IN THE NATIONAL COMPANY LAW TRIBUNAL
ALLAHABAD BENCH, PRAYAGRAJ

CP (IB) NO.74/ALD/2022

(An application under Section 95 of the Insolvency and bankruptcy Code, 2016, read with Rule 7(2) of the Insolvency and Bankruptcy Rules, 2019, and admission of the said application under Section 100 of the Insolvency and Bankruptcy Code, 2016)

IN THE MATTER OF:

STATE BANK OF INDIA

Having Its Office At:

STRESSED ASSETS MANAGEMENT BRANCH-II
11th FLOOR STC BUILDING JAWAHAR VYAPAR BHAWAN
1, TOLSTOY MARG, JANPATH, NEW DELHI-110001.

THROUGH RESOLUTION PROFESSIONAL, MR. CHANCHAL DUA
REGD ADDRESS: 5/36, FIRST FLOOR,
RAMESH NAGAR, NEW DELHI- 110015
E-MAIL ID: CHANCHALDUACO@GMAIL.COM

.........APPLICANT/FINANCIAL CREDITOR

Versus

DEEPAK KUMAR SINGHANIA

S/O LATE SOHAN LAL SINGHANIA
PERSONAL GUARANTOR(S) TO LML LIMITED (CORPORATE DEBTOR-UNDER LIQUIDATION)

..........RESPONDENT/PERSONAL GUARANTOR(S)

AND

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MR. CHANCHAL DUA

Having IBBI Registration No:
IBBI/IPA-003/IP-N00083/2017-2018/10821

Having Its Registered Office At:
5/36, FIRST FLOOR, RAMESH NAGAR
NEW DELHI- 110015

............APPLICANT/ RESOLUTION PROFESSIONAL

Order pronounced on: 28th November, 2024

Coram:

Mr. Praveen Gupta : Member (Judicial)

Mr. Ashish Verma : Member (Technical)

Appearances:

Sh. Sandeep Arora, Adv. : For the SBI/Financial Creditor

Sh. Ashish Makhija with
Sh. Deep Bisht &
Sh. Varun Trivedi Advs. : For the Personal Guarantor

Sh. Shubham Agarwal, Adv. : For the RP/Mr. Chanchal Dua

Present in person

ORDER

1. This is an Application filed by the State Bank of India (*hereinafter referred to as the* ***"Applicant/ Applicant Bank/Financial Creditor"***) under Section 95 of the Insolvency and Bankruptcy Code

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(*hereinafter referred to as the* ***"Code / IBC, 2016")*** read with Rule Rule 7(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantor to Corporate Debtor) Rules, 2019 (*hereinafter referred to as the* ***"PG Rules")***. The prayer sought by the Applicant is to initiate the Personal Insolvency Resolution Process against the Respondent/Personal Guarantor, Shri Deepak Kumar Singhania, who stood as Personal Guarantor to various credit facilities availed by the Corporate Debtor, namely M/s LML Limited, for a total outstanding debt of Rs.125,05,28,848.56/.

2. The Applicant in its Application filed under Section 95, submitted that it initially sanctioned financial assistance of Rs. 25 crores, including a term loan of Rs. 20 crores and a foreign currency credit facility equivalent to Rs. 5 crores, to the Corporate Debtor, M/s LML Limited, on 28.05.1996. Additionally, in a consortium with the

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Bank of India and Bank of Baroda, the Applicant provided working capital facilities (fund-based and non-fund-based) amounting to Rs. 95.50 crores in terms of the loan agreement dated 11.10.2002. The Corporate Debtor created an equitable mortgage on its immovable assets, hypothecated its movable assets, and provided personal guarantees for its three promoters, Mr. Lalit Kumar Singhania, Mr. Deepak Singhania, and Mr. Sanjeev Shriya, to secure the liabilities under the credit facility agreements.

