

IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD
COURT - 2

ITEM No.301
CP(IB)/80(AHM)2021

Order under Section 95 IBC

IN THE MATTER OF:

State Bank of India
V/s
Gourishankar Poddar
(Personal Guarantor)

.....**Applicant**

.....**Respondent**

Order delivered on: 23/02/2024

Coram:

Mrs. Chitra Hankare, Hon'ble Member(J)
Dr. Velamur G Venkata Chalapathy, Hon'ble Member(T)

ORDER

The case is fixed for pronouncement of order.

The order is pronounced in open Court vide separate sheet.

Sd/-

DR. V. G. VENKATA CHALAPATHY
MEMBER (TECHNICAL)

Sd/-

CHITRA HANKARE
MEMBER (JUDICIAL)

**BEFORE THE ADJUDICATING AUTHORITY
THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD (COURT - II)**

CP(IB) No. 80 / NCLT / AHM / 2021

(Filed under Section 95(1) of the Insolvency & Bankruptcy Code, 2016)

State Bank of India
Stressed Assets Management Branch-1,
2nd Floor, The Arcade,
World Trade Centre,
Cuffe Parade,
Maharashtra 400005

... Financial Creditor

Versus

Mr. Gourishankar Poddar
Sunville Apartment, 2nd Floor,
Plot No. 80, N S Road No. 8,
JVPD Scheme, Vile Parle (West),
Mumbai- 400049

... Personal Guarantor

Order pronounced on 23.02.2024

CORAM:

**MRS. CHITRA HANKARE
HON'BLE MEMBER (JUDICIAL)**

**DR. V. G. VENKATA CHALAPATHY
HON'BLE MEMBER (TECHNICAL)**

Present:

For the Applicant : Mr. Vishal Raval, Adv.

For the Respondent : Mr. Deep Roy, Adv. a.w. Mr. Dhaval Savla, Adv

JUDGEMENT

1. The Present Application is filed under Section 95 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as IBC, 2016) read with Rule 7(2) of the Insolvency & Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtor) Rules, 2019 by State bank of India (hereinafter referred to as “Financial Creditor”) for the purpose of initiating insolvency resolution process against Mr. Gourishankar Poddar (hereinafter referred to as Personal Guarantor) for default amount of Rs.633,52,57,131/- The Respondent personal guarantor along with Smt Rajkumari Kanodia stood as guarantor in respect of repayment of interest, cost, charge and other expenses due and payable by the Corporate Debtor, by executing an irrevocable and enforceable Deed of Guarantee dated 10.07.2013 and 29.03.2014.
2. The total debt (including any interest or penalties) is Rs.18,54,00,57,143/- and date of default mentioned is 25.01.2018. The applicant filed an original application bearing no. 185 of 2018 before Debt Recovery Tribunal II, Ahmedabad for

recovery of dues. The stated appeal was disposed off. Thereafter, Company Petition bearing No. CP(IB) 350/NCLT/AHM/2019 filed by the Applicant under Section 7 against M/s.Raj Rayon Industries Limited and same was admitted by this Hon'ble National Company Law Tribunal, Ahmedabad vide order dated 23.01.2020.

3. It is stated in the petition that the corporate debtor entered into Sixth Supplemental Joint Deed of Hypothecation and a deed of guarantee dated 10.07.2013 in favour of the applicant (SBI & its subsidiary banks who have now been merged with the applicant) along with Smt. Rajkumari Kanodia for an amount of Rs.292 crores along with interest due and payable. Further, applicant entered into seventh supplemental working capital consortium agreement dated 25.07.2014 with the corporate debtor.
4. Due to non-Payment of the outstanding dues by the corporate debtor, the Financial Creditor has filed this application for initiation of Insolvency Resolution Process against the guarantor under section 95 of IBC, 2016. As per the Applicant, the personal guarantee was invoked vide notice dated 18.01.2018. Applicant issued demand to the respondent on 08.03.2021 under Rule 7(2)

