



IN THE NATIONAL COMPANY LAW TRIBUNAL MUMBAI BENCH-VI

CP (IB) No.1009/MB/2023 with IA (IBC) No.4914/2024

[Under Section 95(1) of the Insolvency and Bankruptcy Code, 2016 read with 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:

BANK OF MAHARASHTRA

STRESSED ASSET MANAGEMENT BRANCH

2nd Floor, Agarkar School Building

Near Apollo Cinema Somwarpeth

Pune -411011 Maharashtra.

...Financial Creditor

Vs

MRS. KAVITA NINAD MESTRY

A-1, Shubham Park, Sector-26

Pradhikaran Nigdi, Pune-411044.

Also at: 269A/270/271, L. Shirole Road

Shivajinagar, Pune-411005.

Also at: Office at 16, Kamlesh Society

Karve Road, Kothrud, Pune-411029.

...Personal Guarantor/Respondent

Pronounced:11.03.2025

CORAM:

HON'BLE SHRI K. R. SAJI KUMAR, MEMBER (JUDICIAL)

HON'BLE SHRI SANJIV DUTT, MEMBER (TECHNICAL)

Appearances: Hybrid

Financial Creditor: Adv. Meet Pandya i/b Kay Legal & Associates LLP

Personal Guarantor: None

Resolution Professional: Adv. Kartikee Korgaonkar



ORDER

[PER: SANJIV DUTT, MEMBER (TECHNICAL)]

1. **BACKGROUND**

- 1.1 The present Application has been filed by Bank of Maharashtra (hereinafter referred to as "the Financial Creditor") on 11.05.2023 in the prescribed Form 'C' under Section 95(1) and Section 60(2) of the 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 Guarantors to Corporate Debtors) Rules, 2019 (hereinafter referred to as "PG to CD Rules") seeking initiation of the insolvency resolution process against Mrs. Kavita Ninad Mestry (hereinafter referred to as "Personal Guarantor/Respondent") being personal guarantor to M/s Autocrat Automotive Stamping Private Limited, the Corporate Debtor.
- 1.2 The Corporate Debtor availed Term Loan facility of Rs.3.75 Crore and Cash Credit Facility of Rs.1.25 Crore from the Financial Creditor in the year 2013. The Respondent being one of the Directors to the Corporate Debtor had provided personal guarantee against the Credit Facility extended to the Corporate Debtor.
- 1.3 The total outstanding debt including interest and penalties is shown at Rs.14,90,72,181/- (Fourteen Crore Ninety Lakh Seventy-Two Thousand One Hundred and Eighty-One Rupees). The said debt became due on 12.05.2014 and the date of default, as stated in Part-III of the Application is also 12.05.2014.



2. AVERMENTS OF FINANCIAL CREDITOR

- 2.1 The Respondent is the Personal Guarantor to Autocrat Automotive Stamping Pvt. Ltd. (hereinafter referred to as the “Corporate Debtor/Borrower”), a company incorporated on 10.11.2010, having Corporate Identification Number (CIN) U28910PN2010PTC137729 and its registered office at Shop 4, Babar Heritage, SNO.41/2//1A Dattawadi / Akurdi, Pune-411035, Maharashtra.
- 2.2 The Corporate Debtor availed a Term Loan Facility of Rs.3,75,00,000/- (Three Crore Seventy-Five Lakh Rupees) and a Cash Credit Facility of Rs.1,25,00,000/- (One Crore Twenty-Five Lakh Rupees) from the Financial Creditor vide Sanction Letter dated 09.02.2013. Against the Credit Facilities extended to the Corporate Debtor, the Respondent, being one of the Directors, provided a personal guarantee vide Guarantee Agreement dated 14.03.2013.
- 2.3 The Corporate Debtor defaulted in repaying the loan, leading to its account being classified as a Non-Performing Asset (NPA) on 12.05.2014. In 2017, the Financial Creditor filed an Application before the Hon’ble Debt Recovery Tribunal, Pune, bearing Original Application (OA) No. 481 of 2017, which was within the limitation period as stipulated under Section 24 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDDB Act). The OA was disposed of on 31.12.2017 in favour of the Financial Creditor. Subsequently, on 17.05.2018, a notice under Section 13(2) of the SARFAESI Act was issued to both the Corporate Debtor and the Guarantor calling upon