3. The Corporate Debtor failed to maintain financial discipline leading to the account being classified as a Non-Performing Asset (NPA) on 31.03.2004. To facilitate loan repayment, all lenders, including SBI, approved a negotiated settlement proposed by the Corporate Debtor and executed a multi-partite agreement on 28.03.2005. Upon execution of the multi-partite agreement, all conditions and securities favouring the lenders were extended,

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and the charges securing the working capital facility was transferred from Applicant Bank/SBI to the Bank of India and Bank of Baroda. The agreement was also approved by the promoters of the Corporate Debtor, who extended their existing personal guarantees for the settlement payment, executing a deed of guarantee on 28.03.2005.

4. The Applicant Bank submitted that the Respondent, while executing the deed of guarantee dated 28.03.2005, agreed to stand as a guarantor, including his respective heirs, executors, and administrators. Furthermore, as per Clause 18 of the deed, it was agreed that the said guarantee shall continue to remain in force until the due amounts have been repaid by the borrower under the Multi-Partite Agreement dated 28.03.2005.

5. It is further submitted that the application under Section 10 of the Insolvency and Bankruptcy Code, 2016, filed by the Corporate

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Applicant for initiation of Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor, M/s LML Limited, was admitted by this Tribunal on 30.05.2017, and the same is currently under liquidation.

6. The Applicant Bank issued a Demand Notice in Form B dated 04.05.2022 to the Personal Guarantor, calling upon them to repay the outstanding debt amounting to about Rs.1,25,05,28,848.56 crores as on 30.04.2022, payable by the Personal Guarantors due to the default made by the Corporate Debtor in its repayment. However, despite receipt of the said notice, the Respondents failed to pay the outstanding amount.

7. In support of the above debt and default, the Applicant Bank submitted that as per the settled position of law, the liability of the principal borrower (i.e., the Corporate Debtor) and the personal guarantor is co-extensive, and

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therefore the said application is maintainable under section 95 of the Code. Further, it was also submitted that the Applicant Bank, in accordance with Section 78 of the IBC, 2016, has the right and remedy to initiate the Insolvency Resolution Process against the Personal Guarantor, regardless of the Corporate Debtor, M/s LML Limited, undergoing the liquidation process.

8. Since the entire debt of the Financial Creditor is still not paid even after liquidation of the Corporate Debtor, the Financial Creditor has filed the present Application under Section 95 of the Code read with Rule 7(2) of the PG Rules, 2019.

9. This Tribunal, vide order dated 02.01.2024, had appointed Mr. Chanchal Dua, as Resolution Professional (hereinafter referred to as "***RP***") having Registration No. IBBI/IPA-003/IP-N00083/2017-2018/10821, having his address

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at 5/36, 1st Floor, Ramesh Nagar, New Delhi-110015, and having valid AFA up to 31.12.2025, to examine the present Application under Section 95 and file his report within ten days from the date of his appointment.

10. The RP has filed an Interlocutory Application IA No.77 of 2024 for submitting report u/s 99(1) of the Code. The same was taken on record by this Tribunal vide an order dated 02.07.2024. Content of this report is discussed as below:-

<u>REPORT OF THE RESOLUTION PROFESSIONAL</u>

11. The RP, in his report u/s 99 dated 24.01.2024, has reported with regard to following compliances u/s 99 of the Code:

<u>COMPLIANCE OF TERMS OF SECTION 99 OF THE CODE</u>

PROVISIONS	COMPLIANCES
Section 99 (2) of the Code: Where the application has	In compliance of Section 99(2) of the Code, the undersigned has informed the Personal Guarantor vide Letter and

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been filed under Section 95, the Resolution Professional may require the debtor to prove repayment of the debt claimed as unpaid by the creditor.	email dated 05.01.2024 about order passed under Section 95 of the Code and appointment of undersigned as Resolution Professional. Further, in terms of Section 99(2) of the Code, the undersigned also requested Mr. Deepak Kumar Singhania, to prove the repayment of debt (Rs.125,05,28,848.56/- as on 30.04.2022) claimed as unpaid by Financial Creditor by furnishing: a. Evidence of electronic transfer of the unpaid amount from the bank account of the debtor; b. Evidence of encashment of a cheque issued by the debtor; or c. A signed acknowledgment by the creditor accepting receipt of dues. Accordingly, the undersigned requested Mr. Deepak Kumar Singhania, Personal Guarantor(s) to LML Limited), to furnish the above stated information / documentary evidence within a period of seven days from the date of email and letter, i.e., 05.01.2024.

