

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

C.P. (IB) NO. 176/MB/2023

Under Section 100 *r/w*
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

**Small Industries
Development Bank of
India Through Rishabh
Chand Lodha**

...Applicant/Financial
Creditor

Versus

**Smt. Kaushaliya
Omprakash Agarwal PG
To Kosas Exports Limited**

...Respondent/Personal
Guarantor

Order pronounced on 12.07.2024

Coram:

Hon'ble Member (Judicial) : Justice V. G. Bisht (Retd.)

Hon'ble Member (Technical) : Sh. Prabhat Kumar

Appearances:

For the Applicant/Financial Creditor: Mr. Vishal Hirawat, Advocate

For the Respondent : Mr. Vivek Parmar, Advocate

ORDER

Per: Justice V. G. Bisht (Retd.), Member (Judicial)

Brief facts:

1. The present petition is filed *u/s.* 95 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “IBC, 2016”) *r/w.* 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 **Small Industries Development Bank of India Through Rishabh Chand Lodha** (hereinafter referred to as “Applicant/Financial Creditor/Creditor”) for the purpose of initiating insolvency process against **Smt. Kaushaliya Omprakash Agarwal** (hereinafter referred to as the “Respondent/Personal Guarantor/Guarantor”) for recovery of Rs. 17,63,58,362/- (Rupees Seventeen Crore Sixty Three Lac Fifty Eight Thousand Three Hundred and Sixty Two only). The Date of Default, as specified in Part-III of the present petition, is 27.07.2016.
2. The Applicant bearing PAN AABCS3480N, incorporated on 02.04.1990 has its registered address at Swavalamban Bhavan, SARB, 2nd Floor, C-11, G- Block, Bkc, Bandra East, Mumbai, Maharashtra – 400051 and present address at SIDBI Tower, 15 Ashok Marg, Lucknow, Uttar Pradesh - 226001. The present application has been filed through authorized representative of the Applicant viz. Mr. Rishabh Chand Lodha.
3. The Respondent is an Indian resident having her permanent address at 303 – 304, Raj Complex, near Vaishnodevi temple, Bhatar road, Surat – 395007 & business address at 318, Hubtown

Viva, Sale Bldg. No.1, W.E. Highway, Jogeshwari East, Mumbai - 400060.

4. The Respondent is a personal guarantor for **Kosas Exports Limited** (hereinafter referred to as the “Corporate Debtor / KEL/Borrower”) having CIN U17119MH2003PLC260568 and having its registered office at 318, Hubtown Viva, Sale Bldg. No.1, W.E. Highway, Jogeshwari East, Mumbai - 400060.
5. Small Industries Development Bank of India (SIDBI) ('Applicant') vide Letter of Intent/Sanction Letter bearing Ref. No. SIDBI SUBO NO. 1431/KEL dated 24.02.2014 sanctioned Financial Assistance of Rs. 7,00,00,000/- (Rupees Seven Crore) under Secured Business Loan to MSMEs in favor of Corporate Debtor, which was to be utilized by the borrower for any tangible or intangible business needs such as capex, servicing new orders, renovation of property/ assets, reimbursement against self-financed assets acquired in last one year, funding of intangibles, brand building/ marketing, R&D, Inorganic business growth, or any other bona-fide business need etc.
6. In terms of the Sanction Letter the loan was to be repaid by the Borrower in 138 monthly instalments after a moratorium of 6 (Six) months from the date of disbursement of the loan as per the repayment schedule and the repayment of Instalment was scheduled to be due on 10th of each month.
7. The Corporate Debtor accepted the terms and conditions of sanction letter/Letter of Intent dated 24.02.2014, by passing the resolutions in the meeting of its Board of Directors held on 25.02.2014 and also submitted duplicate of the said Letter of Intent with the Applicant duly accepted by its authorized director.

8. Subsequently, on 26.02.2014, a Loan Agreement was executed between the Applicant and the Corporate Debtor for availing the Financial Assistance/Term Loan of Rs. 7.00 Crore on the terms and conditions as mentioned in the Sanction Letter dated 24.02.2014. Additionally, an unconditional and irrevocable deed of guarantee dated 26.02.2014 was executed by Smt. Kaushaliya Omprakash Agarwal along with other personal guarantors in favor of the Corporate Debtor to secure the Financial Assistance availed by the Corporate Debtor.
9. Pursuant to the above, the Applicant disbursed the Loan amount of Rs. 7.00 Crore in the Loan Account of the Corporate Debtor maintained with the Applicant Bank. In the initial period of repayment, the Corporate Debtor was regularly making the repayment, however, with effect from 10.12.2014 the Corporate Debtor became irregular in making the repayment and thus, the Applicant issued recall notice dated 08.03.2016, calling upon the Corporate Debtor to repay the entire outstanding principal amount of the loan together with interest, future interest, penal interest and all other monies dues.
10. That consequent to the failure on part of the Corporate Debtor to discharge its liability in repayment of the loan amount, the Applicant vide notice dated 27.07.2016 invoked the unconditional and irrevocable guarantee given by Smt. Kaushaliya Omprakash Agarwal and other personal guarantors, in favor of the Applicant to secure the financial assistance availed by the Corporate Debtor, and demanded the repayment of the entire outstanding amount of Rs. 7,28,75,463/- 18.04.2016 along with further interest at the rate of 12.75% p.a. w.e.f. 19.04.2016 till the repayment of the amount.
11. Further, on 08.06.2019 the Corporate Debtor along with Kosas

