

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT – III**



I.A. No. 2247/2023

IN

C.P. NO. 575(IB)/MB/2022

Under Section 60(4) r/w 60(5) of the
Insolvency and Bankruptcy Code, 2016
read with Section 179(2) and Rule 11 of the
National Company Law Tribunal Rules,
2016

Raghavendra Joshi

Residing at Apoorva,
B-10, Indraprastha Enclaves, Jyoti Nagar,
Aurangabad – 431 005

.... Applicant

Versus

1. Indian Bank

Chetan Trade Centre, Jalna Road,
Aurangabad

2. Mr. Besi Kuzimanil Mathu

Residing at Flat No. 7,
Friends Colony,
Kokanwadi, Sitton Road,
Aurangabad – 431 001.

.... Respondents

In the matter between:

State Bank of India

.... Financial Creditor

Versus

Raghavendra Joshi

.... Respondent

Order Pronounced on: 13.11.2024

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Coram:

Hon'ble Ms. Lakshmi Gurung, Member (Judicial)

Hon'ble Shri Charanjeet Singh Gulati (Technical)

Appearances:

For Petitioner: Adv. Dheeraj Patil

For Applicant/ Personal Guarantor: Aniruth Purshothaman

For Respondent No. 2: Adv. Rajat Malu

PER: MS. LAKSHMI GURUNG, MEMBER (JUDICIAL)

ORDER

1. I.A. NO. 2247 OF 2023

This application has been filed by, **Raghavendra Joshi ('the Applicant'/ 'Personal Guarantor')** under Section 60(4) r/w Section 60(5) of the Insolvency and Bankruptcy Code, 2016 (**'the Code'/ 'IBC'**) read with Section 179(2) and Rule 11 of the National Company Law Tribunal Rules, 2016 seeking the following prayer:

- a) To set aside the sale of the property as described in Schedule 'A' of the Application, conducted by Respondent No. 1 by way of e-auction dated 10.05.2022 as illegal and breach of the moratorium;*
- b) To direct Respondent Nos. 1 and 2 to maintain status quo in respect of the Property, pending the hearing and disposal of the present Application;*
- c) To restrain Respondent No. 2 and their respective officers, servants, agents, assigns and successors from transferring,*

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disposing of, dealing with and/or otherwise creating any third-party rights on the Property;

d) Ad interim reliefs in terms of prayers (b) and (c) above;

e) To pass such order and further directions and reliefs as may be deemed fit and proper to meet the ends of justice.

Brief Facts of the case:

2. State Bank of India (**‘the Financial Creditor’**) had extended credit facilities (**‘the said facility’**) of Rs. 1500 Lakhs on 17.05.2014 to M/s Deogiri Infrastructure Private Limited (**‘the Corporate Debtor’**). The repayment of the said facilities was secured by personal guarantee given by the Applicant and his wife Smt. Meena Raghavendra Joshi by signing Guarantee Agreement dated 13.03.2015. The said guarantee is a continuing one for all the amounts advanced to the corporate debtor.
3. Thereafter, the said credit facilities were extended from time to time till Sanction Letter dated 19.01.2018 sanctioning the credit facilities to the tune of Rs. 4100 Lakhs. The repayment of the said facility was secured by extended personal guarantee given by the Applicant and his wife Smt. Meena Raghavendra Joshi.
4. Upon the credit facilities becoming irregular, the loan account of the corporate debtor, being Account Number: 33851909502, was classified as a Non-Performing Asset on 30.10.2018. Thereafter, State Bank of India issued notice under Section 13(2) of Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (**‘SARFAESI Act’**) on 10.04.2019 and initiated

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proceedings before Hon'ble Debts Recovery Tribunal (**'DRT'**) at Aurangabad.

