

**IN THE NATIONAL COMPANY LAW TRIBUNAL**

**KOLKATA BENCH, COURT-II**

**Company Petition (IB) No.384/KB/2021**

**An application 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]**

**In the matter of:**

**State Bank of India**

**...FINANCIAL CREDITOR**

**Versus**

**Smt. Anshu Saraf**

**...RESPONDENT/PERSONAL GUARANTOR**

**Coram**

**Smt. Bidisha Banerjee, Member (Judicial)**

**Shri. D. Arvind, Member (Technical)**

**Date of Pronouncement:02/05/2024**

**Appearance (via Hybrid Mode)**

Debashish chakraborty, Adv

] For the Financial Creditor

Snehasish Chakraborty, Adv

Ankan Rai, Adv

] For the personal Guarantor

Saurav Jain, Adv

] For the RP

**ORDER**

**Per: Bidisha Banerjee, Member (Judicial)**

1. The court is convened through hybrid mode.
2. Learned counsel appearing for the parties were heard in extenso.
3. The application has been preferred to seek following relief:  
The state bank of India being Financial Creditor as per section 5(7) of the Insolvency and Bankruptcy Code, 2016 (“code”) requests that the Tribunal 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 Personal Guarantor to Corporate Debtor) Rules, 2019 to initiate insolvency Resolution process in respect of the Personal Guarantor of **Rhythm Overseas Trade Limited, Smt. Anshu Saraf.**
4. The CP (IB) No. 384/KB/2021 has been filed under section 95 of the IBC, 2016 by state Bank of India for Initiating Insolvency Resolution Process of **Smt. Anshu Saraf.** , the Personal Guarantor to Corporate Debtor.
5. **Facts in a Nutshell:-**
  - 5.1 The Corporate Debtor is Rhythm Overseas Trade Limited in CP (IB) No. 230/KB/2019 under section 7 of the IBC filed by state bank of India against Rhythm Overseas Trade Limited. The CIRP was initiated in CP (IB) No. 230/KB/2019 on 7<sup>th</sup> November 2019. Smt. Anshu Saraf is the Personal Guarantor of Rhythm Overseas Trade Limited.
  - 5.2 This Adjudicating Authority was pleased to pass interim order moratorium against **Smt. Anshu Saraf** in CP (IB) No. 384/KB/2021 on 09/05/2022.
  - 5.3 Mr. Niraj Kumar Surekha was appointed as RP to file its report under section 99(7) of the IBC , 2016.
6. The Contentions are noted.
7. As per the Petition the date of NPA is 15.12.2013.

8. A Report under section 99 of the code has been prepared and filed by the RP. The Financial Creditor has informed RP that due to inadvertent typing mistake, there has been wrong calculation of the interest and thereby claim amount. As per the communication and document received from SBI, the claim amount as on 06.01.2021 should be Rs 1,45,06,51498.58 instead of Rs 1,44,39,21,465.27 ( as claimed in section 95 application). An extract of debt after correction in interest calculation sheet is given as under.

Account	Principal	Interest up to 06.01.2021	Adjustment (net)*	Amount Outstanding as on 06.01.2021
37561915198	16,68,80,000.80	21,53,46,833.78	-	38,22,26,834.58
34801410696	52,71,52,560.00	41,55,43,877.44	-	94,26,96,437.44
37562054033	6,43,68,000.00	6,96,43,638.56	(82,83,412.00)	12,57,28,226.56
<b>TOTAL</b>				<b>1,45,06,51,498.58</b>

\*Credit= 3,09,87,000.00; Debit=2,27,03,588.00

9. The RP has examined the following:-

- a. The copies of the rectified interest calculation sheets as provided by SBI by Email dated 17.05.2022 and 25.05.2022.
- b. Demand notice served by Financial Creditor on Personal Guarantor in Form B- 06.07.2021, invoking Guarantee.

10. The RP has sent a letter dated 11.05.2022 and 17.05.2022 enquiring under section 99(2) of IBC , with regard to payment if any made to Financial Creditor. (**Annexure "F" of the report**). The RP received reply from the Personal Guarantor i.e Smt. Anshu Saraf vide email dated 20.05.2022 whereas the Personal Guarantor has made the following submission.

