

IN THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH - I

C.P. (IB) No. 740/MB/2023

C.P. (IB) No. 943/MB/2023

Under Section **95(1)** 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.

C.P. (IB) No. 740/MB/2023

Bank of Maharashtra

... Financial Creditor/Applicant

v/s.

Mr. Anand Ghadigaonkar

... Personal Guarantor/ Respondent

C.P. (IB) No. 943/MB/2023

Bank of Maharashtra

... Financial Creditor/Applicant

v/s.

Mr Ketan Karkhanis

... Personal Guarantor/Respondent

Order delivered on: 15.07.2024

Coram:

Prabhat Kumar

Hon'ble Member (Technical)

Justice V.G Bisht, (Retd).

Hon'ble Member (Judicial)

Appearances:

For the Financial Creditor : Ms.Revati Nansi, Advocate

For the Personal Guarantor : Ms.Kartikee Kargaonkar, Advocate

ORDER

Per: Prabhat Kumar, Member (Technical)

1. The Facts and contention in both **C.P. (IB) No. 740/MB/2023 and C.P. (IB) No. 943/MB/2023** are same. Therefore, the adjudication of both petitions will be consolidated herein.
2. The present petitions are filed on 26.07.2023 u/s. 95 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "IBC, 2016") r/w. Rule 7 of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 by Bank Of Maharashtra (jointly "Financial Creditor / Applicant") for the purpose of initiating insolvency resolution process against **Mr.Anand Ghadigaonkar and Ketan Karkhanis** ("Personal Guarantor / Respondent") for the amount in default of Rs. 30,90,28,800.82/- (Thirty Crores Ninety Lakhs Twenty-Eight Thousand Eight Hundred and Eight Two Paise) as on 19.04.2023. Date on which the debt was due on 12.05.2014 and the Default occurred on 12.05.2014, as per Part-III of the present petition. Since the fact in relation to both the petition are identical, we consider it appropriate to deal with both the petition by this common order.
3. Corporate Debtor M/s Time Polyertathane Pvt Ltd had availed loan of Rs.3,75,00,000/- (Three Crore Seventy Five Lakhs) in the form of Cash Credit Facility in the year 2013, Term loan of Rs 2,30,00,000/- (Two Crore Thirty Lakhs) Force Loan I of Rs 23,00,000/- (Twenty Three Lakhs), Force Loan II of Rs 24,99,000/- (twenty Four Lakhs Ninety Nine Thousand) and Force Loan III of Rs 22,81,000/- (Twenty Two Lakhs Eighty One Thousand) from Bank of

Maharashtra. Total aggregating to Rs 6,75,80,000 against the said loan, six individuals are the guarantors and three are directors of the said Company. The Corporate Debtor defaulted in repayment of loan resulting in being declared as NPA as on 12.05.2014.

4. The Applicant submits that the sanction letter issued by the Bank of Maharashtra in favor of Corporate Debtor on 28.01.2013 to release the loan amount in respect of credit facilities. The Financial Creditor has filed a case before the DRT, Pune by a way of OA No.380/2015.
5. The Applicant thereafter addressed Demand Notice dated 15.11.2022 in Form B to each of the personal guarantor, including the Respondent. The Respondent failed to reply to the said Demand Notice sent by the Applicant.
6. In view of the foregoing, the present Application has been filed by the Applicant under section 95(1) r/w section 60(2) of the insolvency and Bankruptcy Code, 2016 read together with Rule 7 of Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantor or Corporate Debtor) Rules, 2019, seeking order for Insolvency Resolution Process of the Respondent Personal Guarantor to the Corporate Debtor as detailed in Form – C.
7. The Financial Creditor submits that in view of default of the Corporate Debtor, the applicant herein invoked Personal Guarantee of the Personal Guarantor and issued him a notice of invocation of guarantee Demand Notice dated 15.11.2022 in Form B to pay entire outstanding dues of the Financial Creditor.
8. The applicant also filed application under Section 7 of the IBC against the corporate debtor which was admitted.
9. In view of non-payment of dues by the debtor herein, the applicant issued Demand Notice in Form B, as per Sub Rule (1) of Rule 7 Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 on

14.09.2022. The notice was duly serviced to the Debtor. However, the debtor herein has not paid dues of the applicant (i.e., SIDBI) which are due from the debtor despite requests.

