NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH-V

(IB) 739 (ND)/2021
IA/5903/2021
IA/38/2022

IN THE MATTER OF:

SIEMENS FINANCIAL SERVICES PVT.LTD.
PLOT NO. 2, SECTOR 2, KHARGAR NODE,
NAVI MUMBAI- 410210
THROUGH ITS AUTHORIZED REPRESENTATIVE,
MR. VAIBHAV PRIYADRASHI

....APPLICANT/FINANCIAL CREDITOR

VERSUS

MR. VARUN JAJOO
W-10/14, WESTERN AVENUE
SAINIK FARMS, NEW DELHI-110062

ALSO AT-
EMKAY AUTOMOBILE INDUSTRIES LIMITED
39/7 K.M. STONE, N.H.-8
DELHI-JAIPUR HIGHWAY
VILLAGE BEGAMPUR KHATOLLA
GURGAON (HARYANA)-122001

ALSO AT-
EMKAY AUTOMOBILE INDUSTRIES LIMITED
PLOT NO. 73 TO 76, INDUSTRIAL AREA IIE,
SECTOR-7, UDHAMSINGH NAGAR
PANTNAGAR (UTTARAKHAND)-263145

ALSO AT-

EMKAY AUTOMOBILE INDUSTRIES LIMITED

D- 40, AMBAD, MIDC,

NASHIK-(MAHARASHTRA)-422010

....PERSONAL GUARANTOR/RESPONDENT

SECTION: U/S95 of IBC, 2016

Order delivered on: 31/01.2022

CORAM:

MR. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)

MR. AVINASH K. SRIVASTAVA, MEMBER (TECHNICAL)

For the Applicant/Financial Creditor: Adv. Ashwini Kumar Singh

For the Respondent/Corporate Debtor:

ORDER

AS PER MR. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)

1. The present petition has been filed under Section 95 of the Insolvency &Bankruptcy Code, 2016, (hereinafter referred to as the "Code"), by Siemens Financial Services Pvt. Ltd. praying for initiation of Insolvency Resolution Process against Mr. Varun Jajoo, the Director as well as the Personal Guarantor of the Corporate Debtor i.e. Emkay Automobiles Industries Limited.

2. The facts mentioned in the application in brief are as follows:
   i. That the Applicant is a NBFC engaged in the business of granting loans and other financial facilities. The Corporate Debtor is engaged in the business of manufacturing of automotive component for two and four wheeler industry.

ii. That the Applicant Financial Creditor agreed to sanction loan facility vide Sanction Letter dated 20.06.2017 to the Corporate Debtor,pursuant to which a Finance Agreement (Loan cum Hypothecation Agreement) was entered into between the borrower and the Applicant.

Sr. No.	Agreement Date & Number	Sanctioned Amount	Loan Tenor (Months)	Rate of Interest (per annum)	Default Interest (per month)
1	29.06.2017 bearing No. A8452227	Rs. 3,00,00,000/- (Rupees Three Crore Only)	60	13	3

iii. Along with the Finance Agreement dated 29.06.2027, several other documents (viz., Acceptance Note, Promissory Note and Updated Repayment Schedule all dated 29.06.2017 were also executed by the borrower and guarantors in favour of the Applicant for availing the said loan facility.

iv. The Corporate Debtor failed to make payment as per the Repayment Schedule. Thereafter, despite follow ups, after the said loan account of the Corporate Debtor was declared NPA on 27.02.2020, no payment was made by the Corporate Debtor/ Personal Guarantor.

v. That the Applicant issued Notice u/s 13 (2) of the SARFAESI Act, 2002 on 20.02.2019 upon the Corporate Debtor and Personal Guarantor.

vi. That a Demand Notice dated 09.06.2021 Form B under Rule 7(1) of Insolvency & Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process of Personal Guarantors to Corporate Debtors) Rules, 2019 was sent to the Personal Guarantor for payment of total outstanding amount of Rs. 2,06,93,881/-.

vii. That the Personal Guarantor Mr. Varun Jajoo has denied the liability vide reply dated 28.06.2021. In the meantime, the NCLT New Delhi Bench (Court V) vide its order dated 12.10.2021 admitted an application bearing No. IB-C.P. (IB) - 3173/2019, thereby initiating CIRP in respect of the Corporate Debtor under Section 9 of the Code.

viii. Therefore, the Personal Guarantor is liable for an amount of Rs. 2,06,93,881/- due as on 02.06.2021.

