

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
PRINCIPAL BENCH, NEW DELHI**

**CP (IB) No.146/(PB)/2022**

**&**

**I.A. No. 2829 of 2022**

**IN THE MATTER OF:**

**Bank of Baroda**

**Applicant/Financial Creditor**

**Versus**

**Anil Kumar Nigam**

**Respondent /Personal Guarantor**

**Order under Section 95(1) of Insolvency & Bankruptcy Code, 2016**

**Order Pronounced On: 23.04.2024**

**CORAM:**

**CHIEF JUSTICE (RETD.) RAMALINGAM SUDHAKAR  
HON'BLE PRESIDENT**

**SHRI AVINASH K. SRIVASTAVA  
HON'BLE MEMBER (TECHNICAL)**

**Appearances:**

For the Applicant: Vinod Chaurasia, Advocate

For the Respondent: Ankit Sharma, Advocate

For the RP: Sajjan Kumar Dokania, RP

## **ORDER**

The present application has been filed by Bank of Baroda (hereinafter referred to as *Applicant/Financial Creditor* on 30.01.2022 u/s 95(1) of the Insolvency and Bankruptcy Code, 2016 (*The Code*) r/w Rule 7 of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution for Personal Guarantors to Corporate Debtors) Rules, 2019 (the *PG Rules*) against Mr. Anil Kumar Nigam (hereinafter referred to as *Respondent/Personal Guarantor* who stood as Personal Guarantor (PG) to a Company called M/s NIIL Infrastructure Pvt. Ltd, the *Corporate Debtor* (CD).

### **PARTIES**

1. The Financial Creditor (FC) herein is banking company constituted under the Banking Companies (Acquisition and Transfer of Undertaking Act, 1970) having its head office at Baroda Bhawan, R.C. Dutt Road, Alkapuri, Vadodra-390007. The FC is represented through Mr. Bhavesh D Modi, Chief Manager, Bank of Baroda, Stressed Asset Management Branch, Ahmedabad. Copy of letter of authorization has been annexed as **Annexure A-13** of the application.

2. The CD is an entity engaged in providing infrastructure construction services and Mr. Anil Kumar Nigam s/o Late Sh. Shyam Sundar Nigam r/o E-4/216, Arera Colony, Bhopal, 462016, M.P. stood as the personal guarantor (PG) to the CD.

### **BRIEF FACTS**

1. It is stated that the CD though its directors availed Credit Facility in the form of Term Loan amounting to INR 40 crore which was secured by the PG vide General Form of Guarantee dated 01.08.2014. Copy of General Form of Guarantee dated 01.08.2014 is annexed as **Annexure A-11** of the application

2. On account of non-payment of the debt by the CD, the account of CD was classified as NPA on 31.10.2016 as per the RBI Norms. Pursuant to this, the FC initiated action under the provisions of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short

**“SARFAESI ACT, 2002)** against the PG and accordingly issued notice on 26.03.2018 u/s 13(2) of the said Act (**Annexure A-5** of the Application). Further a Loan Recall Notice was issued by the FC to all the guarantors including the PG through its advocate dated 01.10.2019 calling for the payment of the entire outstanding amount of INR 42,53,84,673/- (collectively) (**Annexure A-6** of the Application). Further, on 28.10.2020, the demand notice in terms of Rule 7(1) of the *PG Rules* was sent to the Respondent/Personal Guarantor (**Annexure A-7** of the Application). However it is stated that no reply was received within the statutory period of 14 days.

3. In the meanwhile, the CD was admitted into Corporate Insolvency Resolution Process (CIRP) by this Adjudicating Authority vide order dated 28.03.2018 and subsequently a Resolution Plan was approved vide order dated 26.11.2020. Copy of Admission Order dated 28.03.2018 and the plan approval order dated 26.11.2020 is annexed as **Annexure A-9** of the Application.

4. In view of the default in payment of debt by CD, the FC invoked the guarantees of the Guarantors as they being jointly and severally liable for the outstanding debts of the CD and it is stated that as on 22.09.2021 the total outstanding amounts to 54,49,27,812/- (including normal and penal interest). In view of the same the FC has filed the present petition u/s 95 of the Code. Limited Notice was issued to PG vide order dated 25.02.2022. RP was appointed vide order dated 09.05.2022 and was directed to file report in terms of Section 99 of the Code vide order dated 13.05.2022.

