



**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH - I**

C.P. (IB) NO. 837/MB/2024

Under Section 95 of the Insolvency & Bankruptcy Code, 2016 *r/w* Rule 7(2) of the Insolvency and Bankruptcy (Application to the Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors), Rules, 2019.

In the matter of

**OMKARA ASSETS
RECONSTRUCTION
PRIVATE LIMITED**

...Applicant/Petitioner

Versus

**MR. AGNELLO LOUIS
D'SOUZA**

...Respondent/Personal
Guarantor

Order pronounced on 11.06.2026

Coram:

Prabhat Kumar
Member (Technical)

Sushil Mahadeorao Kochey
Member (Judicial)



Appearances:

For the Petitioner : Adv. Akshay Petkar a/w
Adv. Aniket Malu, Adv
Aalisha Sharma, Adv
Ibrahim Shaikh i/b Vaish
Associates

For the Personal Guarantor/ Respondent : Adv. Akash Rebello a/w
Adv. Ashish Pyasi and
Adv. Anshu Rathore

ORDER

Brief facts:

1. The present Petition has been filed on 2.7.2024 under Section 95 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the “IBC, 2016”/“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 by Omkara Assets Reconstruction Private Limited (hereinafter referred to as the “Petitioner/Applicant”) seeking initiation of insolvency resolution process against Mr. Agnello Louis D'Souza (hereinafter referred to as the “Personal Guarantor/Respondent”) in respect of the alleged outstanding debt. It is stated that the Personal Guarantor had extended a personal guarantee to secure the credit facilities availed by the Corporate Debtor to the extent of Rs. 2,20,00,000/- (Rupees Two Crore Twenty Lakh Only). The total amount claimed to be in default is stated to be



- Rs. 18,33,67,574/- as on 31.05.2024 together with further interest thereon at the rate of 17% per annum and penal interest at the rate of 1% per annum until realization. The date of default, as mentioned in Part III of the Petition, is stated to be 02.09.2016, being the expiry of 60 days from the date of issuance of demand notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.
2. The Petitioner, namely Omkara Assets Reconstruction Private Limited, is stated to be acting in its capacity as Trustee of Omkara PS 28/2021-22 Trust and is represented through its Authorised Representative, Mr. Ashwin Newalkar, duly authorised vide Board Resolution dated 07.11.2023. It is averred that the Applicant is the assignee of the debt originally owed to Janalaxmi Co-operative Bank Limited (hereinafter referred to as the “Original Lender”), which had sanctioned the subject credit facilities to Marshall Breeders Private Limited, the Corporate Debtor.
 3. It is further submitted that the debt came to be assigned in favour of the Applicant by virtue of a duly registered Assignment Agreement dated 31.12.2021 executed between Janalaxmi Co-operative Bank Limited and Omkara Assets Reconstruction Private Limited acting in its capacity as Trustee of Omkara PS 28/2021-22 Trust, bearing Registration No. 4/2022. Pursuant to the said assignment, the Applicant claims to have stepped into the shoes of the Original Lender and to have acquired all rights, title and interest in relation to the subject financial assets.
 4. The Applicant Company is stated to have its registered office at No. 9, M.P. Nagar, First Street, Kongu Nagar Extension, Tirupur, Coimbatore – 641607, Tamil Nadu and its corporate office at Kohinoor Square, 47th Floor, N.C. Kelkar Marg, R.G. Gadkari Chowk, Dadar (West), Mumbai – 400028. The Applicant Company was incorporated on 19.03.2014 and bears Corporate Identification



Number (CIN) U67100TZ2014PTC020363.

5. The Respondent/Personal Guarantor, namely Mr. Agnello D'Souza, is stated to be residing at Plot No. 75, C-1 Road, Mahatma Nagar, Nashik – 422007 and carrying on business at C and M House, N.D. Patel Road, Nashik – 422001. The Respondent is alleged to have executed a personal guarantee in favour of the Original Lender in respect of the credit facilities availed by Marshall Breeders Private Limited (hereinafter referred to as the “Corporate Debtor”) to the extent of Rs. 2,20,00,000/- (Rupees Two Crore Twenty Lakh Only).
6. The Corporate Debtor, namely Marshall Breeders Private Limited, bearing CIN U01222MH2000PTC124317, was incorporated on 17.02.2000 under the provisions of the Companies Act, 1956. The registered office of the Corporate Debtor is situated at C & M House, N.D. Patel Road, Nashik, Maharashtra – 422001. The authorised and paid-up share capital of the Corporate Debtor is stated to be Rs. 10,00,000/-.

Submissions of the Applicant:

7. It is the case of the Applicant that Marshall Breeders Private Limited (hereinafter referred to as the “Corporate Debtor”) had availed a Cash Credit Hypothecation facility of Rs. 2,20,00,000/- from Janalaxmi Co-operative Bank Limited (hereinafter referred to as the “Assignor Bank”) on 02.04.2002. The said facility was, inter alia, secured by a personal guarantee executed by the Respondent herein, namely Mr. Agnello D'Souza. It is further submitted that owing to persistent defaults in repayment by the Corporate Debtor and/or the Personal Guarantor, the loan account was classified as a Non-Performing Asset (NPA) on 30.09.2002. The Applicant has also brought on record that Company Petition bearing C.P. (IB) No. 437/MB/2022 filed under Section 7 of the Code against the Corporate Debtor in respect of the same debt came to be admitted