5. Thereafter, on 30.01.2020 State Bank of India took symbolic possession of the properties at Aurangabad and Latur under Section 13(4) of the SARFAESI Act.
6. The State Bank of India also filed Company Petition bearing No. 429 of 2022 under Section 7 of the Code against the corporate debtor which is pending before National Company Law Tribunal at Mumbai.
7. Further, demand notice dated 05.04.2022 under Rule 7(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Process for Personal Guarantors to Corporate Debtors) Rules, 2019 was issued by the Financial Creditor to the applicant.
8. Thereafter, a Company Petition bearing No. 576/MB/2022 under Section 95 of the Code was filed by the Financial Creditor against the applicant on **26.04.2022**. A Resolution Professional was appointed vide order dated 27.06.2022. An interlocutory application was filed by the resolution professional on 19.07.2022, recommending initiation of personal insolvency proceedings against the applicant/personal guarantor.
9. It is the case of the Applicant that during the subsistence of interim-moratorium under Section 96 of the Code, Indian Bank (**'Respondent No.1'**), on **10.05.2022** sold the following immovable property jointly owned by the Applicant and his wife Smt. Meena Raghvendra Joshi, under the SARFAESI Act, to Mr. Besi Kuzimanil Mathu (**'Respondent No. 2'**):

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“All that piece and parcel of flat no. A-401, 4th Floor, “Zistatva-10”A Wing Building Plot No. 63, Gut No. 41, Golwadi Tq.& Dist.Aurangabad”

(referred to as ‘the said property’/ ‘property in question’)

10. Under this backdrop, the Applicant has filed the present application assailing the sale of the ‘property in question’ by Respondent No.1 to Respondent No.2 on the ground that there is breach of interim moratorium under section 96 of the Code by Respondent No1 and seeking setting aside of the sale of the property in question.
11. An ad-interim injunction was granted by this Tribunal vide order dated 29.11.2023 directing Respondents not to create any third-party rights on the said property in question.

Submission of Respondent No.1

12. The Applicant had mortgaged the property in question in favour of Respondent No. 1 to secure credit facilities availed by the corporate debtor. On default by the Corporate Debtor Respondent No. 1 had issued a demand notice under Section 13(2) of SARFAESI Act. On non-compliance with the demand notice, the Respondent No. 1 took symbolic possession of the property in question in accordance with Section 13(4) of SARFAESI on 08.01.2019 along with “the right to transfer by way of lease, assignment or sale for realising the secured asset”.
13. The Respondent No. 1 issued an e-auction sale notice for said property on 20.04.2022 under SARFAESI read with Rule 8(6) of the Security Interest (Enforcement) Rules, 2002 **(‘said auction sale notice’)** pursuant to which the property in question was to be sold on “As is

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where is”, “As is what is”, and “Whatever there is” basis on 10.05.2022 for recovery due to Respondent No.1 from the Corporate Debtor.

14. Further, the said property in question was sold to the successful (highest) bidder Respondent No. 2 for a consideration of Rs. 48,86,000 on 10.05.2022 (**‘auction sale’**). On completion of the said auction sale, a sale certificate dated 31.05.2022 was issued by the Respondent No. 1 in favour of Respondent No.2. The sale certificate was then registered with Joint Sub-Registrar, Aurangabad – 3, bearing Registration No. 3632 of 2022 and the Respondent No. 2 is in peaceful and vacant possession of the said property.
15. Respondent No.1 has basically taken following objections to the present application:

I. **Jurisdiction**

- a. Ld. Counsel for Indian Bank submitted that the issue involved in the present application falls within the jurisdiction of Debts Recovery Tribunal (DRT) and this Tribunal under the Insolvency and Bankruptcy Code does not have jurisdiction to entertain the present application. If the Applicant is aggrieved by the action of the Respondent No. 1 then the only remedy available to him is to approach DRT under section 17 of SARFAESI Act and further, emphasising that no injunction shall be granted by any Court or authority as per Section 34 of SARFAESI. In spite of said auction sale notice issued upon the Applicant and published in newspapers with sufficient circulation, the recovery proceedings were not challenged and no objection under SARFAESI Act has been filed.

