

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH - I**

C.P. (IB) NO. 139/MB/2022

Under Section 95 of the
Insolvency & Bankruptcy
Code, 2016.

In the matter of

Bank of Baroda

...Petitioner/Financial
Creditor

Versus

Mr. Jitendra V Kikavat

Personal Guarantor Cd

M/S Mahavir Roads And

Infrastructure Pvt. Ltd.

...Respondent/Personal
Guarantor

Order pronounced on 30.07.2024

Coram:

Hon'ble Member (Judicial) : Justice V. G. Bisht (Retd.)

Hon'ble Member (Technical) : Sh. Prabhat Kumar

Appearances:

For the Petitioner/Financial Creditor: Mr. Kairav Trivedi,
Advocate

For the Respondent : Mr. Siddharth Shankar,
Advocate i/b Agarwal and
Dhanuka Legal

ORDER

Per: Justice V. G. Bisht (Retd.), Member (Judicial)

Brief facts:

1. The present petition is filed *u/s.* 95 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “IBC, 2016”) by **Bank of Baroda** (hereinafter referred to as “Petitioner/Financial Creditor/Creditor”) for the purpose of initiating insolvency process against **Mr. Jitendra V Kikavat** (hereinafter referred to as the “Respondent/Personal Guarantor/Guarantor”) for recovery of Rs.66,35,16,757.11/- (Rupees Sixty-Six Crores Thirty-Five Lakh Sixteen Thousand Seven Hundred Fifty-Seven and Eleven Paise only). The Date of Default, as specified in Part-III of the present petition is 30.01.2016.
2. The Petitioner has its business address at Stressed Assets Management Branch, Dena Building, 1st Floor, 17-B, Homji Street, Horniman Circle, Fort, Mumbai – 400023.
3. The Respondent is an Indian resident having his present address at Plot 168, Neelkanth Jyot, 90 Feet Road, Ghatkopar (E), Mumbai, Maharashtra - 400077.
4. The Respondent is a personal guarantor for **M/s Mahavir Roads and Infrastructure private limited** (hereinafter referred to as the “Corporate Debtor/borrower”) incorporated on 16.10.2006 having CIN U45201MH2006PTC165147 and having its registered office at 5, Basement, Vasant Industrial Estate, Saki Vihar road, Saki Naka, Mumbai – 400 072. The Corporate Debtor is in the business of EPC Contractors & Construction
5. Bank of India initiated steps against the Corporate Debtor by filing an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 in C.P. (I&B) No.2300/ NCLT/ MB/

2018. An order of CIRP against the Corporate Debtor was passed by this Tribunal vide order dated 21.02.2019, thereby suspending the Respondent from the management of the Corporate Debtor.
6. The Petitioner has placed on record sanction letter dt. 22.02.2012, deed of guarantees dt. 26.04.2012 and Demand Notice dt. 06.11.2020, invoking Guarantee in respect of unpaid debt owed to M/S Mahavir Roads and Infrastructure Pvt Ltd, against the Respondent. Vide the said guarantee deed, the Respondent is liable to pay Rs.30,00,00,000.00 (Rupees Thirty Crores only) or such less Sum as may be due apart from and in addition to interest thereon at the rate of 14.25% or at such other rate which may then be payable by the Principal or which may have been notified to the Principal, from the date of Principal's default until payment, and also Banking, legal and other costs, charges and expenses.
 7. The Applicant Bank of Baroda issued Demand Notice dated 27th October, 2020 in Form B under Rule 7 (1) reference No. SAMMUM/Mahavir/01/61 for an amount of Rs. 66,35,16,757.11/- (Rupees Sixty-Six Crores Thirty-Five Lakh Sixteen Thousand Seven Hundred Fifty-Seven and Eleven Paise only) as on 30.09.2020 plus unapplied interest w.e.f. 30.09.2020 and other relevant charges till date of full and final payment/ realization against Personal Guarantors namely, Mr. Jitendra V Kikavat. The Respondent has neither made any payment nor reverted to the same.
 8. Despite of issuing statutory notice dated 27.10.2020 vide Form B, under the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process of Personal Guarantors to Corporate Debtors) Rules, 2019, requesting them to make the requisite payment to the Applicant

Bank, no payment was received. Hence, the present Application seeking Insolvency Resolution Process against the Respondent by virtue of the being the Personal Guarantor to the Corporate Debtor.