- by this Tribunal vide order dated 15.05.2024.
8. The Applicant has further submitted that the Corporate Debtor, in its audited financial statements dated 13.09.2003, acknowledged an outstanding liability of Rs. 2,38,97,057/- towards the loan availed from the Assignor Bank. It is further stated that the Corporate Debtor, vide One Time Settlement (OTS) proposal letter dated 13.02.2006, once again acknowledged its liability in respect of the aforesaid Cash Credit Hypothecation facility. Pursuant thereto, on 13.07.2006, C and M Farming executed an Agreement to Create Equitable Mortgage in favour of the Assignor Bank, thereby creating mortgage over its immovable properties as security for the said credit facilities availed by the Corporate Debtor.
 9. It has also been submitted that the Corporate Debtor, in its financial statements and statements of accounts for the financial years 2005-06 up to 2020-21, including the last audited balance sheet dated 09.11.2021, continued to acknowledge its liability towards the Assignor Bank in relation to the aforesaid debt.
 10. The Applicant has further contended that a demand notice dated 04.07.2016 under Section 13(2) of the SARFAESI Act, 2002 was issued to the Respondent/Personal Guarantor by the Financial Creditor requiring the Principal Borrower to pay the outstanding debt within 60 days from the date of receipt of notice, and the said notice had also required the Personal Guarantor herein to compel the defaulting borrower to pay the total overdues to avoid embarrassing situation they may have to face under the provisions of SARFAESI Act or any other Act. Since the Respondent allegedly failed to discharge the liability within the statutory period, the date of default has been stated to be 02.09.2016.
 11. It is further submitted that the Assignor Bank, by virtue of a registered Assignment Agreement dated 31.12.2021, absolutely assigned in favour of the Applicant/Financial Creditor the debt of



- the Corporate Debtor together with all underlying securities, rights, title and interest pertaining thereto.
12. The Petitioner has also filed an Additional Affidavit placing on record certain documents pursuant to and in compliance with the liberty granted by this Tribunal vide order dated 08.10.2025.
 13. In the said affidavit, the Petitioner has reiterated that it became entitled to the subject financial facility by virtue of the Assignment Agreement dated 31.12.2021 executed between Janalaxmi Co-operative Bank Limited and the Petitioner, and under the terms of the aforesaid Assignment Agreement, all rights, title and interest in respect of the subject financial facility stood duly assigned and transferred in favour of the Petitioner. It is further submitted that consequent upon such assignment, the Petitioner informed the Respondent/Personal Guarantor about the transfer of the debt vide communication dated 24.01.2022. According to the Petitioner, the said communication specifically apprised the Respondent of the assignment and of the Petitioner's entitlement to enforce and recover the outstanding dues under the subject facility.
 14. The Petitioner has further submitted that subsequent to the aforesaid assignment, a Demand Notice dated 01.02.2022 was issued to the Respondent/Personal Guarantor calling upon him to pay an amount of Rs. 11,95,24,907/- (Rupees Eleven Crore Ninety-Five Lakh Twenty-Four Thousand Nine Hundred and Seven Only), being the outstanding amount as on 20.01.2022. It is stated that the said notice was duly dispatched on 01.02.2022 through India Post at the address of the Respondent/Personal Guarantor, namely Flat No. 3 & 4, Helicon Castle, Plot No. 75, C-1 Road, Mahatma Nagar, Nashik – 422007.
 15. The Petitioner has further averred that the address to which the aforesaid Demand Notice was dispatched is the correct and admitted address of the Respondent/Personal Guarantor and that the same has



remained consistent, valid and undisputed at all material times. It is further stated that the Demand Notice was sent by duly prepaid registered post and that the postal article was never returned to the Petitioner. On the aforesaid basis, the Petitioner has contended that the Respondent is deemed to have been duly served with and to have received the said Demand Notice.

16. The Applicant Creditor has averred that despite repeated acknowledgements of liability, the Corporate Debtor as well as the Personal Guarantor failed and neglected to repay the outstanding dues arising from the loan facility of Rs. 2,20,00,000/- availed by the Corporate Debtor. Consequently, the Applicant issued a Statutory Demand Notice in Form B dated 06.05.2024 to the Respondent/Personal Guarantor through Speed Post, calling upon him to repay the outstanding dues. It is stated that the aforesaid Demand Notice dated 06.05.2024 was duly served upon the Respondent on 08.05.2024.
17. Though the Respondent is stated to have replied to the Statutory Demand Notice, the Applicant Creditor contends that no payment towards the outstanding dues has been made by the Respondent. Accordingly, the present Petition under Section 95 of the Insolvency and Bankruptcy Code, 2016 has been filed seeking initiation of insolvency resolution process against the Personal Guarantor.

Resolution Professional's Report :

18. This Tribunal, vide order dated 30.10.2024, appointed Shri Prashant Jain, bearing IBBI Registration No. IBBI/IPA-001/IP-P01368/2018-2019/12131, as the Resolution Professional requiring him to submit a report under Section 99 of the Insolvency and Bankruptcy Code, 2016 within a period of ten days. Pursuant thereto, the Resolution Professional filed IA(I.B.C.)/362/MB/2025 to place on record his report dated 06.12.2024, wherein admission of the present



application has been recommended.

19. The relevant part of Report dated 06.12.2024 submitted by the Resolution Professional is reproduced hereinbelow verbatim:

“Hence, the RP considering the requirements of the admission of Personal Guarantee as stipulated in the Code opines and suggests that Insolvency Resolution Process for Personal Guarantor, Shri. Agnello Louis D’Souza (“Personal Guarantor”), the personal guarantor of Marshall Breeders Private Limited (“Corporate Debtor”) should be initiated and the Application filed by the Applicant who is the Financial Creditor shall be admitted for the reasons categorically mentioned in this application in detail.”

20. The Resolution Professional has also recorded the contentions raised by the Personal Guarantor in the said report in the following terms:

“Further, it is pertinent to mention herein that the Personal Guarantor contested the loan amount and the documents executed thereunder, on the basis that the Respondent was not impleaded in the recovery proceedings filed before the Co-operative Court at Nashik, bearing Co-operative Case No. 1491 of 2005. Therefore, the Resolution Professional addressed an email dated 29th November, 2024, to the Financial Creditor seeking certain clarifications, documents, and information pertaining to the contentions raised by the Respondent, which were clarified by the Financial Creditor on 04th December, 2024.”

