del 3634.

²³ *BRS Ventures Inv. Ltd. v. SREI Infrastructure Fin. Ltd.*, (2025) 1 SCC 456.

²⁴ *State Bank of India v. Gourishankar Poddar*, 2025 SCC OnLine NCLAT 62.

²⁵ *Id.* ¶ 28.

²⁶ *TATA Capital Ltd. v. Arjun Agarwal*, Company Appeal (AT) (Insolvency) No. 345 of 2025 (NCLAT).

However, in view of the aforesaid precedents, it is no longer *res integra* that pending CIRP proceedings are not a mandatory pre-condition for moving an application under Section 95 IBC, and thus independent proceedings can be initiated by the Creditor, thereby rendering it a binding precedent, the Madras High Court, in one of its seminal judgments, *Robit Nath v. KEB Hana Bank Ltd.*²⁷, deviated from the aforesaid settled position and held that *in view of the literal interpretation of Section 60(2) IBC, when there is no CIRP initiated in respect of the Corporate Debtor, then no insolvency proceeding can be initiated against the Personal Guarantor, rendering the Section 95 application devoid of merit*²⁸. Similarly, the NCLT Kolkata Bench in *UCO Bank v. Rahul Gupta*²⁹, while relying upon the *Robit Nath* case, has held that *NCLT under Section 60(1) and (2) of the IBC can be the adjudicatory authority only when the CIRP has been 'initiated', 'pending' or 'concluded' against the Corporate Debtor, Section 95 Application can be initiated under NCLT. Otherwise, DRT shall be the competent jurisdiction*³⁰.

Thus, a plain reading of the *UCO Bank* case makes it evidently clear that two scenarios would be covered within the confines of the term '*initiated CIRP*':

- a. CIRP commenced but did not culminate in a Resolution Plan;
- b. CIRP commenced but culminated in a Resolution Plan, which has been approved, meaning the CIRP has been concluded.

On the basis of points (a) and (b), the NCLT Kolkata Bench in *UCO Bank* case differentiated observation of the *Robit Nath* case from the *Mahendra Kumar Agarwal* and *Mahendra Kumar Jajodia* case.

This means, by necessary implication, that once a CIRP proceeding has been either *initiated* or *concluded*, then the Section 95 application shall lie before the jurisdictional NCLT, and in the contrary case, the Application will lie before the jurisdictional DRT. To elaborate further, the earlier position following *Mahendra Kumar Jajodia* case emphasised the term 'Pending' (meaning the CIRP has not concluded into a Resolution Plan while Section 95 Application has been moved), and the *Robit Nath & UCO Bank* case stressed upon the term 'Initiation' (meaning the CIRP has either been initiated or concluded while Section 95 Application has been moved, irrespective of whether it is pending while moving such Application), both interpretations rest on different footings, since in the former case, the maintainability of Section 95 application rests upon pendency, and in the latter case, it rests upon initiation. Such differences in interpretation may lead to increasing uncertainty around the institution of insolvency applications against the personal guarantors either before the jurisdictional NCLT under Section 60 of the IBC or the DRT under Section 179 of the IBC.

²⁷ *Robit Nath v. KEB Hana Bank Ltd.*, 2021 SCC OnLine Mad 2734.

²⁸ *Id.* ¶ 22.

²⁹ *UCO Bank v. Rahul Gupta*, IA(I.B.C)/1988(KB)2024 in C.P. (IB)/285(KB)2024.

³⁰ *Id.* ¶ 30.

3 SUGGESTIONS: AMENDMENTS IN SECTIONS 60 & 95 IBC

While the law appeared settled in view of the binding precedents in the *Mahendra Kumar Jajodia*, *Axis Trustee Services* and *TATA Capital Ltd.* case, that a pending CIRP proceeding is not a condition precedent for instituting a Section 95 application against the personal guarantor, these precedents were unsettled by the ratio in *Rohit Nath & UCO Bank* case and this divergence created ambiguity regarding the appropriate forum.