5. The RP filed the report on 07.06.2022 (I.A. 2829 of 2022). In the report it is stated that, in compliance of the provisions of Code and the requirement of principles of natural justice, the RP undertook the following:

- a. The RP sent a notice/letter to the PG and his advocates vide email dated 26.05.2022 and reminders on 31.05.2022 and 01.06.2022 and the PG was to submit the response till 02.06.2022, however the PG requested for extension of time for submitting the reply which was extended by the RP till 04.06.2022. However, the RP did not received any reply from the PG. Copies of notice/email dated 26.05.2022, 31.05.2022 and 01.06.2022 has been annexed as **Annexure D** of the Report (I.A.2829 of 2022) The RP also sent a notice to the FC. The FC replied on 31.05.2022 stating that an amount of 2,24,21,037/- has been received from the Resolution Applicant of the CD, which has already been adjusted in the present claim.
- b. The RP in its report has submitted that he did not received any evidence of repayment of the debt claimed in Section 95 petition from the PG, and that the FC has clarified that no money has been deposited in the account after the issuance of demand notice dated 28.10.2020.
- c. Further, it is stated in the report that the RP has not received any document where the Contract of Guarantee dated 01.08.2014 was cancelled by the parties and there is no instance of cancellation of contract of guarantee, and the same is still in force.
- d. Further there is no order of a court or tribunal whereby the contract of guarantee agreement dated 01.08.2014 is set aside or cancelled. Further the RP has submitted that the PG does not qualify for a fresh start.
- e. In view of the same, the RP has recommended that the Section 95 petition filed by the FC should be admitted.

A common reply to the Application filed under section 95 of the Code as well as report filed by RP under section 99 of the Code was filed by the PG denying the averments on grounds mentioned below:

- a. Application filed under Section 95 of the Code is barred by Limitation.
- b. That CIRP of the CD has already been completed and thus the present debt stands exhausted and is not due and payable.
- c. That the outstanding amount as stated (Rs. 54,49,27,812) needs to be reconciled.

6. We have heard the parties and perused the documents/pleadings. The first objection raised by the respondent PG is that the application filed by the FC under Section 95 of the Code is barred by limitation. In this regard it is pertinent to mention that Section 238 A of the Code applies to the entire provisions of Code and as such Article 137 of the Limitation Act, 1963 also applies to application filed under Section 95 of the Code. In light of said Article 137, the application has to be necessarily filed within a period of 3 years from the date of cause of action. In the present matter, the account of the CD was classified as NPA on 31.10.2016 and within the period of 3 years a notice dated 26.03.2018 u/s 13(2) of the SARFAESI ACT, 2002 was served upon the PG and a Loan Recall Notice dated 01.10.2019 was also sent. It is pertinent to mention herein that the CD acknowledged its debt vide Letter of Acknowledgement dated 12.07.2017 which is annexed as **Annexure A-4** of the Application. The liability of guarantor is co-extensive with that of the principal borrower. Any acknowledgment by the principal borrower is binding on the guarantor in terms of *Clause 5 of the Deed of Guarantee dated 01.08.2014*. In this context it is relevant to quote Hon'ble Supreme Court in ***Laxmi Pat Surana v. Union Bank of India, (2021) 8 SCC 481***:

**44.** *In the present case, NCLT as well as NCLAT have adverted to the acknowledgments by the principal borrower as well as the corporate guarantor-corporate debtor after declaration of NPA from time to time and lastly on 8-12-2018. The fact that acknowledgment within the limitation period was only by the principal borrower and not the guarantor, would not absolve the guarantor of its liability flowing from the letter of guarantee and memorandum of mortgage. The liability of the guarantor being coextensive with the principal borrower under Section 128 of the Contract Act, it triggers the moment principal borrower commits default in paying the acknowledged debt. This is a legal fiction. Such liability of the guarantor would flow from the guarantee deed and memorandum of mortgage, unless it expressly provides to the contrary.*

7. Further, It has been settled by a catena of judgments that Section 18 of the limitation act is applicable to IBC proceedings. In such a scenario once an acknowledgement is done (before the expiry of 3 years), a fresh cause of action arises, thereby extending the limitation period. Applying the said principle to facts of the present case, it is clear that the acknowledgment dated 12.07.2017 was done before the expiry of 3 years, which extended the limitation period. The limitation to file the present application was to end within the Covid period i.e. 11.07.2020. Further, in view of the Hon'ble Supreme Court judgment in *Suo Moto Writ Petition (C) No.3 of 2020 In Re: Cognizance for Extension of Limitation*, the application filed u/s 95 of the code is well within the limitation period.