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- b. Symbolic possession of the property in question was already taken on 08.01.2019 under section 13(4) of the SARFAESI Act and auction notice was also issued on 20.04.2022 which is prior to filing of the section 96 petition. Therefore, the action under SARFAESI was taken much prior to the commencement of the interim moratorium on 26.04.2022 and on 10.05.2022 that action merely got concluded. It was argued that once action under 13(4) is taken, there is vesting of interest and title in favour of the Bank which right and interest cannot be taken away even under IBC.
- c. It was lastly argued that applicant should have notified the filing of the petition under section 95 of IBC to Respondent No. 1 and could have prevented conclusion of sale and saved the transaction and other costs.

II. **Sale of mortgaged property of Personal Guarantors under SARFAESI**

- a. It was further submitted that to challenge any action taken under SARFAESI Act, the personal guarantor has to resort to the remedies provided under Section 17 of SARFAESI Act. It was further submitted that as per Section 34 of SARFAESI Act, no injunction shall be granted by any Court or authority for the action taken by Bank under SARFAESI Act.
- b. The Respondent No. 1 in respect of the aforementioned submissions contends the present application be filed with malafide intention by a defaulting debtor after the said auction sale.

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Submissions of Respondent No.2

16. Ld. Counsel for Respondent No.2 argued on the same lines as that Respondent No.1 and submitted that the proceedings under SARFAESI Act is not affected by the imposition of interim-moratorium as per Section 96 of the Code which provides a stay on any legal action or proceeding pending in respect of any debt whereas, Section 14 of the Code does not specifically stay the proceedings to enforce security interest over the said property.
17. It was submitted that on attaining the symbolic possession of property as per Section 13(4) of SARFAESI, the Respondent No. 1 possesses the right to transfer by way of lease, assignment or sale for realisation of secured asset. It was argued that as the notice under Section 13(4) of SARFAESI was issued prior to the initiation of the interim-moratorium and hence, the said auction sale of property, which was merely concluded later is not in violation of the interim-moratorium.
18. It was contended by Respondent No. 2 that Respondent No. 1 was duty-bound to disclose about the commencement of interim-moratorium before the said auction sale.
19. Additionally, Ld. Counsel for Respondent No. 2 feebly tried to distinguish the provisions of section 14 and section 96 of the Code. He argued that under section 14(1)(c) there is express prohibition of any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the SARFAESI Act. However, there is no such express provision under 96 of the Code. Therefore, conclusion of the auction sale under SARFAESI Act, during interim moratorium under section 96 of the Code is not prohibited.

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20. It was lastly submitted that the said auction sale was concluded well within the knowledge of financial creditor and Respondent No.1 for which no objection was raised. Therefore, it was prayed that in the eventuality of setting aside of the said auction sale, to direct Respondent No. 1 to refund the purchase consideration of Rs. 80,26,000, stamp duty and registration charges payable as Rs. 4,36,000/- and Rs. 30,000/-, respectively, document handling charges as Rs. 2,000/- along with an interest of 15% per annum from the date of issue of sale certificate till realisation and also cost towards defending the present application.

Submission of the Applicant

21. Per contra the applicant has referred to Section 60 and Section 179 of the Code to contend that this tribunal has the jurisdiction to entertain the present application. The Applicant has relied on judgment of Hon'ble Supreme Court in ***Indian Overseas Bank versus RCM Infrastructure Limited and Another (2022) 8 SCC 516***, which holds that the IBC is a complete code in itself and as per Section 238 of IBC, the provisions of IBC shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Therefore, the Respondent No. 1 cannot continue proceedings under SARFAESI once CIRP is initiated and interim-moratorium has commenced.
22. The Applicant states that the interim-moratorium as imposed under Section 96 of the Code is to protect the value of and preserve the insolvency resolution of Corporate Debtor therefore, maximizing value of assets after the present application is admitted, is the object of the Code.