In the author's view, a harmonious construction may be adopted between the *Mahendra Kumar Jajodia* (including the other precedents) and *Rohit Nath & UCO Bank* case by introducing the following amendments to the relevant provisions –

- a. An amendment may be made to *Section 60(2) of the IBC* by adding an Explanation to sub-section (2) to insert the following Explanation: “*With reference to sub-section (2), ‘pending’ means that a CIRP application, under the relevant provisions of the Code, has been either instituted and admitted by the Adjudicatory Authority or has been concluded, and such CIRP has a nexus with the insolvency proceedings against the personal guarantor, irrespective of whether the CIRP application is instituted and admitted or has concluded, simultaneously while instituting an application under Section 95(1) of the Code.*”
- b. Similarly, an amendment is required in *Section 95(1) of the IBC* by adding the words “*Subject to Section 60(2)*” so that the provision reads as follows: “*A creditor, subject to Section 60(2), may apply either by himself, or jointly with other creditors, or through a resolution professional to the Adjudicating Authority for initiating an insolvency resolution process under this section by submitting an application.*”

In this manner, the meaning of ‘pending’ will be clearly understood by stakeholders and thereby the jurisdictional ambiguity surrounding the institution of Section 95 applications shall be alleviated, thereby bringing greater clarity to the institution of insolvency Applications against the Personal Guarantors. This would ensure that the binding precedents following *Mahendra Kumar Jajodia* case are affirmed by the proposed statutory clarification.

4 INVOCATION OF BANK GUARANTEE QUA DEMAND NOTICE UNDER THE IBBI'S 2019 REGULATIONS

4.1 Understanding the Legislative Scheme Around the Invocation of Bank Guarantees under IBC

While the Code mandates the initiation of IRP against the personal guarantors under Section 95(1) of the IBC³¹, the initiation of IRP is preceded by the definition of personal

³¹ Insolvency and Bankruptcy Code, 2016, § 95(1).

guarantors under *Rule 3(e) of the 2019 Rules*³² which comprises two essential elements:

- a. Who constitutes a ‘guarantor’
- b. When a ‘personal guarantee’ is considered to have been invoked, i.e., *when the guarantee has been invoked by the creditor and remains unpaid, in whole or in part.*

In light of the above, as per the definition provided under Rule 3(e) of the 2019 Rules read with Section 95 of the IBC, insolvency proceedings against a guarantor are said to commence when the guarantee has been *invoked* and remains unpaid, *in whole or in part*. The IBBI’s 2019 Regulations additionally mandate that claims against the personal guarantor/debtor must be submitted to the resolution professional in FORM B (demand notice)³³, constituting a list of claims, along with proof of debt, submitted to the resolution professional, thereby forming the basis for a Section 95 application. Accordingly, it may be submitted that to initiate an IRP against the personal guarantor, the claims must be submitted in FORM B which can only be done once the *guarantee has been invoked*. This implies, by necessary implication, that the invocation of the bank guarantee is an essential requirement, which establishes that a personal guarantor has become a debtor, and enables the initiation of IRP against the personal guarantor³⁴ under Section 95 (4) of the IBC read with Regulation 7(1) of the 2019 Regulations and Rule 3(e) of the 2019 Rules.

4.2 Does Form B Constitute a Formal Invocation of Bank Guarantee under Rule 3(e) 2019 Rules r/w Regulation 7(1) 2019 Regulations?

While the IRP proceedings against the personal guarantor under the statutory scheme of IBC, read with the 2019 Rules and Regulations, are clear, in the context of invoking the bank guarantee, submitting FORM B (as a demand notice) to submit the list of claims to the resolution professional, and to initiate a Section 95 application, one of the key questions arising from these provisions is the *manner of invoking a bank guarantee*, which, in light of recent decisions of the adjudicatory authorities, has become a major impediment in instituting a Section 95 application. This section analyses the relevant judgments in order to demonstrate inconsistencies between two lines of judicial reasoning: (i) FORM B as a demand notice does not amount to formal invocation of a bank guarantee; and (ii) FORM B as a demand notice does amount to formal invocation of a bank guarantee.

³² Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019, r. 3(e), Gazette of India (Nov. 15, 2019).

³³ Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Regulations, 2019, reg. 7(1), Gazette of India (Dec. 1, 2019).

³⁴ Pooja Ramesh Singh v. State Bank of India, Company Appeal (AT) (Ins.) No. 329 of 2023 (NCLAT).

The first line of reasoning was articulated by the NCLAT in *State Bank of India v. Deepak Kumar Singhania*³⁵ wherein the Tribunal held that *since FORM B mentions the particular 'date of default', so it contemplates the default by Guarantor, which means that the invocation of the Bank Guarantee has to be as per the Deed of Guarantee, meaning FORM B is not contemplated as Demand Notice as per the Deed of Guarantee, thereby rejecting the Section 95 Application*³⁶. NCLT Amaravati Bench in *Bank of Baroda v. Rayapati Sambasiva Rao*³⁷ rejected the Section 95 Application on the ground that the bank guarantee merely on the basis of the service of FORM B, cannot be said to have been formally invoked since it was not contemplated in the Deed of Guarantee. In a significant development, NCLT Indore Bench in *Canara Bank v. Ramgopal Agrawal*³⁸ held that neither FORM B, as held in the *Deepak Kumar Singhania* case, nor the Demand Notice under Section 13(2) SARFAESI Act 2002, could be said to constitute a formal invocation of bank guarantee since the latter *pertains to enforcement of security interest rather than contractual liability under the Deed of Guarantee*.³⁹

In line with this, NCLT Indore Bench in *IDBI Bank v. Hemangi Patel*⁴⁰ held that *issuance of a FORM B Demand Notice under Regulation 7(1) of the 2019 Regulations does not create a fresh cause of action, as it is merely a procedural step under the Code*⁴¹. NCLT Ahmedabad Bench, similarly, held that FORM B does not constitute a formal invocation of the bank guarantee⁴². NCLT Ahmedabad Bench in *Omkara Asset Reconstruction Co. Ltd. v. Kirandevi Aggarwal*⁴³ dismissed the Section 95 application on the ground that the Section 13(2) Demand Notice does not constitute the invocation of the bank guarantee, constituting only a procedural step for the enforcement of the security interest.

On the contrary, the NCLAT, in one of its seminal decisions in *Asha Basantilal Surana v. State Bank of India*⁴⁴ held that a demand notice under Section 13(2) of the SARFAESI Act, 2002 constitutes a valid demand notice for the invocation of the bank guarantee, since the said guarantee is an on-demand guarantee *and the guarantee deed does not prescribe any specific mode or manner of issuing a demand notice*⁴⁵. NCLT Chandigarh Bench, on a similar note, recognised a fresh cause of action from the service of the Demand Notice under Section 13(2)

³⁵ *State Bank of India v. Deepak Kumar Singhania*, Company Appeal (AT) (Insolvency) No. 191 of 2025 (NCLAT).

³⁶ *Id.* ¶¶ 20–26.

³⁷ *Bank of Baroda v. Rayapati Sambasiva Rao*, 2025 SCC OnLine NCLT 3117.

³⁸ *Canara Bank v. Ramgopal Agrawal*, CP(IB)/56(MP)2024.

³⁹ *Id.* ¶ 18.

⁴⁰ *IDBI Bank v. Hemangi Patel*, CP(IB)/55(MP)2024.

⁴¹ *Id.* ¶ 7.

⁴² *Bank of Baroda v. Bijal S Shah*, C.P.(IB)/170(AHM)2025.

⁴³ *Omkara Asset Reconstruction Co. v. Kirandevi Aggarwal*, C.P.(IB)/151(AHM)2025.

⁴⁴ *Asha Basantilal Surana v. State Bank of India*, Company Appeal (AT) (Insolvency) No. 84 of 2025 (NCLAT).

⁴⁵ *Id.* ¶¶ 12–14.

