IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH - I

C.P. (IB) NO. 557/MB/2021

Under Section 100 *r/w* Section 95 of the Insolvency & Bankruptcy Code, 2016 *r/w* Rule 7 (2) of the Insolvency and Bankruptcy (Application to the Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors), Rules, 2019.

In the matter of

Anchor Leasing Pvt. Ltd.

...Applicant/Financial Creditor

Versus

Mrs. Anju Dhiraj Gada

…Respondent/Personal Guarantor

Order pronounced on 27.02.2024

Coram:

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

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

Appearances:

For the Applicant/Financial Creditor	:	Mr. Sagar Vichare, Ld. Counsel
For the Respondent	:	Mr. Shyam Kapadia, Ld.counsel

ORDER

Per: Prabhat Kumar

Brief facts:

1. The present petition is filed *u/s.* 95 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "IBC, 2016") *r/w.* Rule 7(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 by **Anchor Leasing Pvt. Ltd.** ("hereinafter referred to as Applicant/Financial Creditor") for the purpose of initiating insolvency process against **Mrs. Anju Dhiraj Gada** ("hereinafter referred to as Personal Guarantor") for recovery of Rs. 26,40,48,694/- (Rupees Twenty-Six Crores Forty Lakhs Forty-Eight Thousand Six Hundred Ninety-Four only) as on 24.05.2021 with interest thereafter at the rate of 21% at quarterly rests. The Date of Default, as specified in Part-III of the present petition, is **30.06.2010**.

2. The Applicant was incorporated on 11.06.1990 bearing CIN U31909MH1990PTC056808 having its registered address at 1301, 13th Floor, Peninsula Business Park, Tower B, Senapati Bapat Marg, Lower Parel (West), Mumbai – 400013, Maharashtra, India.

3. By an order dated February 13, 2019 passed by this Tribunal in Company Petition No. 1799(IB)/MB/2018, corporate insolvency resolution process was initiated against the Corporate

Debtor, viz. Sejal Glass Limited (hereinafter referred to as "SGL"/Corporate Debtor), bearing CIN L26100MH1998PLC117437 and having its registered office at 3rd Floor, 173/174, Sejal Encasa, Opp. Bata Showroom, S. V. Road, Kandivali (West), Mumbai – 400067.

4. Form C under Regulation 8 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 was filed by the Financial Creditor with the insolvency resolution professional. The Financial Creditor was duly admitted in the Committee of Creditors of SGL.

5. Pursuant to approval of the Resolution Plan dated 11.11.2019 by this Tribunal vide its order dated 26.03.2021, the Financial Creditor received an amount of Rs. 33,33,100/- (Rupees Thirty-Three Lakhs Thirty-Three Thousand One Hundred only) from SGL. Consequently, amounts were still due and payable to the Financial Creditor.

6. Vide several previous correspondences issued by the Financial Creditor to SGL the loan and the interest accrued thereon was already placed on demand by the Financial Creditor, in terms of the Loan Agreement dated August 11, 2009 and other incidental documents executed inter alia between the Financial Creditor, **Mrs. Anju Dhiraj Gada** ("hereinafter referred to as The Personal Guarantor/ Respondent") having her address at 1404/5/6, Agarwal Residency, Wing-C, Shankar lane, Kandivali (West), Mumbai – 400067, Maharashtra, India and business address at 173/174, Sejal Encasa, 3rd Floor, S.V. Road, Kandivali (West), Mumbai – 400067 Maharashtra, India and SGL.

7. Under the Deed of Guarantee dated August 11, 2009, the

Personal Guarantor has jointly and severally with other guarantors therein guaranteed to repay the outstanding amounts of SGL.

8. Vide notice in Form B under Rule 7(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 dated May 10, 2021, the Financial Creditor invoked the guarantee provided by the Guarantor under the Deed of Guarantee dated August 11, 2009 and called upon the Guarantor to repay the outstanding amount together with interest at the rate of 21% per annum at quarterly rests until realization. The Guarantor failed to repay the same.