Submissions of the Respondent:

21. The Respondent, through his Reply, Reply to the Additional Affidavit and Sur-Rejoinder, has opposed the present Petition and contended that the documents relied upon by the Petitioner are forged and fabricated. It is the specific case of the Respondent that
- a. he did not sign any document which would create any obligation on the Respondent to repay any debt on behalf of the corporate



- debtor;
- b. although he was associated as a director in certain other group companies of C & M Farming Ltd., he was never a director of the Corporate Debtor;
 - c. the assignment deed dated 31.12.2021 executed between the Janlaxmi Cooperative, a schedule Bank (assignor) with Omkara ARC (Assignee) does not contain the name of the Respondent as personal guarantor;
 - d. prior to the assignment agreement dated 31.12.2021, the assignor bank i.e. Janlaxmi Co-op Bank Ltd, initiated a dispute, concerning award issued on 15.02.2018, against the guarantor in Society Court at Nashik under case no. 1491 of 2005, and the bank's claim involved different names of guarantors, none of which included the Respondent in this case. Dissatisfied with the award, an appeal was filed by the Principal Borrower and one Mr. Elias M. D'souza before the State Co-Operative Appellate Court in Mumbai, under appeal no.98 of 2018. In the second paragraph of the judgment dated 31.01.2019, the Court recorded the names of the sureties, and the Respondent's name was not mentioned;
 - e. the present petitioner filed a Miscellaneous Application 177 of 2022 before the Hon'ble DRT, Mumbai for recovery of its alleged dues against the corporate debtor and other guarantors, however, in the said proceedings as well Petitioner did not implead the Respondent as the Respondent was not a guarantor of the Corporate Debtor.
 - f. the guarantee letter attached as Exhibit M in this petition is a forged and fabricated document;
 - g. since the guarantee was allegedly invoked on 04.07.2016 by the bank and the predecessor of the Applicant, the Petition is clearly barred by the limitation period when filed in 2024.



- h. The guarantee is inadmissible as evidence because they are insufficiently stamped nor even notarized or registered nor have been procured by the rule as per Banking book evidence Act;
- i. the NESL report, relied upon by the Petitioner, is in respect of the Corporate Debtor and not in respect of the Respondent;
- j. the Petitioner is indiscriminately proceeding against various family members of the Corporate Debtor, including persons who are allegedly unconnected with the underlying transaction, and that the present proceedings constitute a misuse and abuse of the process of law.

Findings and Analysis :

22. We heard the Learned Counsel and perused the material on record.
23. It is noted that the notice dated 4.7.2016 issued u/s 13(2) of the SARFAESI Act by the original lender was marked to the personal guarantor herein as a copy, the relevant part of which is reproduced hereunder :

C.C.

To the Guarantors:

They are hereby informed that they should compel the defaulting borrower to pay the total overdues to avoid embarrassing situation which you may have to face under the provisions of this act and any other Act applicable and in vogue.

Guarantor No.1. Mr. Agnello Louis D'Souza

Plot No.-75, C-1 Road, Mahatma Nagar, Nashik.

2. Mr. Nancy Agnello D'Souza Plot No.-75, C-1 Road, Mahatma Nagar, Nashik.

24. It is evident from the above, that the said notice had not required the Respondent herein to pay the outstanding amounts due from the principal borrower in terms of guarantee executed by them. It is noted that the letter of guarantee dated 24.04.2002, executed by the



Guarantors to secure the facilities extended to the principal borrower, binds the executant as guarantor to pay the due amounts *on demand in writing*. Accordingly, in the absence of demand having been made requiring the guarantors to pay the outstanding amounts pursuant to notice dated 4.7.2016, it can not be said that the guarantee dated 24.02.2002 came to be invoked in terms of said notice.

25. Vide additional affidavit, the Petitioner placed on record another notice dated 1.2.2022 issued by it to the Principal Borrower and Guarantors, including the Respondent herein, calling them to pay the outstanding dues within 15 days of the receipt of said letter. The said notice was served via RPAD and a receipt issued by the Post Department is placed on record. The said letter states that “*You are hereby advised to call on us and make payment of aforesaid dues in full within 15 days of the receipt of this letter failing which we would be constrained to initiate such legal measures as deemed appropriate for recovery of our dues including initiation of insolvency/ liquidation proceedings before National Company Law Tribunal (NCLT) under Insolvency and Bankruptcy code 2016.*”
26. The Respondent has contended that the said letter was not served upon him, and questioned the delivery of said letter via RPAD stating that the final delivery tracking reports obtained from the official website of India Post irrefutably establishes that the said articles were, in fact, delivered to various addresses in Mumbai and received by individuals who are complete strangers to the Respondent and have no connection and/or authority to receive any documents on his behalf. It is noted that the Respondent was granted inspection of original records in this relation by the petitioner and inspection report dated 30.3.2026 submitted by the advocates of Respondents reveals that the original RPAD receipt was seen by the Respondent’s counsel, however, the copy of letter dated 1.2.2022



was not the same as that placed in the petition as noticed by the Respondent, and it was explained by the Petitioner to the inspecting person that the document annexed to the additional affidavit has been sourced from the Securitisation Application filed by Terry D'souza. It follows therefrom that the said letter was received by Terry D'souza. On perusal of the receipts placed in the additional affidavit, it is noted that all the four RPAD receipts were issued at identical time i.e. 14.48 of 1.2.2022, hence, it can not be inferred that the receipt in relation to service of notice to the Respondent in forged, when the document booked at same time in the name of Terry D'Souza is acknowledged as delivered by her in the proceedings before DRT by filing the same thereat.