SARFAESI Act 2002⁴⁶. Moreover, NCLAT in *Rakesh Jolly v. Indian Bank*⁴⁷ held that a demand notice in the form of FORM B extends the limitation period and gives rise to a fresh cause of action subsequent to the Section 13(2) Demand Notice being served to the personal guarantor. Similarly, NCLAT in *Mavjibhai Nagarbhai Patel v. State Bank of India*⁴⁸ treated the Section 13(2) demand notice as an invocation under an *on-demand guarantee* which, by virtue of the contents of the Guarantee Deed, contemplated the guarantee to be a continuing one, considered the notice to be a valid demand notice in order to approve Section 95 Application. In line with the aforesaid observations, FORM B Demand Notices were considered to validly invoke the bank guarantee by the NCLT (New Delhi Bench)⁴⁹, the NCLAT⁵⁰, and the Supreme Court⁵¹.

5 SUGGESTIONS: AMENDMENT IN REGULATION 7(1) OF THE IBBI 2019 REGULATIONS

A cursory review of the above-mentioned judicial underpinnings suggests a glaring inconsistency among the dicta of various judicial forums as a result of which a barrage of doubts arises regarding the admissibility of FORM B under Regulation 7(1) of the 2019 Regulations (as well as a demand notice under Section 13(2) SARFAESI Act, 2002) as constituting a formal invocation of a bank guarantee under Rule 3(e) of the 2019 Rules. The NCLAT, in *State Bank of India v. Gourishankar Poddar*⁵² has held that *the limitation period against a guarantor commences only when a specific demand is raised*,⁵³ and that, where the guarantee is a continuing one, any *acknowledgement by the personal guarantor through a demand notice in the form of FORM B shall be treated as giving rise to a fresh cause of action under Section 18 of the Limitation Act, 1963*⁵⁴. This implies that if these two conditions are fulfilled, IRP proceeding against a personal guarantor may be initiated. Accordingly, the two conditions are:

- a. A demand is raised by the creditor (irrespective of the mode and manner of the issuance of the demand notice); and
- b. Acknowledgement of debt thereon.

⁴⁶ *In re* Manveer Kaur, 2025 SCC OnLine NCLT 1610.

⁴⁷ *Rakesh Jolly v. Indian Bank*, Company Appeal (AT) (Ins.) No. 1267 of 2023 (NCLAT).

⁴⁸ *Mavjibhai Nagarbhai Patel v. State Bank of India*, Company Appeal (AT) (Insolvency) No. 1702 of 2024 (NCLAT).

⁴⁹ *Indiabulls Hous. Fin. Ltd. v. Mohit Singh*, 2024 SCC OnLine NCLT 3568.

⁵⁰ *Indiabulls Asset Reconstruction Co. v. Pawan Kapoor*, 2024 SCC OnLine NCLAT 1021. *See also* *Neon Lab's Ltd. v. Mayank Shah*, 2024 SCC OnLine NCLAT 989.

⁵¹ *Neon Lab's Ltd. v. Mayank Shah*, 2024 SCC OnLine SC 2651.

⁵² *State Bank of India v. Gourishankar Poddar*, 2025 SCC OnLine NCLAT 62.

⁵³ *Id.* ¶ 57.

⁵⁴ *Id.* ¶¶ 51–54.

A plain reading suggests that if the two conditions are fulfilled, IRP proceedings may be initiated under Section 95 of the IBC. Accordingly, an amendment is proposed by adding an Explanation to Regulation 7(1) of the 2019 Regulations, as follows –

“With reference to sub-regulation (1), and subject to Rule 3(e) of the 2019 Rules, it is clarified that the issuance of FORM B and the demand notice under Section 13(2) SARFAESI Act, 2002 shall constitute a formal invocation of the Bank Guarantee, subject to the provisions of the Limitation Act, 1963 and the contents of the deed of guarantee.”

This will ensure that certain mandatory pre-conditions for initiating an application under Section 95 of the IBC are fulfilled, while, at the same time, the erroneous and inconsistent findings in *Deepak Kumar Singhania* are also addressed and brought in line with other decisions of judicial and quasi-judicial forums⁵⁵.

