



S.No.5

**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH – 1
VC AND PHYSICAL (HYBRID) MODE
ATTENDANCE CUM ORDER SHEET OF THE HEARING HELD ON
28-11-2024 AT 10:30 AM**

CP(IB) No. 381/95/HDB/2022
u/s. 95 of IBC, 2016

IN THE MATTER OF:

Union Bank of India

...Petitioner

AND

Shri N Sharat
(Personal Guarantor of M/s. Thexa Pharma Pvt Ltd)

...Respondent

C O R A M:-

**DR. VENKATA RAMAKRISHNA BADARINATH NANDULA, HON'BLE MEMBER (JUDICIAL)
SH. CHARAN SINGH, HON'BLE MEMBER (TECHNICAL)**

ORDER

Order pronounced. In the result, **this company petition is rejected. No costs.**

Sd/-
MEMBER (T)

Sd/-
MEMBER (J)



**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH -1
CP (IB) No. 381/95/HDB/2022**

*(Under Section 95 of the Insolvency and Bankruptcy Code, 2016 read with
Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency
Resolution Process for Personal Guarantors to Corporate Debtor) Rules, 2019.)*

In the matter of:

Union Bank of India,
Stressed Asset Management Branch,
3rd floor, Andhra Bank Building
Sultan Bazar, Koti,
Hyderabad 500095.

... Financial Creditor

Versus

Mr N Sharat,
H. No. 8-3-678/26,
Plot No 26, Pragathi Nagar
Colony,
Opp Park Yousufguda,
Hyderabad
Also at:
Flat No.202, AAH Pride,
Plot No 273, Road No 78,
Jubilee Hills,
Hyderabad.

... Respondent No.1/Personal Guarantor

Date of order:28.11.2024

Coram:

Dr. Venkata Ramakrishna Badarinath Nandula, Hon'ble Member (Judicial)
Shri Charan Singh, Hon'ble Member (Technical)



Appearance of Parties/Counsels:

For the Creditor : Ms PBA Srinivasan, Advocate
For the Guarantor : Mr Raghunath, Advocate
Resolution Professional : Mr Mummaneni Vazra Laxmi

PER: BENCH

ORDER

1. This instant petition is filed by the Financial Creditor Union Bank of India (Stressed Assets Management Branch) under Section 95(1) of Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “the Code”) read with Rule 7(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantor to Corporate Debtor) Rules, 2019 (hereinafter referred to as “Personal Guarantors Insolvency Rules, 2019), seeking an order for initiation of the Insolvency Resolution Process (“IR Process”) against Mr.N.Sharat, who is the Personal Guarantor of M/s.Thexa Pharma Private Limited (hereinafter referred to as “Corporate Debtor”).
2. The Corporate Debtor approached the Financial Creditor for Term



loan of Rs. 6.45 Crores towards setting up pellet manufacturing plant and OCC Limit of 18 Crores towards working capital requirement. Board of Directors of the Corporate Debtor vide its Resolution dated 02.05.2015 resolved to take loans and executed the loan documents in favour of the Financial Creditor.

3. It is averred that in the year 2016, working capital (OCC) was enhanced to 31 Crores from 18 Crores and also an additional term loan of Rs 2 Crores was sanctioned to Corporate Debtor for setting up capsule plant. On 02.08.2016 the loan documents were executed by the Corporate Debtor and Personal Guarantors in favour of the Financial Creditor.
4. It is further stated that in the year 2017, Unit II (Capsule plant) of the Corporate Debtor was sold and the proceeds were adjusted towards closure of term loan 2 (Rs.2.00 cr) and the same was closed. As the Corporate Debtor failed to service interest and or principal in the OCC and Term Loan accounts, the accounts were classified as NPA on 28.02.2018 and later the Financial Creditor on 03.03.2018 issued notice informing the same and also demanded repayment of the loan accounts was duly served on the



Corporate Debtor and Personal Guarantor.