9. Since the debt still stands due, the Financial Creditor has filed the present petition u/s 95 of the Code r/w rule 7(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process of Personal Guarantors to Corporate Debtors) Rules, 2019.

10. The Personal Guarantor has filed an Interlocutory Application being IA No. 1316 of 2021 impugning the maintainability of the present petition. In the said Application, the Personal Guarantor has raised the following grounds for challenging the maintainability of the present Company Petition:

    a. Time barred demand notice and Company Petition: The Respondent submits that the demand notice sent by the Financial Creditor is time barred and has been sent to harass the Respondent, he being discharged from the Deed of Guarantee prior to 30.06.2013. Also, the Financial Creditor was required to take appropriate action against Guarantors and SGL within 3 years of the due date, i.e. 30.06.2010.

b. Jurisdiction of Court: Since CIRP against the Corporate Debtor has come to an end, the proper jurisdiction for the said petition is the Debt Recovery Tribunal.

c. Debt Amount: The Respondent has submitted that an incorrect loan amount of Rs.15 Crore has been calculated by the Financial Creditor.

d. Deed of Guarantee insufficiently stamped

e. Amount of default repaid by Respondent: It is submitted that the Financial Creditor has failed to show any document wherein the Respondent has agreed to repay the loan amount of Rs. 15 Crore and interest thereof. Also, it has been admitted by the Financial Creditor that an amount of Rs. 19.12 Crore as principal amount due towards the loan availed by the Corporate Debtor has been repaid to the Financial Creditor against such loan of Rs. 10 Crore which discharges the Respondent from any/all obligations arising out of the deed of guarantee.

f. Amount claimed in demand notices are extortionate in nature

g. Failed to invoke guarantee: The demand notice sent by the Financial Creditor is not tenable in law and void ab initio since the Financial Creditor failed to invoke the guarantee before sending the demand notice.

h. Reasons for discharge of liabilities of Respondent: The Financial Creditor has failed to show any written consent from the Respondent showing that the Respondent has agreed to the grant of loan of any amount exceeding what has been guaranteed. Moreover, the loan was to be repaid on 30.06.2010. However, from June 2010 till the receipt of the

Demand Notice dated 10.05.2021, there was no correspondence from the Financial Creditor with the Respondent for repayment of outstanding loan amount on account of the Default of the Corporate Debtor.

The Personal guarantor has prayed in the said Application to declare the deed of guarantee as ‘void ab initio’ and that the Respondent be discharged as guarantor.

11. These contentions raised in IA 1316 of 2021 shall be dealt with in the following paragraph along with the submissions of the Respondent to defend the Application.

12. Vide order dated 28.11.2023, this bench had appointed **Mr. Vikram Bhatnagar**, as Resolution Professional having Registration No. IBBI/IPA-003/IP-N000183/2018-2019/12197 having his address at D1003, Park Royale, Opp. Aakash Ganga Society, Pimpri, Pune, Maharashtra – 411017 to examine the petition and file his report within 10 days from the date of communication of the said order.

13. Further, the Resolution Professional had filed IA 127/2024 under section 99(1) of the code for submitting the Report on record. The same was taken on record and accordingly the IA 127/2024 was disposed of vide order dated 12.01.2024. The said Interlocutory Application has been contested by the Respondent on the following grounds:

    a. Complete Disregard to judgment dated 20.04.2023 of this Tribunal passed in CP (IB) no. 889 of 2021.

    b. The Resolution Professional has failed to consider and/or deal any of the objection raised by the Respondent.

14. The ground(s) for admission of the present application, as

recorded in the said RP report, are reproduced in-verbatim as hereinafter:

"*That in view of the above stated facts and circumstances, as well as analysis of the RP based on the examination of materials available on record with the RP, the RP recommends that present Application under Section 95(1) of the Code filed by the Financial Creditor Anchor Leasing Private Limited be admitted under Section 100 of the Code and Insolvency Resolution Process be commenced against Mrs. Anju Dhiraj Gada, Personal Guarantor of Sejal Glass Limited for the following reasons as mentioned herein below: -*

(a) That the Application filed by the Creditor satisfies the requirement as set out in Section 95 of the Code.