- a. That the Petition filed by state bank of India is barred by limitation as the Petition has been filed after 3 Years.
  - b. Also there is no acknowledgement of debt by the guarantor or ROTL within the period of 3 years from the date of NPA and therefore the Petitioner is not maintainable.
  - c. OTS proposal of 16 crore is under active consideration of SBI.
  - d. SBI has recovered an amount of Rs 5,44,00,000/- out of the total outstanding amount of Rs 144,39,21465.27 by selling of the two mortgaged properties as under:
  - e. Property sold to Yashika Reality private limited for Rs 2,31,00,000/- on 10.11.2016
  - f. Property sold to Tiger Hill Hotels and properties limited for Rs 3,13,00,000/- on 15.10.2018.
11. The State Bank of India in CP (IB) No.386/KB/2021 of personal insolvency matter of guarantor Smt. Nikarika Devi Dinodiya, of ROTL has informed RP that OTS proposal has been rejected. Again in CP (IB) No. 385/KB/2021 State Bank of India has informed RP that recovery amount of Rs 3,09,87,000/- (after TDS) from sale of property to Tiger Hill Hotels And Properties Ltd. was duly adjusted on 31.10.2018 against the outstanding amount. Further state bank of India has informed that recovery amount of Rs 2,31,00,000/- from sale of property to Yashika Reality Private Limited did not pertain to the Corporate Debtor account instead it belonged to R.Piyarelal International Private Limited.
12. RP on perusal of the interest calculation sheet, Observed that a sum of Rs 3,09,87,000/- and a sum of Rs 2,27,03,588/- was credited and debited respectively into two different accounts. RP sought clarification from the state bank of India and also the same clarification was sought in the personal insolvency matter of another personal guarantor Mr. Ramesh Kumar Agarwal, of ROTL in CP (IB) No. 385/KB/2021. State Bank Of India has informed RP that due to inadvertent typing mistake, there has been wrong calculations of interest and thereby claim amount.

As per the document provided by state bank of India the claim amount as on 06.01.2021 should be Rs 1,45,06,51,498.58 instead of Rs 1,44,39,21,465,.27 (as claimed by section 95 application). State Bank Of India further informed that post write off of the balances, the balances were transferred into new AUCA accounts Viz 34801410696, 37561915198 & 37562054033.

13. Accepting the application against **Smt. Anshu Saraf** filed by the financial creditor, i.e., State Bank of India to initiate insolvency resolution process, on the grounds that: -

- I. The application is found to be satisfying all the ingredients of Section 95 of IBC.
- II. No evidence of repayment of the debt claimed in Section 95 Petition from **Smt. Anshu Saraf**, has been received.

#### **14. Approval of Liquidation order:**

14.1 This Hon'ble Adjudicating Authority in CP (IB) No. 230/KB/2018, admitted Corporate Debtor into CIRP Process on 7<sup>th</sup> November 2019. Thereafter in the year 2021, on finding no feasible Resolution plan for the Corporate Debtor an order of Liquidation of Corporate Debtor has been passed vide order dated 20.02.2020.

#### **15. Analysis and Finding**

**15.1** We have heard the learned counsel and perused the record.

**15.2** The main issue before this Adjudicating Authority is whether the Petition is barred by limitation.

Before dealing with the first issue, we would like to place reliance on the judgment of the Hon'ble NCLAT in **Pooja Ramesh Singh v. State Bank of India**

*“24. The scheme of I&B Code clearly indicate that both the Principal Borrower and the Guarantor become liable to pay the amount when the default is committed. When default is committed by the Principal Borrower the amount becomes due not only against the Principal*

*Borrower but also against the Corporate Guarantor, which is the scheme of the I&B Code. When we read with as is delineated by Section 3(11) of the Code, debt becomes due both on Principal Borrower and the Guarantor, as noted above. The definition of default under Section 3(12) in addition to expression 'due' occurring in Section 3(11) uses two additional expressions i.e "payable" and "is not paid by the debtor or corporate debtor". The expression "is not paid by the debtor" has to be given some meaning. As laid down by the Hon'ble Supreme Court in "**Syndicate Bank vs. Channaveerappa Beleri & Ors.**" (supra), a guarantor's liability depends on terms of his contract. 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 Financial Creditor invoked contract of guarantee by serving demand notice on Personal Guarantor in form B dated 06.07.2021 and this application was filed on 23.12.2023 before this Adjudicating Authority. Hence it is filed within the period of 3 years from the date of invoking guarantee.

