

**NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH
COURT HALL NO: II**

Hearing Through: VC and Physical (Hybrid) Mode

CORAM: SHRI. RAJEEV BHARDWAJ, HON'BLE MEMBER (J)

CORAM: SHRI. SANJAY PURI, - HON'BLE MEMBER (T)

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL,
HYDERABAD BENCH, HELD ON 30.04.2024 AT 10:30 AM

TRANSFER PETITION NO.	
COMPANY PETITION/APPLICATION NO.	CP(IB) No.442/95/HDB/2020
NAME OF THE COMPANY	S. Kishore & KSK Mahanadi Power Company Ltd
NAME OF THE PETITIONER(S)	State Bank of India
NAME OF THE RESPONDENT(S)	S. Kishore & KSK Mahanadi Power Company Ltd
UNDER SECTION	95 of IBC

ORDER

Orders pronounced, recorded vide separate sheets. In the result, the Petition is allowed. Petition under Section 95 is admitted.

Sd/-
MEMBER (T)

Sd/-
MEMBER (J)

**NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH, COURT - II**

CP(IB) No.442/95/HDB/2020

[U/s. 95 of Insolvency and Bankruptcy Code, 2016 r/w Rule 7(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtor) Rules, 2019]

**In the matter of
M/s.KSK Mahanadi Power Company Limited**

Between:

M/s.Aditya Birla ARC Limited,
One World Centre, Tower 1,
18th Floor, Jupiter Mill Compound,
841, Senapati Bapat Marg,
Elphinstone Road,
Mumbai – 400 013
Rep. by Mr. Rupesh Talmale
Authorised Signatory

(Substituted pursuant to Order dt.16.04.2024 in IA 740/2024 in place of State Bank of India)

....Petitioner

And

1. Mr.S. Kishore
H.No.1-2-593, B3
Soubhagya Apartments
Domalguda
Hyderabad – 500 029

...Respondent No.1/Personal Guarantor

2. M/s.KSK Mahanadi Power Company Limited
8-2-293/82/A/431/A
Road No.22, Jubilee Hills
Hyderabad – 500 033

....Respondent No.2/Corporate Debtor

Date of Order: 30.04.2024

Coram:

Hon'ble Rajeev Bhardwaj, Member (Judicial)
Hon'ble Sanjay Puri, Member (Technical)

Counsel/Parties present:

For the Petitioner : Mr.G.P.Yash Vardhan,
Ms.Khushi Singh, Advocates

For the Respondents : Mr.M.Viswaraj, Advocate

PER: RAJEEV BHARDWAJ, MEMBER (JUDICIAL)

ORDER

1. This Petition has been filed under Section 95 of the Insolvency and Bankruptcy Code, 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 for initiating Insolvency Resolution Process against Mr. S. Kishore, Personal Guarantor (hereinafter referred as **Respondent No.1**) of the Corporate Debtor, M/s.KSK Mahanadi Power Company Limited (hereinafter referred as **Respondent No.2/CD**).

2. Briefly, the averments of the Petition are as follows:
 - 2.1 The CD availed credit facilities from various Financial Creditors including State Bank of India, Stressed Asset Management Branch, Hyderabad (hereinafter referred as '**FC**') and Mr.S.Kishore and Mr. K.A.Sastry stood as Guarantors for the repayment of the loans.
 - 2.2 Pursuant to the Assignment Agreement dated 12.08.2022 between FC and M/s.Aditya Birla ARC Limited, (hereinafter referred as '**Petitioner**'), the FC has assigned the fund-based loans of the CD in favour of the Petitioner. Accordingly, the name of the FC has been substituted with the Petitioner by virtue of the Order issued by this Authority on 16.04.2024 in IA 740/2024 in place of FC.
 - 2.3 For availing the credit facilities, both the parties executed various documents including Loan Agreement, Hypothecation Agreement, Guarantee Agreement etc.
 - 2.4 The CD failed to adhere to the terms & conditions of the loan agreement and accordingly, the accounts of the CD were classified as Non-Performing Asset (NPA) on 06.04.2016. Thereafter, a Legal Notice dated 24.12.2018 was sent to the CD and both the Personal Guarantors asking them to pay the outstanding amount within 10 days from the receipt of the notice. Despite the notice, the

CD as well as Personal Guarantors did not repay the loan amount and accordingly, the FC filed O.A. No.717 of 2019 under the SARFAESI Act before the Debt Recovery Tribunal, Hyderabad.

- 2.5 One of the Financial Creditors, M/s. Power Finance Corporation Limited has also filed CP(IB) No.492/7/HDB/2019 under Section 7 of the IBC, which was admitted on 03.10.2019.
- 2.6 After coming into force of the Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors Rules, 2019, the demand notice was sent to the Respondent No.1 on 12.10.2020 and the other Personal Guarantor demanding payment of unpaid loan amount. In response, the Respondent No.1 replied vide letter dated 30.10.2020.
- 2.7 The total debt including interest was Rs.5073,73,83,441/- as on 03.10.2019.
- 3.1 The Respondent No.1 has filed counters on 03.01.2022 and 05.02.2024. In both the counters, Respondent No.1 has not denied the execution of the loan amount and further that he alongwith Mr. K.A.Sastry stood as guarantors for the repayment of the loan.