(b) That the Corporate Debtor, Sejal Glass Limited has committed defaults in repayment of loan amount granted by the Financial Creditor "Anchor Leasing Private Limited".

(c) That Mrs. Anju Dhiraj Gada, Personal Guarantor to Sejal Glass Limited has also committed default in repayment of loan facility demanded by the Creditor "Anchor Leasing Private Limited" after invocation of Personal Guarantee.

(d) That as per the document "Affidavit in reply" annexed by the Financial Creditor vide email dated December 21, 2023 (Annexure III) to the RP, Mrs. Anju Dhiraj Gada has acknowledged the debt, as they were exploring possibilities of the settlement with the Financial Creditor (Anchor Leasing Private Limited).

(e) That Financial Creditor has received the following payments from the Personal Guarantors of Sejal Glass Limited, pursuant to the filing of the captioned petition:

Sr. No.	***Name of Guarantor***	***Amount (Rs.)***
1.	*Anju Dhiraj Gada*	*14,00,000/-*

2.	*Bhavna Amrut Gada*	*20,00,000/-*
3.	*Kanchanben Shantilal Gada*	*14,00,000/-*
4.	*Preeti Mitesh Gada*	*14,00,000/-*
5.	*Naval Kanji Gada*	*14,00,000/-*
6.	*Sejal Realty and Infrastructure Limited*	*15,00,000/-*
Total		*91,00,000/-*

(f) That the Financial Creditor's claim is not barred by limitation.
(g) In the light of the above, it is just and equitable that Insolvency Resolution Process be initiated against Mrs. Anju Dhiraj Gada, Personal Guarantor of Sejal Glass Limited under the order and direction of this Hon'ble Tribunal."

<u>Submissions of the Applicant:</u>

15. The Applicant has relied on the following grounds:

a. **<u>Admitted default by the Petitioner:</u>** The Applicant has submitted that the Principal Borrower has all throughout acknowledged its liability to repay the outstanding amounts under the Loan Agreement and that the Respondent along with other guarantors have waived their subrogation rights against the Principal Borrower for the outstanding guarantees. The Applicant has relied upon the decision given in the case of *Lalit Kumar Jain v. Union of India [(2021) 9 SCC 321]* wherein the Hon'ble Supreme Court has held 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.

b. **Non-applicability of Section 133 of the Indian Contract Act, 1872:** The Applicant has submitted that the defence of the Respondent that the disbursement of the additional amount amounted to variance of the Deed of Guarantee is only an afterthought. For proving the same, the Applicant has relied on the decision given in the case of *H.R. Basavaraj & Anr v. Canara Bank and ors. [(2010) 12 SCC 458]* wherein it has been held that in the absence of any evidence regarding revocation of a continuing guarantee, the guarantor shall be bound by the terms of the Guarantee.

c. **Right of appropriation of Creditor:** Under Section 60 of the Indian Contract Act, 1872, if the debtor has omitted to intimate or indicate to which debt the payment is to be applied, the creditor may apply it, at his discretion, to any lawful debt due and payable to him by the debtor, including a time barred debt. The Applicant has relied on this Tribunal's judgment in *Beetel Teletech Ltd. V. Arcelia IT Services Pvt. Ltd. [Company Appeal (AT)(Insolvency) No. 1459 0f 2022]*. The Applicant has further relied on the decision given by the Apex Court in the case of *Gurpreet Singh v. Union of India [(2006) 8 SCC 457]*.

d. **Pendency of Appeal in NCLAT:** The Applicant has submitted that the Respondent's reliance on order dated 20.04.2023 passed by this Tribunal in Company Petition bearing CP (IB) No. 899 of 2021 for rejection of the present Appeal is misplaced and premature. The

Petitioner has preferred an appeal against the said order being Company Appeal (AT)_(INS) No. 915 of 2023 before the Appellate Court; however, the said Appeal is pending for adjudication before the Appellate Authority and is likely to be listed on Board on 22.02.2024.