them to repay in full the outstanding debt within 60 days from the date of receipt of said notice. Thereafter, the Financial Creditor issued a Demand Notice dated 03.11.2022 in Form B to the Respondent/Personal Guarantor calling upon her to make payment of the outstanding debt in default in full within 14 days from the receipt of the notice failing which personal insolvency resolution process under the Code shall be initiated against her. The said notice was delivered to the Respondent/Personal Guarantor on 11.11.2022 as per the Tracking Report annexed to the Application. However, she failed to respond to the said Demand Notice.

- 2.4 In view of the foregoing, the present Application has been filed by the Financial Creditor under Section 95(1) of the Code read with Rule 7(2) of the PG to CD Rules, seeking orders for initiating the Insolvency Resolution Process in the case of the Personal Guarantor to the Corporate Debtor.

3. CONTENTIONS OF PERSONAL GUARANTOR TO CORPORATE DEBTOR

- 3.1 It is observed that this Bench *vide* Order dated 31.10.2023 directed both the Financial Creditor and the Registry to issue notice to the Personal Guarantor, clearly intimating the next date of hearing. However, it is evident from the records and the submissions of the Financial Creditor that the notice was returned with the remark “insufficient address.” Consequently, on 20.11.2023, this Bench directed the Financial Creditor to provide the correct address and issue a fresh notice.
- 3.2 Further, *vide* order dated 16.10.2024, this Bench directed the Resolution Professional (RP) to effect substituted service by way of a publication in the



newspaper. The RP complied with this direction and filed an affidavit of compliance on 24.10.2024. Despite this, the Personal Guarantor has not made any representation. Accordingly, the Personal Guarantor/Respondent was proceeded ex-parte *vide* order dated 19.11.2024, as no reply was filed despite ample opportunities being granted to her.

4. **RECOMMENDATION OF RESOLUTION PROFESSIONAL (RP)**

- 4.1 This Bench appointed Mr. Mahesh R Sureka, a registered Insolvency Professional to act as Resolution Professional (RP) *vide* Order dated 02.08.2024 in the aforesaid Application and directed the RP to prepare and file Report under Section 99 of the Code and the same has been taken on record on 14.08.2024 through IA 4914/2024 filed by the RP.
- 4.2 The RP, *vide* his Report dated 29.08.2024, after due examination of the application, documents filed along with the same, in addition to the compliance of sub-sections (1) to (10) of Section 99 of the Code, recommended admission of the Application. The ground(s) for admission of the present Application, as recorded in the said RP report, are reproduced as under:

“RECOMMENDATION

1. *The Resolution Professional have gone through the section 95 application along with its annexures and it is in compliance with the provisions of section 95 of the IBC, 2016.*
 2. *Hence, Resolution Professional would like to **recommend the acceptance of the application for initiation of Resolution process under section 99 (7) of IBC, 2016.** And given reason for same as required under section 99 (9).*
- A: The application filed by Petitioner is in compliance with regulations of section 95.*



B: RP has sought the details and explanations from the guarantor but guarantor has not replied back.

C: The Personal guarantor have fixed asset as provided in Form C of application (sic)."

4.3 During the course of hearing, the Ld. Counsel for the RP submitted that neither the Corporate Debtor nor the Personal Guarantor responded to the RP, despite service of intimation on 08.08.2024, which was returned with the remarks "Item Returned – Insufficient Address/No Such Person at the Address." Further, emails were sent on 08.08.2024 and 14.08.2024 on the registered email address of the Corporate Debtor which have not been bounced back. The RP also sent mail to the Personal Guarantor on 08.08.2024 requesting for details and information with respect to outstanding loan amount. The RP submitted that it had also effected substituted service through paper publication and filed an affidavit in compliance thereof.

5. ANALYSIS AND FINDINGS

5.1 We have duly considered the averments of the Financial Creditor as well as the report of the RP along with the materials on record. The Personal Guarantor was set *ex-parte vide* order dated 19.11.2024, as she failed to file her reply or appear despite the issuance of a public notice. Accordingly, this Application is being disposed of *ex parte*.