9. Vide order dated 25.01.2024, this bench had appointed **Mr. Kairav Anil Trivedi**, as Resolution Professional having Registration No. IBBI/IPA-002/IP-N00728/2018-2019/12332 to examine the petition and file his report within 10 days from the date of communication of the said order.

Submissions of the Petitioner:

10. Ld. Counsel for the Financial Creditor submitted that earlier, Jitendra V. Kikavat & Ors. filed a Transfer Application bearing TA (IBC) No. 37(PB)/2022, before the National Company Law Tribunal, New Delhi, Principal Bench for transfer of the present Company Petition along with other Petitions filed in the Mumbai Bench. Counsel for the Financial Creditor further submits that the said Application came to be disposed of vide an order dt. 12.01.2024. The relevant para of the said Order is quoted below for convenience.

“I find no reason to order transfer at this stage because the report of the RP should be taken in all the cases. It is thereafter that the cause if at all will arise for transfer. In view of the present factual scenario, cause for transfer has not arisen. The Benches are directed to allow the RP to give his report in all the cases, thereafter, the matter will be considered if cause arises. In view of the above, TA (IBC) – 37(PB)/2022, disposed of accordingly.”

11. Learned counsel appearing for the Petitioner invited the attention of this Bench to the sanction letter dt. 22.02.2012, deed of guarantees dt. 26.04.2012 and to the Demand Notice dt. 06.11.2020, invoking Guarantee in respect of unpaid debt owed

to M/S Mahavir Roads and Infrastructure Pvt Ltd, against the Respondent.

12. Petitioner also submitted that the Bank of Baroda issued Demand Notice dt. 27.10.2020, in Form B under Rule 7(1) reference no. SAMMUM/Mahavir/01/61 for an amount of Rs. 66,35,16,757.11 as on 30.09.2020 plus unapplied interest w.e.f. 30.09.2020 and other relevant charges till date of full and final payment/ realization against the Personal Guarantor. Written consent in Form A to act as Resolution Professional by Mr. Kairav Anil Trivedi has given been placed on record.

Submissions of the Respondent:

13. It is submitted that the Directors have made every attempt to revive the Corporate Debtor and that a settlement plan was under negotiation with the Bank of India. However, this petition shall have cascading effect on the settlement efforts of the promoters.
14. The Respondent has contended that the aforementioned Guarantee Letter has been insufficiently stamped, since the stamp duty payable as per Article 5(h)(A)(iv) of Schedule 1 of the Maharashtra Stamp Act, 1958 states that in the event the contract amount exceeds 10,00,000/- (Rupees Ten Lakhs only) stamp duty payable is 0.2 percent of the amount agreed upon in the contract. Hence, the Guarantee Letter has been insufficiently stamped with a mere Rs. 300/- non-judicial stamp paper instead of the appropriate stamp duty of Rs.6,00,000/- (Rupees Six Lakhs only) for the Guarantee Letter of Rs. 30,00,00,000/- (Rupees Thirty Crores only).
15. Thereafter, in the year 2016, the account of the Corporate Debtor was declared a Non-Performing Asset ('NPA') by the Bank of India for the non-payment of its respective debts within 90 days of demanding payment.

16. Later, this Tribunal admitted Company Petition (IB) No. 2300 of 2018 filed by the Bank of India under Section 7 of the Code and initiated Corporate Insolvency Resolution Process ("CIRP") against the Corporate Debtor/ MRIPL, thereby suspending the Respondent from the management of the Corporate Debtor.
17. Further, the present Company Petition was filed against the Respondent for the default in paying the Impugned Amount without filing an Information Utility Certificate/NeSL Certificate. The Applicant has also failed to provide any calculation of the Impugned Amount and necessary documents to prove the existence of default.
18. It is further submitted that the Resolution Professional failed to discharge his duties since the Resolution Professional without considering or consulting the Applicant/ Personal Guarantor filed the report, which was merely a gross reproduction of the Company Petition and has failed to provide calculation of the Impugned Amount. Also, information utility report for the Impugned Amount has not been filed. For substantiating the same, the Respondent has relied upon the decision given by the Hon'ble Supreme Court in *Dilip B. Jiwrajka v. Union of India & Ors (2023 SCC Online SC 1530)*.
19. It is reiterated that the Impugned Amount has been unjustly inflated by the Applicant, and no calculation sheet or statement has been provided by the Resolution Professional to demonstrate the basis of the debt.
20. The Respondent reiterates that the Corporate Debtor was declared a Non- Performing Asset ('NPA') in the Financial Year 2016-2017 by the Bank of India. Therefore, it is submitted that admittedly the Applicant has a claim of Rs. 44,74,47,699/-, against the Respondent, since, the Applicant has calculated