of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantor to Corporate Debtors) Rule, 2019. A reply was received on 25.03.2021. The applicant had denied the default and further stated that he had resigned from the directorship of the company on 06.03.2014 and the same was accepted on 18.03.2014 by the board of directors. Accordingly he had informed all the relevant authorities including the stock exchange and he had also transferred all his shareholdings in the company between May 2013 and June 2013 and was no longer promoter of the company. Further, he stated that he had requested the applicant and to the consortium of lenders to release his guarantee through letters dated March 24, 2014, April 1, 2014, April 2 and also April 24, 2014. Further, the Corporate Debtor had also vide their letter dated March 20, 2014 intimated the bank and consortium lenders that he was no longer a director or shareholder of the company. The bank had not accepted the same. He had also signed the guarantee in relation to the Corporate Debt Restructuring and any resignations at this stage would be in violation of the undertaking given to the CDR cell. However, the applicant contended that his tenure was only till March 31, 2014. The bank had served a notice

through their counsels vide letter dated July 6 and July 9, 2014 that the respondent continues to be a guarantor and denied any form of release of the personal guarantee. Further, the applicant in his reply had raised various issues of irregularities and manipulations by disposal of assets and in the operations of the account and its credit facilities.

5. The respondent's letter to the bank on May 4, 2016 highlighting and providing evidence of diversion of funds from the company, which was replied on May 6, 2016 thanking for the information. The respondent further brought to the notice of the bank these issues on June 29, 2018 and January 13, 2021, which were replied stating that they had filed a police complaint in pursuance to his letters. Respondent also pointed out in his reply to the demand notice that the bank had recalled the facility on August 12, 2016 and sent a demand letter to the respondent stating that the account of the company is a non performing asset (NPA) since November 30, 2013. Having given a personal guarantee for the Corporate Debtor and after not being involved in the activities of the company since resignation and having pointed out various irregularities, the respondent has pleaded that not being the director and involved in the day to day affairs of the company, he

was to have been released from the personal guarantee when no action has been initiated and the account had become NPA and the CDR mechanism had failed and he had not acknowledged any debt of the company the demand raised and this subsequent notice is completely a proceeding which is time barred. If the date of default is January 25, 2018 then it is after approximately 4 years after he demitted charge as director of the company. The bank has issued a letter dated 19.01.2015 when the credit facilities were renewed/sanctioned. A revival letter issued by the CDs two directors Smt Rajkumari Kanodia, Director of the Corporate Debtor and Shri Sushil Kumar Kanodia Director of Raj Money Market Ltd and Director of Corporate Debtor. They have confirmed that the supplemental deed of guarantees executed on 26/2/2007, 28/2/2007. 25/11/2010, 5/7/2011, 11/2/2013, 10/7/2013 and 29/3/2014 have been acknowledged in terms of their liability.

6. On presentation of the application by the Applicant/Financial Creditor this Tribunal had vide an order dated 05.10.2021 appointed Ms. Vineeta Maheshwari bearing registration no. IBBI/IPA-001/IP-P00185/2017-18/10364 as resolution professional to carry out Insolvency Resolution Process of the

personal guarantor as per section 97(3) of IBC, 2016. Accordingly the RP has filed a report on 22.10.2021 with following observations:

- I. It is stated that M/s Raj Rayon Industries Limited (under CIRP) (“Borrower”) availed various financial facilities of Rs. 495.96 lakhs and after due consideration of their request, the applicant had sanctioned various financial facilities on various terms and conditions stipulated in the sanction letter dated 07.04.1999. Subsequently the financial facilities were renewed /enhanced / extended at various instances at the request of Corporate Debtor. Accordingly, the guarantor had extended / created guarantee at various instances as and when required for availing / renewing / enhancing the financial facilities.
- II. The Guarantee deed dated 10.07.2013 and 29.03.2014 executed by Mr.Gourishankar Poddar in favour of State Bank of India, for guaranteeing the outstanding sum and any other amounts and dues payable which the corporate debtor failed to pay with respect to agreed terms and conditions.

