

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

C.P. (IB) No. 971/MB/2022

Under Section **95(1)** of the Insolvency & Bankruptcy Code, 2016 *r/w* Rule **7** 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

JM Financial Asset Reconstruction Company
Limited
... Financial Creditor

Versus

Usha Rajendra Agrawal
... Respondent/Personal Guarantor

Order delivered on: 08.05.2024

Coram:

Sh. Prabhat Kumar
Hon'ble Member (Technical)

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

Appearances:

For the Financial Creditor : Mr.Yash Dhruva, Advocate

For the Personal Guarantor : *ex parte*

For_Resolution_Professional : Mr.Aniruth_Purusothman, Advocate

ORDER

Per: Virendrasingh G. Bisht, Member (Judicial)

1. The present petition is filed under Section 95 of the Insolvency and Bankruptcy Code, 2016 (“**Code**”) 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 JM Financial Asset Reconstruction Company Limited (“**Financial Creditor / Applicant**”) for the purpose of initiating insolvency resolution process against Usha Rajendra Agrawal (“**Personal Guarantor / Respondent**”)
2. The total debt amounting to INR 77,77,34,425.66/- (Rupees Seventy-Seven Crores Seventy-Seven Lakhs Thirty-Four Thousand Four Hundred Twenty-Five and Sixty-Six Paise Only) including interest, cost, charges, expenses as on 31.05.2023. The Date on which the Guarantee was invoked on 27.02.2018 by a way of demand notice under Section 13(2) of the Securitisation and Resolution of Financial Assets & Enforcement of Security Interest Act,2002, invoking the Guarantee in respect of unpaid debt.
3. The Account of Corporate Debtor was classified as Non-Performing Assets (NPA) on 31.03.2017.
4. The Deed of Guarantee was executed by the Personal Guarantor on 31.12.2016.

Submission on Behalf of the Financial Creditor/Petitioner

5. The Financial Creditor Submits that the Corporate Debtor has availed various Financial Facilities of Rs.43.62 Crores which were completely secured by the way of creating the mortgage and the personal guarantee. The date of Guarantee was 31.12.2016. The Personal Guarantor has undertaken to unconditionally and irrevocably pay

original lender who is the Financial Creditor forthwith on demand.

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

- i.** Deed of Guarantee
- ii.** Supplemental Consortium Joint Deeds of Hypothecation on all movable assets
- iii.** Agreement of Pledge of Shares
- iv.** Trust and Retention Account Agreement
- v.** Registered Assignment Deed

7. The Federal Bank (the Assignor Bank/Original Lender) as a member of consortium of Banks led by Union Bank of India sanctioned Credit Facility-I through agreement dated 30.06.2017 and further Credit Facility-II assigned through agreement dated 28.03.2018.

8. The Corporate Debtor failed to comply with its debt obligation as result of which the account of the Corporate Debtor was classified as Non-Performing Asset (NPA) on 31.03.2017 by original lender as per the guidelines of Reserve Bank of India pertaining to asset classification.

9. The Financial Creditor submits that to recover the outstanding dues of Credit Facility-1, the original lender initiated the proceedings and issued a demand notice on **27.02.2018** under 13(2) of SARFAESI act on both Corporate Debtor and the Personal Guarantor.

10. The Financial Creditor submits that the outstanding dues of Credit Facility-II was recalled by the Financial Creditor through letter dated 18.06.2018.

11. The Financial creditor emphasizes on the Deed of Personal Guarantee signed on 31.12.2016 between parties. Personal Guarantor Mr. Usha Rajendra Agrawal in accordance with the deed of personal guarantee and as an obligor under the loan agreements is liable to pay Financial Creditor for the any kind of default if arises. Thus, the Personal Guarantor according to the deed of Personal Guarantee is liable to pay Financial Creditor for the Default of Corporate Debtor, which is the outstanding dues.
12. The Financial Creditor submits that in the subsequent stage by vide letter dated 19.07.2018, Mr. Usha Rajendra Agrawal in his capacity as Director of M/s Nicomet Industries Limited, acknowledged the outstanding dues of the Corporate Debtor.
13. The Financial Creditor submits that this Hon'ble Adjudicating Authority, Mumbai vide dated 14.12 2018, in C.P. (I.B.) No. 619 of 2018 admitted the application u/s 9 of Insolvency and Bankruptcy Code, 2016 ("**Code**") filed by the Petitioner/Financial Creditor against the Corporate Debtor and Corporate Insolvency Resolution Process ("**CIRP**") initiated against the Corporate Debtor. Further, on 16.12.2020 in I.A No.713 of 2020 in C.P(IB) No.619 of 2018, the Hon'ble Tribunal passed an Order for Liquidation of the Corporate Debtor.
14. The Petitioner/Financial Creditor has already initiated Recovery proceedings against the Corporate Debtor and its Guarantors before the Hon'ble Debt Recovery Tribunal-I (OA No.312 of 2019) on 27.07.2018. The matter is pending before the Tribunal.
15. The Corporate Debtor on 19.07.2018 has made an OTS proposal to the Financial Creditor for settlement of Bank dues which is in default by Mr. Usha R. Agrawal on behalf of Nicomet Industries Ltd.