e. Further, vide Affidavit in Rejoinder, the Applicant has submitted that assuming that the Guarantor's liability to repay is limited to the principal amount of Rs. 10 Crores along with interest as per the terms contained in the Transaction documents, an aggregate amount of Rs. 29,91,41,458/- (Rupees Twenty nine Crores Ninety One Lakhs Forty One thousand Four Hundred Fifty Eight only) (including interest) as on October 3, 2022 remain outstanding and the guarantor is liable to repay the same to the financial creditor under the Transaction documents. The Applicant has denied that the loan of Rs. 10 Crores along with interest has been paid by SGL to the Financial Creditor in August 2012 and that the Guarantor has till date not called upon the Financial Creditor to release the shares pledged under the Pledge Agreement dated August 11, 2009.

Submissions of the Respondent:

16. The Respondent has contested the present Application on the following grounds:

a. Time barred demand notice and petition

b. Debt is extinguished and hence no guarantee can be invoked

c. Debt amount is extortionate

d. Amount of default

e. Deed of guarantee is insufficiently stamped

f. Amount claimed in the demand notice and the Petition are extortionate in nature

g. Failure to invoke guarantee

h. The liability of the guarantors (if any) was discharged

i. Arbitration clause: The Guarantee deed contained an arbitration clause and hence the Petitioner ought to have invoked arbitration clause.

j. Demand notice and petition amount claims differ

k. Equity: The respondent has submitted that settlement talks were going on between the Applicant and the respondent and draft consent terms were also exchanged. Accordingly, the Guarantors have collectively paid Rs. 91 Lakhs to the Applicant as settlement amount and were willing to pay the remaining Rs. 54 Lakhs. Though the payment has been paid, the Applicant is claiming additional amount through the present petition.

In light of the aforesaid observations, it is accordingly hereby ordered.

<u>Findings:</u>

17. Heard learned counsel for the Applicant and Respondent and perused the record.

18. On perusal of Deed of guarantee dated 11.08.2009, we find that the Respondent had stood guarantor for a sum of Rs. 10 Crores with interest on any part thereof on such amount. The clause 6

of the guarantee deed provides that the guarantee is irrevocable, unconditional and unqualified and a continuing one and is to remain in force until the said sum of Rs. 10 Crores with interest be paid off in full without any demur. Further, clause 7 provides that a demand in writing by the lender shall be deemed to have been given to the guarantors by sending the same in duplicate and clause 8 provided that a demand in writing in terms of clause 7 shall be deemed to be adequate invocation of this guarantee by the lender. We note that a notice in writing was issued on 10.05.2021 when a notice in form B under rule 7(1) of IBBI (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors Rules, 2019) was issued. This application has been filed on 28.05.2021, accordingly the same is within the period of limitation. It is made clear that the default in case of Guarantor arises on the invocation of guarantee which took place in this case on 10.05.2021 and not prior to that. The Respondent has not brought any document on record to evidence that guarantee was invoked on any date prior to this date.

19. We further find that the Corporate Debtor had sent a confirmation of Balance certificate as on 31.03.2018 admitting a liability of Rs. 2,60,63,632 /-. It is the case of the Respondent that the terms of the loan agreement were varied as the Corporate Debtor was provided an additional loan of Rs. 5 Crores without consent of the Guarantors thus varying the terms of the Guarantee. It is seen that the sum of Rs. 5 Crores was disbursed on 25.09.2009 and the guarantee was executed on 11.08.2009. The Corporate Debtor made substantial repayment in the financial year from July 2011 to July 2013 and thereafter no repayment has been paid. The Applicant has determined the amount due from the Corporate Debtor along with interest.