27. Though, the said letter does not refer to any guarantee details, which were sought to be invoked in terms of said letter, however, we are of considered view that the claim of a creditor, subject to determination whether such creditor had a right to recover under the said guarantee in terms of assignment agreement executed in its favour, ought not be rejected on technicalities, when the said letter requires the addressee(s) to pay the outstanding dues. Since, the present petition has been filed on 2.7.2024, the said petition having been filed within 3 years from the occurrence of default arising pursuant to invocation of guarantee vide letter dated 1.2.2022, the present petition is within limitation.
28. It is noted that the present petition has been filed stating the date of default as "02.09.2016 i.e. 60 days from the date of the demand notice issued under Section 13 (2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002(SARFAESJ Act)", and the statutory demand notice dated 6.5.2024 was issued by the petitioner stating the date of default as "02.09.2016".



29. In the matter of *Royal Construction v. Gannon Dunkerley & Company Ltd.*, (2025) ibclaw.in 229 NCLAT, Hon'ble NCLAT held that "14. The contention of the Appellant that the Adjudicating Authority should have modified the date of default after examining the records is an absurd proposition. If the date of default required any change or modification, the onus was on the Appellant to have sought leave of the Adjudicating Authority to file an amendment application. To expect the Adjudicating Authority to have amended the date of default without any amendment application or specific pleading made for such a modification would tantamount to the Adjudicating Authority exceeding its jurisdiction which cannot be countenanced."
30. It is pertinent to note that Section 9 of the IBC also requires an operational creditor to issue a statutory demand notice u/s 8 of IBC requiring the debtor to pay the amounts due, which makes the provisions of section 9 and section 95 similar in nature, as both the provisions requires issuance of a statutory demand notice upon the debtor to afford it the opportunity to pay the amounts dues. Accordingly, the ratio laid down in *Royal Construction* (Supra) applies to the present case also. It is noted that the petitioner has not carried out any amendment in the date of default, however, the petitioner in its additional affidavit dated 10.11.2025 has pleaded that *subsequent to the aforesaid assignment, the Petitioner addressed a Demand Notice dated February 01, 2022, calling upon the Respondent/Personal Guarantor to pay a sum of Rs. 11,95,24,907/- (Rupees Eleven Crore Ninety-Five Lakh Twenty-Four Thousand Nine Hundred and Seven only), being the amount outstanding as on January 20, 2022.* It has further pleaded that *the*



Respondent/Personal Guarantor has failed and neglected to make payment of the outstanding dues, thereby rendering itself liable under the terms of the guarantee, and has accordingly pleaded therein that the documents annexed hereto and referred to in this Affidavit be taken on record and treated as forming an integral part of the captioned matter. I further pray that the Company Petition be accordingly adjudicated and admitted by this Hon'ble Tribunal in accordance with law. In our considered view, the said pleadings in the additional affidavit dated 10.11.2025, by which the notice dated 1.2.2022 was placed on record, constitutes specific pleadings for the modification of date of default, accordingly, we proceed further to adjudicate the present petition.

31. ***In the matter of State Bank of India and Ors. v. Doha Bank Q.P.S.C. and Anr., [\(2026\) ibclaw.in 234 SC](#)***, it is held that “28.....*The production of corporate guarantees in a proceeding in New Delhi, does not attract the provisions of Maharashtra Stamp Duty Act, 1958. In any case, the legal position governing the effect of insufficiently stamped document is no longer res integra and the same does not become void or unenforceable merely on that account (Hindustan Steel Ltd. v. Dilip Construction Company, (1969) 1 SCC 597). The defect of insufficient stamping of the document is curable in nature and does not go to the root of validity of the instrument. Even otherwise, the Stamp Act is a fiscal measure enacted to secure revenue for the State on certain classes of instrument. It is not intended to be used as a weapon by a litigant to defeat the cause of the opponent (NN Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd. & Ors.; [\[\(2023\) ibclaw.in 56 SC\]](#)). A Constitution Bench of this Court (Interplay Between Arbitration Agreements under Arbitration & Conciliation Act, 1996 and Stamp Act, 1899, IN RE, [\[\(2023\) ibclaw.in 153 SC\]](#)) has held that “Non stamping or improper stamping does not result in the*



- instrument becoming invalid. The Stamp Act does not render such an instrument void. The non-payment of stamp duty is accurately characterized as a curable defect. Therefore, the contention that the corporate guarantees were not duly stamped as Stamp Duty under the Maharashtra Stamp Duty Act, 1958 was not paid is sans substance.”* Accordingly, the non-stamping or insufficiency of stamping is not a relevant factor for consideration in the insolvency proceedings. Hence, we do not find any merit in the objection.
32. On perusal of guarantee dated 24.04.2002, it is noted that the said guarantee does not specify name of the guarantors, however, the said guarantee is signed by three persons on all pages as director of principal borrowers, and by 2 more persons on last page, one of whom is the Respondent herein. The Respondent has denied putting any signature on the said guarantee.
33. On perusal of the audited financial statements for the year ended on 31.3.2003 placed on record by the petitioner (page 96 of Petition), it is noted that the credit facilities extended by the original lender are stated to be secured against “*Hypothecation of stocks, Book debts, Tangible moveable property, equitable mortgage of land of M/s Shivneri Farms Pvt. Ltd. together with structures thereon, Corporate Guarantee of C&M Farming Ltd., and Personal Guarantee of Directors*”, and the Respondent herein is not stated as director therein. The security details are similarly stated in audited financial statements for the year ended on 31.3.2005 till 31.3.2011. It is further noted that the audited financial statements for the year ended 31.3.2014 onwards have disclosed that the bank loan taken from original lender is guaranteed by an associate company, by one director & a relative of director’s company and the said disclosure is continued till 31.3.2020.
34. It follows from the above, the contention of the Respondent that he had not signed letter of guarantee dated 24.4.2002 is corroborated



