

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

C.P. (IB) No. 1288/MB/2022

Under Section **95(1)** of the Insolvency & Bankruptcy Code, 2016 *r/w* Rule **3(1) (a)** 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

State Bank of India

... Financial Creditor

v/s.

Mr.Jayant Kasliwal

... Personal Guarantor

Order delivered on: 18.04.2024

Coram:

Sh.Prabhat Kumar
Hon'ble Member (Technical)

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

Appearances:

For the Financial Creditor :

Adv Pulkitesh Dutt a/w Adv.Shruti
Singhi

For the Respondent :

Akshat Agrawal a/w Adv.Rajat Lohia
for Personal Guarantor

PER: Justice V.G Bisht,(Retd).

ORDER

1. The present petition is filed *under*. 95 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "IBC, 2016") *r/w*. Rule 7(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 by **State Bank Of India through Mr.Ashutosh Agarwala** ("Financial Creditor / Applicant") for the purpose of initiating insolvency resolution process against **Mr. Jayant Kasliwal** ("Personal Guarantor / Respondent") for recovery of total debt amounting to INR 147,65,11,293 as on 28.02.2022 and the date on which the debt was due on 27.11.2015. The Date on which Default occurred, as per Part-III of the present petition, is 16.01.2017(The date when the notice period under the recall notice dated 09.01.2017 expired without payment being made by the guarantor). Default also occurred when demand notice dated 31.01.2022 under Rule 7(1) of this code.
2. The Principal amount in Default is of Rs.48.73 Crores as on 28.02.2022.
3. The interim-Moratorium was granted vide order dated 09.10.2023 under Section 96(1) (a) of the Insolvency and Bankruptcy Code,2016 has commenced on the date of filing of this Application by the Financial Creditor and will cease to have effect on the date of admission.

Submission on Behalf of the Financial Creditor/Petitioner

4. The Financial Creditor herein submits that the Personal Guarantor/Respondent had availed various fund-based credit facilities from the Petitioner. The Personal Guarantor executed a deed of Guarantee dated 31.01.2005, guaranteeing due payment and discharge of the dues towards the aforementioned credit facilities due and payable to the Petitioner.
5. The Financial Creditor submits that on account of the failure of the Corporate Debtor to repay the outstanding amount, the Petitioner issued a recall notice dated 9.01.2017, calling upon the Respondent to pay to the Petitioner the outstanding dues. Further, a

demand notice was issued on 31st January 2022 to the Respondent, in terms of section 95(4)(b) of the code. However, the Respondent has failed to clear the said outstanding debt till date, despite being in receipt of the said demand notice.

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

- i.** Agreement of Loan -cum-Hypothecation
- ii.** Memorandum of creation of charge for overall limit.
- iii.** Deed of Guarantee
- iv.** Supplementary Deed of Guarantee

7. The Financial Creditor *viz.* Applicant herein issued Demand Notice under section in Form-B under Rule 7(1) of the Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019, on 31.01.2022, demanding forthwith payments of its dues. However, the Personal Guarantor per the Financial Creditor herein, have failed to act thereupon Hence, the present petition.

8. We note that this Bench had appointed the **Mr. Ashutosh Agarwala**, Insolvency Resolution Professional (“RP”) *vide* Order *dated* 09.10.2023 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 *dated* 23.11.2023, 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 “*..accept the application filed under Section 95 of the Insolvency and Bankruptcy Code, 2016, for initiation of Insolvency Resolution Process in respect of Mr.Jayant Kasliwal and:*
a.)*upon persual of the documents attached along with the petition filed by the applicant , the Personal Guarantor has committed a default of the Guarantees* **b.)** *The Applicant submits that the present application meets the necessary requirements of the Code for its approval by this Hon'ble Tribunal and the reason for the same have been submitted in the Report (Exhibit A)”.*

9. In Compliance with the provisions of section 99(2) read with section 95 of the code, the RP called upon the Personal Guarantor *vide* letter dated 25.10.2023 to prove

repayment of the debt claimed as unpaid by the Financial Creditor in the aforementioned Application. The Personal Guarantor responded to the RP vide his letter dated 04.11.2023 but failed to furnish any proof of repayment of the Debt, as required under section 99(2) of the code. Therefore, the Personal Guarantor has failed to provide necessary information/evidence in relation to repayment of the debt.

- 10.** That this bench Vide order dated 20.02.2024 had directed the Financial Creditor to place on record the relevant extracts of the books of the accounts of the Corporate Debtor to plead that the Petition is in Limitation. This Bench had allowed the Financial Creditor to place on record the relevant evidences for the purpose of Limitation. The Financial creditor by virtue of the additional document has described the accounts which forms the basis of Petition which is within the Limitation. On the Additional document produced by the Petitioner which brings on record the annual report of Phoenix Impex Pvt.Ltd for Financial Year 2017-2018;2018-2019.