3. The Respondent has filed written submissions and submitted the following:

i. That the application is not in consonance with the provisions of Section 240A r/w Section 29A of the Code.

ii. That the Financial Creditor has failed to disclose the exact amount due on part of the Corporate Debtor.

iii. That in Part III, Column 1 of the Application, the Financial Creditor has claimed Future Outstanding Principal of Rs. 82,35,740/- and also wrongly claimed exorbitant Cheque Dishonour fees to the tune of Rs. 54,280/-, alleged Default interest of Rs. 28,66,548/-, alleged Prepayment Fees of Rs. 3,29,340/- as also GST @ 18% on such alleged prepayment fees to the tune of Rs. 59,297/-, other Legal Charges of Rs.2,14,899/- without any explanation or justification towards the same. It is clarified that the cheques are not issued by the Personal Guarantor.

iv. That levy of prepayment charges on an NPA, as also the GST on the said charges is illegal and unjustified. That the exclusion of the aforementioned amounts would bring the threshold limit of the outstanding debt to less than Rs. 1 crore, rendering the instant application infructuous.

v. That as per the submissions of the Financial Creditor, the loan arrangement with the Corporate Debtor was declared

an NPA on 27.02.2020, however a per CIBIL reporting by the Financial Creditor on 28.02.2020, the account of the Corporate Debtor had been declared as 'Standard' by the Financial Creditor.

4. That the Insolvency Professional Mr. Amit Ojhahas filed an interlocutory application vide IA/5903/2021u/s 98 of the Code praying to withdraw his consent and get him discharged in the present matter. It was submitted that his Authorisation for Assignment (AFA) to act as an Insolvency Professional had already expired on 03.12.2021and the consent was given inadvertently thinking that the AFA was to expire on 24.12.2021.

5. Subsequently, the Applicant/Financial Creditor, has filed an interlocutory application vide IA/38/2022 u/s 98(1) of the Code for replacement of the Resolution Professional. It was submitted that the Applicant is filing fresh written consent of Mr. Babu Lal Gurjar, Insolvency Professional, to act as Resolution Professional (Form A), under Regulation 4(2) of the IBBI (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Regulations, 2019.

6. We have heard the Ld. Counsel for the applicant and perused the averments made in the application.

7. The respondent had filed an application being IA no. 5988/2021 which was heard the disposed of on 03.01.2022. By filing that application, the respondent had prayed to recall the order dated 15.12.2021 and permit the respondent to file the reply. After hearing the parties, the respondent was permitted to file the written synopsis and with this, the said application was disposed of.

8. Accordingly, `the respondent has filed the written synopsis which has already been referred here in before.

9. Before considering the prayer of the applicant, we would like to refer to the contention of the respondent, who by filing the written synopsis has claimed that the application filed by the applicant is not maintainable as the minimum threshold limit to file an application as per Section 4 of IBC is of Rupees One Crore but here in case, the outstanding principal amount is of Rs. 82,35,740/- only. It is further contended on behalf of the respondent that the applicant has added the other amount which is not correct. Apart from that, the respondent has also claimed that there is a pre-existing dispute and the claim of the applicant is also barred in view of the regulatory package issued by the Reserve Bank of India on 27.03.2020. It is further contended on behalf of the respondent that in view of the decision of Hon'ble NCLAT in Company Appeal (AT) (Insolvency) No. 346/2018 in the matter of Dr. **Vishnu Kumar Aggarwal Vs. M/s Piramal Enterprises Ltd** simultaneous proceeding under the IBC, 2016 cannot be initiated against the Corporate Debtor and Personal Guarantor for the same set of claim, once the Corporate Debtor is admitted to CIRP on the basis of same set of claim.