- by the contemporaneous disclosures in the audited financial statements in relation to the security interest held by the original lender.
35. It is pertinent to note that the original lender filed a Co-operative Case No.1491/2005 before Cooperative Court, At Nashik, wherein the defendant no. 5 and 6, namely, Smt. Terry Elias D'suza and Sau. Augusta R. D'suza, were only named as Guarantor to the credit facility extended by the original lender to M/s Marshal Breeders Pvt. Ltd., in relation to which the Letter of Guarantee dated 24.4.2002 was executed. Further, in the Arbitration claim no. 1491/2005 filed by the original lender, the officer of the original lender Shri Kailas Wamanrao Malode filed an affidavit dated 22.11.2007 stating that *"Defendants No. 5 and 6 are the guarantors for the said loan and the same guarantee agreement has been made in favor of the plaintiff bank."* Further, the Judgement dated 31.1.2019 passed by Ld. Maharashtra State Co-operative Appellate Court, Mumbai in an appeal no. 98 of 2018, arising from judgement and award dated 15.2.2018 passed in CC/1491 of 2005 by Co-operative Court, Nashik, filed by M/s Marshal Breeders Pvt. Ltd. and Mr. Elias M. D'souza also recorded only opponent no. 5 & 6 as sureties, and not the Respondent Personal Guarantor herein.
36. It is also noted that Miscellaneous Application No. 177 of 2022 before the Debt Recovery Tribunal-III, Mumbai, was filed by the applicant creditor solely for issuance of a Recovery Certificate in respect of the award dated 15.02.2018 passed by the Nashik Co-operative Court. The petitioner has accepted that the Respondent was not a party to the original proceedings culminating in the said award, while stating that the question of impleading him in the said proceedings did not arise.
37. Upon perusal of the alleged guarantee agreement dated 24.04.2002, it appears that the document bears signatures of five persons on the



last page. Prima facie, three signatures appear to have been affixed in the capacity of directors of Marshall Breeders Private Limited, whereas two signatures appear against the column meant for guarantors. However, as rightly contended by the Respondent, the document does not disclose the names of the persons who have signed the same. Further, the Hypothecation Agreement dated 29.04.2002 also appears to bear signatures of the same five persons, the signatures therein prima facie appearing similar to those on the guarantee agreement. Here too, the names of the signatories are not disclosed. A similar position emerges from the Promissory Note dated 24.04.2002 executed in favour of the Assignor Bank by Marshall Breeders Private Limited, which also bears signatures of five persons, out of whom three have signed in the capacity of borrower and two in the capacity of guarantors, without disclosure of their names.

38. However, in the Loan Application for Cash Credit Hypothecation dated 02.04.2002 annexed at Exhibit “K” to the Petition, the names of the guarantors are specifically recorded as Mr. Agnello D’Souza and Ms. Nancy A. D’Souza, with signatures appearing against their respective names. Prima facie, the said signatures appear similar to the signatures affixed against the guarantors’ column in the aforesaid guarantee agreement, hypothecation agreement, and promissory note.
39. Further, Form C filed with the National E-Governance Services Limited (NeSL), the Information Utility under the Code, also records the names of Nancy Agnello D’Souza and Agnello Louis D’Souza as guarantors in respect of the debt of Marshall Breeders Private Limited. It is pertinent to note that the said information was submitted by the present Petitioner, Omkara Assets Reconstruction Private Limited, on 24.02.2022 at 21:17:28, and the status of the debt is reflected as “Deemed to be Authenticated” by the debtor on



05.03.2022 at 02:58:47.

40. This Tribunal has also perused Co-operative Case No. 1491 of 2005 instituted before the Co-operative Court at Nashik by the predecessor-in-interest of the Petitioner in respect of the same loan transaction. It is pertinent to note that the judgment specifically records only two guarantors in relation to the subject transaction, namely, Mrs. Terry Elias D'Souza and Mrs. Augusta R. D'Souza. The learned Co-operative Court rendered its findings after considering various documents including the loan application, details of sureties, promissory note, hypothecation agreement, letter of lien and set-off, letter of guarantee, loan account extracts, and the resolution of the disputant bank.
41. Prima facie, neither the predecessor bank nor the learned Co-operative Court referred to or recorded the present Respondent as a guarantor in respect of the subject transaction. The said order of the learned Co-operative Court records as follows:

10] In the cross-examination of disputant's witness execution of loan documents and signatures thereon is not denied by the opponents. Also from perusal of the copies of the documents filed on record, it is seen that Exh.D-1 is the loan application filed by opponent. This loan application contents name of opponent No.1 company as borrower and names and signatures of opponents No.2 to 4 as directors of the opponent No. 1 company and names and signatures of the opponents No.5 & 6 as guarantors.

.....

This loan application bears signatures of opponents No.2 to 4 as directors of the opponent No. 1 company i.e.



borrower and signatures of opponents No.5 & 6 as sureties for the loan transaction.

.....

The document at Exh.D-4 is a hypothecation loan agreement, which is executed by opponent No. 1 for loan of Rs.2,20,00,000/-. This agreement also bears signatures of the opponents No.2 to 4 as borrowers and directors of opponent No. 1 and signatures of opponents No.5 & 6 as guarantors. Exh.D-5 is the letter of lien and set-off and Exh.D-6 is the letter of guarantee. These letters are signed by opponents No.2 to 6 as borrower and guarantors, respectively.

