

**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI, COURT-III**

**IA-24/2024
And
IB-103(ND)2023**

Under Section 95(1) of the Insolvency and Bankruptcy Code, 2016 read with Rule 7 of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors), Rules 2019.

IN THE MATTER OF:

SMALL INDUSTRIES DEVELOPMENT BANK OF INDIA

Having its registered office at:

New Delhi Specialised Asset Recovery Branch

2nd Floor, Atma Ram House, 1,

Tolstory Marg, New Delhi-110001.

Through Resolution Professional

Mr. Harish Taneja

IBBI Registration No.: IBBI/IPA-002/IP-N-00088/2017-2018/10229

..... Applicant/Financial Creditor

VERSUS

SMT. SHAILENDRA UPADHYAY

R/o 18, Central Drive, OLF, Chattarpur Farms,

Mehrauli, New Delhi-110068.

Also at: 31, Kalindi Puram, near Khandari

Bypass crossing, Mau Road, Agra-282005.

..... Respondent/ Personal Guarantor

Order delivered On: 02.05.2024

CORAM:

SHRI BACHU VENKAT BALARAM DAS, HON'BLE MEMBER (JUDICIAL)

SHRI ATUL CHATURVEDI, HON'BLE MEMBER (TECHNICAL)

PRESENT:

For RP : Mr. Aman Raj Singh, Ms. Parul, Advs. along with
Mr. Harish Taneja, RP

For Guarantor : Mr. Aman Chaudhary, Mr. Jasmeet S. Chadha, Adv.

ORDER

PER: BACHU VENKAT BALARAM DAS, MEMBER (JUDICIAL)

1. The present application for Insolvency Resolution Process for the Personal Guarantor to Corporate debtor has been filed by Small Industries Development Bank of India (“**Applicant**”) through Mr. Harish Taneja, Resolution Professional on 17.01.2023 under Section 95 of the Insolvency and Bankruptcy Code, 2016 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 against Smt. Shailendra Upadhyay (“**Personal Guarantor**”). for the total outstanding default amount of Rs. 4,76,36,564/-.
2. The Applicant had granted a total loan of Rs. 14,20,00,000/- to M/s. IAP Company Private Limited ("Corporate Debtor"/"Principal Borrower") during the period from 07.03.2011 till 31.03.2017. The Personal Guarantor has executed personal guarantee in favour of the Applicant Financial Creditor for only the loan amount of INR 470 Lacs (Rs. 4,70,00,000/-).
3. In respect of the facilities provided herein above, the Applicant, in order to secure the repayment obligations of the Corporate Debtor, executed amongst other documents, the deed of Guarantee dated 23.02.2011 for Term Loan of INR 100 Lacs, deed of guarantee dated 26.11.2012 for Term Loan of INR 170 Lacs, deed of Guarantee dated 11.12.2013 for Term Loan of INR 100 Lakh & deed of Guarantee dated 19.09.2014 for Term Loan of INR 100 Lacs for securing the loan.
4. An application under Section 9 has been filed by Takkshill Enterprises (“Operational Creditor”) bearing CP No. IB-446/(ND)/2017 on 28.12.2017 for initiating the Corporate Insolvency Resolution Process in relation to the Corporate Debtor, M/s. IAP Company Private Limited before this Adjudicating Authority which has been admitted vide order dated 28.02.2018. Mr. Dharmendra Kumar having IBBI No. IBBI/IPA-003/IP-N000112/2017-2018/11264 has been appointed as Interim Resolution Professional. Presently, the Corporate Debtor is under liquidation.

5. The Applicant has sent the letter of invocation of personal guarantee to the Personal Guarantor vide letter dated 29.01.2021.

Para 3 of Deed of Personal Guarantee dated 23.02.2011, 26.11.2012, 11.12.2013 & 19.09.2014 is reproduced hereunder for reference:

“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 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.”

6. The Applicant served a Demand Notice in Form-B dated 28.07.2022 under section 95(4)(b) of the Insolvency and Bankruptcy Code, 2016 read with rule 7(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 on the Personal Guarantor demanding the payment of the unpaid debt in default amounting to outstanding amount of INR 470 Lacs.
7. The Respondent despite having been served with the Demand Notice did not pay the outstanding amount. Even after regular follow up, the repayment of loan has not been made by the Personal Guarantor, even the reply of the Demand Notice is not yet received by the Applicant from the Personal Guarantor of the Corporate Debtor.
8. This Adjudicating Authority vide order dated 05.12.2023 appointed Mr. Harish Taneja (having IBBI Registration: IBBI/IPA-002/IP-N00088/2017-18/10229) as the Resolution Professional and the Resolution Professional was directed to submit a report in terms of Section 99 IBC.
9. Accordingly, the Resolution Professional has filed a report and a copy of the said report has been duly served on the Personal Guarantor by all modes.
10. The Resolution Professional vide IA-24/2024 dated 22.12.2023 has filed its report before this Adjudicating Authority.