6 SCOPE OF INTERIM MORATORIUM UNDER SECTION 96 IBC QUA THE RIGHTS OF THE SECURED CREDITORS

6.1 The Legislative Scheme on the Interim Moratorium

While CIRP offers some breathing space to corporate debtors under *Section 14 of the IBC* which is imposed upon the admission and approval of a CIRP application by the NCLT, the position is markedly different in the case of personal insolvency⁵⁶, wherein, based on the U.S. bankruptcy model of an automatic stay on enforcement and recovery actions against the debtor⁵⁷, an *interim moratorium* is automatically imposed on the assets of the personal guarantor under *Section 96(1) of the IBC*⁵⁸, which continues until the report of the resolution professional on the IRP Application is submitted to the NCLT for approval or rejection. There is an additional distinction between Sections 14 and 96 of the IBC, in that the former is narrower in scope, as it covers civil proceedings against the debtor, while the latter is wider in scope, as it stays all proceedings against the corporate debtor, including execution and enforcement actions, and imposes a stay on the debt rather than on the actions of the personal guarantor⁵⁹.

⁵⁵ Anuj Shah, *Invocation of Guarantee: A Mandatory Precondition for Insolvency Proceedings Against Personal Guarantors*, IBCLAWS (Mar. 8, 2025), <https://ibclaw.in/invocation-of-guarantee-a-mandatory-precondition-for-insolvency-proceedings-against-personal-guarantors-anuj-shah/>.

⁵⁶ IIIPICAI, *Comparison Between the IBC and USA's Chapter 11 Bankruptcy Code* 24, 25 (2025), <https://www.iiipicai.in/wp-content/uploads/2025/01/22-28-Article.pdf>.

⁵⁷ 11 U.S. Code § 362 - *Automatic Stay*, CORNELL LAW SCHOOL, <https://www.law.cornell.edu/uscode/text/11/362> (last visited Aug. 8, 2025).

⁵⁸ Insolvency and Bankruptcy Code, 2016, § 96(1).

⁵⁹ Saranga Anilkumar Aggarwal v. Bhavesh Dhirajlal Sheth, (2025) 4 SCC 629.

Additionally, a unique characteristic that reinforces the democratic and inclusive nature of personal insolvency under PART III of the IBC is that *secured creditors* have the right to forfeit their voting rights, remain outside the IRP proceedings, and forgo voting rights on the repayment plan and enforce their security independently against the personal guarantor⁶⁰, subject to the condition that such secured creditors retain residual rights on the unsecured part of the debt⁶¹.

6.2 Does the Interim Moratorium under Section 96 IBC Hamper the Recovery Rights of the Secured Creditors?

On a harmonious reading of Sections 96 and 110 of the IBC, it is clear that secured creditors who forfeit their voting rights are entitled to undertake independent enforcement and recovery actions against the personal guarantor and shall not be prohibited by the imposition of an interim moratorium under Section 96 of the IBC.

While the above position reflects the statutory scheme, the democratic framework of Section 110 of the IBC is undermined when secured creditors are left with no other option but to face an onerous stay on enforcement and recovery proceedings due to the mandatory imposition of interim moratorium, thereby creating inconsistencies between Section 96 and Section 110 of the IBC⁶². The implications for creditors are such that upon the mere filing of an application under Section 94 or Section 95, *the law imposes an automatic stay on creditor actions, even before the adjudicating authority applies its mind to the merits of the application*. Thus, such a moratorium operates without judicial scrutiny, solely based on the filing, and applies indiscriminately to all creditors⁶³.

The Kerala High Court, while adjudicating a Section 94 application, held that such an application, filed solely to obtain the benefit of an automatic stay under Section 96 IBC, constitutes a misuse of the statutory framework of the IBC, and unless there arises any kind of repugnancy between the IBC 2016 and the SARFAESI Act, 2002, there can be no question of the IBC overriding the SARFAESI Act, 2002, and accordingly, proceedings under Section 14 of the SARFAESI Act ought not to be stayed (as both statutes operate in different fields)⁶⁴.

⁶⁰ Insolvency and Bankruptcy Code, 2016, § 110(2).