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	The Applicant received a reply from the personal guarantor's legal counsel dated 12.01.2024, in which contentions were raised about the debt, but no details of payment of debt were shared by him.
Section 99 (3) of the Code: Where the debt for which an application has been filed by a creditor is registered with the information utility, the debtor shall not be entitled to dispute the validity of such debt	The undersigned wrote an email dated 05.01.2024 to the Financial Creditor (State Bank of India) to apprise the Financial Creditor about order dated 02.01.2024 (received on 05.01.2024) passed by this Hon'ble Adjudicating Authority. The undersigned also requested the Applicant Bank in terms of Section 99(3), (4), and (5) of the Code, to confirm whether the debt due from M/s LML Ltd. and/or its Personal Guarantor, Mr. Deepak Kumar Singhania, is registered with Information Utility, i.e., 'National E-Governance Services Limited. The undersigned also requested the Bank to provide this information within a period of seven days from the receipt of the email dated 05.01.2024.

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	That vide email dated 11.01.2024, the Financial Creditor (State Bank of India) has informed the undersigned that the Financial Creditor in the process of taking certificate of default in the account of M/s LML Ltd. with Information Utility, i.e., 'National E-Governance Services Limited."
Section 99(4) of the Code read with Section 99(6)(b)	The information provided by the Financial Creditor along with the Insolvency Application are exhaustive to proof that there is no repayment of debt by the Personal Guarantor of LML Limited. Accordingly, the Financial Creditor has provided the information and / or given the explanation sought by the Resolution Professional.

12. The ground(s) for admission of the present application, as recorded in the said RP report, are reproduced in verbatim as hereinafter: -

“ In view of the above observations, I, Chanchal Dua, the Resolution Professional appointed by this Hon'ble Adjudicating Authority, National Company Law Tribunal, Allahabad Bench vide order dated 02.01.2024 (received on 05.01.2024) in C.P. (IB) -74/2022, hereby confirm that I have

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perused/examined the Insolvency Application filed by the Financial Creditor State Bank of India under Section 95 of the Code along with all the underlying documents and annexures and have formed the opinion to Recommend the application filed under Section 95 of the Code for approval to this Hon'ble Adjudicating Authority, based on following grounds:-

a. *That there is no proof of repayment of debt to the Applicant bank i.e. State Bank of India and hence invocation of the Personal Guarantee was invoked by the Applicant Bank.*

b. *The Insolvency Application has been filed in the requisite form, Form C, in terms of Rule 7 (2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtor) Rules, 2019, supported by requisite fee and documents.*

c. *The Insolvency Application satisfies the requirements set out in Section 95 of the Code.*

d. *The Personal Guarantor was duly served with demand notice dated 04.05.2022 by the Financial Creditor in terms of provisions of the Code prior to filing of the Insolvency Application, but the Personal Guarantor failed to repay the amount. Further, the proof of service is annexed with the application filed under Section 95 of the Code.*

e. *The undersigned has also sent a communication to the Personal Guarantor, vide e-mail dated*

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05.01.2024 and letter dated 05.01.2024, immediately on receipt of aforesaid order of this Hon'ble Adjudicating Authority, dated 02.01.2024 (received on 05.01.2024), in terms of Section 99(2) of the Code, asking him to prove repayment of debt claimed as unpaid by the Financial Creditor. The personal guarantor's reply dated 12.01.2024 through his legal counsel was received by the undersigned on even date i.e. 12.01.2024, in which no payment details were provided by the Personal Guarantor.