5. It is averred that the financial creditor also issued Demand Notice dated 12.08.2021 in Form B as per Section 95 (4) (b) of the Code demanding payment of Rs. 50,71,65,556.58 /- (Rupees Fifty crores Seventy-One lakhs Sixty-Five thousand Five hundred and Fifty-Six and Fifty-Eight only), and despite receipt of the same the personal guarantor did not pay the outstanding amount.
6. The Creditor relied on the following documents to prove the existence of debt and its default by the personal guarantor besides service of notice of demand: -
 - (1) Copy of the sanction letter dated 17.01.2015.
 - (2) Copy of the Composite Agreement dated 04.05.2015.
 - (3) Copy of the General form of Guarantee by N. Sharat dated 04.05.2015.
 - (4) Copy of the Board Resolution Dated 02.05.2015.
 - (5) Copy of the Sanction letter dated 22.06.2016.
 - (6) Copy of the Composite Agreement Loan amount of 33 Cr dated 02.08.2016.
 - (7) Copy of Joint Deed of Hypothecation dated 27.06.2017.
 - (8) Copy of the Deed of Guarantee executed by N Sharat and other Personal Guarantors dated 27.06.2017.
 - (9) Copy of Deed working capital Consortium agreement dated



27.06.2017.

- (10) Copy of the Facility Agreement dated on 07.07.2017.
- (11) Copy of the Demand Notice issued under Section 13(2) of SARFAESI Act dated 03.03.2018.
- (12) Copy of the Statement of Accounts for Term Loan-I.
- (13) Copy of the Statement of Accounts for Term Loan-II.
- (14) Copy of the Statement of Accounts for OCC.
- (15) Notice of serving copy of Company Petition on Personal Guarantor tracking report along with postal receipts has been filed on 01.02.2023.
- (16) Copy of Paper Publication filed on 17.03.2024.

7. Counter filed by the Personal Guarantor/Respondent:-

- i. The personal guarantor has denied all the allegations which are made by the Creditor except those that are specifically admitted.
- ii. It is averred that the respondents herein stood as personal guarantor of the Corporate Debtor/Principal Borrower by executing a General Form of Agreements, Deed of Guarantee and Facility Agreement dated 04.05.2015, 02.08.2016, 27.06.2017 and 07.07.2017 respectively in favour of Financial Creditor during the sanction of credit



facilities, additional term loan and hypothecation to the Principal Borrower is adjudicated under law and further same is barred by limitation.

- iii. It is averred that while the matter is pending before the Hon'ble Debt Recovery Tribunal, Hyderabad for the recovery of the outstanding liabilities from the Principal Borrower and Personal Guarantors filed by the Creditor through an Original Application vide O.A.No. 729/2018, this Tribunal has admitted the application U/s 9 of I & B Code, 2016 vide CP(IB) No 414/9/HYD/2018 against the Principal Borrower/Corporate Debtor herein and initiated CIRP. When the matter stood thus, the Creditor herein has filed the present application for initiation of insolvency resolution proceedings against the Personal Guarantor without serving a Demand Notice in Form-B and a copy of application as mandated under Rule 7(1) & 7(3) of the I & B (AAA) IRP for PGCD Rules, 2019.
- iv. It is averred that, the Personal Guarantor herein has not received any Demand Notice in Form-B and a copy of the



present application and since the creditor has categorically failed to serve a Demand Notice and a copy of application to the Respondent, the present company petition cannot be maintainable as the creditor do not have locus standi to file their company petition before this Tribunal, seeking initiation of insolvency resolution proceedings against the Personal Guarantor. In the case whether if the Creditor has served any such Demand Notice in Form-B and a copy of application on to the Respondent, no such proof of service is found enclosed in the company petition.

- v. It is averred that the Creditor herein has filed an affidavit along with their application which also implies that the Creditor has sworn for following all the mandatory provisions which are required for filing the present application. However, the creditor did not act in accordance with Rule 7(1) & 7 (3) of the I & B AAIRPPGCD Rules, 2019 and filed the application along with an affidavit. It is relevant to refer to the Rules framed for service of Form-B Demand Notice to the Respondent and Rule 7 requires that



a demand notice under Clause B of sub section (4) of Section 95 be served upon the guarantor demanding payment of amount in default in Form-B Rule 3(h) of Personal Guarantor provides that service means sending any communication by any means including registered post/speed post/courier/any electronic form. The conjoint reading of Rule 7 and Rule 3 (h) of PG, Rules r/w Rule 38 of NCLT Rules, which prescribes service to be carried out by Registered. The Creditor claims to have served Form B demand notice upon the respondent and has filed affidavit of service which is not as per law.