10. The Company has executed the following security documents in favour of applicant/Financial Creditor against the loan Facilities granted:

- i.** Deed of Guarantee.
- ii.** Authority Letter of Bank
- iii.** Sanction Letter
- iv.** Copy of Guarantees for all Facilities except Agricultural Facilities
- v.** Demand Notice (Form B)

11. We note that this Bench had appointed the **Mr.Mahesh R.Surekha**, Insolvency Resolution Professional (“RP”) *vide* Order *dated* 11.12.2023 in the captioned petition and had thereby directed the Applicant to prepare and file a Report *u/s.* 99 of the IBC, 2016 and the same has been taken on record on 15.02.2024 by a way of *IA No.543 of 2024*. The RP after due examination of the application, documents filed along with the application, in addition to the requirements as mandated under clauses (6) (a) (b) of Section 99 of the IBC, 2016, has recommended to “*..have formed the opinion to recommend the same for its admission under sub section (7) of Section 99 of the IBC, for initiation of Insolvency Resolution Process against Mr.Anand Ghadigaonkar and Ketan Karkhanis and : a.)upon perusal of the documents attached along with the petition filed by the applicant , the Personal Guarantor has committed a default b.) The Applicant submits that the present application meets the necessary requirements of the Code for its approval by this Hon'ble Tribunal and the reason for the same have been submitted in the Report.*

the RP has had formed the opinion to recommend the same for its admission

under sub section (7) of Section 99 of the IBC. The recommendation for admission of the application before the Hon'ble Adjudicating Authority is based on the following grounds:

- a. *“The Resolution Professional have gone through the section 95 application along with its annexures and it is in compliance with the provisions of section 95 of the IBC, 2016.*
- b. *The applicant has provided information sought by the Resolution Professional and given explanation regarding the same, but the guarantor has not provided any reply or information.*
- c. *Hence, Resolution Professional would like to recommend the acceptance of the application for initiation of Resolution process under section 99 (7) of IBC, 2016. And given reason for same as required under section 99 (9).*

Submission of the Financial Creditor

12. The Petition/Application in question has been diligently filed well within the prescribed period of limitation, in strict compliance with the statutory provisions governing such matters. Given the severity and persistence of these breaches, the Applicant Bank was constrained to issue notice under Section 13 (2) of the Securitisation & Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 to the Corporate Debtor and all its guarantors on 04.11.2014, unequivocally demanding the immediate repayment outstanding balances across the term loan, cash credit, Bank Guarantee, and Forced Loan accounts. The Financial Creditor submits that even after issuance of the aforementioned notice dated 04.11.2014. Consequently, the Applicant Bank was compelled to institute an Original Application for the recovery of its outstanding dues before the Debt Recovery Tribunal, Pune, under O A No. 380 of 2015. This action was taken within the prescribed period of limitation as prescribed by Section 24 of the Recovery of Debts Due to Banks and Financial Institutions

Act, 1993 (RDB and FI Act). The Financial Creditor submits that the said OA No. 380 of 2015 was disposed off in the favour of the Applicant Bank on 31.12.2015.

- 13.** The filing of this Application remains within the stipulated time frame, as the Demand Notice was duly served upon the Respondent on 15.11.2022, well within the statutory limitation period for initiating proceedings under section 95 of the IBC, 2016. The Applicant, Bank/Financial Creditor, lodged this Application in May 2023, which aligns with the legal requirements. Further the Financial Creditor draws attention to Clause 6 of the Deed of Guarantee dated 30.01.2013, as appended in “Annexure-7” of this application. This clause explicitly states the enduring nature of the guarantee, asserting that it remains in effect until all obligations owed to the Bank by the borrowers are fully discharged, regardless of the utilization or repayment status of the credit facilities. It is emphasized that this guarantee persists even in scenarios where the Bank’s claim against the borrowers becomes time-barred and unenforceable through legal means against the borrowers. Clause 6 of the Deed of Guarantee explained in the below paragraph:

“This guarantee shall not be revoked by the guarantors and shall remain in force till all the amounts due and payable to the Bank by the borrowers in respect of the said credit facilities are paid in full inclusive of interest and other charges payable by the borrowers. The guarantors further specifically agree that this guarantee shall continue to remain in force and the guarantors shall continue to be liable thereunder for all amount due and payable to the Bank by the borrowers even though some of the credit facilities may have been unutilised or utilised and then repaid in full, so long as the credit facility is continued by the bank to the borrower. This guarantee shall be in full force even though the borrowers have not renewed the documents and even though the claim of the bank for the amounts due from the borrowers get time barred and the bank cannot recover the same from the borrowers by filing a suit or any legal proceedings against the borrowers.”