f. *The Insolvency Application does not relate to "excluded debts" as defined under Section 79(15) of the Code.*

g. *The Debtor, Personal Guarantor, is not eligible for fresh start under Chapter II of the Code."*

<u>REPLY FILED BY THE RESPONDENT/PERSONAL GUARANTOR</u>

13. The Personal Guarantor/Respondent had filed a reply, on 30.09.2022, raising preliminary objections against the maintainability of the Application u/s 95 on the following grounds: -

a. The Respondent argued that the application is time-barred, as the limitation period under the Code begins from the date of default. In this case, the Applicant's demand notice (Form B) cites 01.01.2007 as the default date, exceeding the three-year limitation period under Article 137 of the Limitation Act. Reliance was placed on *B.K. Educational Services Pvt. Ltd. v. Parag Gupta and Associates (2019) 11 SCC 633*, which held that the right to sue arises on the date of default, and applications filed beyond three years are barred.

b. It was further submitted by the Respondent that the Applicant failed to pursue alternative remedies under the Provincial Insolvency Act, 1920, which remains in force. Additionally, proceedings initiated in the Debt Recovery Tribunal (DRT) do not extend or preserve the limitation period for filing under Section 95 of the Code.

c. The Respondent contended that, even after excluding the period of proceedings before the BIFR, the present application is time-barred and relied on the following judgments:-*Bank of Baroda v Vivek Kumar Aggarwal passed by Hon'ble NCLT Cuttack Bench dated 15.07.2022, B.K. Educational Services Private Limited v Parag Gupta and*

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Associates (2019) 11 SCC 633 passed by Hon'ble Supreme Court dated 11.10.2018, SBI v V. Ramakrishna (2018) 7 SCC 394 passed by Hon'ble Supreme Court dated 14.08.2018 and Tech Sharp Engineers Pvt. Ltd. v Sanghvi Movers Limited MANU/SC/1198/2022 passed by Hon'ble Supreme Court dated 19.09.2022 which has been annexed as Annexure 1 in the reply.

d. The Respondent asserted that the Applicant bank filed this application solely to recover its dues, despite the settled principle of law that the Adjudicating Authority under the Code is not a recovery forum, relying on *Swiss Ribbons (P) Ltd. v. Union of India* (2019) 4 SCC 17.

e. The Respondent argued that the Applicant failed to disclose a settlement agreement dated 04.08.2012 between the Corporate Debtor and lenders, including SBI, and a Joint Deed of Hypothecation dated 01.02.2006 executed under the Multi-Partite Agreement dated 28.03.2005. Further, the settlement agreement dated 04.08.2012, the Corporate Debtor paid

₹56,67,371 to the Applicant in March 2013. The agreement extinguished all accrued interest, penalties, and charges, restructured the secured debt to be interest-free, revised the repayment schedule, and extended the redemption period for Preference Shares to two installments in 2024 and 2025, replacing the original timeline. Consequently, the Multi-Partite Agreement dated 28.03.2005 and the Joint Deed of Hypothecation dated 01.02.2006 stands novated and the guaranteed settlement amount is limited to the terms of the Settlement Agreement dated 04.08.2012.

f. The Respondent claimed that the Applicant was aware of the Settlement Agreement's existence and implementation but obstructed the revival of Corporate Debtor, leading to its liquidation. The Respondent also challenged the claim of the Corporate Debtor's lenders before the Hon'ble High Court of Allahabad (Writ Petition C No. 32444 of 2017), where it was held that the Respondent could challenge the lenders' claim if it did not comply with the

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Settlement Agreement.