8. The second plea raised by the PG in the present case is that since the CIRP of the CD has already been done that a resolution plan has also been approved by the Adjudicating Authority, therefore the sum alleged to be due stands exhausted as on date and thus there is no debt outstanding as on date to be in default. It is noteworthy that a sum of INR 2,24,21,037/- has been received by the FC from the Successful Resolution Applicant (***in short "SRA"***) of the CD as admitted by the FC in the email dated 31.05.2022 sent to the RP. This amount is stated to be already adjusted in the amount claimed in the present application. Here we find that the PG entered into a continuing guarantee with the FC (Paras 1-4 of the Deed of Guarantee dated 01.08.2014) which still subsists in the eyes of law, and that the RP has not received any document/order of court from either of parties which

shows that the Deed of Guarantee has been cancelled or set aside or revoked by any of the parties. Further it is noteworthy to mention that the approval of resolution plan does not absolve the liability of the personal guarantor. In this context it is relevant to quote Hon'ble Supreme Court in ***Lalit Kumar Jain v. Union of India, (2021) 9 SCC 321***:

*125. In view of the above discussion, it is held that approval of a resolution plan does not ipso facto discharge a personal guarantor (of a corporate debtor) of her or his liabilities under the contract of guarantee. As held by this Court, the release or discharge of a principal borrower from the debt owed by it to its creditor, by an involuntary process i.e. by operation of law, or due to liquidation or insolvency proceeding, does not absolve the surety/guarantor of his or her liability, which arises out of an independent contract.*

Thus in view of the same, the stand taken by the PG is of no avail, since his liability to pay subsists.

9. The third plea raised by the PG is that the outstanding amount as stated (Rs. 54,49,27,812) needs to be reconciled as it is not correct. In light of the plea raised by the PG, it has already been mentioned in the report submitted by the RP that final claim will be calculated and will also be verified by the RP after the submission of claims by the FC after admitting the PG into Insolvency Resolution Process.

10. Thus in view of report submitted by the RP, it is clear that the RP has sent letters, notices informing the PG regarding the present application to which the RP has not received any reply. Further the report of the RP makes it clear that he did not receive any evidence of repayment of the debt claimed in Section 95 application from the PG and that the FC also confirmed that it did not receive any money from the PG post issuance of Demand Notice dated 28.10.2020 and further there is no document on record which shows that the Deed of Guarantee dated 01.08.2014 stands cancelled.

11. Further as per the judgment of Hon'ble Supreme Court dated 09.11.2023 in ***Dilip B Jiwrajka Vs. Union of India and Ors. Writ Petition (Civil) No. 1281/2021***, the role of Adjudicating Authority is to assess the various materials produced in both the applications and report of the RP to come to an independent assessment. The Adjudicating Authority is also bound to give a fair opportunity to the Personal Guarantors to give their views. We have complied with the above requirements and direction of the Hon'ble Supreme Court. All the details relevant for the adjudication is also captured in the application and the report and we find no reason to discredit the report on the plea raised by the Respondent.

12. Having regard to the conspectus of the present case (as discussed above) we are inclined to **ADMIT** the present application bearing No. **(IB)-146(PB)/2022** under the Provisions of Section 100(1) of IBC, 2016 for commencing Insolvency Resolution Process of the Personal Guarantor.

**Accordingly, the present petition bearing No. (IB)-146(PB)/2022 stands admitted under Section 100 of IBC, 2016.**

13. The RP is directed to proceed further in accordance with the provisions of the Code. Interim moratorium which came into effect in terms of Section 96(1)(a) on the date of filing the application shall cease to have effect. A fresh moratorium in terms of Section 101 of the Code shall commence as applicable. RP is directed to take all further steps in accordance with Part III, Chapter III of the Code.

14. The RP is directed to issue public notice on our behalf in terms of Section 102 and to invite the claims from the creditors at large. For this purpose he will be paid a consolidated amount of Rs. 2,00,000 by the Bank of Baroda to meet the cost arising out of issuing public notice and inviting claims etc.



15. Copy of this admission order along with the report of RP be made available to Bank of Baroda in terms of Section 100(3) of the Code, by the RP.

16. Copy of this order be also sent to IBBI by the Registry.

**Sd/-**  
**(RAMALINGAM SUDHAKAR)**  
**PRESIDENT**

**Sd/-**  
**(AVINASH K. SRIVASTAVA)**  
**MEMBER(TECHNICAL)**