We rely on the judgement of **Hon'ble NCLAT in Pooja Ramesh Singh vs SBI Company Appeal (AT)(insolvency) No. 329 of 2023**, wherein Appellant Tribunal has held that the date of Notice to guarantor for repayment has to be treated as notice of default on receipt of such notice the date of default is established. In this case, considering the above judgement of Hon'ble NCLAT this application has been filed within the 3 years from date of the notice and hence not barred by limitation.

**15.3** Accordingly, it is **admitted invoking power u/s. 100 of IBC.**

16. We have noted that Hon'ble Supreme Court in the judgment of Dilip B.Jiwrajka V/s Union of India & Ors. In WP (civil) No. 1281 of 2021 dated 09.11.2023 has upheld the Constitutional Validity of the Sections

94 to 100 and the propositions that can be culled out from the Judgments inter-alia are as follows: -

- I. No judicial adjudication is involved at the stages envisaged in Sections 95 to Section 99 of the IBC;
- II. The Resolution Professional appointed under Section 97 serves a facilitative role of collating all the facts relevant to the examination of the application for the commencement of the insolvency resolution process which has been preferred under Section 94 or Section 95. The report to be submitted to the adjudicatory authority is recommendatory in nature on whether to accept or reject the application;
- III. No adjudicatory function of Adjudicating Authority is contemplated at the admission stage. To read in such a requirement at that stage would be to rewrite the statute which is impermissible in the exercise of judicial review;
- IV. The resolution professional may exercise the powers vested under Section 99(4) of the IBC for the purpose of examining the application for insolvency resolution and ; **CP/IB/384/KB/2021** to seek information on matters relevant to the application in order to facilitate the submission of the report recommending the acceptance or rejection of the application;
- V. There is no violation of natural justice under Section 95 to Section 100 of the IBC as the debtor is not deprived of an opportunity to participate in the process of the examination of the application by the resolution professional;
- VI. No judicial determination takes place until the adjudicating authority decides under Section 100 whether to accept or reject the application. The report of the resolution professional is only recommendatory in nature and hence does not bind the adjudicatory authority when it exercises its jurisdiction under Section 100;

- VII. The adjudicatory authority must observe the principles of natural justice when it exercises jurisdiction under Section 100 to determine whether to accept or reject the application; **CP/IB/384/KB/2021**.
- VIII. The purpose of the interim moratorium under Section 96 is to protect the debtor from further legal proceedings; and
- IX. The provisions of Section 95 to Section 100 of the IBC are not unconstitutional as they do not violate Article 14 and Article 21 of the Constitution.
17. Accordingly, the provisions of Section 100 will come into play.
- I. When the application is admitted under Section 100, a moratorium shall commence in relation to all the debts and shall cease to have effect at the end of the period of one hundred and eighty days beginning with the date of admission of the application or on the date the Adjudicating Authority passes an order on the repayment plan under Section 114, whichever is earlier.
- II. During the moratorium period: -
- a. Any pending legal action or proceeding in respect of any debt shall be deemed to have been stayed;
- b. The creditors shall not transfer, alienate, encumber or dispose of any of his assets or his legal rights or beneficial interest therein;
- III. Where an order admitting the application under Section 96 has been made in relation to a firm, the moratorium under Sub-Section (1) shall operate against all the partners of the firm.
- 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.
- 18. List the main CP (IB) No. 384/KB/2021 for progress report on 21.06.2024.**



19. The Registry is directed to send e-mail copies of the order forthwith to the Board and all the parties and their Ld. Counsel for information and for taking necessary steps.
  
20. Certified copy of this order may be issued, if applied for, upon compliance of all requisite formalities.

**D. Arvind**  
**Member (Technical)**

**Bidisha Banerjee**  
**Member (Judicial)**

**Signed this, on the 2<sup>nd</sup> day of May 2024**

**NKS(LRA)**