interest and penal interest on the principal amount without considering the NPA status of the Corporate Debtor. As per the Reserve Bank of India's ('RBI') Master Circular on Income Recognition, Asset Classification, Provisioning & Other Related Matters - UCBs dated 04.06.2007, once an account is classified as NPA, the entire interest accrued and credited to income account in the past periods, must be reversed to the extent it remains unrealized.

21. Further, in the Demand Notice dated 06.11.2020 issued by the Petitioner Bank, the Petitioner Bank itself has identified the purported date of default as 30.01.2016. Therefore, the Demand Notice was issued by the Petitioner Bank after a lapse of about 5 years since the purported date of default, which is beyond the limitation period. Also, the said demand notice was issued during the period which is exempted under Section 10A. The Respondent has relied upon the decision given by Hon'ble Supreme Court in *B.K. Educational Services Private Limited v. Parag Gupta and Associates (Civil Appeal No. 23988 of 2017)*. Also, the Company Petition was filed on 01.01.2022. Therefore, the alleged debt is a time barred debt.

Submissions of the Applicant vide Rejoinder:

22. Contentions of the Applicant vide its rejoinder, in brief, are as follows:
- i. That the Petition has been filed within limitation period since the limitation against the Personal Guarantor shall run from the date when he committed default. Decisions given in *Mrs. Margaret Lalita Samueal v. Indo Commercial Bank Ltd. reported in AIR 1979 SC 102* which has been relied upon in the case of *R. Lelavati vs. Bank of Baroda & Ors reported IN air 1987 Karnataka and Union Bank of India, Ernacullam vs. T. J Stephen*

& ors. reported in AIR 1990 Kerala.

- ii. As far as the application of provisions of S.238A of IBC is concerned, the Applicant submits that the said provision is not applicable since it is submitted that although the liability of the personnel guarantor is coextensive with the principal Borrower, it is not always but subject to contract, if any. In the present case the guarantee deed executed by the guarantor is continuing guarantee and payable on demand. Decision given by Supreme Court in *Syndicate Bank vs Channaveerappa Beleri & Ors* is relied upon.
- iii. Further, with respect to exemption under S.10(A), the Applicant has submitted as follows:
 - a) The application has been filed u/s 95 of IBC and the said section has not been specifically covered in sec 10(A) as it contains only sec 7,9,10 and not sec 95
 - b) Further this application u/s 95 is not for initiation of the Corporate Insolvency Resolution Process but for Initiation of the Personal Guarantee Resolution Process. This PG IRP has not been specifically included in sec 10(A) thus the suspension u/s 10(A) does not apply to PG IRP.
 - c) This application filed u/s 95 is not against the Corporate Debtor and the sec 10(A) applies only when application is filed against the Corporate Debtor and not against the PG. Thus the suspension u/s sec 10(A) does not apply in this present case.

Submissions of the Resolution Professional:

23. Present Application along with the Resolution Professional, seeking Insolvency Resolution Process against the Respondent by virtue of the Respondent being the Personal Guarantor to the Corporate Debtor. The Resolution Professional-Kairav Trivedi

reports and states that: -

- a. *He has examined the application in the Form C annexed herewith.*
- b. *The Necessary Deed of Guarantee has been properly executed.*
- c. *The copy of CIRP order CP 2300/NCLT/MB/2018 of the CD M/s Mahavir Roads and Infrastructure private limited has been enclosed.*
- d. *The Necessary Demand Notice has been issued in the FORM B.*
- e. *The Demand Notice under IBC has remained unpaid and a period of 14 days have expired, there by the default for non-payment is existing as on the date of this application as re confirmed by the bank under sub-section (4)(b) of section 95.*
- f. *The details of Debt owned have been submitted by the Financial creditor for initiating the application for insolvency resolution process against personal Guarantors under sub-section (5) of section 95.*
- g. *This Hon'ble bench has the necessary Jurisdiction to hear this application.*
- h. *The applicant has provided information and given explanation sought by the Resolution Professional under sub-section (4) of section 95.*
- i. *Thus after examination of the application under sub-section (6), the Resolution Professional recommends acceptance of this application.*
- j. *A separate report mentioning the reasons for recommending the acceptance of this application as mentioned above is enclosed as per the report under subsection (7).*
- k. *The copy of his report has been shared with the Personal Guarantor and Financial creditor as required under sub sections (9).*