10. In the light of the submissions, we consider the application of the applicant. Admittedly, the Corporate Insolvency Resolution Process (CIRP) in respect of the Corporate Debtor is admitted by this bench in IB No. 3173/2019 filed under Section 9 of IBC on 12.10.2021, therefore, the default in payment of debt by the Corporate Debtor is admitted in that proceeding too and the respondent is the Personal Guarantor. The question raised by the respondent that simultaneously against the Corporate Debtor and the Personal Guarantor cannot be initiated and the respondent has placed reliance upon a decision referred to supra, we have perused the decisions referred by the respondent and we observed that

decision is prior to the date, when the notification dated 15.11.2019 issued by the Central Government has come into force. The said notification was under Challenged in the writ petition filed by the different persons decided in the matter of Lalit Kumar Jain Vs. Union of India in transfer case (Civil) No. 245/2020 on 21.05.2021 by which the Hon'ble Supreme Court held that the notification dated 15.11.2019 is legal and valid and by the same judgment the Hon'ble Supreme Court also held that approval of resolution plan relating to a Corporate Debtor does not operate so as to discharge the liabilities of Personal Guarantor (Corporate Debtor). At this juncture, we would like to referto the relevant portion of the paragraphs of the decision of Lalit Kumar Jain Vs. Union of India. The relevant paragraphs are reproduced below:-

"108. It is therefore, clear that the sanction of a resolution plan and finality imparted to it by Section 31 does not *per se* operate as a discharge of the guarantor's liability. As to the nature and extent of the liability, much would depend on the terms of the guarantee itself. However, this court has indicated, time and again, that an involuntary act of the principal debtor leading to loss of security, would not absolve a guarantor of its liability. In *Maharashtra State Electricity Board* (*supra*) the liability of the guarantor (in a case where liability of the principal debtor was discharged under the insolvency law or the company law), was considered. It was held that in view of the unequivocal guarantee, such liability of the guarantor continues and the

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68(2020) 8 SCC 531.

creditor can realize the same from the guarantor in view of the language of Section 128 of the Contract Act as there is no discharge under Section 134 of that Act. This court observed as follows:

> *"7. Under the bank guarantee in question the Bank has undertaken to pay the Electricity Board any sum up to Rs 50,000 and in order to realise it all that the Electricity Board has to do is to make a demand. Within forty-eight hours of such demand the Bank has to pay the amount to the Electricity Board which is not under any obligation to prove any default on the part of the Company in liquidation before the amount demanded is paid. The Bank cannot raise the plea that it is liable only to the extent of any loss that may have been sustained by the Electricity Board owing to any default on the part of the supplier of goods i.e. the Company in liquidation. The liability is absolute and unconditional. The fact that the Company in liquidation i.e. the principal debtor has gone into liquidation also would not have any effect on the liability of the Bank i.e. the guarantor. Under Section 128 of the Indian Contract Act, the liability of the surety is coextensive with that of the principal debtor unless it is otherwise provided by the contract. A surety is no doubt discharged under Section 134 of the Indian Contract Act by any contract between the creditor and the principal debtor by which the principal debtor is released or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor. But a discharge which the principal debtor may secure by operation of law in bankruptcy (or in liquidation proceedings in the case of a company) does not absolve the surety of his liability (see Jagannath Ganeshram Agarwala v. Shivnarayan Bhagirath [AIR 1940 Bom 247; see also In re Fitzgeorge Ex parte Robson [(1905) 1 KB 462])."*

109. This legal position was noticed and approved later in *Industrial Finance Corpn. of India Ltd. v. Cannanore Spg. & Wvg. Mills Ltd.*[77] An earlier decision of three judges, *Punjab National Bank* v. *State of U.P.*[78] pertains to the issues regarding a guarantor and the principal debtor. The court observed as follows:

> *"The appellant had, after Respondent 4's management was taken over by U.P. State Textile Corporation Ltd. (Respondent 3) under the Industries (Development and Regulation) Act, advanced some money to the said Respondent 4. In respect of the advance so made, Respondents 1, 2 and 3 executed deeds of guarantee undertaking to*

pay the amount due to the bank as guarantors in the event of the principal borrower being unable to pay the same.