Affidavit of Reply/Objections under this code filed by the Respondent/Personal Guarantor:

- 11.** The Personal Guarantor denies all the averments made in the Company Petition (IB) and contends that it should be dismissed at the very instance.
- 12.** The Personal Guarantor contends that the amount claimed by the Petitioner is prima facie wrong and incorrect. The bare perusal of Form-C and documents annexed therewith makes it crystal clear that the Petitioner has failed to establish as to how and by what virtue does the amount of alleged debt be clubbed together and maintainability of the Petition under this code.
- 13.** The Personal Guarantor submits that the demand notice which they have received from the Financial Creditor is not maintainable.
- 14.** The Personal Guarantor submits that the alleged guarantee deed upon which the proceedings have been instituted is not admissible in evidence as the same is insufficiently stamped and barred by law of Limitation. The Bank is not entitled to claim any relief on the basis of the alleged guarantee deed as the same cannot be read in evidence. Therefore, the claim of Bank is liable to be rejected on this ground alone.

- 15.** The Personal Guarantor further submits that the documents filed by the Bank along with the Petition cannot be admitted in evidence. It is submitted that the documents evidencing guarantee are to be in a valid written document and further has to contain the details of the facts of grant of various advance facility granted to the principal borrower. The documents containing and reciting bargain between the parties as engraved and written are required to be registered and further is to be properly executed and thereafter be renewed so as to bring within the ambit of laws of Limitation. Only thereafter, with invocation notices as prescribed under the law, the recovery of debt from Personal Guarantor can be invoked. Since the document evidencing are incongruity, therefore, the very institution of insolvency resolution process of Personal Guarantor is void-ab-initio. Further the same cannot be proceeded ahead, and therefore the bank cannot claim any relief on the basis of the alleged documents as the same cannot be read in evidence. Therefore, the claim of bank is liable to be rejected on this ground.
- 16.** The Personal Guarantor submits that the limitation to recover the alleged amount is 3 years from the date it had become due. The alleged amount had become due on the very date when the same was credited in the account of Principal Borrower. The deed of Guarantee as relied by the bank dates to 17.09.2008. The bank thereafter recalled the financial assistance on 09.01.2017 and the petition was filed on the year 2022.
- 17.** The amount of debt claimed in demand notice is incorrect as there exists no amount due or payable on the part of Mr. Jayant Kasliwal.
- 18.** The Personal Guarantor submits that they have never received the demand notice in the registered envelope and therefore the service of said demand notice was ineffective and improper.
- 19.** The Personal Guarantor submits that the statement of account placed on record is not legal statement. By mere statement of the nature produced on record liability cannot be fastened on personal guarantor. It is further submitted by the Personal Guarantor that no person can be charged with liability merely on the basis of entries in the book of accounts. There has to be concrete evidence to prove payment of the money which may appear in the books of accounts, in order to show that person may be charged with liability. Hence mere entries from bank's books of accounts or

mere copies thereof are not sufficient to charge a person with liability.

- 20.** The Personal Guarantor submits they have issued objections to Invocation of the Personal Guarantee to the notice of Mr. Ashutosh Agarwala, Insolvency Professional and thereafter raised all the objections, existence of debt under this code and sought for the documents based on which the Guarantee has been allegedly invoked.
- 21.** The Personal Guarantor submits that as per RP report dated 10.11.2023, the Insolvency Professional admitted receipt of the written objections dated 04.11.2023 but had miserably failed to rebut the same and supply the documents based on which the guarantee has been allegedly invoked. This petition therefore cannot be admitted without the supplying the basic document of such invocation.
- 22.** We are of the considered view that the captioned petition is complete in all aspects, and the present case is therefore fit for admission. Ordered accordingly.

Findings:

- 23.** We have heard the learned counsel(s) for both the parties and have duly perused the documents on record.
- 24.** Demand notice was served upon the Personal Guarantor on 31.01.2022 under Rule 7(1) of this code.
- 25.** That this bench Vide order dated 20.02.2024 have directed the Financial Creditor to place on record the relevant extracts of the books of the accounts of the Corporate Debtor to plead that the Petition is in Limitation. This Bench has allowed the Financial Creditor to place on record the relevant evidences for the purpose of Limitation. The Financial creditor by the virtue of the additional document has described the accounts which forms the basis of Petition which is within the Limitation. On the Additional document produced by the Petitioner which brings on record the annual report of Phoenix Impex Pvt.Ltd for Financial Year 2017-2018;2018-2019.
- 26.** The Resolution Professional has filed his report on 10.11.2023, recommending the admission of the Petition under Section 95 of the Code, 2016. The Resolution

Professional in his report its clear that the grounds for admission of this instant Petition are that the Personal Guarantor stood as a guarantor to the loans availed by the Corporate Debtor and Corporate Debtor failed to repay the same and since the Personal Guarantor has admitted the debt and non-existence of dispute.