- 14.** Consequently, it is evident that the Deed of Guarantee establishes an enduring and non-revocable commitment by the guarantors, ensuring continued liability for all outstanding amounts owed to the Bank. The filing of this Application in May 2023 falls well within the statutory limitation period, as the Demand Notice was issued within three years of the Respondent's default. Therefore, the respondent's contention regarding the timeliness of this proceeding lacks merit and should be dismissed.
- 15.** Furthermore, the said Report also clearly states that Petition has been filed within the limitation period as laid down under Section 238A of IBC, 2016. Hence, the allegations stating that the Petition is time barred, is also dealt with, thereby proving that the Petition is not barred by limitation as it has been filed well within limitation period.
- 16.** With reference to the contention as regards lack of authorisation in favour of signatory, it is vehemently refuted for its lack of factual accuracy and legal understanding. It is categorically stated that Mr. Anup Kumar Singh, Chief Manager of the Applicant Bank, is duly authorized to act on behalf of the Applicant Bank/Financial Creditor in the present matter. This authorization stems from a meticulously crafted Authority Letter dated 21.04.2023, endorsed and sanctioned by Mr. P.K. Dash, the Deputy Zonal Manager (DZM) and Deputy General Manager, Pune City Zone.

Reply to the Resolution Professional's Report by the Personal Guarantor

- 17.** Ld. Counsel for the Personal Guarantor takes his defence on the limitation stating that Notice under Section 13(2) of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act. 2002, was issued in the year 2014, calling upon them to pay the amount.
- 18.** At the outset, it is submitted that the Application U/s 95 filed by the Financial Creditor is hopelessly time barred and thus, needs to be rejected. It is submitted that prima-facie from the bear perusal of the application it can be seen that it is

the case of the Financial Creditor that they had availed a loan facility of Rs.3,75,00,000/- on 20.01.2013 in form of Cash Credit to the Corporate Debtors M/S Time Polythene Pvt. Ltd. Accordingly, a Term Loan of Rs.2,30,00,000/-, Force Loan (i) Rs.23,00,000/-, Force Loan (ii) Rs.24,49,000/- and Force Loan (iii) Rs.22,81,000/- also came to be sanctioned to the Corporate Debtor.

- 19.** As per the Financial Creditor the Corporate Debtor defaulted in repaying the amount and thus on 12.05.2014 all the loan accounts were classified as Non-Profit Asset (hereinafter referred to as "NPA"). Accordingly, 31.12.2015 an original application bearing on O.A No. 380/2015 also came to be filed by the Financial Creditor before Ld. Debt Recovery Tribunal (hereinafter referred to as "Ld. DRT") and came to be disposed in their favour. However, it is pertinent to mention here that, the applicant has not annexed a copy of said order passed in O.A. No. 380/2015. Therefore, the Personal Guarantor is craving the leave of this Tribunal to file additional reply whenever the same is filed.
- 20.** From the application it also appears that the last payment made to the Financial Creditor by the Corporate Debtor was on 12.12.2017 of Rs. 85,50,291/- towards onetime payment settlement. Thereafter, no payment has been made either by the Corporate Debtor or by any of the Guarantor.
- 21.** It is the settled position that the limitation for filing of proceedings u/s 95 of IBC is 3 Years. The present proceedings were filed on 11.05.2023 i.e. almost after 10 years from the date of NPA, 9 years from the date of order passed by Ld. DRT in OA No. 380/2015 and almost 5 years from the date of last payment. Thus, the present proceeding is hopelessly time barred and therefore, needs to be rejected. The Personal Guarantor is also relying upon few judgements passed by Hon'ble Supreme Court and various Hon'ble High Court in that respect.
- 22.** It is also submitted that the present Insolvency proceedings filed by Mr. Anup Kumar Singh who is purportedly authorised vide authority letter dated 21.04.2023 by Mr. B.K. Das, Deputy General Manager. However, it needs to be appreciated that Bank of Maharashtra being, Public Company needs to pass a

resolution in a Board Meeting for authorizing anyone to file proceeding before this Hon'ble Tribunal. In the instant case, there is no such Board Resolution on record and thus, the present proceeding is without authority.