Industries Private Limited sent a One Time Settlement proposal to the Applicant offering to pay Rs. 12.00 Crores towards full and final settlement for the loan account of Corporate Debtor and Kosas Industries Private Limited. Thereafter, the Applicant through letter dated 21.06.2019 addressed to the Corporate Debtor and Kosas Industries Private Limited informed that the OTS offer could not be acceded and cited reasons for rejection of the OTS offer.

12. Further, on 05.11.2020 the Corporate Debtor along with Kosas Industries Private Limited again sent a One Time Settlement proposal to the Applicant offering to pay only Rs. 7.50 Crores towards full and final settlement for the loan account of Corporate Debtor and Kosas Industries Private Limited. In response, the Applicant vide letter dated 17.11.2020 sought certain information and documents to evaluate the proposal, however, no response was received and hence, the OTS offer, impliedly stood cast aside and rejected.
13. Furthermore, the Applicant vide letter dated 24.11.2021 informed the Corporate Debtor and the Guarantors about the One Time Settlement Scheme for MSMEs- Non- Discriminatory & Non-Discretionary (OTS-NDND 2022) floated by the Applicant Bank and requested the Corporate Debtor to inform the willingness to settle the dues by 30.11.2021, however, no response was received from the Corporate Debtor.
14. Subsequently on 19.10.2022, the Applicant issued demand notice, which was served on 04.11.2022 [the demand notice attached to the Petition is dated 04.05.2022 and the amount stated therein is Rs.16,55,75,905/- the amount stated in Part III is Rs. 17,63,58,362/- which is on account interest for the period after

demand notice date], under Rule 7(1) of the Insolvency and Bankruptcy, (Application to Adjudicating Authority for Insolvency Resolution Process of Personal Guarantors to Corporate Debtors) Rules, 2019 to Smt. Kaushaliya Omprakash Agarwal seeking payment of default amount of Rs. 17,63,58,362/- (Rupees Seventeen Crore Sixty Three Lac Fifty Eight Thousand Three Hundred and Sixty Two Only) within 14 days from the receipt of the Demand Notice. The aforesaid period for payment expired on 18.11.2022, however, the Applicant has till date not received the payment. Hence, the present petition under Rule 7(2) of the Personal Guarantor Rules read with Section 60(2) and Section 60(5) of the Insolvency and Bankruptcy Code.

15. Vide order dated 06.12.2023, Mr. Rishab Chand Lodha, Insolvency Resolution Professional having Registration No. IBBI/IPA-001/IP-P01075/2017- 2018/11766; was appointed as the Resolution Professional (RP) in the present matter.

Submissions of the Applicant:

16. The Applicant has submitted that the Personal Guarantor has raised only 1 objection and has wrongly submitted that the guarantee was invoked on 19.10.2022 by issuance of FORM E. Personal Guarantor has wrongly contended that the Application is barred by limitation.
17. Clause 3 of the deed of guarantee provides that the liability of guarantor would commence from the date of demand. Clause 3 is as follows:

“3. In the event of any default on the part of the Borrower in payment / repayment of any of the moneys referred to above, or in the event of any default on the part of the Borrower to comply with or perform any of the

terms, conditions and covenants contained in the said Agreement, the Guarantors shall upon demand, forthwith pay to SIDBI, without demur, all the amounts payable by the Borrower under the said Agreement.”

The Guarantee was invoked on 27.07.2016. Hence, default occurred on 27.07.2016. Period of 3 years from the date of invocation of guarantee would have expired on 26.07.2019. However, before expiry of 3 years, Corporate Debtor submitted an OTS letter on 08.06.2019, thereby, extending the period of limitation to further 3 years. Thereafter, on 05.11.2020, Corporate Debtor submitted another OTS Proposal and the Guarantee was again extended to further 3 years. That the period of 3 years from 05.11.2020 would have expired on 04.11.2023. That the present petition under Section 95 was filed on 21.02.2023. Hence, the present petition is well within limitation.