The Recommendations of the Resolution Professional are as under:

“15. In pursuance of section 99(6) of the Insolvency and Bankruptcy Code, 2016, the Resolution Professional has examined the application and ascertained that the applicant/ creditor satisfied the requirements as set out in sub-section 4 of section 95 of the Code as the application is accompanied with details and documents relating to :-

a. the debts of INR 470 Lacs owned by the principal borrower/personal guarantor to the applicant creditor in compliance to section 95(4)(a) of the Code.

b. the failure by the debtor to pay the debt of INR 470 Lacs within a period of fourteen days of the service of the notice of demand in Form B dated 28.07.2022 in compliance to section 95(4)(b) of the Code.

c. There is no evidence of repayment of debt of INR 470 Lacs in compliance of section 95(4)(c) of the Code.

d. The present application is filed in Form C along with fee of Rs. 2000/- in compliance of section 95(6) read with Rule 7(2) of Insolvency & Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019.

16. Further it has been observed that the Guarantee provided by the personal guarantor in favor of the applicant is Irrevocable Guarantee as mentioned in clause 16 of the Personal Guarantee.

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*22. On the basis of the facts, reasons and grounds of belief as stated above, It is therefore, most respectfully prayed to this Hon’ble Tribunal that the application for Insolvency Resolution Process for the Personal Guarantor to Corporate debtor filed by SIDBI (“Applicant”) under section 95 of the Insolvency and Bankruptcy Code, 2016 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 against Smt. Shailendra Upadhyay (“Personal Guarantor”) may be **ADMITTED** considering the reasons recorded as above by the Hon’ble Adjudicating Authority or may pass such other orders as the tribunal may deems fit.”*

11. In Response to the Report filed by the Resolution Professional, the Personal Guarantor filed its reply and raised the following objections: -
- i. The Petition is not maintainable as the guarantee furnished by the Respondent stands withdrawn w.e.f. 29.06.2015.*
 - ii. The Report is not maintainable as RP has not complied with Section 99 (2) of the Code.*
 - iii. The Petition is not maintainable as it is barred by Limitation.*
 - iv. No arrears due in respect of the alleged claim amount.*
 - v. NeSL Report highlights it is yet to be authenticated.*
 - vi. Respondent is a Senior Citizen and a Pensioner.*
12. The Ld. Counsel for the Resolution Professional dealing with the objections raised by the Personal Guarantor made the following submissions: -
- i. Mere pleadings without evidentiary support cannot be relied as there is no indication/proof of withdrawal of guarantee executed by the Personal Guarantor.*
 - ii. Claim filed by creditor is not barred by limitation as guarantee agreement as per Clause 15 of the Deed of Guarantee, the guarantee agreement continues to be in full force till the debt owed to the Petitioner is cleared.*
 - iii. One time settlement (OTS) proposal falls within the definition of acknowledgment of debt under Section 18 of the Limitation Act, 1963.*
13. We have heard the submissions made by Ld. Counsel for the Applicant, Resolution Professional and Personal Guarantor and perused the report.
14. The Personal Guarantor has contended that the Personal Guarantee was withdrawn with effect from 29.06.2015. However, no document has been placed on record to prove the contention of the Personal Guarantor. Therefore, we are unable to accept this contention.

15. Ld. Counsel for the Personal Guarantor raised the objection that the present petition is barred by limitation. The Resolution Professional in its submission stated the guarantee in the present case was continuing in nature as evident from clause 15 of Deed of Guarantee which is reproduced below: -

Clause 15. "This Guarantee shall not be wholly or partially satisfied or exhausted by any payments made to or settled with SIDBI by the Borrower and shall be valid and binding on the Guarantors and operative until repayment in full of all moneys due to SIDBI under the said agreement."

The Resolution Professional has also relied upon the judgment of Hon'ble Supreme Court in the case of **Syndicate Bank vs Channaveerappa Beleri & Ors.** reported in (2006) 11 SCC 506 wherein it was held Guarantor's liability depends on terms of his contract. It is well settled that the loan agreement with the Principal Borrower and the Bank as well as Deed of Guarantee between the Bank and the Guarantor are two different transactions and the Guarantor's liability has to be read from the Deed of Guarantee.

In view of the above and considering the clause in the Deed of Guarantee, the guarantee agreement continues to be in full force till the debt owed to the Applicant is cleared. Therefore, the objection of Personal Guarantor that the present petition is barred by limitation cannot be relied upon.

