NATIONAL COMPANY LAW TRIBUNAL
AMARAVATI BENCH
(Video Conference)

PRESENT: JUSTICE TELAPROLU RAJANI – MEMBER JUDICIAL
ATTENDANCE-CUM-ORDER SHEET OF THE HEARING HELD ON 22.12.2022 AT 10.30 AM

TC/CP. Nos.	CA/IA No.	Section/ Rule	Name of Parties
CP (IB) No.53/95/AMR/2022		95 of IBC	State Bank of India Vs. Mrs. Kondaiah Vijaya (in the matter of Pratuysha Resources & Infra Private Limited)

ORDER

Mr.P.B.A. Srinivasan, Advocate along with Ms.Srishti Bansal, Advocate for the Financial Creditor present. Mr.T.V.L.Narasimha Rao, Advocate for the Personal Guarantor present.

CP(IB) No.53/95/AMR/2022 is dismissed, vide separate orders.

Sd/-
JUSTICE TELAPROLU RAJANI
MEMBER JUDICIAL

NATIONAL COMPANY LAW TRIBUNAL
AMARAVATI BENCH AT MANGALAGIRI
*** *** ***

CP (IB) No.53/95/AMR/2022

Under Section 95 (1) of the Insolvency and Bankruptcy Code, 2016 Read with Rule 7 (2) of Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Process for Personal Guarantors to Corporate Debtors) Rules, 2019

AND

In the matter of Mrs. KONDAIAH VIJAYAA

BETWEEN:

State Bank of India,
Stressed Assets Management Branch,
2nd Floor, Red Cross Buildings, No.32,
Montieth Road, Egmore,
Chennai - 600008.

...Petitioner/ Financial Creditor

AND

Mrs. Kondaiah Vijayaa,
Plot No.26, MG Section V, MVP Colony,
Visakhapatnam, Andhra Pradesh - 530017.

... Respondent /Personal Guarantor

Date of Orders pronounced on: 22.12.2022

CORAM:

Justice Telaprolu Rajani, Member Judicial.

Appearance:

For Financial Creditor : Mr.P.B.A.Srinvasan, Mr.Parth Tandon, Ms. Prerana Sabharwal, Ms.Sneha Iyer, Advocates

For the Personal Guarantor : Mr.T.V.L.Narasimha Rao, Advocate

ORDER

1. This Company Petition is filed by the Financial Creditor (FC) i.e., State Bank of India Under Section 95(1) of the Insolvency and Bankruptcy Code, 2016 Read with Rule 7 (2) of Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Process for Personal Guarantors to Corporate Debtors) Rules, 2019 seeking to initiate Insolvency Resolution Process against the Personal Guarantor of the Corporate Debtor (CD).

2. The facts as stated in the Synopsis, filed along with the application, are as follows:

   a. The CD has availed working capital facilities of Rs.50 Crores vide sanction letter dated 18.03.2011 from the FC and the FC executed the Agreement of Loan for Overall Limit with the CD on 24.03.2011. The Respondent stood as guarantor for the said credit facilities to an extent of Rs.50 Crores and executed a deed of guarantee on 24.03.2011. The Deed of Guarantee entitled the FC to recover all the dues payable by the CD in case of default, and it is pertinent to note that the guarantee was a continuing guarantee, hence holds the Personal Guarantor liable for all the subsequent loans granted to the CD along with the originally sanctioned credit amount. The FC enhanced the working capital facilities and renewed the cash credit limit of the CD to Rs.70 Crore vide sanction letter dated 03.02.2012. The FC executed a Supplemental Agreement of Loan dated 15.02.2012 for Increase

in Overall Limit and the Respondent executed a Supplemental Deed of Guarantee on 15.02.2012 in favour of the FC. On 07.01.2014, a revival letter was executed by both the CD and the Respondent. On 28.03.2015, a restructuring sanction letter was signed by both the CD and the Respondent. Thereafter on 31.03.2015 a letter regarding grant of individual limit was executed by the applicant. On 31.03.2015 a restructuring agreement was executed between the CD and the applicant. On 31.03.2016, an advance sanction for continuation of existing limits was signed by the applicant. On 21.12.2016 a revival letter was signed by both the CD and the respondent. On 28.06.2016 the account was declared as NPA. The CD, after fully availing the said credit facilities, failed to adhere to the repayment terms of the sanctioned credit facilities, even after several reminders. FC filed an Original Application against the CD before the Debt Recovery Tribunal – I, Chennai and the same is pending.

b. On 26.09.2018, the CD requested the FC for settlement under compromise. FC sanctioned an OTS for Rs.40,00,00,000/- and issued a sanction letter dated 01.04.2019 with the last date of payment as 29.06.2019 which is not materialised and has failed. Hence, the OTS was cancelled by the FC vide letter dated 03.07.2019. Thus, the default occurred on 29.06.2019.

c. A Company Petition was filed against the CD seeking to initiate the Corporate Insolvency Resolution Process (CIRP) and the same was admitted by this Tribunal on 03.11.2021. As the Personal Guarantor did not come forward to discharge the debt, this application is filed seeking to initiate CIRP. Inspite of the demand notice dated 04.09.2021 issued by the FC, the Respondent did not come forward to pay the outstanding amounts. As such, the cause of action arose on 04.09.2021. As the Personal Guarantor did not come forward to discharge the debt, this application is filed seeking to initiate CIRP.