16. By letter dated 15.06.2022 the Financial Creditor submits that they have issued a demand notice in Form-B under Rule 7(1) of this code. Despite receipt of statutory Demand Notice, the Personal Guarantor has failed and neglected to reply to or comply with the requisition contained therein.
17. The Financial Creditor submits that after compliance of pre-requisite Demand Notice to Personal Guarantor before initiation of Insolvency Process against the Personal Guarantor, the Personal Guarantor failed to discharge his liabilities within a statutory period of 14 days from the date of Demand Notice. Therefore, the Petitioner/Financial Creditor compelled to file present Petition before this Hon'ble Tribunal in accordance with the provisions of Section 95 of the Code read with the Rule 7 of the Code with the intention to initiate insolvency resolution process against the Respondent/Personal Guarantor to meet the end of justice.
18. This Bench had appointed the **Mr. Kailash Shah**, Insolvency Resolution Professional ("RP") *vide* Order dated 26.09.2023 in the captioned petition and had thereby directed the Applicant to prepare and file a Report *u/s.* 99 of the IBC, 2016. The RP *via* his Report was taken on record by a virtue of I.A.5595 of 2023 dated 08.12.2023, after due examination of the application, documents filed along with the application, in addition to the requirements as mandated under of Section 99 of the IBC, 2016, has recommended to "*..Admitting the present application filed by JM Financial Asset Reconstruction Company Limited through the RP in CP(IB)/971(MB) of 2022 and thereafter declare Moratorium under Section 101 of the code and issue Public Notice for inviting the claims under section 102 of the code and may pass such orders as this Hon'ble NCLT deem necessary.*

Findings

19. We have heard the learned counsel for both the parties and have duly perused the documents on record.
20. We find that even after granting various opportunities to the Respondent/Personal Guarantor herein, he chose not to appear and file on record Affidavit in Reply to the Report of the Resolution Professional. The present Company Petition against the Respondent/Personal Guarantor, is thus, proceeded *ex- parte* vide order dated 16.04.2024. It is revealed from the records that this bench vide order dated 16.02.2024 had directed Petitioner to serve notice upon the Respondent/Personal Guarantor by way of Paper Publication. Despite service of Notice, Personal Guarantor chose not to appear before this Bench and file reply in the present matter.
21. This Court holds that the service upon the Respondent/Personal Guarantor is sufficient in the eyes of law.
22. The Deed of Guarantee was executed on 31.12.2016 and was invoked pursuant to the Guarantee Invocation Notice under Section 13(2) of the Securitisation and Resolution of Financial Assets & Enforcement of Security Interest Act, 2002 to the Personal Guarantor dated 27.02.2018. Subsequently, another Demand notice was served upon the Personal Guarantor on 15.06.2022 under Rule 7(1) of the Insolvency and Bankruptcy (Application to the Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors), Rules, 2019.
23. We observe that Part III of Form-C (Application) annexed to the Petition highlights the significance of the Date of Default in determining the limitation period and the Applicant has explicitly stated 15.06.2022, as the date on which the debt fell due. However, exhibit 7 of this Petition i.e. Demand Notice under Section 13(2) of the Securitisation and Resolution of Financial Assets & Enforcement of Security Interest Act, 2002 states that the Guarantee

was invoked on 27.02.2018.