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23. Ld. Counsel for the Applicant has further relied on the case of ***Sanjay Dhingra versus IDBI Bank Limited and Others (2024 SCCOnLine Del 4521)*** wherein the Hon'ble Delhi High Court held that the provisions of IBC shall supersede the provisions of SARFAESI.
24. The applicant states that the proceedings initiated by Respondent No. 1 under SARFAESI stood stayed on account of interim-moratorium which came into operation on the date of filing of said petition on 26.04.2022. The Applicant has relied on the case of ***Indiabulls Asset Reconstruction Company Limited versus Pawan Kapoor (Company Appeal (AT)(Ins) No. 192 of 2021)*** wherein the Hon'ble National Company Law Appellate Tribunal, New Delhi in its decision dated 28.08.2024 has placed reliance on the Hon'ble Delhi High Court's decision in Sanjay Dhingra (supra) to direct the lender bank to restore the possession of the mortgaged property sold under the provisions of SARFAESI belonging to personal guarantor and to not proceed further under SARFAESI during period of interim-moratorium.
25. The applicant concludes that no right is accrued to the third party even if an instrument is registered and therefore, the sale by Indian Bank/ Respondent No.1 should be set-aside. Further, the Applicant relies on the Hon'ble National Company Law Appellate Tribunal decision in ***M/s Omkara Assets Reconstruction Private Limited versus ECI Infra Towers Company Private Limited and Another (Company Appeal (AT)(CH)(Ins.) No. 35 of 2022)*** wherein it was held that a Sale Certificate registered in violation of interim-moratorium would be non-est in law and the purchaser cannot claim/get any advantage/title/right/interest with respect to property covered under the sale certificate.

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Findings

26. We have heard the Ld. counsel for the applicant and the respondents. Upon considering the facts and circumstances of the present case and the submissions of the counsel for parties and having perused the record, the issues that arise for consideration are:

- I. *Whether this Tribunal has jurisdiction to entertain the present application?*
- II. *Whether the sale of the ‘property in question’ on 10.05.2022 by Indian Bank to Respondent No.2 under the provisions of SARFAESI Act is a valid sale despite having concluded during interim moratorium under section 96 of the Code?*

27. Let us first deal with the issue of jurisdiction. At this juncture, we may refer to section 60 of the IBC which is reproduced below for ease of reference: -

“60. Adjudicating Authority for corporate persons.—

(1) The Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the National Company Law Tribunal having territorial jurisdiction over the place where the registered office of the corporate person is located.

(2) Without prejudice to sub-section (1) and notwithstanding anything to the contrary contained in this Code, where a corporate insolvency resolution process or liquidation proceeding of a corporate debtor is pending before a National Company Law Tribunal, an application relating to the insolvency resolution or [liquidation or bankruptcy of a corporate guarantor or personal guarantor, as the case may be,

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of such corporate debtor] shall be filed before such National Company Law Tribunal.

(3) An insolvency resolution process or [liquidation or bankruptcy proceeding of a corporate guarantor or personal guarantor, as the case may be, of the corporate debtor] pending in any court or tribunal shall stand transferred to the Adjudicating Authority dealing with insolvency resolution process or liquidation proceeding of such corporate debtor.

(4) The National Company Law Tribunal shall be vested with all the powers of the Debts Recovery Tribunal as contemplated under Part III of this Code for the purpose of sub-section (2).

(5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of—

(a) any application or proceeding by or against the corporate debtor or corporate person;

(b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and

(c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.”

