

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

IB-510(ND)/2021

And

IA-5035/2021

IN THE MATTER OF IB-510(ND)/2021:

Under Section 95(1) 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.

M/s. BANK OF BARODA

Having its Branch Office at:

Stressed Asset Management Branch,
4th Floor, Rajendra Bhawan,
Rajendra Place, New Delhi-110008

..... Applicant/Financial Creditor

Versus

MR. SAURABH RATHI

24/1A, Mohan Cooperative Industrial Estate,
Mathura Road, New Delhi-110044

Also at

26A, Sadhna Enclave,
Malviya Nagar, Delhi-110017

..... Respondent/ Personal Guarantor

AND IN THE MATTER OF IA-5035/2021:

Report Under Section 99 (1) of the Insolvency & Bankruptcy Code, 2016

Mr. Anil Matta

(Now Replaced with Mr. Shaikh Nafis Anjum)

IBBI Registration: **IBBI/IPA-003/IPA-ICAI-N-00211/2018-2019/12363**

..... Applicant

Order Pronounced On: 05.07.2024

CORAM:

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

PRESENT:

For RP : Ms. Anju Bhushan Gupta, Mr. Aditya Geol, Mr. Sanyam Gupta, Advs.

For Respondent : Mr. Sumesh Dhawan, Ms. Vatsala Kak, Mr. Shaurya Shyam, Advs.

ORDER

PER: BACHU VENKAT BALARAM DAS, MEMBER (JUDICIAL)

1. The present application has been filed by M/s. Bank of Baroda, the Applicant under Section 95(1) of the Insolvency and Bankruptcy Code, 2016 read with Rule 7(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Personal Insolvency Resolution Process for Personal Guarantors to Corporate Debtors), Rules 2019 for initiation of Insolvency Resolution Process against Mr. Saurabh Rathi, the Personal Guarantor to the Corporate Debtor, M/s. RGTL Industries Ltd. for the total debt amount of Rs. 20,10,27,358/- (Rupees Twenty Crore Ten Lakhs Twenty Seven Thousand Three Hundred Fifty Eight only) as on 10.04.2019.
2. It is stated that the Corporate Debtor, M/s RGTL Industries Ltd. is an entity engaged in the business of manufacturing of steel and Iron and Mr. Saurabh Rathi is the Director of the Corporate Debtor as well as Personal Guarantor in the financial facilities amounting to Rs. 15,00,00,000/- (Rupees Fifteen Crores Only), availed by the Corporate Debtor.
3. The Applicant/Financial Creditor along with SBI and Bank of Maharashtra executed a Working Capital Consortium Agreement dated 29.09.2015 with the Borrower and subsequently the Applicant agreed to sanction and disburse the following Working Capital Facility:

S.No.	Bank Name	Cash Credit Amount (INR)	Sanction Date
1.	State Bank of India	55,00,00,000	06.04.2015

2.	Bank of Maharashtra	50,00,00,000	17.08.2015
3.	Vijaya Bank (Bank of Baroda)	15,00,00,000	23.09.2015

4. The Respondent stood as one of the Personal Guarantor for the financial facilities provided to the Borrower and further executed Deed of Guarantee and other relevant documents thereby undertaking to guarantee the repayment of all the amounts payable by the Borrower/Corporate Debtor and the due performance of the terms and conditions of the Working Capital Consortium Agreement as guarantor. Further, the sanctioned Working Capital facility was secured by creation of:
- i. Hypothecation of Stock and Book Debts of Borrower on 29.09.2015;
 - ii. Equitable Mortgage over residual factory land and building of the Borrower located at SP 293-296, Phase 4 Chopanki, Bhiwadi Industrial Area Rajathan-301019
 - iii. Hypothecation of other fixed assets of the Borrower dated 29.09.2015.
5. It was agreed by the Borrower that the payments shall be made according to the repayment schedules of the respective Working Capital Consortium Agreement. But the Borrower operation and conduct of the accounts in respect of the above-mentioned financial assistance/credit facilities became irregular. Despite of the repeated requests, the Borrower failed to regularize the Account. Consequently, the debt of the Borrower was declared NPA on 31.03.2017.
6. The Applicant sent a notice under section 13(2) of the SARFAESI Act, 2002 to the Borrower and the Personal Guarantor under the Deed of Guarantee for the loan facility of the Borrower, for the repayment of the due and pending amount on 19.07.2017.
7. The Applicant also initiated the proceedings under Section 19 of The Recovery of Debts Due to Banks and Financial Institutions Act, 1993 against the Borrower and Respondent/Personal Guarantors towards the recovery of the financial facilities advanced by the Applicant and the same is pending adjudication on the due amount of the Applicant.