g. The Respondent emphasized that neither the Settlement Agreement nor the Draft Revival Scheme was rejected by the BIFR. As a result, the Settlement Agreement dated 04.08.2012 is final and binding on the lenders. The Respondent cited Section 5 of the Sick Industrial Companies Act (SICA) Repeal Act, which states that actions taken under the Act do not affect prior actions done in accordance with it.

h. The Respondent argued that due to the actions and omissions of the Applicant, the Respondent's remedy has been impaired, leading to their discharge from the deed of guarantee dated 28.03.2005. Therefore, the Applicant cannot claim relief from the Respondent or other guarantors. Under the Indian Contract Act, 1872, the Respondent is also discharged from the alleged deed of guarantee.

i. The Respondent contended that the application before the DRT, Allahabad, is pending adjudication. Given the disputed questions of fact and law under consideration by the DRT, the Respondent requested this Tribunal not to adjudicate the matter in a summary proceeding.

REJOINDER FILED BY THE APPLICANT

14. A Rejoinder has been filed by the Applicant on 02.01.2024 countering all the contentions raised in the Reply of the Corporate Debtor. The Applicant has made the following averments in the Rejoinder:

a. With respect to the issue of limitation, the Applicant Bank stated that M/s LML Limited, the Corporate Debtor, defaulted on the loan repayment as per the negotiated settlement on 01.01.2007 and was declared sick under the Sick Industrial Companies (Special Provisions) Act, 1985, on 08.05.2007. Although a draft revival scheme was filed with the BIFR, the Act was repealed on 01.12.2016. Despite the abolition of the Act, the Corporate Debtor and Personal Guarantors promised to honour the previous settlement but later failed to do so.

b. The Applicant also submitted that in the judgment passed by the Hon'ble High Court

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of Allahabad on 06.09.2017, the promoters of M/s LML Limited acknowledged the outstanding debt of the Corporate Debtor towards the Applicant Bank. Thus, the cause of action for the liability to pay the outstanding debts by the Respondent/Personal Guarantor was in continuation.

c. Further, the Applicant relied on the *Suo-Moto Writ petition (Civil) No.(s) 3/2020 passed by the Hon'ble Supreme Court vide an order dated 10.01.2022*, wherein it was held that in cases where the limitation would have expired during the period between 15.03.2020 till 28.02.2022, notwithstanding the actual balance period of limitation remaining all persons shall have a limitation period of 90 days from 01.03.2022. Therefore, the Applicant submitted that the present application is within the period of limitation.

d. Subsequently, the Applicant Bank asserted that the demand notice dated 04.05.2022 was sent to the Respondent. However, the Respondent failed to repay the defaulted amount within 14 days of the receipt of the notice.

e. The Applicant also argued that the Guarantee Deed executed by the Respondent/Personal Guarantor on 28.03.2005 explicitly states in Clause 2 that if the Corporate Debtor defaults on the Multi-Partite Agreement, the Guarantors must immediately pay the Lender all amounts owed upon demand. Therefore, the Respondent, having signed the deed in favor of the Applicant Bank, cannot avoid his financial responsibility.

f. The Applicant stated that during the proceedings of Writ-C No. 30033 of 2017 in the Hon'ble High Court of Allahabad, the Respondent acknowledged that M/s LML Limited, the Corporate Debtor, was declared a 'Sick Industrial Company' by the BIFR on 08.05.2007, as recorded in the judgment dated 06.09.2017.

g. The Applicant asserted that filing the application under Section 19 of the Recovery of Debts and Bankruptcy Act, 1993 before the DRT, is within the statutory rights of the Applicant, and there is no bar against initiating such

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proceedings.