- III. The Applicant has issued demand/recall notice invoking the personal guarantee to the tune of Rs. 998.52/- Crore including interest as on 31.12.2017 and further interest, penal interest plus cost, etc. accrued from 01.01.2018 and directed to pay the same within 7 days from the date of this notice and served the same to the personal guarantors dated 18.01.2018. No payment under the personal guarantees was received by the financial creditor in response to the demand / recall notice dated 18.01.2018.
- IV. Pursuance to the demand notice served upon Guarantor, the guarantor replied stating that he has already intimated the Bank of his dissociation at the correct time, requested for a release of his liability, mentioned that he is not able to direct actions of the company and highlighted infractions and problems of the company to the Bank, to which he received no response.
- V. The Resolution Professional has intimation order passed by the Hon'ble Tribunal dated 05.10.2021 for declaration of interim moratorium to the various persons including the present guarantor. The RP vide his letter dated 11.10.2021 asked the personal guarantor for the proof of payment of outstanding debt

claimed as unpaid by the financial creditor, if already paid by him, to which RP has not received any such proof.

VI. As all the conditions of section 95 complied with, the RP recommended for admission of this application against the personal guarantor Mr. Gourishankr Poddar subject to provisions of IBC.

7. Respondent/personal guarantor filed a reply stating the following issues:

I. The Guarantor was the director of the Company under a contract, wherein the scheduled tenure was from 2009 to 2014. Therefore, the Guarantor was primarily involved in his professional capacity and the Financial Creditor was clearly aware of this position. The Guarantor, in his capacity as the director of the Company had extended a personal guarantee to the Financial Creditor in respect of the financial facilities availed by the CD.

II. Guarantor, vide his letter dated 06.03.2014 resigned from the post of director of the Company. Guarantor also informed the relevant stock exchanges and the Financial Creditor of his resignation. Such resignation was accepted by the Company in its board

meeting dated 18.03.2014. In response to the Guarantor's letter dated 06.03.2014, the Financial Creditor replied vide its letter dated 12.03.2014. This makes it clear that the Financial Creditor was aware of and in receipt of the Guarantor's letter dated 06.03.2014.

III. Guarantor also transferred his entire shareholding in the company to the existing promoters. Thus he was no longer a shareholder or a promoter of the company. The Company, vide its letter dated 20.03.2014 informed the Financial Creditor and other consortium lenders of the resignation of the Guarantor and conveyed to the lenders that the Guarantor was no longer the shareholder or the director of the Company. Additionally, the Company also informed various authorities, including the Chief Inspector of Factories and Boilers and the direct tax and indirect tax authorities of the resignation of the Guarantor from directorship and thereby clearly indicating his dissociation from the Company.

IV. Guarantor requested the financial creditor and other consortium lenders to release his guarantee as he was no longer associated with the company on various occasion. The approval of the Corporate Debt Restructuring Cell ("CDR Cell") in relation to the corporate debt restructuring of the Company was provided on

24.03.2014 and communicated to the parties on 27.03.2014. Therefore, the Guarantor's resignation and the intimation of such resignation to the consortium lenders, including the Financial Creditor was prior to the approval by the CDR Cell.

- V. The Personal Guarantor states that despite intimation of his resignation and dissociation from the Company, the Financial Creditor, in its recommendation report dated March 2014 has still misrepresented the Guarantor as the promoter and director of the Company.
- VI. The Financial Creditor has classified the Company as non-performing asset and classified the Company and its directors as wilful defaulter with effect from 30.11.2013. Further states that the Guarantor was coerced and pressurized to provide an additional guarantee under the terms of the corporate debt restructuring despite having resigned and completely dissociated himself with the Company.
- VII. The Guarantor, after receiving no response from the Financial Creditor in respect to the notices issued by him intimating about his resignation and dissociation from the Company, sent a legal notice dated 12.05.2014 through Interjuris Advocates and

Consultants to the consortium lenders, including the Financial Creditor. Further, informed to the consortium of lenders of the sale of charged assets from the company on which he had no control. Further states that these proceedings are time barred under Limitation Act. Guarantor had not received recall notice from the applicant.