5.2 To recapitulate the factual matrix of the case, the Financial Creditor sanctioned Term Loan/ Cash Credit Facilities aggregating to Rs.5,00,00,000/- to the Corporate Debtor in 2013 *vide* Sanction Letter dated 09.02.2013. The Respondent being Director of the Corporate Debtor stood as a Personal



Guarantor to the Corporate Debtor in respect of the aforesaid facilities by executing the Guarantee Bond/Agreement dated 14.03.2013. The Corporate Debtor committed default in repayment of the loan due to which its loan account was declared as NPA on 23.04.2014. A demand notice under Section 13(2) of the SARFAESI Act was subsequently issued on 17.05.2018 to the Corporate Debtor and its Directors including the Respondent informing them that pursuant to default by the Corporate Debtor, its loan had been declared as NPA on 12.05.2014 and calling upon the Corporate Debtor to repay in full the outstanding debt within 60 days from the date of receipt of the said notice. However, the Corporate Debtor neither responded to the notice nor made any payment to the Financial Creditor. Thereafter, the Financial Creditor issued Demand Notice dated 03.11.2022 in Form B under Rule 7(1) of the PG to CD Rules calling upon the Respondent to unconditionally pay the unpaid debt in default in full within 14 days from the receipt of the letter failing which necessary action under the Code shall be initiated against her. However, not to speak of making any payment, the Respondent did not even respond the said notice.

- 5.3 The first issue in the present Application is with regard to determination of limitation for filing the Application. Though the date of default specifically mentioned by the Financial Creditor in the Application is 12.05.2014, the said date pertains to the default *qua* the Principal Borrower, the Corporate Debtor, viz., Autocrat Automotive Stamping Private Limited. However, it is trite law that the default in the case of personal guarantor to Corporate Debtor would arise when the guarantee is invoked making the former liable to pay the debt. It is well



settled that the date of default in case of Personal Guarantor depends on the nature and contents of the Deed of Guarantee executed by the guarantor. In *Syndicate Bank Vs. Channaveerappa Belari and Ors.*, [Civil Appeal No. 6894 of 1997], the Hon'ble Supreme Court clearly held that a claim may be even **time-barred against the principal debtor, but still enforceable against the guarantor**. The parties may agree that the liability of a guarantor shall arise at a later point of time than that of the principal debtor. Similarly, the guarantor's obligation to pay is triggered upon the invocation of the guarantee, and a default occurs if the guarantor, despite such invocation, fails to discharge the debt.

- 5.4 From perusal of the record, it is observed that due to the Corporate Debtor's failure to repay the outstanding dues, the Financial Creditor issued a Demand Notice under Section 13(2) of the SARFAESI Act, 2002 on 17.05.2018, which was addressed to the Corporate Debtor and, additionally, to the Respondent in her capacity as a director and not as a personal guarantor. It is pertinent to note that Clause 2 of the Deed of Guarantee/Guarantee Bond executed by the guarantor states as under:-

*"2. The Guarantors agree that the amount guaranteed shall be due and payable by the Guarantors jointly and severally to the Bank, two days after demand and without demur merely upon the **Bank sending Guarantors a demand notice requiring payment of the amount**. Any such demand made by the Bank on the Guarantors shall be conclusive as regards the amount claimed there having become due and payable by the Borrowers to the Bank in respect of the credit facilities mentioned therein and also*



*conclusive as regards the default having been committed by the Borrowers in repayment of the said amount to the Bank. **The Guarantors agree that they...will pay the amount demanded forthwith on receipt of the demand notice..***" (emphasis supplied).

A plain reading of above-mentioned clause clearly shows that the Respondent/Guarantor's liability would arise only upon an explicit demand for payment being made by the Financial Creditor. However, we find that the Demand Notice dated 17.05.2018 does not explicitly invoke the guarantee, nor is there any proof that the Respondent received the said notice in her capacity as personal guarantor. Therefore, this notice dated 17.05.2018 issued under the SARFAESI Act cannot be treated as an invocation of the guarantee.

