



**IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOCHI BENCH**

**CP (IBC)/26/KOB/2023**

*(Under Section 95(1) of the IBC, 2016 read with Rule 7(2) of IBBI (Application to Adjudicating Authority for Insolvency Resolution Process of Personal Guarantors to Corporate Debtors) Rules, 2019)*

***In the matter of:***

**THE SOUTH INDIAN BANK LTD. VS. MRS.  
DEVI KALESH**

**MEMO OF PARTIES:**

**THE SOUTH INDIAN BANK LTD.,**

*Regd. Office:* SIB, House, TB Road, Mission Quarters, Thrissur, Kerala – 680 001

*Branch Office:* Door No:2487 C, Ward No.18, Kejees Building, Opp. St. Sebastian's High School, Thoppumpady P.O., Ernakulam, Kerala - 682 005

Represented by its Branch Manager

**... Applicant/Creditor**

**-vs-**

**MRS. DEVI KALESH,**

W/o Kalesh AV, 49/213, Karthika RSA C Road, Vytilla P.O., Ernakulam – 682 019

**... Respondent/  
Personal Guarantor**

**Order delivered on: 16.02.2024**



***Coram:***

**Hon'ble Member (Technical)**

**Hon'ble Member (Judicial)**

**Shri. Shyam Babu Gautam**

**TMT. Justice T Krishna Valli**

***Appearances:***

For the Applicant : Mr. Sojan James, Advocate

For the Respondent : Ms. Sreeja S., Advocate

**ORDER**

***Per Coram***

1. The present application has been filed by Applicant Creditor, under Section 95(1) of the Insolvency and Bankruptcy Code, 2016 ("Code") 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 ("Rules") by The South Indian Bank Ltd., for initiation of the insolvency resolution process of Mrs. Devi Kalesh, the Personal Guarantor to M/s. Tanish My Zone Super Markets India Limited, the corporate debtor ("CD").

The brief facts of the case are as follows:

2. The Corporate Debtor approached the South Indian Bank Ltd. ("Applicant") for financial assistance for setting up a supermarket at Chalikkavattom, Ernakulam. A Cash Credit Overdraft Loan (CCOL) Account No. 0118083000051039 for an amount of Rs.40,00,000/-.



Term Loan for an amount of Rs. 80,00,000/-, Rs. 24,49,000/- and Rs. 43,00,000/- were also sanctioned. Together the company availed an amount of Rs.2,16,49,000/- from the bank. The sanction was conveyed vide Letter of Intent dated 02.08.2019, 17.09.2019 and 24.10.2020, respectively. The CD created the following securities in favour of the Applicant:

- i. Hypothecation of all the movable assets of the borrower, including stock-in-trade, Stock of raw materials, stock in process, finished goods, and goods of the borrower, all the present and future actionable claims and other movable property, and all other assets acquired /to be acquired by the borrower under the project/scheme.
- ii. Hypothecation of Machineries/Equipment of the coconut oil extraction acquired utilizing the loan amount from M/s Essar Technis or such other vendors and kept in the premises of the borrower company or such other places, which was created on 02.08.2019.
- iii. Equitable Mortgage of the immovable properties, admeasuring 12.54 Ares (8.73 ares + 3.81 ares) along with other constructions, improvements, easement rights existing and appurtenant thereon situated in old Sy No, 6920/31, 6920/ 9-32, 6920/9-34, 713/1, 7135/4,6,7,14 Re-Sy No.2893/3 and 225/86 within Koljam West Village, Kollam Taluk, Kollam District and owned by Meena Kumari more fully described in Registered Will having Document No.83/2col dated 12.10.2001 of sub Registrar office-Kollam which was created on 03.08.2019.



- iv. Personal Guarantees of Ms. Devi Kalesh, Ms. Meenakshi C.S., Ms. Sathikumari Mohankumar and Ms. Syama Shinu.
3. The Creditor stated that the said loans were disbursed to the CD account on various dates between 02.08.2019 to 02.12.2020 as per the terms agreed between the parties. The said term loans were to be repaid over monthly instalments after a moratorium of 12 months from the date of the first disbursement of the loan. In terms of the Loan agreement executed by the CD and Financial Creditor, interest is payable at floating rates at 0.25% above SIB's prime lending rate (PLR) raising or falling therewith with monthly rests. The present rate of interest is 10.20% per annum.
4. It is stated that in terms of the said agreement, the CD was required to pay interest, further interest, on the principal amount of the said loan outstanding from time-to-time monthly rests. The first such payment of instalment/interest fell due on 06.10.2021. The payments of instalments/ interests fallen due up to 06.08.2021 were paid by the CD regularly.
5. The CD had completely stopped making payments towards the interest and principal repayment and the account of the CD was declared as NPA on 05.12.2021 in terms of the extant guidelines of the Reserve Bank of India.
6. The Applicant finally recalled the entire loan facility on 24.12.2021 and declared that the entire principal amount of the said loan together with interest, further interest, penal interest and all other monies due, aggregating to Rs.1,48,17,216.01/- have become immediately due and payable by the Borrower to SIB.