3. A notice was issued to the Respondent. But however, at the stage of appointing the Resolution Professional (RP) since, there is no right of audience to the Respondent, no opportunity for filing counter was given. RP was appointed by virtue of the order dated 04.08.2022 and the RP submitted his report, stating that the Guarantor has committed default in payment of his dues in respect of the guarantees extended to the CD. Hence, this Petition.

4. Respondent filed counter, with the following contentions:

a) She is the shareholder of the CD i.e., M/s.Prathyusha Resources & Infra Private Limited with a shareholding of 10.01%. She did not sign Annexure -A/18 dated 31.03.2016 in his personal capacity which is a Sanction for Continuation of Existing Limits for a period of 6 months. She is not personally liable for the

transactions after 31.03.2016. Since OTS was granted, she is discharged from the liability as per Section 135 of the Indian Contract Act, 1872.

b) The Petitioner disposed of the property which is 6000 Square Feet of land at Sholinganallur Village, Seashore Town, Saidapet Taluk, Chengalpet District (presently Tambaram Taluk, Kancheepuram District). There is no mortgage deed on record enabling the Petitioner to sell the above property. The above property was not mutated in the joint names of legal heirs of late Mr.N.Sambasiva Rao for facilitating creation of any charge in favour of the Petitioner. As the sale was without her consent, she is discharged from all kinds of liabilities of the CD.

c) The cause of action is barred by time. The last acknowledgment by the CD was on 21.12.2016. The default occurred on 28.06.2016 when the account was declared as NPA. The acknowledgement as on 21.12.2016 was done within three years and created no further limitation beyond 20.12.2019.

d) The OTS approval was without prejudice and once the same is not accepted, it became *non est.* The other grounds mentioned in the counter, however, are not material, hence not mentioned.

5. FC filed Rejoinder, denying the contents of the counter and further contending that the Respondent/Personal Guarantor is well versed

with all the events that have taken place subsequent to the Loan Agreement. Hence she cannot claim of not signing a document which is a part of the series of contract. She consciously executed the documents in the capacity of the Personal Guarantor. The OTS letters are linked to one another creating chain of events. In the judgement of the Supreme Court in ***Dena Bank vs. C.Shivakumar Reddy & Another (2021) 10 SCC 330,*** *it was held that OTS proposal falls within the ambit of acknowledgement of debt as defined under section 18 of the Limitation Act, 1963.* Hence, the Company Petition has to be admitted for initiation of CIRP against the Respondent/Personal Guarantor.

6. Heard both the counsel and perused the written submissions filed by both the counsel. The counsel for the Personal Guarantor does not deny any of the facts as put forth by the FC, but his contention is that the liability of the personal guarantor would only extend upto 3 years from the date of the second revival letter which was given on 21.12.2016 and not later. He contends that the OTS proposal which was given to the CD does not bind the Personal Guarantor and it cannot be taken as an acknowledgment of debt by the Personal Guarantor. Even according to what is put forth by the Counsel for the FC, the OTS proposal was between the CD and the FC. The Counsel for the Personal Guarantor also contends that by virtue of Section 135 of Contract Act, the Respondent/Personal Guarantor debts

discharged. Section 135 of the Contract Act, is extracted hereunder for ready reference:

***Sec.135. Discharge of surety when creditor compounds with, gives time to, or agrees not to sue, principal debtor*:**

"A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor, discharges the surety, unless the surety assents to such contract.

A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor, discharges the surety, unless the surety assents to such contract."

The language of section 135 is very clear that once the creditor and principal debtor entered into a contract, by which the creditor makes a composition with, or promises to give time to, the principal debtor, discharges the surety, unless the surety assents to such contract.

7. The Personal Guarantor was not a party to the said OTS proposal and no signatures are taken from the Personal Guarantor in respect of the said OTS proposal. A judgment relied upon by the Counsel for the FC which is rendered by the Hon'ble Supreme Court of India in Civil Appeal No.1650 of 2020 between Dena Bank (now Bank of Baroda) vs. C.Shivakumar Reddy & Anr., is on the point whether OTS proposal would amount to an acknowledgment on the part of the CD. The judgment does not pertain to the Personal Guarantor. The

question whether Section 18 of the Limitation Act, applies to the proceedings under IBC is too well settled that it is applicable. But from the facts, it has to be seen whether there is any acknowledgment on the part of the Personal Guarantor, when alone Section 18 of the Limitation Act, can be made applicable. So far as the revival letter dated 21.12.2016 is concerned, since there is no denial of the fact of execution of the revival letter, it amounts to acknowledgment of debt as on that date. Hence the limitation would be three years from 21.12.2016 which would expire on 20.12.2019. The company Petition is filed on 28.02.2022. Since the above-mentioned judgment does not apply to the Personal Guarantor, the OTS to which the Personal Guarantor is not a party cannot be construed as an acknowledgment on the part of the Personal Guarantor. Hence on the basis of the above said facts, it has to be concluded that the Company Petition is beyond the period of limitation and hence is not maintainable and is consequently dismissed.

JUSTICE TELAPROLU RAJANI
MEMBER JUDICIAL

Swamy Naidu