Findings:

24. Heard submissions of learned counsel for the Petitioner and Respondent. Perused records.
25. Upon perusal of the documents on record, it is clearly established that the Corporate Debtor has committed defaults in repayment of loan amount granted by the Financial Creditor. **Mr. Jitendra**

V Kikavat, Personal Guarantor to **M/S Mahavir Roads And Infrastructure Pvt. Ltd.** has also committed default in repayment of loan facility demanded by the Financial Creditor after invocation of Personal Guarantee vide demand notice dated 06.11.2020 issued under rule 7(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process of Personal Guarantors to Corporate Debtors) Rules, 2019 by the Petitioner to the Respondent. The filing date of the present petition is 01.01.2022. Moreover, the Petitioner has placed on record the Commercial Credit Information Report which establishes the existence of debt. Hence, the present Petition is filed within the prescribed Limitation period. The Application filed by the Creditor satisfies the requirement as set out in Section 95 of the Code and has been filled well within the limitation period.

26. The Respondent has pleaded the limitation on the ground that the Date of Default has specifically been mentioned by the Petitioner as 30.01.2016 in the Petition, however the said date pertains to the date of default qua Principal borrower. The default in case of guarantor arises when the guarantee is invoked making the personal guarantor to pay the debt. In this case, the guarantee was invoked on 06.11.2020 and the petition has been filed on 01.01.2022. The Hon'ble Supreme Court had extended the period of limitation in view of COVID 19 pandemic and ordered that in case limitation period expires between 15.3.2020 to 28.2.2022, the litigant will have another 90 days. In this case, the petition has been filed on 01.01.2022, and is accordingly within the limitation period.
27. As regards validity of the Guarantee Agreement questioned by the Respondent on ground of insufficiency of stamp, we note that

the *N.N. Global Mercantile vs Indo Unique Flame & Ors. (Civil Appeal No(s). 3802-3803 of 2020)* decided on 25.04.2023 was subsequently placed seven-member bench of Hon'ble Supreme Court, where it was held that "Section 35 of the Stamp Act is unambiguous. It stipulates, "*No instrument chargeable with duty shall be **admitted in evidence...**" The term "admitted in evidence" refers to the admissibility of the instrument. Sub-section (2) of Section 42, too, states that an instrument in respect of which stamp-duty is paid and which is endorsed as such will be "**admissible in evidence.**" The effect of not paying duty or paying an inadequate amount renders an instrument inadmissible and not void. Non-stamping or improper stamping does not result in the instrument becoming invalid. The Stamp Act does not render such an instrument void. The non-payment of stamp duty is accurately characterised as a curable defect. The Stamp Act itself provides for the manner in which the defect may be cured and sets out a detailed procedure for it. It bears mentioning that there is no procedure by which a void agreement can be "cured."* In the present case, the guarantee agreement is in place and it has been invoked thus casting an obligation on the Respondent to pay the amount, he is called upon to pay. It is the obligation of the borrower to pay for the stamp duty on the documents executed for the purpose of borrowing, and neither borrower nor the guarantor ever raised any question on this issue. The proceedings under IBC are not intended to enforce the guarantee but are meant for resolution of the insolvency of the personal guarantor. Accordingly, we do not find any merit in this argument as well.