- 3.2 It is submitted that there was no option with the replying respondent except to furnish the guarantee. He is not having any money or assets to meet the liabilities. This position was also explained to the Petitioner.
- 3.3 With the initiation of the CIRP against M/s.KSK Energy Ventures Limited (**M/s.KSKEVL**), the capacity of the Respondent No.1 has also been curtailed. Now M/s.KSKEVL has been put in liquidation and therefore the personal estate of the Respondent No.1 has also been eroded.
- 3.4 The default by the CD has been on account of various factors which are beyond the control of the Respondent No.1. He has further referred to the decision of the Hon'ble Supreme Court dated 21.05.2021 in **Lalit Kumar Jain versus Union of India** to emphasize his contention.
- 3.5 It is claimed that the admission of the application under Section 95 will impair and prejudice the legal remedies available to the Respondent No.1.
- 3.6 In the Counter dated 05.02.2024, the Respondent No.1 has not taken any substantial ground to challenge the application under Section 95 of the IBC except that M/s.KSKEVL was put in CIRP on 04.09.2019 and it was sold as a going concern to M/s.Gland Celsus Bio

Chemicals Private Limited on 28.04.2021 thereby eroding the marketable securities of Respondent No.1.

4. In the Rejoinder, the Petitioner has reaffirmed and reasserted the contentions put forward in the petition.
5. We have heard Learned Counsel for both the parties and have also gone through the entire records.
6. Taking credit facilities from the Financial Creditors and execution of various documents including Guarantee Deed have not been disputed by the Respondent No.1. It is also not disputed that one of the Financial Creditors, M/s.Power Finance Corporation Limited has filed CP(IB) No.492/7/HDB/2019 under Section 7 of IBC, which was admitted against the Respondent No.2/CD vide Order dated 03.10.2019 (**Annexure 6 – page Nos.63-74 of the application**).
7. The liability of the surety is co-extensive with the principal debtor, unless it is otherwise provided for by the contract. The Guarantee Deeds dated 26.09.2016, 25.11.2016, 30.03.2017 and 21.12.2017 (**Annexure 14 – page Nos.962-1044 of the application**) have been executed by the Respondent No.1 and Mr.K.A.Sastry. The Guarantee Deed executed by the Personal Guarantors is continuous. An agreement between the guarantor and creditor is separate and collateral contract distinct from the contract

of debt between the principal debtor and creditor. Here we also rely upon the judgment of the Hon'ble Supreme Court in ***Ansal Engineering Projects Limited versus Tehri Hydro Development Corporation Limited and Another 1996 (5) SCC 450***, wherein it was held:

4. It is settled law that bank guarantee is an independent and distinct contract between the bank and the beneficiary and is not qualified by the underlying transaction and the validity of the primary contract between the person at whose instance the bank guarantee was given and the beneficiary. Unless fraud or special equity exists, is pleaded and prime facie established by strong evidence as a triable issue, the beneficiary cannot be restrained from encashing the bank guarantee even if dispute between the beneficiary and the person at whose instance the bank guarantee was given by the Bank, had arisen in performance of the contract or execution of the Works undertaken in furtherance thereof. The Bank unconditionally and irrevocably promised to pay, on demand, the amount of liability undertaken in the guarantee without any demur or dispute in terms of the bank guarantee. The object behind is to inculcate respect for free flow of commerce and trade and faith in the commercial banking transactions unhedged by pending disputes between the beneficiary and the contractor.

(Own emphasis)

8. No doubt, the obligation of the guarantor is coextensive and coterminous with that of the principal borrower to defray the debt, as explained in Section 128 of the Contract Act, but the liability of the principal debtor and surety are separate although arising out of the same transaction and even the liability of surety does not also, in all cases, arise simultaneously. We may profitably refer to the decision of the Hon'ble Supreme Court in ***State***

Bank of India versus Index Port Registered and Ors (1992) 3 SCC 159, wherein it was held :

16. "In Halsbury's Laws of England Forth Edition paragraph 159 at page 87 it has been observed that "it is not necessary for the creditor, before proceeding against the surety, to request the principal debtor to pay, or to sue him, although solvent, unless this is expressly stipulated for."

17. In Hukamchand Insurance Co Ltd. Versus Bank of Baroda, AIR (1977) Kant 204, a Division Bench of the High Court of Karnataka had an occasion to consider the question of liability of the surety vis-à-vis the principal debtor. Venkatachaliah, J. (as His Lordship then was) observed:-

"The question as to the liability of the surety, its extent and the manner of its enforcement has to be decided on first principles as to the nature and incidents of surety ship. The liability of a principal debtor and the liability of a surety which is co-extensive with that of the former are really separate liabilities, although arising out of the same transaction. Notwithstanding the fact that they may stem from the same transaction, the two liabilities are distinct. The liability of the surety does not also, in all cases, arise simultaneously."

18. It will be noticed that the guarantor alone could have been sued, without even suing the principal debtor. so long as the creditor satisfies the court that the principal debtor is in default."