42. The aforesaid facts were affirmed on affidavit by Shri Kailas Vamanrao Malode, the authorised representative of the predecessor-in-interest of the present Petitioner. Notably, Opponent Nos. 5 and 6 in the said proceedings were Mrs. Terry Elias D'Souza and Mrs. Augusta R. D'Souza, whereas the present proceedings seek to proceed against Mr. Agnello D'Souza as guarantor.
43. Prima facie, the position that there were only two guarantors to the subject transaction appears to have remained consistent throughout the proceedings before the Co-operative Court, the appeal filed before the Maharashtra State Co-operative Appellate Court on 08.10.2018, as well as Miscellaneous Application No. 177 of 2022 filed by the present Petitioner before DRT-III, Mumbai, for recovery pursuant to the order dated 15.02.2018 passed in the co-operative proceedings after assignment of the debt in favour of the present Petitioner.
44. It is also pertinent to note that the Notice issued under Section 13(2) of the SARFAESI Act, 2002 by Janalaxmi Co-operative Bank Ltd., the predecessor-in-interest of the present Petitioner, specifically



records Mr. Agnello Louis D'Souza and Mrs. Nancy Agnello D'Souza as guarantors in respect of the subject loan transaction. The said notice came to be issued on 04.07.2016. Thereafter, the Petitioner issued a Demand Notice dated 01.02.2022 to the Respondent in his capacity as Personal Guarantor. It is stated that the said notice was duly dispatched through India Post on 01.02.2022 at the address of the Respondent, namely Flat No. 3 & 4, Helicon Castle, Plot No. 75, C-1 Road, Mahatma Nagar, Nashik – 422007. Notably, the said address is identical to the address mentioned in the notice issued under Section 13(2) of the SARFAESI Act dated 04.07.2016.

45. Subsequently, the Petitioner also issued Demand Notice dated 06.05.2024 (Form-B) to the Respondent at the same address, to which the Respondent replied vide communication dated 18.05.2024. It appears that, for the first time in the said reply, the Respondent denied the existence of any agreement fastening liability upon him. The relevant portion of the said reply is reproduced hereunder:

5. Client strongly submits that before the execution of the assignment deed dated 31st December 2021 the earlier bank JanLaxmi has raised the dispute before Society court Nashik in case no. 1491 of 2005 (Janlaxmi Bank Vs Marshall Breeders) against the borrower and the guarantor after verifying all the documents of the loan and the guarantee executed by the guarantor, they have mentioned different names of guarantors and not my client Agnello Dsouza hence this demand notice is a misnomer. The dispute was over and award was passed on dated 15th February 2018. Aggrieved by the order an appeal was preferred before the State Co-Operative Appellate Court Mumbai bearing appeal no. 98 of 2018 wherein the second



paragraph of the Judgement dated 31st January 2019 the court has recorded the names of the surety which is not my client at all and the surety are totally different than what you claimed hence the documents annexed to your demand notice dated 6" May 2024 is totally forged, fabricated and manipulated after the gap of two years on the instructions of your criminal syndicate and for that my client will take appropriate action against all of you before RBI, concerned Courts with competent jurisdiction for harassing my client who is diagnosed with early stage of Alzheimer having acute coronary disease and who is already in the evening of life and night is not too far. Yourself Omkara have filed an application before DRT III, Vashi bearing application 77 of 2022 (Omkara ARC vs Marshall Breeders PVT LTD) wherein you have sworn on oath as well as on affidavit you have stated that respondent no. 1 to 6 are borrower and guarantor whereas Agnello Dsouza is not a party because he was not a guarantor this very fact was known to you as you have taken a stand of the earlier bank and after perusal of all documents and hence doctrine of ESTOPPEL is squarely applicable, you have falsely sent this notice to my client for ransom of rupees 17,77,14,150 this is nothing but extortion which is best covered in section 385 of IPC

46. Thus, two competing versions emerge from the record. The Petitioner contends that the Respondent, Mr. Agnello D'Souza, is a guarantor and had executed the guarantee deed in respect of the subject loan transaction. On the other hand, the Respondent has categorically denied being a guarantor and has relied upon the fact that he was never treated or proceeded against as a guarantor in the earlier recovery proceedings. The Respondent has further alleged



- that the guarantee documents are forged and fabricated with an intent to harass him in relation to a non-existent liability.
47. The Petitioner, on the one hand, attributes the status of guarantor to the Respondent, whereas, on the other hand, its predecessor-in-interest, namely the Assignor Bank, did not even refer to the present Respondent as a guarantor in the earlier proceedings before the Co-operative Court. Hon'ble Supreme Court in *Nagindas Ramdas v. Dalpatram*, (1974) 1 SCC 242, particularly paragraph 27 thereof held that admissions made in pleadings constitute the best form of evidence and ordinarily cannot be permitted to be withdrawn or contradicted by the party making them. Prima facie, therefore, the Petitioner, being the successor-in-interest of the Assignor Bank, cannot completely disregard the stand consistently taken by its predecessor in the earlier proceedings.
48. The Respondent was addressed with three separate notices, namely: (i) notice under Section 13(2) of the SARFAESI Act dated 04.07.2016; (ii) Demand Notice dated 01.02.2022 issued by the Petitioner to the Respondent as Personal Guarantor; and (iii) Demand Notice dated 06.05.2024 (Form-B). All the aforesaid notices were issued at the same address. It is also not in dispute that the Respondent replied to the notice dated 06.05.2024.
49. Prima facie, it appears that the Respondent disputed the alleged guarantee deed for the first time only in the year 2024. In this regard, reliance has been placed on the judgment of the Hon'ble NCLAT in *Tulip Hotel Pvt. Ltd. v. J.C. Flowers Asset Reconstruction Pvt. Ltd.* Company Appeal (AT) (Insolvency) No. 1146 of 2023, wherein it was observed that disputes involving allegations of fraud and forgery relating to contractual documents cannot ordinarily be adjudicated by the Adjudicating Authority exercising summary jurisdiction under the IBC and are matters to be agitated before a competent civil court. The Hon'ble Appellate Tribunal further held



that, unless cognizance of forgery has been taken by a competent court, the creditor is entitled to proceed on the basis that the guarantee documents were executed validly and in good faith. The relevant portion of the aforesaid judgment is reproduced hereinbelow:

“26. Thus, to answer the second issue, we hold that in the given circumstances, when there is no cognisance which has been taken by any court of law, civil or criminal, of the Deeds of Guarantee being forged and fabricated, in all fairness, the Respondent No. 1 is fully protected in proceeding on the assumption that the signing and execution of the Guarantee Deeds has taken place in good faith and is therefore a valid and legal document. We are also of the considered opinion that such disputes COMPANY APPEAL (AT) (INSOLVENCY) No. 1146 of 2023 which involve fraud and forgery in respect of contractual documents cannot be investigated and decided by the Adjudicating Authority which has only been conferred the benefit of summary jurisdiction. Such issues can be raised only in a civil suit and hence any attempt to convert the proceedings under the IBC into civil proceedings akin to a trial cannot meet our approval since it clearly transgresses the legislative intent behind the IBC framework. As regards the alleged handwriting expert's opinion which has been adverted attention to by the Appellant to establish forgery, the Adjudicating Authority in exercise of summary jurisdiction is not expected to scrutinise such opinions and rely upon the assessment contained therein and more so when the opinion has been disputed as not being an independent third-party opinion. We find no error on the part of the Adjudicating Authority to have desisted from entering into the realm of contractual disputes as it would tantamount to



judicial overreach.”

50. It is pertinent to note that the Coordinate Bench of the NCLT, Delhi, in *Narender Steel and Alloys v. M/s Jai Mata Engineering Ltd.* [CP (IB) No. 695/ND/2022], vide order dated 26.09.2023, observed as under:

“7. The Operational Creditor has submitted that these quality reports and Debit note submitted by Corporate Debtor are forged and denied its existence. The dispute with respect to forgery cannot be decided by this Adjudicating Authority. It is settled law that proceedings before NCLT are summary in nature and adversarial evidence cannot be led and appraised by this Tribunal. This Adjudicating Authority is not expected to ascertain the veracity of documents in a summary proceeding, if the Tribunal starts adjudicating these types of issues, then the purpose of the statute of enacting speedy disposal by the mechanism will be defeated. Therefore, the Applicant may explore other legal remedies.”

51. The above facts clearly demonstrate that the Respondent Personal Guarantor, even though may have signed the loan application agreeing to be a guarantor to the credit facilities to be extended to M/s Marshall Breeders Pvt. Ltd., was not a guarantor to the said facilities as per disclosure(s) in the audited financial statements of the Principal Borrower during contemporaneous time and as per declaration(s) filed by the original lender before Co-operative Court in proceedings to recover the dues from the Principal Borrower.
52. However, the Respondent ought to have been aware of the invocation of the alleged guarantee against him in light of the notices issued from time to time. In such circumstances, the belated challenge to the guarantee documents as being forged and fabricated cannot be readily accepted at this stage of the proceedings. At the



same time, this Tribunal is conscious of the settled position that, although the Adjudicating Authority under the IBC possesses jurisdiction to examine allegations of fraud incidental to insolvency proceedings, disputes involving serious allegations of forgery and fabrication requiring detailed oral and forensic evidence ordinarily fall outside the ambit of the summary jurisdiction exercised under the IBC, where adversarial evidence cannot be comprehensively led and appreciated.

53. Thus, in view of the aforesaid facts and circumstances, we are of the considered opinion that unless the alleged guarantee deed is declared forged, fabricated, or otherwise invalid by a court of competent jurisdiction, the same is required to be proceeded with on a prima facie presumption of having been genuinely and validly executed.
54. The term 'Financing Documents' is defined in clause 1.1(i) of the Assignment Agreement dated 31.12.2021 to mean "*all the agreements, deeds and/or documents, executed in favour of the Assignor and / or entered into between the Assignor and any Borrower and/or any third parties, inter alia setting out the terms and conditions on which the Assignor has agreed to provide Financial Assistance to such Borrower, Including any writings creating/evidencing a Security Interest, pledge and/or guarantee in favour of the Assignor and any undertakings by any Person, on the basis of which the Assignor disbursed or made available such Financial Assistance, a list of which agreements, deeds and/or documents is more particularly set out In Schedule 1 annexed hereto. The description of the movable/ immovable properties over which Security Interests have been created in favour of the Assignor is also as set out in Schedule 1 annexed hereto.*"
55. Schedule 1 to the Assignment deed executed in favor of the Petitioner lists the following guarantors to the credit facility extended to the Principal Borrower, M/s Marshall Breeders Pvt. Ltd.



2.	Name & Details of the Guarantor (Name Address PAN numbers Aadhar Number Date of Birth)	1.Elias Marshal D'Souza C & M House, ND. Patel Road, Nashik. 2. 2.Mr.Richard Marshall D'Souza Deceased – Legal heir 1. Smt.Agasta Richard D'Souza 2. Shri.Marshalltarry Richard D'Souza C&M House, ND.Patel Road, Nashik – 1. 3.Mr.Rudolph Anthony Lima Plot No.B-7, S.No.49, (3A&3B), Serene Meadows, Anandwall, Gangapur Road, Nashik.
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56. Indubitably, the name of the Respondent Personal Guarantor is not stated therein. Clause 2.1.2 of the Assignment Agreement further states that “*The Assignor hereby further assigns in favour of the Assignee, all its rights, title and interest in the Financing Documents, all agreements, deeds and documents related thereto and all collateral and underlying Security Interests and / or pledges created to secure, and/or guarantees issued in respect of, the repayment of the loans, which the Assignor is entitled to....*”. Accordingly, the assignee, the petitioner herein, received security interests securing the assigned debt to the extent the assignor was entitled to at the time of assignment, and such security interest(s) are listed in Schedule 1 to the Assignment Agreement.
57. A plain reading of Section 5(1) of the SARFAESI Act, 2002, which begins with a non-obstante clause, makes it clear that an Asset Reconstruction Company may acquire financial assets from a bank or financial institution “on such terms and conditions as may be agreed upon between them.” Thus, the scope and extent of the assignment are governed by the express terms of the Assignment Agreement executed between the parties. Section 5(3) of the SARFAESI Act further provides that, unless otherwise expressly provided, all contracts, deeds, guarantees, agreements, and other instruments relating to the financial asset shall continue to remain enforceable in favour of the Asset Reconstruction Company upon acquisition of the financial asset. However, the operation of Section 5(3) is subject to the terms expressly agreed upon in the Assignment