24. The Financial Creditor has contended that the computation of limitation would begin afresh from 15.06.2022, i.e. from the date of the second Demand Notice, which would imply that the present Petition is not barred by limitation. Per contra, it is the Personal Guarantor's case that since the Guarantee was invoked vide Guarantee Invocation Notice dated 27.02.2018, the computation of limitation would begin from 27.02.2018 and would last until 27.02.2021, which would result in the present Petition being barred by limitation.
25. We find that the Corporate Debtor on 19.07.2018 has made an One Time Proposal to the Financial Creditor for settlement of Bank dues which is in default by Mr. Usha R. Agrawal on behalf of Nicomet Industries Ltd. It is trite law that One Time Proposal (OTS) is an Acknowledgement of Debt under Section 18 of Limitation Act. Even if we were to establish 19.07.2018 as the fresh date from which the limitation period commences, the same will expire on 19.07.2021 and the Petition will still remain outside the bounds of the Limitation.
26. The Petitioner/Financial Creditor has already initiated Recovery proceedings against the Corporate Debtor and its Guarantors before the Hon'ble Debt Recovery Tribunal, Mumbai (OA No.312 of 2019) on 27.07. 2018.The matter is pending before the Tribunal.
27. The Counsel for the Financial Creditor has brought to our notice that there is a pending proceeding before the learned DRT Presiding Officer, Mumbai, being **Original Application No. OA No. 312/2019**, *inter alia*, seeking of recovery in respect of the outstanding amount. The matter is pending before the Hon'ble Debt Recovery Tribunal. We take note that the matter is still pending before the learned Presiding Officer, DRT.

28. In light of the above, we have no hesitation to hold that present Petition is barred by limitation on the following grounds:

- a) The issuance of the subsequent Demand Notice dated 15.06.2022 does not constitute a fresh cause of action and hence the limitation cannot begin afresh from 15.06.2022. The limitation period had begun from 27.02.2018 and ended on 27.02.2021.
- b) We note that the Corporate Debtor on 19.07.2018 has made an One Time Proposal to the Financial Creditor for settlement of Bank dues which is in default by Mr. Usha R. Agrawal on behalf of Nicomet Industries Ltd. Even if we were to establish 19.07.2018 as the fresh date from which the limitation period commences and the same will expires on 19.07.2021, the Petition will still remain outside the bounds of the Limitation.
- c) The Financial Creditor has already initiated Recovery proceedings against the Corporate Debtor and its Guarantors before the Hon'ble Debt Recovery Tribunal, Mumbai (OA No.319 of 2019).The matter is pending before the Tribunal. In addition, the National Company Law Appellate Tribunal ("NCLAT") in the case of *Gulabchand Jain V/s Punjab National Bank and Anr.* passed in Company Appeal (AT) (Insolvency) No. 416 of 2020, has held as under:

"The benefit of Section 14 can be availed by a person when the proceedings which was filed before the earlier forum suffers from lack of jurisdiction or other similar cause. In the present case, it cannot be said that the proceedings before the DRT were suffering from any lack of jurisdiction. Hence, submission of counsel of the Respondent for extension of limitation on the basis of Section 14 cannot be accepted."

Hence, such an exclusion in terms of Section 14 of the Limitation Act, 1963 cannot be granted in the present case as the proceeding is pending before the DRT do not suffer from any lack of jurisdiction.

29. Moreover, in light of the fact that the date of default falls during the Covid-19 period, we have to take cognizance of the Hon'ble Supreme Court's decision in Suo Motu Writ Petition No. 03 of 2020. In the Present matter, the date of One Time Proposal for settlement is 19.07.2018, therefore the limitation period comes to an end on 19.07.2021. In view of the aforesaid decision of the Hon'ble Supreme Court iterated herein above, the Applicant was entitled to a further period of 90 days, to file the Petition. The said period of 90 days comes to an end on 31.05.2022, however the date of e-filing the Petition is 25.08.2022. Hence, the present Petition is not maintainable as it is absolutely barred by limitation.
30. The I.A.5595 of 2023 is filed by the Resolution Professional for taking on record the report filed under 99(1) of this code in the matter of Personal Guarantor and the said report is duly considered at the time of disposing of the main Company Petition. In that view of the matter, we need to pass any order in the said Application; accordingly, the same is disposed of.
31. Accordingly, C.P. (IB) No. 971/MB/2022 is hereby **dismissed and disposed of.**

Sd/-
Prabhat Kumar
Member (Technical)

Sd/-
Justice V. G. Bisht
Member (Judicial)