⁶¹ *Id.* § 110(3).

⁶² Mukesh Chand, *Lacunas in Personal Insolvency Process*, ECONOMIC LAWS PRACTICE (2025), <https://media.licdn.com/dms/document/media/v2/D4D1FAQG-WSmD-n9F6Q/feedshare-document-pdf-analyzed/B4DZaBacmEGgAg-/0/1745927920159?e=1755129600&v=beta&t=KI7OAAquVP6BgTCMZ1Webiuy4ENi3kFE96t0UlegTQ7s> (last visited Aug. 8, 2025).

⁶³ *Id.*

⁶⁴ *Jeny Thankachan v. Union of India*, 2023 SCC OnLine Ker 10748.

While the Code offers the secured creditors the option either to relinquish their security and participate in the repayment plan or to stand outside the process and enforce security independently, the blanket imposition of a stay under Section 96 IBC prohibits the enforcement and recovery actions of such creditors, thereby undermining both the objective and the statutory recourse under Section 110 IBC. Such inconsistency and blanket prohibition is seen in the enforcement actions undertaken by the secured creditors under the SARFAESI Act, 2002, when such creditors may be willing to relinquish their security and participate in the IRP, yet remain subject to the implications of Section 96. Similarly, the NCLAT adopted this position in *Syed Sirajis Salikin Khadri v. Edelweiss ARC*⁶⁵ wherein the Tribunal upheld the dismissal of the Section 94 application, emphasizing that an automatic moratorium cannot be misused as a shield against legitimate enforcement actions under the provisions of the SARFAESI Act, 2002.

However, the Delhi High Court in *Sanjay Dhingra v. IDBI Bank Ltd.*⁶⁶ directed the creditor bank-cum-mortgagee not to proceed with the sale of the mortgaged property in the course of its legitimate enforcement actions under the SARFAESI Act, 2002, in view of the interim moratorium, and also held that such enforcement actions can take place once the interim moratorium is lifted. Similarly, despite symbolic possession of the mortgaged property having been taken by the creditor and actual possession being with the District Magistrate pursuant to the order of possession under the SARFAESI Act, the NCLAT in *Indiabulls Asset Reconstruction Company Ltd. v. Pawan Kapoor*⁶⁷ erred in prohibiting further action by the creditor under the SARFAESI Act until the moratorium is lifted.

6.3 Suggestions: Recourse to UK's Corporate Insolvency and Governance Act 2020

While U.S. Bankruptcy Code, under Section 362 of Chapter 11 U.S. Code provides for an automatic stay on enforcement actions and recovery proceedings by the creditors (subject to limited exceptions, as determined by the bankruptcy court)⁶⁸ the UK Insolvency Act 1986, which operates in consonance with the IBC framework in terms of a creditor-in-control mechanism and demand driven personal insolvency under Section 268 of the UK Insolvency Act 1986,⁶⁹ adopts a similar restructuring mechanism, following a creditor-in-control approach in line with the IBC restructuring framework. Apart from the 1986 Act governing insolvency of both corporate persons and individuals, particular emphasis is

⁶⁵ *Syed Sirajis Salikin Khadri v. Edelweiss ARC*, Company Appeal (AT) (Insolvency) No. 455 of 2025 (NCLAT).

⁶⁶ *Sanjay Dhingra v. IDBI Bank Ltd.*, 2024 SCC OnLine Del 4521.

⁶⁷ *Indiabulls Asset Reconstruction Co. v. Pawan Kapoor*, 2024 SCC OnLine NCLAT 1021.

⁶⁸ *Automatic Stay*, CORNELL LAW SCHOOL, https://www.law.cornell.edu/wex/automatic_stay (last visited Aug. 8, 2025).