- 8.** An Application under Section 9 of the Code bearing **CP-IB/431(ND)/2019** filed by M/s. Shree Balaji Refractories Company, the Operational Creditor for initiating CIRP against the Corporate Debtor, i.e., M/s. RGTL Industries Limited has been admitted by this Adjudicating Authority vide Order dated 10.04. 2019. Subsequently, Liquidation proceedings under Section 33 of the Code were initiated against the Corporate Debtor by this Adjudicating Authority vide Order dated 09.11.2020. The Corporate Insolvency Resolution Proceedings are pending before this Adjudicating Authority against the Principal Borrower, i.e., M/s. RGTL Industries Limited. Therefore, in terms of Section 60 of the Code, the jurisdiction for filing the insolvency application against Personal Guarantor of the Principal Borrower also rest with this Adjudicating Authority.
- 9.** The Applicant issued Demand Notice (Form B) on 03.09.2020 in respect of the unpaid debt as per the provisions of the Code which was duly delivered upon the Respondent's Address. There has been reply from the Respondent to the Demand Notice on 22.09.2020 to Form-B. The non-payment of the Working Capital Facility by the Borrower and its Guarantors including the Respondent, of the repayment of amounts owed to the Applicant has resulted in default, and the total amount outstanding towards the Respondent being a financial debt, thereby making the applicant a Financial Creditor under the provisions of the Code.
- 10.** The Applicant in Part-III of Form-C has submitted the Record of Default filed with the Information Utility recording the debt committed by the Corporate Debtor, M/s. RGTL Industries Limited has been annexed with the application.
- 11.** The Applicant in Part IV of the Form-C has proposed the name of Mr. Anil Matta to act as the Resolution Professional in the Insolvency Resolution Process of Mr. Saurabh Rathi.
- 12.** This Adjudicating Authority vide order dated 08.10.2021 appointed Mr. Anil Matta (**IBBI/IPA-001/IP-P00223/2017-2018/10422**) as the Resolution Professional in the Insolvency Resolution Process of Mr. Saurabh Rathi and was directed to submit a report within the stipulated time as envisaged under the provisions of Section 99 of the Code.

Subsequently, this Adjudicating Authority on an application by the Financial Creditor/Bank of Baroda/Applicant replaced the Resolution Professional with Mr. Shaikh Nafis Anjum vide Order dated 20.03.2024. The replaced Resolution Professional adopted the Report U/s 99 of the Code filed by erstwhile Resolution Professional.

- 13.** The Resolution Professional submitted that in accordance with Section 99(2) of the Code, he requested the Personal Guarantor to furnish any document proving repayment of the debt claimed, as unpaid, by the Creditor in its application dated 01.09.2021 within 7 days from the date of receipt of Letter and E-mail dated 12.10.2021. However, no response has been received by the Resolution Professional from the Personal Guarantor.
- 14.** The Resolution Professional vide IA-5035/2021 dated 20.10.2021 has filed its report before this Adjudicating Authority and an advance copy of the said report has been duly served on the Personal Guarantor via E-mail dated 25.10.2021. After detailed examination of the application along with the supporting documents thereof, the Resolution Professional recommended that the Application filed by the creditor, viz., Bank of Baroda, under Section 95(1) of the Code vide **IB-510/ND/2021** be **admitted** under Section 100(1) of the Code and the Insolvency Resolution Process be commenced against the Personal Guarantor, viz., Mr. Saurabh Rathi.
- 15.** In response to the Report filed by the Resolution Professional, the Personal Guarantor filed its reply and raised the following objections on the maintainability of the Petition: -
 - i. Application under Section 95 of the Code for initiating Personal Insolvency Process is time barred as the guarantee was invoked on 19.07.2017 when the Personal Guarantor was served Demand Notice u/s 13(2) of the SARFAESI Act.
 - ii. Alleged Debt as sought by the Applicant Bank is not an absolute and crystallized amount. The debt being sought is amount already taken care of by the Scheme of Arrangement accepted in the CIRP proceedings of

Borrower and thus same cannot be demanded again as it is already settled and dealt with.

iii. Non-compliance of Section 99(6) and 99(9) of the Code by the Resolution Professional while preparing the Report.