28. Section 60(2) states that where a CIRP of a corporate debtor is pending before National Company Law Tribunal, an application relating to the insolvency resolution of personal guarantor shall be filed before such National Company Law Tribunal. We note that the Corporate Debtor i.e. M/s Deogiri Infrastructure Pvt. Ltd. was admitted to CIRP on 26.04.2022 and as such CIRP process is pending before National Company Law Tribunal Mumbai Bench. Therefore, any application relating to the insolvency of the personal guarantor to the corporate Debtor has to be filed before National Company Law Tribunal, Mumbai

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Bench. By virtue of sub-section (4) of section 60 of IBC, the National Company Law Tribunal shall be vested with all the powers of the Debt Recovery Tribunal under Part III of this Code for the purpose of sub section (2).

29. Part III of the IBC deals with Insolvency Resolution and Bankruptcy for Individuals. According to Section 179 of IBC, the Adjudicating Authority in relation to insolvency matters of individuals shall be the Debt Recovery Tribunal. We note that section 179 is subject to the provisions of section 60 and according to section 60(2) discussed above, the National Company Law Tribunal is vested with all powers of DRT under Part III of the Code.
30. In view of above statutory provisions, we have no hesitation to conclude that this Tribunal has jurisdiction to entertain the present application challenging the sale by Respondent No 1 conducted during the subsistence of the Interim Moratorium. Issue No.1 is accordingly answered in **affirmative**.
31. Coming to the next issue, we note that State Bank of India had filed the petition, bearing Company Petition (IB) No. 575 of 2022, under section 95 of the Code against the Applicant on 26.04.2022. Therefore, the provisions of section 96 pertaining to the Interim Moratorium are attracted with effect from 26.04.2022. Section 96 is reproduced below for ease of reference:

“96. Interim-Moratorium – (1) When an application is filed under Section 94 or Section 95—

(a) an interim-moratorium shall commence on the date of the application in relation to all the debts and shall cease to have effect on the date of admission of such application; and

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(b) during the interim-moratorium period—

(i) any legal action or proceeding pending in respect of any debt shall be deemed to have been stayed; and

(ii) the creditors of the debtor shall not initiate any legal action or proceedings in respect of any debt.”

32. In no uncertain terms, it is mentioned in section 96(1)(a) that an interim moratorium shall commence **on the date of the application in relation to all the debts** and shall cease to have effect on the date of admission of such application. It is further made clear under clause (b) that during the moratorium period, all legal proceedings pending in respect of any debt shall be stayed and that the creditors of the debtor shall not initiate any legal action or proceedings in respect of any debt.
33. It is undisputed position that the proceedings under section 13 (4) was initiated prior to the filing of section 95 petition. No doubt the auction notice was issued on 20.04.2022 but the sale of the property in question was concluded on 10.05.2022. On the date of commencement of interim moratorium under section 96 of IBC, i.e. on 26.04.2022 all legal action and all proceedings in respect of any debt of the Personal Guarantor stood stayed and Respondent No. 1 could not have proceeded to conduct sale on 10.05.2022 and issued Sale Certificate on 31.05.2022.
34. We are of the considered view that even if the action of taking symbolic possession under SARFAESI Act was taken prior to commencement of interim moratorium, and certain rights were vested in favour of the Respondent Bank, yet they were prohibited by virtue of section 96 of the Code not to proceed any further in respect of any debt of the personal guarantor.

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35. According to section 238 the provisions of the Code shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. As the IBC is a complete Code in itself with overriding effect over any other inconsistent law, we do not agree with the submission of Respondent No. 1 that symbolic possession had vested rights and Respondent were entitled to conclude the sale initiated with auction publication on 20.04.2022. In this regard we are supported by the judgment of Hon'ble High Court of Delhi in the matter of **Sanjay Dhingra versus IDBI Bank Limited and Others (2024 SCCOnLine Del 4521)** in which under similar circumstances, the Court held that provisions of IBC would prevail over the provisions of SARFAESI. The relevant extract is reproduced below: -

“xxxx xxxx xxx

15.interim moratorium under Section 96 of IBC, 2016, is intended to operate in respect of a debt, as opposed to a debtor and the purpose of interim moratorium is to restrain the initiation or continuation of legal action or proceedings against the debt.....