28. Considering the above facts and circumstances and upon perusal of the documents on record viz. the demand notices, guarantee deeds, etc., the C.P. (IB) 139/MB/2022 filed under Section 95 of the IBC, 2016 is hereby **Admitted** and the Insolvency Resolution

Process stands initiated against **Mr. Jitendra V Kikavat** viz. the Respondent herein. We hereby direct as hereinafter:

- I. Initiate Insolvency Resolution Process against the Respondent/Personal Guarantor and moratorium in relation to all the debts is declared, from today *i.e.* date of admission of the application, and shall cease to have effect at the end of the period of 180 days, or this Tribunal passes order on the repayment plan under Section 114 whichever is earlier as provided under Sec 101 of IBC, 2016. During the moratorium period,
 - a. Any pending legal action or proceeding 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; and
 - c. The debtor shall not transfer, alienate, encumber, or dispose of any of his assets or his legal rights or beneficial interest therein;
 - d. The provisions of this section shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- II. The Resolution Professional viz. **Mr. Kairav Anil Trivedi**, having Registration No. IBBI/IPA-002/ IP-N00728/2018-2019/12332, having registered address at 23 A, 5th Floor, Jyoti Building, Wadala (East), Mumbai-400037 and correspondence address at 413-414 Shramjeevan B 5 Opp. New Cuffe Parade, Wadala (East), Mumbai 400037 [E-Mail: *kairavtrivedi2002@yahoo.co.in*, *Mobile no.: 9987330793*] is directed to cause a public notice published on behalf of the Adjudicating Authority within

7 days of passing this Order on the website of the NCLT Mumbai Bench, inviting claims from all Creditors, within 21 days of such issue. The notice under Sub Section (1) of Section 102(2) shall include: -

- a.* details of the order admitting the application;
- b.* particulars of the resolution professional with whom the claims are to be registered; and
- c.* the last date for submission of claims.

III. The publication of notice shall be made in two newspapers, one in English and other in Vernacular, which have wide circulation in the State where the Corporate Debtor and Personal Guarantor resides. The Resolution Professional shall furnish two spare copies of the notice to the Registry for the record.

IV. The Resolution Professional, in exercise of the powers conferred under Section 104, shall prepare a list of creditors on the basis of:

- a.* the information disclosed in the application filed by the debtor under Sections 94 or 95, as the case may be, and
- b.* claims received by the Resolution Professional under Section 102 within 30 days from the date of the notice. The debtor shall prepare a repayment plan under Section 105, in consultation with the Resolution Professional, containing a proposal to the Creditors for restructuring of his debts or affairs.

The repayment plan may authorize or require the Resolution Professional to:

- a.* carry on the debtor's business or trade on his behalf or in his name: or

- b.* realise the assets of the debtor; or
- c.* administer or dispose of any funds of the debtor.

The repayment plan shall include the following, namely;

- a.* justification for preparation of such repayment plan and reasons based on which the creditors may agree upon the plan;
- b.* provision for payment of fee to the Resolution Professional;
- c.* such other matters as may be specified.

- V. The Resolution Professional shall submit the repayment plan along with his report on the plan to this Authority within a period of **21 days** from the last date of submission of claims, as provided under Section 106.
- VI. In case the Resolution Professional recommends that a meeting of the creditors is not required to be called, he shall record the reasons thereof. If the Resolution Professional is of the opinion that a meeting of the creditors should be summoned, he shall specify the details as provided under Section 106(3) of IBC, 2016. The date of meeting should not be less than 14 days or more than 28 days from the date of submission of the Report under sub-section (1) of Section 106 of IBC, 2016, for which at least 14 days' notice to the creditors (as per the list prepared) shall be issued by all modes. Such notice must contain the details as provided under the provisions of Section 107 of IBC, 2016.
- VII. The meeting of the creditors shall be conducted in accordance with Sections 108, 109, 110 & 111 of IBC, 2016. The Resolution Professional shall prepare a report of the meeting of the creditors on repayment plan with all

details as provided under Section 112 of IBC, 2016 and submit the same to this Tribunal, copies of which shall be provided to the Debtor and the Creditors. It is made clear that the Resolution Professional shall perform his functions and duties in compliance with the Code of Conduct provided under Section 208 of IBC, 2016.

- VIII. The Resolution Professional shall submit his periodic reports before this Tribunal, every 30 days.
- IX. The Petitioner is directed to deposit **INR 2,00,000/-** (Indian Rupees Two lakhs) to the bank account of the Resolution Professional within **one week**, towards his fees. This shall be subjected to the rules and regulations under the provisions of the Insolvency and Bankruptcy Code, 2016.
- X. The Registry is directed to communicate a copy of order, report and application within **seven** working days and upload the same on the website immediately after the pronouncement of order.

Sd/-

PRABHAT KUMAR
MEMBER (TECHNICAL)
MK

Sd/-

JUSTICE V. G. BISHT
MEMBER (JUDICIAL)