⁶⁹ Insolvency Act 1986, § 268 (Eng.).

placed on the UK's Corporate Insolvency and Governance Act, 2020 ["2020 Act"] wherein, based on the imposition of a moratorium, there are three types of debts:

- a. pre-moratorium debts for which the company has a payment holiday;
- b. pre-moratorium debts for which the company does not have a payment holiday; and
- c. moratorium debts.⁷⁰

Although the 2020 Act governs the insolvency framework for corporate entities, the same is referred here to explain that certain *pre-moratorium debts* (having no payment holidays) are exempt from the imposition of moratorium, and such debts generally comprise financial obligations owed by the debtor to the corporate creditors⁷¹, and could be incorporated within Part III of the IBC, to address the existing inconsistencies between Sections 96 and 110 of the IBC.

Accordingly, the author proposes some amendments to address two issues: inconsistent approach of the interim moratorium with the rights of the secured creditors, and the exemption of certain financial debts owed by the Personal Guarantors before the Moratorium period –

- a. Amend Section 96 of the IBC by incorporating sub-section (2) as follows:

“Notwithstanding the provisions of the Insolvency and Bankruptcy Code, nothing in this section shall prevent the enforcement and recovery actions by the secured creditors under other applicable laws, who have forfeited their rights under Sections 110 (2) and (3).”

- b. Amend Section 96 of the IBC (in line with Section A18 of the Insolvency Act 1986, inserted by the 2020 Act) by incorporating sub-sections (2A) & (2B) as follows:

“(2A) Subject to sub-sections (1) and (2), the Adjudicating Authority shall have the power to exclude certain kinds of pre-moratorium debts, having pecuniary liabilities, which are subject to the provisions of the other Acts.

(2B) Any decision of the adjudicatory authority in sub-section (2A) shall be challenged before the appellate tribunal under Section 61(1).”

7 CONCLUSION

With the introduction of Part III of the Insolvency and Bankruptcy Code, 2016, and subsequent judicial sanction accorded in *Lalit Kumar Jain*, a landmark step was taken to address the legislative vacuum concerning personal guarantors, which has gained prominence in

⁷⁰ UK *Corporate Insolvency and Governance Act: Moratorium*, DLA PIPER, <https://www.dlapiper.com/en/insights/publications/2020/09/uk-corporate-insolvency-and-governance-bill> (last visited Aug. 8, 2025).

⁷¹ Insolvency Act 1986, c. 45, § A18 (Eng.) (inserted by Corporate Insolvency and Governance Act 2020).

recent years owing to low recovery rates in CIRP proceedings⁷². However, its implementation has been fraught with judicial inconsistencies and procedural ambiguities. This paper examines the complex challenges that currently undermine the efficacy of the personal insolvency framework.

The first major hurdle examined is the maintainability of insolvency applications against personal guarantors. Conflicting judicial pronouncements, particularly in *Mahendra Kumar Jajodia* and *Rohit Nath* cases, have created significant uncertainty regarding whether a pending CIRP is a mandatory precondition for initiating an IRP under Section 95 of the IBC. The second critical issue delves into the invocation of bank guarantees. The adjudicatory authorities remain divided on whether a FORM B demand notice under the 2019 Regulations or a Section 13(2) Notice under the SARFAESI Act, 2002 constitutes a formal invocation of the guarantee, and this procedural impasse often stalls legitimate claims at the very inception of a Section 95 application. Additionally, the third issue concerns the scope of the interim moratorium under Section 96 of the IBC, where an automatic and blanket application inadvertently clashes with the rights of the secured creditors to enforce their security independently, as provided under Section 110 of the IBC.

These inconsistencies have been addressed to highlight the amendments proposed to the provisions of the IBC to remove such procedural and judicial ambiguities and to promote a more coherent approach to the debt resolution framework of the IBC. Ultimately, these proposed amendments are not mere legislative tweaks; they are essential reforms aimed at aligning the personal insolvency regime with the core objectives of the IBC: maximizing the value of assets and balancing the interests of all stakeholders, thereby fostering a more robust, transparent, and inclusive resolution process.

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⁷² *Claims Against Personal Guarantors in IBC Cases Jump 80% in FY25*, THE HINDU BUSINESSLINE, <https://www.thehindubusinessline.com/economy/claims-against-personal-guarantors-in-ibc-cases-jump-80-pc-in-fy25/article69621344>. ece (last visited Aug. 8, 2025).