Agreement itself. Therefore, where the Assignment Agreement specifically identifies or limits the guarantees and guarantors forming part of the assigned assets, the scope of assignment cannot be enlarged beyond such express contractual stipulations by invoking Section 5(3) in isolation.

58. Section 5(1)(a) of the SARFAESI Act, 2002 merely provides that a financial asset may be acquired on such terms and conditions as may be incorporated in the agreement of assignment, accordingly, the security interest(s) declared in the Schedule 1 to the deed of assignment excluding the Respondent herein does not the Petitioner herein to initiate proceedings u/s 95 IBC against the Respondent Guarantor. The omission of the Respondent's name in Schedule 1 can not held to be accidental, as the exclusion of Respondent as Guarantor in Schedule 1 is in consonance with stand of the original lender before Co-operative Court and the Appellate Proceedings. In our considered view, Section 5(3), providing that acquisition of a financial asset would also result in acquisition of all underlying securities, cannot be read in isolation and must necessarily be read conjointly with Regulation 5(1)(a).
59. In our considered view, there is no conflict between Sections 5(1) and 5(3) of the SARFAESI Act, 2002. Section 5(3) is a natural consequence and extension of the assignment contemplated under Section 5(1). Once a financial asset is assigned in accordance with Section 5(1), the effect of such assignment is that all contracts, deeds, bonds, guarantees, agreements, powers-of-attorney, permissions, approvals, consents, and related instruments pertaining to the assigned financial asset are to operate in favour of the Asset Reconstruction Company as if the ARC itself were the original lender or beneficiary thereto. The object of Section 5(3) appears to be to ensure that, upon lawful assignment of the financial asset, the ARC is placed in the same legal position as the assignor bank for the



purpose of enforcement. However, such statutory consequence can arise only in respect of those contracts, guarantees, and instruments which themselves stand transferred under the Assignment Agreement executed in terms of Section 5(1). Therefore, the scope of Section 5(3) cannot travel beyond the terms of the assignment actually agreed upon between the parties.

60. Therefore, when the Assignment Agreement expressly records only Mr. Elias Marshall D'Souza, legal heirs of Mr. Richard Marshall D'Souza, and Mr. Rudolph Anthony Lima as guarantors in relation to the financial asset assigned, and does not mention the name of the present Respondent, a prima facie inference arises that no assignment of any alleged guarantee executed by the Respondent was effected in favour of the Petitioner, even assuming that the Respondent had executed such guarantee as alleged.
61. The Petitioner has also submitted that, while exercising summary jurisdiction under the Insolvency and Bankruptcy Code, 2016, this Tribunal cannot adjudicate complex disputed questions of fact, including allegations relating to forgery or fabrication of documents. It was submitted that such issues, if at all, are required to be agitated before a competent civil court and not before this Tribunal. Accordingly, the Petitioner contended that this Tribunal lacks jurisdiction to adjudicate upon the allegations of forgery and fabrication raised by the Respondent. There is no quarrel to this proposition, however, this tribunal is required to determine the existence of debt and default in payment thereof, accordingly, this tribunal is vested with power to adjudicate on counter-claims of the parties in relation to the documents relied upon, as default presupposes existence of a debt at first place.
62. Therefore, even assuming that a valid and enforceable guarantee existed against the Respondent, the material on record does not establish that such alleged guarantee was ever assigned in favour of



the present Petitioner. In absence of assignment of the underlying guarantee rights, the Petitioner lacks the locus to invoke and enforce the alleged guarantee against the Respondent under Section 95 of the Insolvency and Bankruptcy Code, 2016. Consequently, the present Petition is held to be not maintainable and is accordingly rejected.

Order:

43. Accordingly, for the reasons recorded hereinabove, the Report and recommendations of the Resolution Professional dated 06.12.2024 submitted under Section 99(1) read with Section 100 of the Insolvency and Bankruptcy Code, 2016 are not accepted. This Tribunal is of the considered view that the Petitioner, namely OMKARA ASSETS RECONSTRUCTION PRIVATE LIMITED, has failed to establish that the alleged guarantee purportedly executed by the Respondent formed part of the financial assets validly assigned in its favour under the Assignment Agreement dated 31.12.2021. Consequently, the Petitioner lacks the locus and legal entitlement to invoke or enforce the alleged guarantee against Mr. Agnello Louis D'Souza under Section 95 of the Insolvency and Bankruptcy Code, 2016.
44. In view of the aforesaid facts, circumstances, and findings, and upon consideration of the pleadings and documents placed on record, C.P. (IB) No. 837/MB/2024 filed under Section 95 of the Insolvency and Bankruptcy Code, 2016 is hereby rejected and dismissed.
45. The Registry is directed to communicate a copy of this Order to the Resolution Professional and all concerned parties forthwith, and upload the same on the website within two days from the date of pronouncement.



46. Ordered accordingly.

Sd/-

Prabhat Kumar
Member (Technical)
Vijay Andhale

Sd/-

Sushil Mahadeorao Kochey
Member (Judicial)