16.Ld. Counsel for the Resolution Professional negated the Objections raised by the Personal Guarantors and have submitted that: -

i. The date of Default/NPA date is 31.03.2017 as stated in Application u/s 95 of the Code and Demand Notice u/s 13(2) of SARFAESI Act dated 19.07.2017 is admitted by the Personal Guarantor in its Reply dated 22.09.2020. Therefore, Limitation for filing the Application U/s 95 of the Code expires on 31.03.2020 or 19.07.2020. The Guarantee Deed was invoked vide Demand Notice dated 03.09.2020 which was received by the Personal Guarantor on 09.09.2020 as the date of invocation of Guarantee. The Present Application being filed on 01.09.2021 is within the period of limitation.

ii. The Financial Creditor has not recovered any due amount from either the Guarantor or the RGTL Industries Ltd. Further PG has also failed to produce any evidence of repayment of the debt due. The liability of the Guarantor and that of the principal debtor are co-extensive and that the Financial Creditor has the right to proceed against both the Guarantor and Corporate Debtor parallelly till the time outstanding due amount is recovered.

iii. The Application has been recommended for acceptance by the Resolution Professional after considering all the documents placed before him. As the Personal Guarantor failed to appear before the Resolution Professional and failed to provide any proof of repayment of debt and whereas the Financial Creditor was able to satisfy the Resolution Professional, thus satisfying the requirements u/s 95(4) of the Code.

17. We have heard the submissions made by Ld. Counsel for the Applicant, Resolution Professional and Personal Guarantor and perused the report.

18. The Ld. Counsel for the Personal Guarantor has raised an objection that the present application is time barred and liable to be dismissed. It is an admitted fact that the Date of Default/NPA date is 31.03.2017 as stated in the Application u/s 95 of the Code and Demand Notice U/s 13(2) of the

SARFAESI Act was sent to the Personal Guarantor, for the repayment of the due and pending amount on 19.07.2017.

The Ld. Counsel for the Resolution Professional submitted that the Guarantee Deed dated 29.09.2015 was invoked vide Demand Notice dated 03.09.2020 which was received on 09.09.2020 by the Personal Guarantor. Thus, the debt became due and payable on 09.09.2020 in terms of Clause 20 of Guarantee Deed which is reproduced as below: -

“The guarantor agrees that the loans hereby guaranteed shall be payable to the lenders on the lenders serving the guarantor with a notice Requiring payment of the amount and such notice shall be deemed to have Been served on the guarantor either by actual delivery thereof to the Guarantor or by dispatch thereof by registered post or certificate of Posting to the guarantor address herein given or and address in India to Which the guarantor may by written intimation given to the lenders Request the communication addressed to the guarantor be dispatched Any notice dispatched by the lenders by registered post or certificate of Posting to the address to which it is required to be dispatched under this Clause shall be deemed to have been duly served on the guarantor four Days after the date of posting thereof and shall be sufficient if signed by Any officer of the lenders and in proving such service it shall be sufficient If it is established that the envelope containing such notice Communication or demand was properly addressed and put into the post.”

The Hon’ble NCLAT in **Pooja Ramesh Singh v. SBI**, Company Appeal (AT) (Insolvency) No. 329 of 2023 wherein it was held as follows:

“There can be default by the Principal Borrower and the Guarantor on the same date or date of default for both may be different depending on the terms of contract of guarantee. 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.”

“The Corporate Guarantee Deed dated 17.05.2019 is on demand guarantee deed and the default shall arise on the part of the Guarantor only when demand notice is issued as contemplated in the Deed of Guarantee.”

The Hon’ble Supreme Court in **Syndicate Bank vs. Channaveerappa Beleri & Ors.**, reported in (2006) 11 SCC 506 categorically held that a guarantor’s liability depends upon the terms of his contract and that the limitation begins to run when the demand is made against the guarantor, and he commits breach by not complying with the demand.