<u>REPLY FILED BY THE RESPONDENT TO THE REPORT FILED BY THE RP UNDER SECTION 99 OF THE CODE.</u>

15. The Respondent filed a reply, vide Diary No. 953 on 02.05.2024, raising preliminary objections against the report filed by the RP under section 99 of the Insolvency and Bankruptcy Code, 2016 on the following grounds: -

a. The Respondent argued that the Insolvency Professional cannot act as the RP in the individual resolution process under Chapter III of Part III of the Code, as the Ministry of the Corporate Affairs (MCA) has not notified Clause (b) of Section 208(1). Therefore, the RP's filing of an application under Section 95, appointment under Section 97, and the filing of a report under Section 99 should be considered null and void.

b. The Respondent contended that the application is time-barred, as the limitation period for filing expired on 01.01.2010,

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based on the date of default mentioned in the application. The Respondent also highlighted that the Applicant and the RP failed to provide documents supporting the claim that the Company was declared a Sick Company by BIFR on 08.05.2007. Further, the Applicant's reliance on the Supreme Court judgment dated 10.01.2022 does not establish that the proceedings fall within the limitation period.

c. Further, the Respondent submitted that the Applicant's reliance on the financial statements as of 31.03.2017 is misleading. The balance sheet was signed by the Respondent in his capacity as managing director of the Corporate Debtor, but for an acknowledgment of debt under Section 18 of the Limitation Act, it must be signed by the Respondent in a personal capacity.

d. The Respondent also submitted that M/s LML Limited paid Rs. 56,67,371 to the Applicant as per the settlement agreement. The Applicant was entitled to approximately Rs. 23.91 crores but has already received Rs. 24.10 crores from

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liquidation proceeds, suggesting an overpayment of Rs. 75.45 lakhs. A total of Rs. 106.10 crores is held by the liquidator for the Committee of Creditors, indicating no debt is due from the Respondent to the Applicant.

e. The Respondent affirmed that their counsel, AMC Law Firm, responded to the demand notice on 24.05.2022, asserting that no dues are payable to the Applicant.

f. The Respondent stated that the RP misrepresented the judgment passed by the Hon'ble High Court on 06.09.2017, clarifying that it did not indicate the Respondent's application under Section 10 of the IBC was meant to delay the recovery process. Instead, the judgment stayed the DRT proceedings until the CIR Process concluded, or the NCLT approved a resolution plan or ordered liquidation.

16. During the course of hearing, a point has been raised on invoking of guarantee as per the Deed of Guarantee to fasten any liability on the Personal Guarantor to pay the unpaid debt of the Corporate Debtor after the default in repayment of debt was committed by the Corporate Debtor. It has been argued that under the IBC, 2016, a guarantor as defined under rule 3(e), means a debtor who is Personal Guarantor to a Corporate Debtor and in respect of whom guarantee has been invoked by the creditor and remained unpaid in full or part. Relying on these provisions, it has been argued by the Ld. Counsel of the Respondent that a demand notice under Rule 7(1) of the PG Rules, 2019 in Form B can be issued to only such guarantor in respect of whom guarantee has been invoked by the creditor earlier in terms of the Deed of the Guarantee and remained unpaid in full or part. Therefore, while reserving the matter on 02.07.2024, this Tribunal had directed the Applicant to file an affidavit attaching the communication issued by the Applicant Bank to the Personal Guarantor invoking the guarantee. Subsequently, after

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taking few adjournments, in the hearing held on 20.11.2024, the Applicant informed that it had complied with our previous order by submitting a Supplementary Affidavit, filed under Diary No. 2094 on 09.10.2024. This affidavit included certain documents including the notice issued by the DRT in O.A. No. 238 of 2017 dated 30.03.2017, to establish the invocation of the guarantee. The affidavit was duly taken on record, and the matter was finally reserved on 20.11.2024.

WRITTEN SUBMISSION FILED BY THE PARTIES

17. During the course of hearing of the matter, both parties filed written submissions also in support of the arguments taken during the hearing, which are not discussed again to avoid any repetition.