- 5.5 During the course of hearing, the Counsel for the Financial Creditor heavily relied on the Demand Notice dated 03.11.2022 issued in Form B under Rule 7(1) of the PG to CD Rules in order to establish the invocation of the guarantee. Upon careful perusal of Form B, we find that this notice fails to meet the requirements of a valid invocation as there is no explicit mention of invoking the guarantee agreement. It is observed that the Financial Creditor nowhere calls upon the Personal Guarantor to repay the outstanding debt of Rs.2,47,32,903/- (rounded off), by invoking the guarantee provided by the Personal Guarantor under the Deed of Guarantee. In our opinion, the demand notice in Form-B dated 03.11.2022, is merely a statutory requirement under Section 95(4)(b) of the Code. It does not amount to invocation of the guarantee and was merely attached to the Application as a compliance requirement. In this



connection, reference is made to the recent judgment of Hon'ble NCLAT in ***State Bank of India vs. Mr. Deepak Kumar Singhania*** [CA (AT) (Ins.) No.191 of 2025], wherein it has been categorically held that a Demand Notice issued under Rule 7(1) of the PG to CD Rules, 2019 cannot be considered a notice for invocation of a guarantee for the purpose of filing an application by a creditor under Section 95 of the Code. *"The Notice contemplates demanding payment of the amount of default. The above Rule clearly indicates that Demand Notice has to be issued, demanding payment of the amount in default.....Default before issuance of Notice under Rule 7(1) must exist on the part of the Guarantor"*. It has also been held that a Personal Guarantor becomes a debtor only when guarantee is invoked, making him liable to make the payment to the lender. The definition of 'Guarantor' under Rule 3(1)(e) of the PG to CD Rules contains two conditions i.e., (i) who is a Personal Guarantor to a Corporate Debtor; and (ii) in respect of whom guarantee has been invoked by the creditor and remains unpaid in full or part. Both conditions have been held to be cumulative.

- 5.6 In this background, it emerges that neither the notice under Section 13(2) dated 17.05.2018 nor the Demand Notice in Form B dated 03.11.2022 demonstrates actual invocation of the guarantee against the Personal Guarantor/ Respondent. We are of the considered view that if no guarantee has been invoked, there cannot be any default on the part of the Personal Guarantor. Thus, it is clear the Financial Creditor has failed to discharge the onus of proving that it had made demand on the Personal Guarantor by invoking the guarantee and that the latter



had committed default in discharge her liability in terms of the Guarantee Agreement. Thus, the Financial Creditor having failed to establish the occurrence of default on part of the Respondent/Personal Guarantor, the pre-requisite for triggering CIRP under Section 95 of the Code is not satisfied and hence, the present Application is found to be not maintainable and deserves to be rejected on this ground. In these circumstances, the present Application under Section 95 of the Code is liable to be dismissed.

- 5.7 The Resolution Professional has filed an Interlocutory Application bearing **IA No. 4914 of 2024** for submitting on record his Report under Section 99 of the Code. On perusal of the Report of the RP dated 29.08.2024, we find that the RP has given reasonable opportunity to the Personal Guarantor following the principles of natural justice and has taken into consideration various documents and come to the conclusion that insolvency resolution process should be initiated against the Personal Guarantor. At this juncture, we may refer to the Hon'ble Supreme Court's ruling in ***Dilip B. Jiwrajka Vs. Union of India and Ors.* (2023) SCC OnLine SC 1530** which emphasises that the Adjudicating Authority (AA) must conduct an independent assessment and should not solely rely on the report submitted by the RP. As the Financial Creditor in the present case has been unable to demonstrate the occurrence of default on the part of the Respondent/Personal Guarantor, the primary condition for invoking the provision of Section 95 of the Code is not fulfilled. Hence, in these circumstances, the report submitted by the RP recommending initiation of insolvency resolution process against the



Respondent/Personal Guarantor will be of no consequence and is rendered infructuous.

ORDER

In view of aforesaid findings, **IA No.4914 of 2024** is dismissed as infructuous, while **C.P. (IB)/1009/MB/2023** is rejected as being non-maintainable.

Sd/-

SANJIV DUTT

MEMBER (TECHNICAL)

//LRA-Deepa//

Sd/-

K.R. SAJI KUMAR

MEMBER (JUDICIAL)