8. Respondent/personal guarantor filed an affidavit to the report filed by the RP stating the following issues:
 - I. The RP Report mentioned certain insurance policies of the Guarantor. It is submitted that the said insurance policies have been issued under the Married Women's Property Act, 1874 which RP has not considered the same. Further, RP has included the amounts held under National Pension Scheme and Public Provident Fund, According to Section 155(2) of the IB Code, 2016 the estate of bankrupt shall not include any excluded assets.
 - II. The Report has indicated that the Guarantor has executed a revival letter dated 06.02.2016 in favour of the Financial Creditor. This observation of the RP is completely false and misleading. It is submitted that the Guarantor had already resigned from the directorship of Raj Rayon Industries Limited on 06.03.2014.

Further, RP has not considered certain liabilities in his report despite duly informed.

9. The RP has recommended to initiate the Insolvency Resolution Process against the Personal Guarantor. The RP has submitted the copies of documents and also details of assets of respondent. The respondent had not brought on record any document denying or disputing the invocation of his Personal Guarantee. There is no any evidence given by the respondent to show that he has paid the debt or his Personal Guarantee agreement is cancelled. The action initiated is within the period of limitation.
10. We have heard the Ld. Counsel for the petitioner and respondent and gone through the Report of RP and the documents available on records and the written submissions of the applicant and the respondent.
11. The applicant in his submission by affidavit has reiterated the facts that the deed of guarantee dates 10.07.2013 in favour of the applicant was invoked on 18.01.2018. Further, as far as resignation of personal guarantor is concerned, who has stated to have resigned the company vide letter dated 06.03.2014, even

though the same is intimated to the present applicant, he had sent a letter dated 12.03.2014 stating that his liability will continue as per the terms of deed of guarantee executed on various dates and that decision of the resignation is in violation to the undertaking dated 07.11.2013, given by respondent to the CDR cell, in which respondent had agreed to not to resign from post till final approval and implementation thereof. Mere acceptance of resignation letter by RoC and Company the personal guarantor shall not be discharged from his obligation that he has given by virtue of deed of guarantee as it is irrevocable and unconditional. The date of invocation of guarantee is 18.01.2018 whereas the present petition filed on 23.04.2021, the limitation period was due to end in January, 2021. The Supreme Court through a suo moto writ order (C) No. 3 of 2020 extend the period of limitation. Therefore the present application is within the period of limitation.

12. As regards the contention of the respondent that the renewal letter dated 19.1.2015 and revival letter dated 06.02.2016 were signed by only the Corporate Debtor and other guarantors namely Mr. Sushil Kumar Kanodia and Ms. Rajkumari Kanodia, the applicant stated that it was merely extension of existing facilities admitted

by the guarantor in the guarantee agreement executed and not the enhancement of any facility, hence should be accounted to pay an amount of Rs.1854.00 crores along with interest and other charges.

13. Observations:

- a. The respondent Guarantor had executed the gurantee along with another Ms. Rajkumari Kanodia on 10.07.2013 which was an irrevocable and unconditional guarantee as specifically mentioned in Para 2 and that the agreement binds the applicant and shall not be released by any exercise by the said banks as mentioned in para 3 of the agreement.

- b. On perusing the revival letter dated 06.02.2016, it appears that, it was signed only the company through Smt. Rakumari Kanodia and Mr.Sushilkumar Kanodia by supplemental Working Capital Consortium Agreement dated 25.07.2014 to which an agreement is made with the Corporate Debtor by the applicant and State Bank of Hyderabad, State Bank of Trivancore, State Bank of Mysore, State Bank of Bikaner and State Bank of Jaipur and South India Bank Limited. It is also mentioned in pursuance of the above, the parties were desirous of modifying and altering the

existing working capital consortium agreement as mentioned in this agreement. By this agreement various working capital consortium agreement since 2005 were reconstituted the existing facilities were also restructured in terms of the package approved by CDR cell. By way of this agreement the consortium of banks reduced existing facilities and granted additional working capital facilities of 80.94 Crores that means terms of contract were varied between the bank and the Corporate Debtor. In the terms of this agreement it is specifically mentioned in para 7 that the borrower shall procure irrevocable joint and several and unconditional personal guarantees from Mr. Gauri Shankar Poddar and Mrs. Rajkumari Kanodia and Corporate guarantees of Rajmani Markets Limited for the payment of discharge by the borrower.... etc.