- vi. It is averred that, due to non-service of demand notice the opportunity of 14 days for paying the debt was not provided to the Personal Guarantor. Further, the details of the debt owed to the creditor stands undisclosed to the Personal Guarantor which is due to the absence of Form-B Demand Notice and documents related to such debt was not found to be served. Reverting again to Section 95(4) of the I & B Code, 2016, the provision mandates that the application



under subsection (1) should be accompanied with details and such details are nothing but the documents disclosing “relevant evidence of the default or non-repayment of debt”.

- vii. *It is averred that the Hon’ble NCLAT in Ravi Ajit Kulkarni vs State Bank of India [(Company Appeal (AT) (Insolvency) No. 316 of 2021)] dated 12-August-2021, wherein it was held at Para 22 that an Application u/s. 95 shall be filed post issuance of demand notice. The notice of demand was sought to be issued as per Rule 7 in Form-B and the service of notice to be affected as per Rule 3(1)(g), Para 22 of the Judgment is reproduced below:*

“22. Coming back to Section 95(4), the application under Section 95(1) needs to 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; and (b) the details and documents relating to failure by the debtor to pay the debt within a period of 14 days of service of notice of demand. The notice of demand as per Rule 7(1) has to be in Form C (supra). The service of notice has to be effected as per Rule 3(1)(g).”service” has been defined in the Rules as follows:”

(g) service means sending any communication by any means, including registered post, speed post, courier or electronic means, which is capable of producing or generating an acknowledgment of receipt of such communication: provided that where a document cannot be served in any of the modes, it shall be affixed at the outer door or some other conspicuous part of the house or building in which the addressee ordinarily resides or carries on business or personally works for gain.

8. Pursuant to this Application, this Adjudicating Authority vide order dated 22.12.2023 appointed an IRP Mr. PVB Sudhakara Rao,



directing him to file a report within 10 days. Subsequently, Learned IRP filed the report and a copy was served on the Personal Guarantor, with regard to this proof of service was also filed on 30.01.2024. As per the same the report is served on the Personal Guarantor. A copy of postal receipt of speed post is also annexed. However, the case was posted on 28.02.2024 for hearing on the objections of RP's report. Despite service of the notice on the personal guarantor, personal guarantor called absent. Accordingly, personal guarantor was set-ex-parte and matter was posted for orders on 11.11.2024.

9. The Resolution Professional has filed his report, vide IA No.148/2024, recommending for the admission of the Petition under Section 95 of the Code, 2016 and the Resolution professional in the application stated that the petitioner has sent the demand notice in Form-B dated 12.08.2021 and reissued on 03.04.2023. Based on the facts the RP is recommending for approval of the petition filed by the creditor against personal guarantor Mr.N.Sharat. Thus, RP has recommended for acceptance of the Application under Section 95 of IBC, 2016.



10. In the light of the contest put forth as above, the point that emerges for the consideration of this Tribunal is:
1. **Whether an application under Section 95 of Insolvency and Bankruptcy Code, 2016 can be rejected upon the failure of the creditor in establishing 'due' service of demand notice on the guarantor?**
 2. **Whether the instant petition for initiation of Insolvency Resolution Process against the respondent can be ordered under section 100 of IB Code?**
11. We have heard the Learned Counsel Mr PBA Srinivasan, for the Creditor, and Learned Counsel Smt Mummaneni Vazra Laxmi for Resolution Professional and Mr PVB Sudhakar Rao, Resolution Professional and perused the record.
- POINT 1:**
- Whether an application under Section 95 of Insolvency and Bankruptcy Code, 2016 can be rejected upon the failure of the creditor in establishing 'due' service of demand notice on the guarantor?**
12. It is trite law that service of demand notice is *Sine qua non* for initiating action against the Guarantor for payment of the amount guaranteed.
13. In terms of Section 95(4), it is imperative for the Applicant to



enclose the details and the documents relating to the failure by the guarantor/debtor to pay the debt within a period of 14 days of service of the demand notice. Thus, the service of demand notice on the guarantor is essential in order to maintain an Application under Section 95 of IBC.

14. Since the central issue in the case on hand being alleged *non service* of notices of demand alleged to have been issued on 12.08.2021 and reissued on 03.04.2023 on the Personal Guarantor, which plea is stoutly denied by the creditor, it is imperative for this Tribunal to find, whether 'due' service of notice of demand by the creditor on the guarantor demanding payment of the amount due and payable under the subject contract of guarantee is '*sine qua non*' for maintaining the present company petition U/s. 95 IBC? If so, what are the consequences of non-service of the notice of demand on the personal guarantor/respondent herein?
15. Before we proceed with our discussion on the point above, we usefully refer to the following sections of the Insolvency & Bankruptcy Code, 2016.