7. The applicant herein was constrained to invoke the personal guarantee of the respondent vide their guarantee invocation letter dt. 24.12.2021 calling upon the guarantor to pay the outstanding dues of the CD.
8. A Demand notice dated 10.02.2022 under Section 13(2) of the SARFAESI Act, 2002 was issued demanding the CD to pay a sum of Rs.1,50,92,825.32/- as of 09.02.2022. Despite all this, the CD did not affect any payment in favour of the applicant.
9. The applicant accordingly issued a Form B Demand Notice dt. 28.04.2022 demanding the respondent to pay Rs.1,55,20,329.42/- together with interest, penal interest, and cost and charges, etc. The CD or the personal guarantors have not made any payment towards the amount due despite acknowledgement of notice of demand.
10. The applicant has submitted the Record of default of CD filed with NESL (Information Utility) evidencing default on the part of the CD in repayment as per schedule and it is annexed as Annexures 36-40.
11. The creditor served a copy of the application to the respondent, personal guarantor, as well as to the CD through email. Registry also issued a notice of hearing to the respondent.
12. The amount of default of Rs. 1,44,70,171.73/- as of 24.12.2021 is greater than the minimum threshold of Rs.1 Crore for application under Part III of the code. The date of default stated in Part III of the petition is 24.12.2021.
13. The applicant herein has proposed the Insolvency Professional, **Mr. Jasin Jose** (IBBI/IPA-001/IP-P00695/2017-2018/11225) having



registered address at Ponmattam, Madaserry House, Mookkannoor PO, Ernakulam, Kerala -683577. The Insolvency Professional has submitted his authorisation for assignment no. AA1/11225/02/301024/106208 from IIP of ICAI valid till 30.10.2024 and his certificate of registration from the Insolvency and Bankruptcy Board of India along with the application and declared his eligibility to act as the RP in Part IV of the application.

14. The application filed on 13.06.2023 is not barred by limitation as the amount was declared as a non-performing asset on 05.12.2021, which is the date the right accrues to the creditor and the period of limitation begins to run.
15. On 06.02.2024 the Personal Guarantor filed their reply statement and stated that the respondent has resigned from the position of the Director of the CD. The respondent is no more Director of the CD from 01.12.2021 and had transferred the shares to the new director namely, Sanjeev Bhaskara Kurup.
16. Respondent was undergoing treatment for cancer at the Aster Medicity Hospital, Ernakulam during 2015-16 and was not medically fit due to the after effects of the strong medications and was unable to be part of the routine business of the CD. The Respondent is not aware of any transactions of the CD and believed that the CD would have informed the petitioner about the resignation and release of the respondent from the position of personal guarantor to the transactions between the CD and the petitioner.
17. It is submitted that an amount of Rs.74,054/- (Rupees Seventy-Four Thousand Fifty-Three) was debited from the personal account of the



respondent herein, toward the debt due from the CD towards the petitioner on 30.07.2022 from her Account No. 0173053000021575 of the Vennala Branch of the petitioner and subsequently on many occasions many small amounts were debited by the petitioner herein totalling to around Rs.1,00,000/- (Rupees One Lakh), which is not admitted by the petitioner in Part III of the application.

18. The respondent stated that the documents of the petitioner were signed by the directors of the CD herein, even without being read over or explained to them. Many of the entries in the columns in the documents executed were left blank and was not filled in fully, at the time of signing them. The entries in row 11,13,14,15 of part III and the entries in part IV of the application are not known to the respondent and denies the same.
19. We have heard the Learned Counsel for both parties and perused the documents available on records. In this connection, it is profitable to quote Section 95 of I&B Code, 2016: -

*“(1) A creditor may apply either by himself, or jointly with other creditors, or through a resolution professional to the Adjudicating Authority for initiating an insolvency resolution process under this section by submitting an application.*

*(2) A creditor may apply under sub-section (1) in relation to any partnership debt owed to him for initiating an insolvency resolution process against-(a) any one or more partners of the firm; or (b) the firm.*



*(3) Where an application has been made against one partner in a firm, any other application against another partner in the same firm shall be presented in or transferred to the Adjudicating Authority in which the first-mentioned application is pending for adjudication and such Adjudicating Authority may give such directions for consolidating the proceedings under the applications as it thinks just.*