It is pertinent to note that in spite this condition the personal guarantee was not procured from respondent. Moreover, at that particular point of time the bank had knowledge that the respondent had resigned from the directorship of the Corporate Debtor. As per Section 133 of the Contract Act, "any variance made without surety consent, in the terms of the contract between the debtor and the creditor, discharges this surety as to transaction subsequent to the variance".

- c. The respondent guarantor has stated that he was under a scheduled tenure from 2009 to 2014 in professional capacity as the Director for the company and had extended the personal guarantee and the Financial Creditors were aware of the same. He had also transferred all his shares in the company to the existing shareholders and had sent a letter to the applicant on 6th March 2014. SBI in its letter dated 12th March 2014 did not agree with the resignation and further stated that his liability would continue to be treated and the company's account is NPA as on 30.11.2013 and restructuring under CDR was in process and resignation from the post of Chairman and MD does not absolve of the personal guarantor of his liabilities to the bank. Further, the Corporate Debtor conveyed to the SBI vide their letter dated 20th March, 2014 that the resignation of the PG who was also the Chairman and MD of the Corporate Debtor was accepted in the board meeting dated 18th March, 2014 for which form 32 was filed with the ROC. It also mentioned that all the shares of the personal guarantor and his family members were transferred to Raj Money Market Ltd. Further the respondent vide his letter dated 24th March 2014 further clarified to the points raised in the Joint Lenders Meeting of Raj Rayon Industries Limited held on 22

March 2014 that he had resigned from the Corporate Debtor which was before the sanction of the CDR package and that his tenure is between 1 April 2009 and 31 March 2014 and sought revocation of all personal guarantees. Further in the Form 32 provided as record, the name of respondent has been mentioned as Cessation as MD of the company with effect from 18/3/2014 and Mr Prahlad Rai Jajodia has been appointed as Addl Director of the company.

- d. He relied upon the following judgments:
- i. H.R. Basavaraj Vs. Canara Bank, (2010) 12 SCC 458
 - ii. Syndicate Bank Vs. Channaveerappa Beleri, (2006)11 SCC 506
 - iii. Kailash Chandra Gaur Vs. Central Bank of India, 2005 SCC Online DRAT 74
 - iv. B.G. Vasantha Vs. Corpn. Bank, (2005) 10 SCC 215
 - v. Canara Bank Vs. A Chidambaram, 2002 SCC Online DRAT 10
 - vi. Indian Bank Vs. State of Tamil Nadu, 2002 SCC Online Ms. Mad 339
 - vii. Margaret Lalita Samuel Vs. Indo Commercial Bank Ltd. (1979) 2 SCC 396.

The observations made in these rulings are not helpful to the applicants as the facts of this case are different.

- e. It is observed from the documents that the respondent had signed the personal guarantee document on 29 March 2014 and further on 1 April 2014 issued a letter to the SBI and its group of banks stating that he had resigned, seeking release of guarantee. In view of this ruling and as per Section 130 of the Contract Act, he cannot be liable for future contracts.
- f. The applicant's documents states that the Guarantee executed on 29.03.2014 is a continuing guarantee which has been taken by the bank. After being informed that he has resigned from the company and the board had approved the facilities. It is stated that one of the departments Corporate Debt Restructuring Cell was not aware of it. The bank had not agreed with the guarantor stepping out of the company is a different matter altogether.
- g. It is pertinent to the facilities were continued/renewed by issue of fresh sanction renewal letter and revival letters dated 19.01.2015 and 6.2.2016 respectively which sought the continuance of the guarantor. However, when the guarantor has not consented it should have been invoked then and there or the bank should have taken substitution by another guarantor on its own terms and conditions. If the guarantor has been omitted and another

guarantee has been substituted along with the renewal document or if there was no substitution grant/renewal of any other facilities, when there was protest or unwillingness, it is deemed that the guarantor has not agreed to continuation of his guarantee which has to be substituted or should have been invoked. In such case, sureler who has not signed new agreement cannot be held liable.