18. The Applicant has relied upon the decision given by the Supreme Court in *Laxmi Pat Surana V s. Union Bank of India & Anr.* (Civil appeal no. 2734 of 2020) wherein it has been held that when the principal borrower/ guarantor admit and acknowledge their liability after declaration of NPA but before the expiration of three years therefrom fresh period of limitation would being from the date of acknowledgement.

Submissions of the Respondent:

19. The respondent has contended that as per the Applicant, the date of default is 27.07.2016 and the demand notice was issued on 19.10.2022. Hence, the alleged guarantees have been invoked after a period of 3 years from the date of default and therefore barred by limitation.
20. Further, since no authorization letter has been enclosed by the

Petitioner authorizing its officer to sign and issue the said demand notice, the said demand notice is not valid.

Submissions of the Resolution Professional:

21. The Resolution Professional has filed an Interlocutory Application being IA No. 1768 of 2024 for submitting RP report u/s 99(1) of the Code on record. The same was taken on record and the said Interlocutory Application is allowed and disposed of on 18.04.2024.

22. The ground(s) for admission of the present application, as recorded in the said RP report, are reproduced in-verbatim as hereinafter:

“That in view of the above stated facts and circumstances, and on further examining the documents available on record, Applicant recommends that Application under section 95 (1) of the Code filed by the Creditor, Small Industries Development Bank of India, be admitted under Section 100 of the Code and Insolvency Resolution Process be commenced against the Personal Guarantor to Kosas Exports Limited (Corporate Debtor) namely, Smt. Kaushaliya Omprakash Agarwal for the following reasons as mentioned herein below: -

a) That the Application filed by the Creditor satisfies the requirement as set out in Section 95 of the Code, i.e. existence of debt and failure to pay the debt within 14 days of demand notice;

b) That the Corporate Debtor has obtained Loan from Small Industries Development Bank of India and defaulted in the repayment of Loan granted.

c) That Smt. Kaushaliya Omprakash Agarwal, has given Personal Guarantee to Small Industries Development Bank of India for the Loan

granted to Kosas Exports Limited and have committed default in repayment of Loan Facility demanded by the Creditor Small Industries Development Bank of India after invocation of personal guarantee.

d) That no payment has been made till date against the demand notice - Form B issued by Small Industries Development Bank of India.

That, in light of the above, it is just and equitable that Insolvency Resolution Process be initiated against the above mentioned Personal Guarantor to Corporate Debtor, Kosas Exports Limited, under the orders and directions of this Hon'ble Tribunal.”

Findings:

23. Heard submissions of learned counsel for the Applicant and Respondent. Perused records.
24. The contention of the respondent that the present Company Petition is barred by Limitation does not have any merit. The Guarantee was invoked on 27.07.2016. The limitation for the purpose of petition against the Personal Guarantor starts to run from the date when the default is made by the Personal Guarantor in his guarantee obligation and not from the date when the Principal Borrower commits default in payment of debt. Hence, default occurred on 27.07.2016. Period of 3 years from the date of invocation of guarantee would have expired on 26.07.2019. However, before expiry of 3 years, Corporate Debtor submitted an OTS letter on 08.06.2019, thereby, extending the period of limitation to further 3 years. Thereafter, on 05.11.2020, Corporate Debtor submitted another OTS Proposal and the Guarantee was again extended to further 3 years. That the period of 3 years from 05.11.2020 would have expired on 04.11.2023. That the present petition under Section 95 was filed on

21.02.2023. Hence, the present petition is well within limitation.

25. The demand notice dated 4.5.2022 by SBI to the Personal Guarantor was served vide Speed Post and RPAD acknowledgement dated 1.11.2022 and the present petition was filed on 21.02.2023.
26. Ld. Counsel for the Personal Guarantor informed this bench that an Application u/s 94 of the Insolvency and Bankruptcy Code, 2016 (Code) was filed prior in time; however, no order came to be passed. However, this Bench noticed that the Respondent, Personal Guarantor never appeared before the Bench in the said matter and has never brought the same facts to the notice of the Bench that this Petition is not maintainable in the eyes of law as they have already filed an Application u/s 94 of the Code. Hence, this Bench cannot take note of said Application in the absence of any details relating thereto. These facts are placed on record.
27. Upon perusal of the documents on record, it is clearly established that the Corporate Debtor has committed defaults in repayment of loan amount granted by the Financial Creditor. **Smt. Kaushaliya Omprakash Agarwal**, Personal Guarantor to **Kosas Exports Limited** has also committed default in repayment of loan facility demanded by the Financial Creditor after invocation of Personal Guarantee. The Application filed by the Creditor satisfies the requirement as set out in Section 95 of the Code.
28. Considering the above facts and circumstances and upon perusal of the documents on record viz. the demand notices, proof of service, guarantee deeds, joint deed of guarantee, etc., the C.P. (IB) 176/MB/2023 filed under Section 95 of the IBC, 2016 is hereby **Admitted** and the Insolvency Resolution Process stands

initiated against **Smt. Kaushaliya Omprakash Agarwal** viz. the Respondent herein. We hereby direct as hereinafter:

- I.** Initiate Insolvency Resolution Process against the Respondent/Personal Guarantor and moratorium in relation to all the debts is declared, from today *i.e.* date of admission of the application, and shall cease to have effect at the end of the period of 180 days, or this Tribunal passes order on the repayment plan under Section 114 whichever is earlier as provided under Sec 101 of IBC, 2016. During the moratorium period,

 - a.* Any pending legal action or proceeding in respect of any debt shall be deemed to have been stayed, and
 - b.* The creditors of the debtor shall not initiate any legal action or proceedings in respect of any debt; and
 - c.* The debtor shall not transfer, alienate, encumber, or dispose of any of his assets or his legal rights or beneficial interest therein;
 - d.* The provisions of this section shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

- II.** The Resolution Professional viz. **Mr. Rishabh Chand Lodha** Insolvency Resolution Professional, having Registration No. IBBI/IPA-001/IP-P01075/2017-18/11766, having registered address at E-5, Shraman Basant Vihar, Gandhi Nagar, Bhilwara, Rajasthan - 311001 [E-Mail: *rishabhlodha57@gmail.com*, Mobile no.: *+91-7042527528*] is directed to cause a public notice published on behalf of the Adjudicating Authority within

7 days of passing this Order on the website of the NCLT Mumbai Bench, inviting claims from all Creditors, within 21 days of such issue. The notice under Sub Section (1) of Section 102(2) shall include: -

- a.* details of the order admitting the application;
- b.* particulars of the resolution professional with whom the claims are to be registered; and
- c.* the last date for submission of claims.

III. The publication of notice shall be made in two newspapers, one in English and other in Vernacular, which have wide circulation in the State where the Corporate Debtor and Personal Guarantor resides. The Resolution Professional shall furnish two spare copies of the notice to the Registry for the record.

IV. The Resolution Professional, in exercise of the powers conferred under Section 104, shall prepare a list of creditors on the basis of:

- a.* the information disclosed in the application filed by the debtor under Sections 94 or 95, as the case may be, and
- b.* claims received by the Resolution Professional under Section 102 within 30 days from the date of the notice. The debtor shall prepare a repayment plan under Section 105, in consultation with the Resolution Professional, containing a proposal to the Creditors for restructuring of his debts or affairs.

The repayment plan may authorize or require the Resolution Professional to:

- a.* carry on the debtor's business or trade on his behalf

or in his name: or

b. realise the assets of the debtor; or

c. administer or dispose of any funds of the debtor.

The repayment plan shall include the following, namely;

a. justification for preparation of such repayment plan and reasons based on which the creditors may agree upon the plan;

b. provision for payment of fee to the Resolution Professional;

c. such other matters as may be specified.

V. The Resolution Professional shall submit the repayment plan along with his report on the plan to this Authority within a period of **21 days** from the last date of submission of claims, as provided under Section 106.

VI. In case the Resolution Professional recommends that a meeting of the creditors is not required to be called, he shall record the reasons thereof. If the Resolution Professional is of the opinion that a meeting of the creditors should be summoned, he shall specify the details as provided under Section 106(3) of IBC, 2016. The date of meeting should not be less than 14 days or more than 28 days from the date of submission of the Report under sub-section (1) of Section 106 of IBC, 2016, for which at least 14 days' notice to the creditors (as per the list prepared) shall be issued by all modes. Such notice must contain the details as provided under the provisions of Section 107 of IBC, 2016.

VII. The meeting of the creditors shall be conducted in accordance with Sections 108, 109, 110 & 111 of IBC,

2016. The Resolution Professional shall prepare a report of the meeting of the creditors on repayment plan with all details as provided under Section 112 of IBC, 2016 and submit the same to this Tribunal, copies of which shall be provided to the Debtor and the Creditors. It is made clear that the Resolution Professional shall perform his functions and duties in compliance with the Code of Conduct provided under Section 208 of IBC, 2016.

VIII. The Resolution Professional shall submit his periodic reports before this Tribunal, every 30 days.

IX. The Applicant is directed to deposit **INR 2,00,000/-** (Indian Rupees Two lakhs) to the bank account of the Resolution Professional within **one week**, towards his fees. This shall be subjected to the rules and regulations under the provisions of the Insolvency and Bankruptcy Code, 2016.

X. The Registry is directed to communicate a copy of order, report and application within **seven** working days and upload the same on the website immediately after the pronouncement of order.

Sd/-

PRABHAT KUMAR
MEMBER (TECHNICAL)

MK

Sd/-

JUSTICE V. G. BISHT
MEMBER (JUDICIAL)