The ratio of the decision in the judgment of Hon’ble NCLAT in the case of **Pooja Ramesh v. SBI** and as held by the Hon’ble Supreme Court in the case of **Syndicate Bank v. Channaveerappa Beleri & Ors.**, makes it clear that the date of default will be the date on which the demand was made. In the instance case, the Demand Notice (Form B) was issued on 03.09.2020 and the present Application U/s 95 of the Code was filed on 01.09.2021. We, therefore, have no hesitation to hold the present application is within limitation.

It may not be out of place to mention that the Applicant/Resolution Professional has made an alternative submission, that even if the date of NPA is taken as Date of Default. In view of the Order passed by the Hon’ble Supreme Court in **Re: Cognizance for Extension of Limitation**, SMW(C) No. 3 of 2020, the present Application can be said to be within limitation. Since, we have already held that present application is within limitation. We are not expressing any view on this argument.

19. The Ld. Counsel for the Personal Guarantor has also raised an objection that the debt of Rs. 20,10,27,358/- (Rupees Twenty Crore Ten Lakh Twenty Seven Thousand Three Hundred Fifty Eight) is the claim amount which the Applicant has already sought in the liquidation proceedings of the Principal Borrower and has already been dealt in the Scheme approved by the Applicant Bank. Hence, the debt amount is not crystallized in terms of the Code and is liable rejected at outset.

20. On the contrary, the Ld. Counsel for the Resolution Professional submitted that the Financial Creditor has not recovered any due amount from either

the Guarantor or the RGTL Industries Ltd. and no evidence of repayment of debt due has been filed by the Personal Guarantor. He relied upon Section 128 of The Indian Contract Act and submitted that the liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.

He relied upon the judgment of the Hon'ble Supreme Court in the case of **Laxmi Pat Surana v. Union Bank of India and Anr.**, reported in (2021) 8 SCC 481 held as follows: -

“19. Indubitably, a right or cause of action would ensue to the lender (financial creditor) to proceed against the principal borrower, as well as the guarantor in equal measure in case they commit default in repayment of the amount of debt acting jointly and severally. It would still be a case of default committed by the guarantor itself, if and when the principal borrower fails to discharge his obligation in respect of amount of debt. For, the obligation of the guarantor is coextensive and coterminous with that of the principal borrower to defray the debt, as predicated in Section 128 of the Contract Act.

As a consequence of such default, the status of the guarantor metamorphoses into a debtor or a corporate debtor if it happens to be a corporate person, within the meaning of Section 3(8) of the Code. For, as aforesaid, expression “default” has also been defined in Section 3(12) of the 18 Code to mean non-payment of debt when whole or any part or instalment of the amount of debt has become due or payable and is not paid by the debtor or the corporate debtor, as the case may be.”

Therefore, in light of the judgment of the Hon'ble Supreme Court and as per the Guarantee Deed dated 29.09.2015 executed by the Personal Guarantor. We agree with the submission made by the Ld. Counsel for the Resolution Professional that the liability of the Guarantor and that of the principal debtor are co-extensive and that the Financial Creditor has the right to proceed against both the Guarantor and Corporate Debtor parallelly till the time outstanding due amount is recovered.

- 21.** 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 and has come to a conclusion that the Personal Insolvency Resolution Process be initiated against the Personal Guarantor as the application filed by the Creditor before this Hon'ble Tribunal is within the limitation period provided under the Limitation Act, 1963.
- 22.** The Objections raised by the Personal Guarantor are not substantiated with adequate evidence and are not tenable. We are satisfied with the grounds/reasons given by the Resolution Professional for the initiation of the Personal Insolvency Resolution Process against the Personal Guarantor. Having regard to the facts and circumstances of the case, we are of the view that the Personal Insolvency Resolution Process ought to be initiated against the Personal Guarantor. Hence, the Main Petition **IB-510(ND)/2021** is **admitted** and the Personal Insolvency Resolution Process is initiated against the Respondent - Personal Guarantor.
- 23.** Resultantly, the moratorium begins on the date of this Order. i.e., Date of Admission of the application and shall cease to have effect at the end of the period of 180 days from the date of this order, as provided under Section 101 of IBC, 2016. 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.
- 24.** The Resolution Professional is directed to cause a public notice to be published within 7 days of uploading 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.

25. 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.

26. 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.

27. 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.

28. 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.

29. 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.

30. In view of the above **IA-5035/2021** stands **disposed of**.

-SD-
(ATUL CHATURVEDI)
MEMBER (TECHNICAL)

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