Section 95:

Application by creditor to initiate insolvency resolution process.

“(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.”

Section 99:



Submission of report by resolution professional.

“(1) The resolution professional shall examine the application referred to in section 94 or section 95, as the case may be, within ten days of his appointment, and submit a report to the Adjudicating Authority recommending for approval or rejection of the application.

(2) Where the application has been filed under section 95, the resolution professional may require the debtor to prove repayment of the debt claimed as unpaid by the creditor by furnishing—

(a) evidence of electronic transfer of the unpaid amount from the bank account of the debtor;

(b) evidence of encashment of a cheque issued by the debtor; or

(c) a signed acknowledgment by the creditor accepting receipt of dues.

(3) Where the debt for which an application has been filed by a creditor is registered with the information utility, the debtor shall not be entitled to dispute the validity of such debt.

(4) For the purposes of examining an application, the resolution professional may seek such further information or explanation in connection with the application 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.

(5) The person from whom information or explanation is sought under sub-section (4) shall furnish such information or explanation within seven days of receipt of the request.

(6) The resolution professional shall examine the application and ascertain that—

(a) the application satisfies the requirements set out in section 94 or 95;

(b) the applicant has provided information and given explanation sought by the resolution professional under sub-section (4).

(7) After examination of the application under sub-section (6), he may recommend acceptance or rejection of the application in his report.

(8) Where the resolution professional finds that the debtor is eligible for a fresh start under Chapter II, the resolution professional shall submit a report recommending that the application by the debtor under section 94



be treated as an application under section 81 by the Adjudicating Authority.

(9) The resolution professional shall record the reasons for recommending the acceptance or rejection of the application in the report under sub-section (7).

(10) The resolution professional shall give a copy of the report under sub-section (7) to the debtor or the creditor, as the case may be.”

- 16.** A bare perusal of *Sub Clause 4 (b)* of Section 95 makes it clear that the creditor in an application filed under section 95 of IB Code, shall enclose the documents relating to the “debt” owned by the debtor to the applicant/creditor, and also the documents relating to failure by the debtor to pay the said ‘debt’ within a period of 14 days from the date of *service* of notice of demand.
- 17.** Thus, undoubtedly, Section 99(1) in I&B Code imposes a legal obligation on the resolution professional to examine the application under Section 94 or Section 95, as the case may be, within ten days of his appointment, and submit a report to the Adjudicating Authority recommending for *approval or rejection* of the application.
- 18.** It is trite law that the guarantee becomes a debt once the said guarantee is invoked, wherein after the guarantor becomes liable. Here, we usually refer to the ruling of Hon’ble NCLAT, in



Edelweiss Asset Reconstruction Company vs Orissa Manganese and Minerals Limited and others, Company Appeal No 437/2018
wherein it has been held that:

“A contract of guarantee matures in to a binding obligation only upon its invocation. Contract of Guarantee is an autonomous contract and the admission of the principal debtor to CIRP does not mean that the debt stands proved as against the Guarantor in a Section 7 proceeding against the Corporate Guarantor automatically. The guarantee has to be invoked and the debt and default proved separately in the proceeding against the Guarantor.” (Emphasis is supplied).

19. Precisely, for this reason only *Sub Clause 4 (a) (b) (c)* of Section 95 IBC, mandates filing of 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.
20. Therefore, unhesitatingly, the *sine qua non*, for initiation of insolvency resolution under section 95 IB Code 2016 is the ‘*due invocation*’ of the personal guarantee executed by the respondent/guarantor. The ‘burden’ lies on the applicant/creditor to establish that the subject general form of agreement dated 04.05.2015 and a deed of guarantee dated 27.06.2017 executed by Mr.N.Sharat along



with other Personal Guarantors has been duly invoked, *lest* the “debt” under the guarantee payable by the guarantor will not exist and the application under section 95 of I&B Code, 2016 will be liable for *rejection*.