16. The Personal Guarantor has brought to our notice an E-mail dated 08.02.2024 addressed to Mr. Vipul Upadhyay sent by the Resolution Professional of Corporate Debtor, M/s. IAP Company Pvt. Ltd. in CP-IB-446/(ND)/2017 containing the details of disbursement to various lenders under Liquidation which has been filed along with the Reply Affidavit that an amount of Rs. 4,37,94,414/- has been received by SIDBI, the Applicant here in during the Liquidation Proceedings of the Corporate Debtor. However, there is nothing on record to show that the said amount has been received. Further, the Personal Guarantor has stated that there is a One Time Settlement ("**OTS**") proposal between the parties which is under consideration. The Ld. Counsel for the Applicant submitted that the

Personal Guarantor has acknowledged the debt by way of offering a OTS. Be that as it may, from the records, it is established that the Personal Guarantor are on default. Hence, CIRP ought to be admitted against the Personal Guarantor.

17. On a perusal of the report, we find that the Resolution Professional has given reasonable opportunity following the principle of Natural Justice and has taken into consideration the various documents including copy of the Information Utility Report evidencing record of Default; Copy of the Letter of Intent dated 09.02.2011, 23.11.2012, 09.12.2013 and 11.09.2014; along with Deed of Guarantee dated 23.02.2011, 26.11.2012, 11.12.2013 and 19.09.2014; Copy of the Letter of Invocation of Guarantee dated 29.01.2021; and Copy of the Statutory - Demand Notice in Form B dated 28.07.2022 and has come to a conclusion that Insolvency Proceedings be initiated against the Personal Guarantor.
18. We are satisfied with the grounds/reasons given by the Resolution Professional for the initiation of the Insolvency process against the Personal Guarantor. The Objections raised by the Personal Guarantor are not substantiated with adequate evidence and are not tenable. Having regard to the facts and circumstances of the case, we are of the view that the personal insolvency ought to be initiated against the Personal Guarantor.
19. The Insolvency process is initiated against the Respondent - Personal Guarantor. The moratorium begun on the date of admission of the application shall cease to have effect at the end of the period of 180 days from the date of this order. During the moratorium period, the following provisions shall be in effect:
 - i. Any pending legal action or proceeding 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; and
 - iii. The Debtor shall not transfer, alienate, encumber, or dispose of any of his assets or his legal rights or beneficial interest therein;
 - iv. 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.

20. The Resolution Professional is directed to cause a public notice to be published within 7 days of uploading of this order on the website of this Adjudicating Authority for inviting claims from all Creditors, who shall register their claims as provided under Section 103 of IBC within 21 days of such issuance. The notice shall contain the necessary information as provided under Section 102(2) of IBC.
21. The publication of the notice shall be made in newspapers, one in English and the other in Vernacular which have wide circulation in the state.
22. The Resolution Professional in exercise of the powers conferred under Section 104 of IBC shall prepare a list of creditors within 30 days from the date of the notice. The Debtor shall prepare a repayment plan in consultation with the Resolution Professional as provided under Section 105 of IBC which shall include the provisions for payment of fee to the Resolution Professional. The Resolution Professional shall submit the repayment plan along with his report on the plan to this Adjudicating Authority within a period of 21 days from the last date of submission of claims as provided under Section 106 of IBC.
23. In case the Resolution Professional recommends that a meeting of the creditors is not required to be summoned, he shall record the reasons thereof. If the Resolution Professional is of the opinion that the meeting of the creditors should be summoned, he shall specify the details as provided under Section 106(3) of IBC. The date of the 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, for which at least 14 days' notice to the creditors (as per the list prepared) shall be issued by all relevant/feasible modes. Such notice must contain the details as provided under the provisions of Section 107 of IBC.
24. The meeting of the Creditors shall be conducted in accordance with Sections 108, 109, 110 & 111 of IBC. The Resolution Professional shall prepare a report of the meeting of the creditors on the repayment plan with

all details as provided under Section 112 of IBC and submit the same to this Adjudicating Authority, copies of which shall be provided to the debtor and the creditors.

25. The Applicant is directed to deposit Rs. 2,00,000/- to the bank account of Resolution Professional within one week, towards his fees. This shall be subjected to the rules and regulations under the provisions of IBC, 2016. It is made clear that the Resolution Professional shall perform his functions and duties in compliance with the Code of Conduct provided under IBC, 2016.
26. In view of the above IA-24/2024 along with IB-103(ND)/2023 stands **disposed of.**

-Sd-
(ATUL CHATURVEDI)
MEMBER (TECHNICAL)

-Sd-
(BACHU VENKAT BALARAM DAS)
MEMBER (JUDICIAL)