20. The interest working at Annexure A to the Application demonstrates that the repayment and the amount of loan advanced are maintained under a common account and the Appropriation of such repayment is against the common balance, accordingly, an outstanding of Rs. 26,40,48,694/- as on 24.05.2021 is claimed from the Corporate Debtor and consequently from the Personal Guarantor. However, the confirmation account for the year 2012-13 sent by the Financial Creditor to the Corporate Debtor reveals an outstanding of Rs. 2,72,64,133/- recoverable from the said Corporate debtor. As seen from the said statement annual interest has been debited. There is no explanation as to whether the Financial Creditor had maintained 2 sets of ledger, that is, one for loan amount of Rs.10 Crores and another for loan of Rs. 5 Crores. However, we consider that the difference in the outstanding claim as per Annexure A and that claimed as per statement of account as on 31.03.2013 explains that the statement of account as on 31.03.2013 is in relation to the debt of Rs. 10 Crores and all payments made by the Corporate Debtor has been appropriated against the debt. Accordingly, we are of considered view that the Guarantor is liable to pay the amount due as per confirmation along with the interest for the period from 01.04.2013 onwards. Since the amount due from the Corporate Debtor in relation to loan amount of Rs. 10 Crores is recoverable from the Guarantor whose liability is co-extensive, we have no hesitation to hold that the Respondent is liable to be admitted to the bankruptcy process in terms of Section 100 (2) of the Code.

21. The Co-ordinate bench of this Tribunal dismissed another petition on similar facts holding that the variation in the terms of guarantee discharges the guarantor and also noticed that guarantor cannot be made liable for the debt of Rs. 15 Crores

while the liability was restricted to the borrowing of Rs. 10 Crores. We are of the opinion that the Hon'ble co-ordinate bench missed out one vital aspect that is the application of the interest of the debt and resulting position of the total debt due in respect of the obligation of Rs. 10 Crore loan only. However, we are in agreement that the liability of the guarantor shall be restricted to Rs. 10 Crores borrowing and shall not be extended to another borrowing of Rs. 5 Crores. We make it clear that the liability of Rs. 10 Crores is towards principal and the interest due in relation to the obligation is over and above the principal repayment.

22. 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. Mrs. Anju Dhiraj Gada, Personal Guarantor to Sejal Glass Limited has also committed default in repayment of loan facility demanded by the Financial Creditor after invocation of Personal Guarantee. That the Application filed by the Creditor satisfies the requirement as set out in Section 95 of the Code.

23. That as per the document "Affidavit in reply" annexed by the Financial Creditor vide email dated December 21, 2023 to the RP, Mrs. Anju Dhiraj Gada has acknowledged the debt, as they were exploring possibilities of the settlement with the Financial Creditor (Anchor Leasing Private Limited).

24. It is trite in law that the liability of surety is co-extensive with that of the principal debtor. Be that as it may, law on extinguishment of claim against personal guarantor and/or third party on approval of Resolution Plan has been well-settled by Hon'ble Supreme Court in ***Lalit Kumar Jain vs. Union of India and Ors.*** *[(2021) 9 SCC 321]*, wherein the Hon'ble Supreme Court has held that approval of resolution plan does not *ipso facto* discharge a

Personal Guarantor (of a Corporate Debtor) of her/ his liability under the contract of guarantee. In paragraph (126) of the said judgement, the Hon'ble Supreme Court held as hereunder:

> "*126. 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 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.*"

25. Considering the above facts and circumstances and upon perusal of the documents on record, the C.P. (IB)/557/MB/2021 filed under Section 95 of the IBC, 2016 is hereby **Admitted** and the Insolvency Resolution Process stands initiated against Mrs. Anju Dhiraj Gada *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. Vikram Bhatnagar** Insolvency Resolution Professional, having Registration No.IBBI/IPA-003/IP-N000183/2018-2019/12197, having registered address at D1003, Park Royale, Opp. Aakash Ganga Society, Pimpri, Pune, Maharashtra - 411017 [E-Mail: *arun.kapoor58@yahoo.in, Mobile no.: +919617084912*] 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, business or trade on his behalf or in his name: or

b. realise the assets of the debtor; or

c. administers 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 Applicant 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/-	Sd/-
PRABHAT KUMAR	**JUSTICE V. G. BISHT**
MEMBER (TECHNICAL)	**MEMBER (JUDICIAL)**

<MK>