21. Here it is pertinent to note that though the creditor has contended that the Demand Notice, purportedly sent to the Personal Guarantor, on 12.08.2021 and 03.04.2023, no proof of service of the same has been filed along with Company Petition.
22. As rightly contended by the Learned Counsel for the Personal Guarantor, unless and until the petitioner is able to show that the address mentioned in the postal cover matches the admitted address of the petitioner, it is not required for the respondent to establish non service of the demand notice on the respondent.
23. The Resolution Professional who is under the legal obligation to verify the due compliances of the provisions of IB Code by the creditor before submitting his report to the Adjudicating Authority in terms of Section 99(1) of I&B Code, which is as below:

“99(1) The resolution professional shall examine the application referred to in section 94 or section 95, as the case may be, within ten days of his appointment, and submit a report to the Adjudicating Authority recommending for approval or rejection of the application”.



in his report dated 08.01.2024 in column 4(b) of the report stated as below:

“1. The financial creditor issued notice of demand on 12.08.2021 and reissued on 03.04.2023 under Rule 7(1) of Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process of Personal Guarantor to Corporate Debtor) Rules, 2019 calling upon the Guarantor herein to pay the unpaid debt within 14 days from the date of the receipt of the notice.

2. The Personal Guarantor has not replied the demand notice nor come forward to pay the outstanding amounts.

3. The Resolution Professional through email dated 23.12.2023 requested the Financial Creditor herein to confirm the repayment of the debt claimed is unpaid and the financial creditor replied on stating that the balance pending in the two accounts of the Corporate Debtor is Rs.51,93,55,782.75”

Further in para 10(f) of the report of the RP has stated as below:

“The debtor failed to repay the debt within a period of fourteen days of the service of the notice of demand dated 12.08.2021 and reissued demand notice on 03.04.2023 (as the proof of service has not been filed for the earlier demand notice).

Further in para 10(e) of the report of the RP has stated as below:

“As the debt for which an application has been filed by a creditor is registered with the information utility, Nesl the debtor shall not be entitled to dispute the validity of such debt as per Section 99(3) of IBC, 2016”.

- 24.** Here we wish to point out that, in terms of sub sections 4, 5, 6 & 7 of Section 99 of the I&B Code, 2016 which are as below:

Section 99 :

Submission of report by resolution professional:

“99 (1), (2), (3)



(4) For the purposes of examining an application, the resolution professional may seek such further information or explanation in connection with the application 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.

(5) The person from whom information or explanation is sought under sub-section (4) shall furnish such information or explanation within seven days of receipt of the request.

(6) The resolution professional shall examine the application and ascertain that—

(a) the application satisfies the requirements set out in section 94 or 95;

(b) the applicant has provided information and given explanation sought by the resolution professional under sub-section (4).

(7) After examination of the application under sub-section (6), he may recommend acceptance or rejection of the application in his report.”

the resolution professional while examining the application, in order to ascertain whether the application satisfies the requirements set out in section 94 or 95 of the I&B Code, 2016 as the case may be, is entitled to seek such further information or explanation in connection with the application 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 and the person from whom information or explanation is sought under sub-section (4) shall furnish such information or explanation within seven days of receipt of the request.

25. Admittedly, when no proof of service of the Demand Notice on the Personal Guarantor has been filed along with Company



Petition, the Resolution Professional in this case ought to have ascertained from the creditor regarding the proof of service of the demand notices dated 12.08.2021 and 03.04.2023 as part of his verification process. Moreover, when non-compliance of subsection (4) of section 95 I&B Code, 2016 is *ex facie*, apparent and unequivocal, the Resolution Professional had ventured to observe that demand notice has been served on the personal guarantor and recommend the ‘admission’ of the present application, which in our considered opinion is a sheer mechanical act, without any application of mind.

26. Therefore, in light of our discussion as aforementioned, we are of the firm view that the applicant/ creditor failed in establishing compliance of subsection (4)(a) of section 95 I&B Code, 2016. As such the “debt” as claimed under the impugned Guarantee Agreement does not “exist” as on the date of filing of the present application.
27. The Point is answered accordingly.



POINT 2

Whether the instant petition for initiation of Insolvency Resolution Process against the respondent can be ordered under section 100 of IB Code?

- 28.** In the light of the findings on point 1, the present petition deserves to be rejected.
- 29.** The point is answered accordingly.
- 30.** In light of our discussion and findings on the points above the report of the Resolution Professional and the Company Petition are hereby rejected, moratorium order passed earlier stands vacated forthwith.
- 31.** In the result CP (IB) No.381/95/HDB/2022 is hereby rejected. No costs.

-sd-

Charan Singh
Member Technical

-sd-

Dr. Venkata Ramakrishna Badarinath Nandula
Member Judicial

Swapna/Pavani