- 23.** It is further submitted that the present personal guarantor is having no connection either with the Corporate Debtor or the Directors of the Corporate Debtor. It is also the case of present personal guarantor, that he was just an office boy in the premises of corporate debtor and his signatures has been obtained fraudulently on the deed of guarantee. The signature of the personal guarantor has been taken by misrepresenting him that the same is just to show that service of some notice or document has been done upon the company and he has received it. The personal guarantor being less educated signed the same. Thus, the deed of guarantor is hit by the provision of Section 18 of Indian Contract Act, 1872.
- 24.** It is further submitted that from the perusal of report filed by Ld. Resolution Professional u/s 99 of IBC it appears that no detailed explanation has been provided by the Ld. Resolution Professional as to why the application needs to be accepted and insolvency proceedings needs to be initiated. It is true that, the Ld. Resolution Professional U/s 99 of IBC has to Collate facts and material for the initiation of insolvency proceeding, however, section 99(9) of IBC also mandates the Ld. Resolution Professional to examine the information and record the reason for recommendation of acceptance or rejection. Thus section 99(9) of IBC mandates Ld. Resolution Professional to apply his mind and then recommend acceptance or rejection of the application filed under Section 95 of IBC.
- 25.** It is further submitted that the present personal guarantor is having no fixed asset and moreover, the details of fixed asset as provided in form C also does not belong to the present personal guarantor.

Findings:

- 26.** Heard learned counsel for Financial Creditor and perused the documents on record.
- 27.** The present petition is filed on 26.07.2023 against Personal Guarantor/ Respondent for the amount in default is of Rs. 30,90,28,800.82/- (Thirty Crores Ninety Lakhs Twenty-Eight Thousand Eight Hundred and Eight Two Paisa) as on 19.04.2023, the Default occurred on 12.05.2014, as per Part-III of the present petition.
- 28.** It is a disputed fact that the notice under section 13(2) of the Sarfaesi Act was issued to the respondent guarantors and they were specifically called upon to pay the amount claimed outstanding in the said notice. Accordingly, the guarantee in question was invoked on 31.10.2014 Pursuant to notice under section 13(2) of the SARFAESI act and the respondent guarantors was also called upon to pay the amount claimed to be in default in the said notice. It is trite law that the limitation runs from the date of Invocation of the Guarantee (after expiry of period allowed for payment of outstanding debt in the invocation notice), accordingly the limitation runs from 31.10.2014. In these cases, we note that the financial creditor has filed an OA before DRT which came to be allowed on 31.12.2015. Further there was one-part payment from the Principal Borrower on 12.12.2017. Accordingly, even it is considered that the limitation gets extended by part payment made by the Principal Borrower, the limitation shall start running from 12.12.2017, these petitions had been filed on 26.07.2023 which is the beyond the period of 3 years from the said date. Accordingly these petitions are hit by limitation and cannot be maintained.
- 29.** The reliance placed by the Financial Creditor on the Clause 6 of the Deed of guarantee is misplaced. The said clause providing for continuance of guarantee is relevant till the point the guarantee is not invoked calling upon the guarantor therein to pay the Guaranteed amount. In this case guarantee having been invoked on 31.10.2014 by calling upon the respondent guarantors along with the

principal borrower to pay the amount due from them, it cannot be said that the guarantee was in fact in force after such invocation and was actually invoked on 15.11.2022 by issue of demand notice on that date. We do not find any force in the argument in these circumstances the Deed of Guarantee establishes an irrevocable commitment by the guarantors, ensuring ongoing responsibility for all outstanding amounts owed to the Bank even after it's invocation vide notice dated 31.10.2014 issued under 13(2) of Sarfaesi Act.

30. In terms of the above, the **C.P. (IB) No. 740/MB/2023 and C.P. (IB) No. 943/MB/2023** filed under Section 95 of the IBC, 2016 are hereby **dismissed**

Sd/-

PRABHAT KUMAR

MEMBER (TECHNICAL)

Sd/-

JUSTICE V. G. BISHT

MEMBER (JUDICIAL)