- h. As regards limitation, the applicant has stated that respondent had sent a legal notice dated 06.07.2014 disallowing the resignation. Further, the applicant obtained a consent letter for revival of the facilities on 6th February 2016, signature of one of the Directors with common seal of the Corporate debtor in which there are signatures of two other guarantors (common seal of Raj Money Market Limited and not of the respondent. This effectively cedes the rights of the bank to further pursue the guarantee executed earlier as the bank has neither shown any other guarantee in which the replacement has been made or whether the guarantor has agreed to continue and executed further the guarantee to continue the facility. To continue, renew, increase a liability in which the Guarantor was not a party or his consent is not obtained is not binding on him.

- i. It is further noted that the respondent had sent a legal notice of his resignation and release from the guarantee on May 12, 2024. When the respondent has failed to reply to the notice dated 06.07.2014 or has not agreed to the consent to continue as guarantor, the bank for renewal executed certain documents on which other guarantors have signed and the bank had relaxed the norm or accepted the new arrangement, thereby this guarantor stands to be relieved or was not proceeded upon. The guarantee arrangement is not continued by replacement, The time period for invoking the guarantee should have been 3 years from which the borrower declined to continue the guarantee as the account was already under default since 2014 as a NPA w.e.f. 2013 and was only renewed granting further time for recasting of the loan or consolidating the debt in which the applicant was not a party to the proceedings or execution of further documents in support of this guarantee. Further, the respondent as per documents has before on his resignation, intimated the regulatory authorities including the stock exchange and has also confirmed not having even equity in the company any more. The applicant has not taken appropriate steps to protect the guarantee, and has decided

to proceed on guarantor after a period of more than 7 years. The invocation of guarantee itself is not within time.

In such circumstances, extension of limitation by Hon'ble Supreme Court as per order in Suo Moto Writ Order (c) No. 3 of 2020 is not at all helpful to the applicant.

- j. The RP filed report recommending to initiate the insolvency resolution process against the respondent –Personal Guarantor. The RP has submitted the copies of documents and also details of assets of respondent. According to him respondent had not brought on record any documents denying or disputing the invocation of his personal guarantee. In the list and dates of events with particulars, the RP has mentioned that on 25.07.2014, the applicant entered into 7 supplemental working capital consortium agreement with Corporate Debtor again on 19.01.2015 Raj Rayon Industries Limited sanctioned and renewed various financial facilities. He has further mentioned that the guarantor executed revival letter dated 06.02.2016.
- k. On perusing the revival letter, it appears that it was signed by Ms.Rajkumari Kanodia and Mr. Sushilkumar Kanodia. When the RP is appointed regarding insolvency proceedings of guarantor Mr.

Gourishankar Poddar it is his duty to specifically mention whether this guarantor has signed revival letter or not. This guarantor has not at all signed revival letter but an absolutely false statement is made by the RP that the guarantor has signed. Being an officer of the Court it is very serious on the part of the RP to make such vague statement in the report, which is to be taken into consideration while deciding the application. This act of RP needs to be inquired into by IBBI.

1. Therefore, the respondent who has not signed cannot be held liable as per the provisions of Contract Act.
- m. Further, if the financial creditor, in spite various letters and other information given on the financial irregularities not acted upon to get either a fresh guarantee from the company or has acted (in terms of Sec 139 of Indian Contract Act) “ if the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety himself against the principal debtor is thereby impaired, the surety is discharged.
- n. The applicant had filed an application against the Corporate Insolvency Resolution Process under Section 7 against the

Corporate Debtor in CP(IB) 350/7/2019. Even at that time, the respondent had not invoked the guarantee and filed an application against the personal guarantor if eligible and if it was within limitation. Considering above facts it is clear that the respondent has not signed any guarantee after renewing agreement so also as to his previous guarantee the application is time barred.

- o. Hence, we pass the following order:

ORDER

- i. Accordingly, this application is rejected.

Sd/-

DR. V. G. VENKATA CHALAPATHY
MEMBER (TECHNICAL)

Sd/-

CHITRA HANKARE
MEMBER (JUDICIAL)