Subsequently, Respondent 3 which had taken over the management of Respondent 4 became sick and proceedings were initiated under the Sick Textile Undertakings (Nationalisation) Act, 1974 (for short 'the Act'). The appellant filed suit for recovery against the guarantors and the principal debtor of the amount claimed by it.

The following preliminary issue was, on the pleadings of the parties, framed:

'Whether the claim of the plaintiff is not maintainable in view of the provisions of Act 57 of 1974 as alleged in para 25 of the written statement of Defendant 2?'

The trial court as well as the High Court, both came to the conclusion that in view of the provisions of Section 29 of the Act, the suit of the appellant was not maintainable.

We have gone through the provisions of the said Act and in our opinion the decision of the courts below is not correct. Section 5 of the said Act provides for the owner to be liable for certain prior liabilities and Section 29 states that the said Act will have an overriding effect over all other enactments. This Act only deals with the liabilities of a company which is nationalized and there is no provision therein which in any way affects the liability of a guarantor who is bound by the deed of guarantee executed by it. The High Court has referred to a decision of this Court in Maharashtra SEB v. Official Liquidator, High Court, Ernakulam [(1982) 3 SCC 358 : AIR 1982 SC 1497] where the liability of the guarantor in a case where liability of the principal debtor was discharged under the insolvency law or the company law, was considered. It was held in this case that in view of the unequivocal guarantee such liability of the guarantor continues and the creditor can realize the same from the guarantor in view of the language of Section 128 of the Contract Act as there is no discharge under Section 134 of that Act.

In our opinion, the principle of the aforesaid decision of this Court is equally applicable in the present case. The right of the appellant to recover money from Respondents 1, 2 and 3 who stood guarantors arises out of the terms of the deed of guarantee which are not in any way superseded or brought to a naught merely because the appellant may not be able to recover money from the principal borrower. It may here be added that even as a result of the Nationalisation Act the liability of the principal borrower does not come to an end. It is only the mode of recovery which is referred to in the said Act."

110. In *Kaupthing Singer and Friedlander Ltd. (supra)* the UK Supreme Court reviewed a large number of previous authorities on the concept of double proof, i.e. recovery from guarantors in the contest of insolvency proceedings. The court held that:

> *"The function of the rule is not to prevent a double proof of the same debt against two separate estates (that is what insolvency practitioners call "double dip"). The rule prevents a double proof of what is in substance the same debt being made against the same estate, leading to the payment of a double dividend out of one estate. It is for that reason sometimes called the rule against double dividend. In the simplest case of suretyship (where the surety has neither given nor been provided with security, and has an unlimited liability) there is a triangle of credits and liabilities between the principal debtor (PD), the surety (S) and the creditor (C). PD has the primary obligation to C and a secondary obligation to indemnify S if and so far as S discharges PD's liability, but if PD is insolvent S may not enforce that right in competition with C. S has an obligation to C to answer for PD's liability, and the secondary right of obtaining an indemnity from PD. C can (after due notice) proceed against either or both of PD and S. If both PD and S are in insolvent liquidation, C can prove against each for 100p in the pound but may not recover more than 100p in the pound in all."*

111. In view of the above discussion, it is held that approval of a resolution plan does not *ipso facto* discharge a personal guarantor (of a corporate debtor) of her or his liabilities under the contract of guarantee. As held by this court, the release or discharge of a principal borrower from the debt owed by it to its creditor, by an involuntary process, i.e. by operation of law, or due to liquidation or insolvency proceeding, does not absolve the surety guarantor of his or her liability, which arises out of an independent contract.

112. For the foregoing reasons, it is held that the impugned notification is legal and valid. It is also held that approval of a resolution plan relating to a corporate debtor

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does not operate so as to discharge the liabilities of personal guarantors (to corporate debtors). The writ petitions, transferred cases and transfer petitions are accordingly dismissed in the above terms, without order on costs. "

11. In view of the decision referred to supra, we are of the considered view that the contention of of the respondent that simultaneous proceeding against the Corporate Debtor and Personal Guarantor cannot be initiated, is not liable to be accepted and the decision upon which the respondent has placed reliance is not applicable, after the notification dated 15.11.2019 has come into operation.

