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INSOLVENCY & BANKRUPTCY

LIABILITY OF A PERSONAL GUARANTOR SHALL NOT EXTINGUISH UPON SUBSEQUENT RENUNCIATION OF INDIAN CITIZENSHIP: NCLT KOLKATA BENCH

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NCLT Kolkata Bench, comprising of Shri Rohit Kapoor, Member (Judicial) and Shri Harish Chander Suri, Member (Technical), in ***SBI v. Sudip Bijoy Dutta, Director of Ess Dee Aluminium Ltd.***(*Company Petition No. 54/KB/ 2021*), on 16th June, 2022 held that liability of a personal guarantor to a Corporate Debtor shall not extinguish upon subsequent renunciation of Indian citizenship.

Facts of the Case:

State Bank of India ("**SBI**") sanctioned and disbursed term loan and working credit facilities to one M/s Ess Dee Aluminium Ltd ("**Corporate Debtor**"). The credit facilities so extended were secured inter-alia by way of personal guarantee of Mr. Sudip Bijoy Dutta, Promoter and Director of the borrower company. Thereafter, the said credit facilities were renewed and sanctioned several times against the personal guarantee of Mr.Sudip Bijoy Dutta. The Corporate Debtor defaulted in repayment of their dues and after various failed attempts to recover the outstanding amount from the Corporate Debtor and the Personal Guarantor, SBI filed an Application u/s 7 of the Insolvency and Bankruptcy Code, 2016("**Code**") against the Corporate Debtor and the Hon'ble NCLT Kolkata Bench, admitted the same on 19th February, 2020. However, the Corporate Debtor could not be revived during Corporate Insolvency Resolution Process ("**CIRP**") and subsequently liquidation of the Corporate Debtor was ordered by the Hon'ble Tribunal. Thereafter, an application was filed by SBI u/s 95(1) of the Code to initiate Insolvency Resolution Process against the Personal Guarantor – Mr.Sudip Bijoy Dutta.

Counsel for the Guarantor while challenging the maintainability of the Application filed u/s 95 on various other grounds, contended that the Guarantor renounced his Indian Citizenship in 2018 and become a citizen of Singapore. He is now governed by the jural and municipal laws of Singapore, consequentially a foreign national and is therefore, beyond the scope of the Code, which extends only to the territory of India. The Counsel further argued that Centre of Main Interest ("**COMI**") of the Guarantor is Singapore and as such, any Insolvency Application against him can be moved only before Singapore Courts. The Counsel also argued that Section 234 and 235 of the Code, which provides a limited framework for international coordination to empower the NCLT in connection with insolvency processes in India, has not yet been notified. The Counsel also argued that even if said sections were notified theirapplicability were contingent on the existence of reciprocal arrangements with Singapore, and further placed reliance on the contents of the impugned notification of the Ministry of Home Affairs dated 22th July 2022 which exempts the liabilities of foreign nationals who are OCI card-holders unless laid down under a specific policy. The Counsel emphasized that, as on date of hearing the present matter,the NCLT does not have the requisite powers and jurisdiction to entertain Insolvency Applications filed against foreign nationals in the absence of any reciprocal arrangement with Singapore.

Findings of the Tribunal:

The Hon'ble NCLT Kolkata Bench was pleased to admit the Application u/s 95 after perusing intention of the legislature in Sections 2(e), 2(g), 60, 95 and 234 of the Code and placing reliance on the observations made by the Hon'ble Supreme Court in the landmark precedent of ***Lalit Kumar Jain v. Union of India ((2021) 9 SCC 321).***

The Hon'ble Tribunal threw light on the discretionary language of Section 234(1) which uses the word 'may' and clarified that any reciprocal arrangement with a foreign country shall become necessary only in respect of assets of the Corporate Debtor or the Personal Guarantor situated outside India and whereas the present Application only mentions Immovable property located in India. The Hon'ble Tribunal was of the view that since the Personal Guarantor was an "Indian Citizen" on the day of contracting the instrument of guarantee and the deed is of "continuing" nature, the consequences flowing from the failure to repay are to be dealt with Indian laws and more particularly Section 95 of the Code. As such, the Hon'ble Tribunal is the proper Adjudicating Authority having necessary jurisdiction to entertain, adjudicate upon and grant necessary reliefs in the present application.The Hon'ble Tribunal further asserted that the impugned notification of the Ministry of Home Affairs dated 22th July 2022,which states that *"with respect to all economic, financial and educational field or the rights and privileges, a foreigner has no rights or liabilities, unless it has been laid down under a specific policy."* relied upon by the Counsel for the Respondent does not apply to the

Respondent/Personal Guarantor as he is not an OCI card holder and further the policy does not in any manner exempt foreign citizens from consequences arising out of failure to discharge their lawful obligations in terms of deed of guarantee executed by them as an Indian citizen.

The Hon'ble Tribunal has categorically condemned the *"Catch me if you can"*conduct and absurd interpretation of law made with the sole intention of evading liability arising out of contracts duly executed and accordingly allowed initiation of insolvency process against the Personal Guarantor of the Corporate Debtor – Mr. Sudip Bijoy Dutta.

IndiaLaw LLP represented the financial creditor, State Bank of India, in this matter.