17. It is no longer res integra that IBC, 2016, is a complete code in itself and the provisions of the IBC, 2016, would prevail notwithstanding anything inconsistent therewith, contained in any other law for the time being in force. Further, mere fact that possession of the property in question has been taken over by the respondent-bank under SARFAESI proceedings, prior to the commencement of IBC proceedings against the petitioner, would have no effect on the interim moratorium that becomes applicable in terms of Section 96 of IBC..... cannot be excluded merely because the bank has taken possession of the property in question prior to commencement of the proceedings under the IBC, 2016.

.....

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22. once the interim moratorium has come into play on account of the insolvency proceedings against the petitioner under the IBC, 2016, the respondent-bank cannot proceed any further in the proceedings under SARFAESI with respect to the property mortgaged by the petitioner with the bank, in his capacity as a personal guarantor.”

(emphasis supplied)

36. Further, Counsel for Respondent No. 2 in its written submissions drew a comparative understanding and stated that interim-moratorium under Section 96 of the Code is different from interim-moratorium under Section 14 of the Code therefore, the filing of the Petition and/or imposition of interim-moratorium would have no effect on the auction sale of said property carried under the provisions of the SARFAESI Act. However, this issue has been discussed in the case of **Sanjay Dhingra (supra)** with reference from **State Bank of India versus V. Ramakrishnan** as the interim-moratorium under Section 14 of the Code is not applicable to the personal guarantor:

“24. Besides, it is to be noted that Supreme Court in the case of *State Bank of India v. V. Ramakrishnan (supra)*, itself has stated that the moratorium under Section 96 IBC, 2016, under Part III of the said Act, is a separate moratorium, applicable separately in the case of personal guarantors against whom insolvency resolution processes may be initiated under Part III. Thus, Supreme Court has held as follows:

“xxx xxx xxx

26. We are also of the opinion that Sections 96 and 101, when contrasted with Section 14, would show that Section 14 cannot possibly apply to a personal guarantor. **When an application is filed under Part III, an interim-moratorium or a moratorium is applicable in respect of any debt due. First and foremost, this is a separate moratorium, applicable separately in the case of personal guarantors against whom insolvency resolution processes may be initiated under Part III.**

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Secondly, the protection of the moratorium under these sections is far greater than that of Section 14 in that pending legal proceedings in respect of the debt and not the debtor are stayed. The difference in language between Sections 14 and 101 is for a reason.

26.1. Section 14 refers only to debts due by corporate debtors, who are limited liability companies, and it is clear that in the vast majority of cases, personal guarantees are given by Directors who are in management of the companies. The object of the Code is not to allow such guarantors to escape from an independent and co-extensive liability to pay off the entire outstanding debt, which is why Section 14 is not applied to them. However, insofar as firms and individuals are concerned, guarantees are given in respect of individual debts by persons who have unlimited liability to pay them. And such guarantors may be complete strangers to the debtor — often it could be a personal friend. It is for this reason that the moratorium mentioned in Section 101 would cover such persons, as such moratorium is in relation to the debt and not the debtor.

xxx xxx xxx”

(emphasis provided)

37. Thus, it has been clearly held that the protection of moratorium under section 96 is far greater than of section 14. Therefore, the submission of Respondent No.2 is rejected.

38. In view of the above discussions, we hold that the sale of the property in question on 10.05.2022 by Respondent No. 1 Bank to Respondent No. 2 is violative of section 96 of the Code and is therefore not a valid sale. The second issue is accordingly answered in **negative**.

39. Accordingly, I.A. No. 2247/2023 is **allowed**.

Sd/-

CHARANJEET SINGH GULATI
(MEMBER TECHNICAL)

Akshita, L.R.A.

Sd/-

LAKSHMI GURUNG
(MEMBER JUDICIAL)