*(4) An application under sub-section (1) shall be accompanied with details and documents relating to-(a) the debts owed by the debtor to the creditor or creditors submitting the application for insolvency resolution process as on the date of application; (b) the failure by the debtor to pay the debt within a period of fourteen days of the service of the notice of demand; and (c) relevant evidence of such default or non-repayment of debt.*

*(5) The creditor shall also provide a copy of the application made under sub-section (1) to the debtor.*

*(6) The application referred to in sub-section (1) shall be in such form and manner and accompanied by such fee as may be prescribed.*

*(7) The details and documents required to be submitted under sub-section (4) shall be such as may be specified."*

20. Given the above provision and that the Creditor has complied with Section 95(4) as quoted above and also the Demand Notice dt. 28.04.2022 was sent to the Personal Guarantor, however, the Personal Guarantor failed to make the payment, we have concluded that there is a default on the part of the Personal Guarantor by not fulfilling the debts owed to the CD as per the clauses contained in the



Consent Terms in respect of the outstanding financial debt which is apparent from the documents placed on record.

21. It is also satisfied that the debt in default is above the threshold limit prescribed under the Code and that the application is filed within the limitation period. Even though the CIRP has not been initiated against the CD, given the decision of the Supreme Court in ***Mahendra Kumar Jajodia v. State Bank of India***, Creditor can initiate proceedings against the Personal Guarantors regardless of whether a CIRP has been initiated against the CD. Therefore, this Tribunal orders as under: -

9. This application filed under Section 95 of the Insolvency and Bankruptcy Code, 2016 (IBC) read with Rule 7(2) of the Insolvency and Bankruptcy Rules, 2019 by the South Indian Bank Ltd. against the Personal Guarantor of the Corporate Debtor M/s. Tanish My Zone Super Markets India Limited, Mrs. Devi Kalesh, is hereby **allowed** with the following directions:

- i. The interim moratorium under Section 96 of the Code has commenced on the date of the application by the Creditor in relation to all the debts and will cease to have an effect on the date of admission.
- ii. During such an interim-moratorium period:
  - a) any legal action or proceeding pending 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.



- iii. **Mr. Jasin Jose (IBBI/IPA-001/IP-P00695/2017-2018/11225)** having registered address at Ponmattam, Madaserry House, Mookkannoor PO, Ernakulam, Kerala 683577, is appointed as the Resolution Professional under section 97 of the Code to carry out the insolvency resolution process of Mrs. Devi Kalesh. The fee payable to the Resolution Professional (RP) shall be as per the Insolvency and Bankruptcy Board of India (IBBI) Regulations/ Circulars/ Directions issued in this regard.
- iv. This Tribunal also directs an advance payment of **Rs. 2,00,000/- (Rupees Two Lakhs only)** to be paid by the Applicant/Creditor to the Resolution Professional immediately to initiate the process which shall be adjusted towards the fee and expenses payable to the Resolution Professional (RP).
- v. The Resolution Professional shall examine the application filed under section 95 within 10 days of appointment and submit a report to this Tribunal recommending approval or rejection of the application along with reasons for the recommendation.
- vi. The resolution professional shall exercise all the powers as enumerated under Section 99 of the Code read with Rules made thereunder. The resolution professional shall provide a copy of the report under sub-section 7 of section 99 to the Creditor as soon as the same is filed before this Adjudicating Authority.
- vii. The resolution professional for the purposes of examining an application may seek such further information or explanation in connection with the application under section 99(4) as may be



required from the debtor or the creditor or any other person who, in the opinion of the resolution professional, may provide such information. The persons from whom information or explanation is sought shall furnish such information or explanation within seven days of receipt of the request.

viii. The Registry is hereby directed to send immediate e-mail copies of this order forthwith to the Creditor, Personal Guarantor, Corporate Debtor and the Resolution Professional (RP) for information and to take necessary steps. The Registry shall place a compliance report of this direction in this file.

11. Let the certified copy of this order be issued, if applied for, upon compliance with the requisite formalities.

12. List the above Company Petition for further proceedings on **01.03.2024**.

13. File be consigned to records.

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BABU GAUTAM  
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**SHYAM BABU GAUTAM**  
**(MEMBER TECHNICAL)**

T.KRISHNAVALLI Digitally signed by T.KRISHNAVALLI  
Date: 2024.02.16 14:58:24 +05'30'

**T KRISHNA VALLI**  
**(MEMBER JUDICIAL)**

Signed on this the 16<sup>th</sup> day of February, 2024.

Leona/LRA