27. We are of the considered view that the captioned petition is complete in all aspects, and the present case is therefore fit for admission. Ordered accordingly. In terms of the above, the C.P. (IB) No. 1288/MB/2022 filed under Section 95 of the IBC, 2016 is hereby **Admitted** and the Insolvency Resolution Process stands initiated against Mr. Jayant Kasliwal viz. the Respondent herein. We hereby direct as hereinafter:

I. Initiate Insolvency Resolution Process against the Respondent/Personal Guarantor and moratorium in relation to all the debts is declared, from today *i.e.* date of admission of the application, and shall cease to have effect at the end of the period of 180 days, or this Tribunal passes order on the repayment plan under Section 114 whichever is earlier as provided under Sec 101 of IBC, 2016. During the moratorium period,

- a.* Any pending legal action or proceeding in respect of any debt shall be deemed to have been stayed, and
- b.* The creditors of the debtor shall not initiate any legal action or proceedings in respect of any debt; and
- c.* The debtor shall not transfer, alienate, encumber, or dispose of any of his assets or his legal rights or beneficial interest therein:
- d.* 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.

II. The Resolution Professional Mr. Ashutosh Agarwala, is appointed as a Resolution Professional, having Registration No. IBBI/IPA-001/IP-P021123/2018-19/11901, having address at D-1005, Ashok Towers, Dr. S.S. Rao, Parel, Mumbai-City, Maharashtra-400012; Email- ashutosh.agarwala@gmail.com is directed to cause a public notice published on behalf of the Adjudicating Authority within 7 days of passing this Order on

the website of the NCLT Mumbai Bench, inviting claims from all Creditors, within 21 days of such issue The notice under Sub Section (1) of Section 102(2) shall include: -

- a.* details of the order admitting the application;
- b.* particulars of the resolution professional with whom the claims are to be registered; and
- c.* the last date for submission of claims.

III. The publication of notice shall be made in two newspapers, one in English and other in Vernacular, which have wide circulation in the State where the Corporate Debtor and Personal Guarantor resides. The Resolution Professional shall furnish two spare copies of the notice to the Registry for the record.

IV. The Resolution Professional, in exercise of the powers conferred under Section 104, shall prepare a list of creditors on the basis of:

- a.* the information disclosed in the application filed by the debtor under Sections 94 or 95. as the case may be, and
- b.* claims received by the Resolution Professional under Section 102 within 30 days from the date of the notice. The debtor shall prepare a repayment plan under Section 105, in consultation with the Resolution Professional, containing a proposal to the Creditors for restructuring of his debts or affairs.

V. The repayment plan may authorize or require the Resolution Professional to:

- a.* carry on the debtor, business or trade on his behalf or in his name: or
- b.* realize the assets of the debtor; or
- c.* administers or dispose of any funds of the debtor.

VI. The repayment plan shall include the following, namely;

- a.* justification for preparation of such repayment plan and reasons based on which the creditors may agree upon the plan;

b. provision for payment of fee to the Resolution Professional;

c. such other matters as may be specified.

VII. The Resolution Professional shall submit the repayment plan along with his report on the plan to this Authority within a period of 21 days from the last date of submission of claims, as provided under Section 106.

VIII. In case the Resolution Professional recommends that a meeting of the creditors is not required to be called, he shall record the reasons thereof. If the Resolution Professional is of the opinion that a meeting of the creditors should be summoned, he shall specify the details as provided under Section 106(3) of IBC, 2016. The date of 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, 2016, for which at least 14 days' notice to the creditors (as per the list prepared) shall be issued by all modes. Such notice must contain the details as provided under the provisions of Section 107 of IBC, 2016.

IX. The meeting of the creditors shall be conducted in accordance with Sections 108, 109, 110 & 111 of IBC, 2016. The Resolution Professional shall prepare a report of the meeting of the creditors on repayment plan with all details as provided under Section 112 of IBC, 2016 and submit the same to this Tribunal, copies of which shall be provided to the Debtor and the Creditors. It is made clear that the Resolution Professional shall perform his functions and duties in compliance with the Code of Conduct provided under Section 208 of IBC, 2016.

X. The Resolution Professional shall submit his periodic reports before this Tribunal every 30 days.

XI. The Applicant is directed to deposit **INR 2,00,000/-** (Indian Rupees Two lakhs) to the bank account of the Resolution Professional within one week, towards his fees. This shall be subjected to the rules and regulations under the provisions of the Insolvency and Bankruptcy Code, 2016.

XII. The Registry is directed to communicate a copy of order, report and application within seven working days and upload the same on the website immediately after the pronouncement of order.

Sd/-

SH. PRABHAT KUMAR
MEMBER (TECHNICAL)

Sd/-

JUSTICE V. G. BISHT
MEMBER (JUDICIAL)