12. For the reasons discussed above, in our considered view Section 95 of IBC 2016 has given the independent right to the creditor to initiate the CIRP against the Personal Guarantor, apart from the right, of the Financial Creditor to initiate the CIR Process against the Corporate Debtor under Section 7 of IBC, 2016.

13. In sequel to above, we find, no force in the contention raised on behalf of the Ld. Counsel appearing for the Respondent. So far the pre-existing dispute is concerned like the Section 7 of IBC, since the present application is filed by the Financial Creditor, therefore, the pre-existing dispute cannot be taken into consideration. More over, as per the different provisions contained under chapter III of the IBC 2016, the question of admission or rejection of the

application u/s 100 of the IBC, can only be decided after the submission of the report by the Resolution Professional u/s 99 of IBC. At present, the question is only for the appointment of Resolution Professional u/s 97 of IBC Hence, we are of the considered view this submission of the Respondent is also not liable to be accepted.

14. Now, coming to the merits of the application filed by the applicant; before passing any order under Section 95, we would like to consider what is required to be proved in order to appoint a Resolution Professional for the purpose of examination of the application referred to under Section 94 or 95 IBC, 2016. At this juncture, we would like to refer to the relevant provision of Section 95 (4) and the same is reproduced below:-

Section 95-Application by creditor to initiate insolvency resolution process

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(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.

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15. Now, when we consider the application in terms of Section 95 (4) of IBC, 2016, admittedly, the applicant had issued a demand notice which was duly replied by the Respondent/Personal Guarantor. It is admitted fact that on the date of filing of the application there is

non-payment of the debt or in other words, there is a default in payment of the debt by the Personal Guarantor, therefore, the Applicant has fulfilled the criteria, which is required to file an application under Section 95 of IBC, 2016. It is also observed that the Applicant has also served the copies to the debtor as required under Section 95 (5) of the IBC, 2016.

16. We further notice that the Applicant has earlier proposed the name of the Resolution Professional but he had withdrawn his consent, by filing IA/5903/2021. Thereafter, by filing an application bearing no. IA-38/2022, the applicant has prayed for replacement of Resolution Professional and proposed the name of Mr. Babulal Gurja, Insolvency Resolution Professional who has also given his written consent to act as Resolution Professional under Regulation 4 of IBBI (Insolvency Resolution Process for Personal Guarantor to Corporate Debtor) Regulation, 2019. Therefore, we are inclined to proceed in the matter in accordance with the law.

17. In view of Section 96 (1) (a) an interim moratorium shall commence on the date of the application in relation to all debts and shall cease to have effect on the date of admission of such application; and (b) during the interim moratorium period- (i) any legal action or proceeding pending 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.

(2) Where the application has been made in relation to a firm, the interim-moratorium under sub-section (1) shall operate against all the partners of the firm as on the date of the application.

(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

18. Since, the applicant/creditor has proposed the name of Insolvency Resolution Professional for the appointment as Resolution Professional by filing the IA-38/2022, therefore, we hereby appoint

Mr. Babulal Gurja as Resolution Professional who has given his written consent to act as Resolution Professional. The Resolution Professional shall exercise all the powers as referred to in Section 99 of IBC, 2016 read with relevant Rules met thereunder. The Resolution Professional is further directed to examine the application and make recommendation alongwith reasons in writing for acceptance or rejection of the application within ten days of his appointment as referred to in Section 99 (1) of IBC, 2016.

19. The Resolution Professional shall give a copy of the report as required under Section 99 (7) to the Applicant/creditor as soon as the same is filed before this Adjudicating Authority. The Applicant as well as Registry is directed to serve a copy of this order alongwith copy of the application immediately on the Resolution Professional so appointed by all modes for information and compliance. List the matter on **11.03.2022.**

20. With both the IA no.5903/2021 and IA/38/2022 stand **disposed of.**

-Sd-

AVINASH K. SRIVASTAVA
Member (T)

-Sd-
31.01.2022

ABNI RANJAN KUMAR SINHA
Member (J)