9. Starting date of limitation in case of continuing guarantee is when it is invoked. The relevant Clause of the guarantee deed is reproduced below:

"2.1.21 Any demand for payment or notice under this Deed shall be sufficiently given if sent by post to or left at the last known address of the Guarantors or their personal representative(s), such demand or notice is to be made or given, and shall be assumed to have reached the addressee in the course of post, if given by post, and no period of limitation shall commence to-run-in-favour of the

Guarantors until after demand for payment in writing shall have been made or given as aforesaid and in proving such notice when sent by post it shall be sufficiently proved that the envelope containing the notice was posted and a certificate by any of the responsible officers of the Lender that to the best of their knowledge and belief, the envelope containing the said notice was so posted shall be conclusive as against the Guarantors, even though it was returned unserved on account of refusal of the Guarantors or otherwise.”

10. For the first time, notice dated 24.12.2018 (**Annexure - 4 at pg. nos.49 to 56 of the application**) was sent to the CD and both the Personal Guarantors asking them to pay the due amount within a period of 10 days from the receipt of this notice. The said notice was received by the Respondent No.1 on 03.01.2019. No doubt, the Applicant again issued demand notice dated 12.10.2020 after coming into force of the Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019, but as per Clause 2.1.21, the guarantee was invoked when the legal notice dated 24.12.2018 was received on 03.01.2019 by the Respondent No.1. After receipt of this notice, Respondent No.1 was required to pay the debt amount. Therefore, the legal notice meets the requirements of invoking the guarantee deed. Accordingly, the cause of action to file the present application arose after 10 days of receiving the legal notice dated 03.01.2019. This Petition has been filed on 16.12.2020 and accordingly, this petition is within limitation period.

11. Regarding the existence of debt, it is proved from the Balance Sheet and other records which remains un rebutted.
12. Therefore, in the light of our discussions above and the report dated 25.09.2021 filed by the Resolution Professional supporting the case of the Financial Creditor, we consider it a fit case to order insolvency resolution process against Respondent No.1/Personal Guarantor.

ORDER

13. Therefore, by exercising powers under Section 100 of the Code, we pass the following orders:
 - 13.1 The petition i.e. **CP (IB) No. 442/95/HDB/2020 filed under the provisions of Section 95 of IBC, 2016 is hereby admitted.**
 - 13.2 Consequently, the Insolvency Resolution Process is hereby initiated against Mr. S. Kishore, Personal Guarantor and moratorium is declared in relation to all debts, which begins with effect from the date of admission of the instant petition and shall cease to have effect at the end of the period of 180 days, as provided under Section 101 of IBC, 2016. During the interim moratorium period:

- i. Any pending legal action or proceeding in respect of any debt shall be deemed to have been stayed;
- ii. The creditors shall not initiate any legal action or legal 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.
- v. The Resolution Professional, Mr. Kalvakolanu Murali Krishna Prasad, Registration No. IBBI/IPA-001/IP-P00967/2017-2018/11588, having Office at H.No.8-27, Plot No.106, Road No.10, Mythripuram Colony, Jillelguda, Vyshalinagar Post, Hyderabad – 500 079, email: kmk123ip@gmail.com, Mobile No: 9866512532, who was appointed vide order dated 08.09.2021 is directed to cause public notice published on behalf of the Adjudicating Authority within 7 days from the date of uploading of this Order on the website of NCLT, Hyderabad, inviting the claims from all creditors, who shall register their claims as provided under Section 103 of the Code within 21 days of such issuance. The notice

shall contain the necessary information as provided under Section 102 (2) of IBC, 2016. The publication of notice shall be made in newspapers, one in English and other in vernacular (Telugu) which have wide circulation in the State where the debtor (being the Personal Guarantor of the Corporate Debtor) resides. The Resolution Professional shall furnish two spare copies of the notice to the Registry. One shall be placed on our website by the Registry and the other shall be affixed in the premises of this Adjudicating Authority.

- vi. The Resolution Professional in exercise of the powers conferred under Section 104 shall prepare a list of creditors within 30 days from the date of the notice. The Personal Guarantor shall prepare, in consultation with the Resolution Professional, a Repayment Plan containing a proposal to the creditors for restructuring of his debts or affairs as provided under Section 105 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.

- vii. 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 creditors should be summoned, he shall specify the details as provided under Section 106 (3). The date of meeting shall not be less than fourteen days or more than 28 days from the date of submission of the Report under Sub-Section (1) of Section 106 of the Code, 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 the Code.
- viii. The meeting of the creditors shall be conducted in accordance with the provisions of sections 109, 110 and 111. The Resolution Professional shall prepare a report of the meeting of the creditors on repayment plan with all details as provided under Section 112 and submit the same to the Authority, copies of which shall be provided to the guarantor 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 the Code.

- ix. The Petitioner is directed to communicate this Order to the Resolution Professional appointed in the instant Company Petition immediately.

Sd/-

**SANJAY PURI
MEMBER (TECHNICAL)**

Sd/-

**RAJEEV BHARDWAJ
MEMBER (JUDICIAL)**

Syamala