18. However, in his written submission, the Respondent raised following contentions against the Supplementary Affidavit filed by the

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Applicant in which certain documents were sought to be brought on record for showing the invocation of the guarantee against the Personal Guarantor as discussed in previous para.

a. It is submitted that the notice issued by the DRT in O.A. No. 238 of 2017, dated 30.03.2017, which has been placed by the Applicant to demonstrate the invocation of the guarantee, is not legally permissible. It is well-established law under Section 95 of the Insolvency and Bankruptcy Code, 2016, read with Rule 3(e) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 that the invocation of the guarantee must be made by the Creditor. Therefore, the affidavit submitted by the Applicant, which includes the DRT notice, cannot be considered as an invocation of the guarantee, as the notice is merely a show cause notice issued to the Respondent by DRT.

b. In adherence to Clause 21 of the deed of guarantee dated 28.03.2005, it can be clearly observed that the invocation of the guarantee is a mandatory prerequisite, and only after such invocation of guaranty, the statutory requirement of issuing and serving of the demand notice under rule 7(1) of the PG Rules would arise.

c. The Applicant Bank has failed to follow the procedure for invoking the guarantee as outlined in the Deed of Guarantee and as per the provisions of the Code. Therefore, under no circumstances can the Respondent be considered a guarantor under Rule 3(e) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019. Accordingly, as per the Respondent/Personal Guarantor, the present application is not maintainable and is liable to be dismissed.

d. In light of the above submissions, the Respondent has placed reliance on the judgment passed by the Hon'ble Delhi High Court in the matter of *KKSPUN India Ltd.*

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Vs. OFB Tech. Private Limited and Ors. (MANU/DE/3784/2022), the judgment passed by the Hon'ble Supreme Court in *Hindustan Construction Co. Ltd. vs. State of Bihar and Ors.* (AIR 1999 SC 3710), and the judgment passed by the Hon'ble NCLAT, Principal Bench, New Delhi in *Amanjyot Singh vs Navneet Kumar Jain & Ors.* (Company Appeal (AT) (Insolvency) No.961 of 2022).

19. In response to the above submission of the Respondent/Personal Guarantor on invocation of guarantee, a written submission by the Applicant has also been filed regarding the relevant documents submitted before this Tribunal for the invocation of the guarantee countering his submissions as under: -

a. It was submitted that the two judgments relied upon by the Respondent, passed by the Hon’ble Delhi High Court and the Hon’ble Supreme Court, pertain to bank guarantees and not contracts of guarantee. Additionally, the Respondent's reliance on the judgment of the Hon’ble NCLAT

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concerns the treatment of a demand notice issued under Section 13(2) of the SARFAESI Act, 2002.

b. The Applicant also submitted that the notice issued by the DRT in OA No. 238 of 2017, dated 30.03.2017, informed the Respondent of the outstanding amount and directed the Respondent to show cause. This order was duly served to the Respondent. Therefore, the effect of the order dated 30.03.2017, in itself, should be considered as an invocation of the guarantees.

c. The Applicant further explained the legal definition of "notice" as information concerning a fact communicated to a party by an authorized person. The term "notice" has been interpreted in various cases, including *Neelkantha Sidramappa v. Kashinath Somanna* (MANU/SC/0384/1961: AIR 1962 SC 666) by the Hon'ble Supreme Court, *Bahadur Singh v. Fuleshwar Singh* (MANU/BH/0032/1969: AIR 1969 PAT 114) by the Hon'ble Patna High Court, and *State of West Bengal v. L.M. Das*

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(MANU/WB/0076/1976: AIR 1976 CAL 406) by the Hon'ble Calcutta High Court.

d. The Applicant strongly submitted that the word "any" used in Clause 21 of the deed of guarantee dated 28.03.2005 has a broader scope, thus encompassing the order dated 30.03.2017. Furthermore, all mandatory requirements under the Code have been fulfilled. Given that there is a clear default in payment by the Respondent, the application is within the limitation period and complete in all respects. Therefore, the application filed under Section 95 of the Code should be admitted.

FINDINGS AND ORDER UNDER SECTION 100

20. We have considered the submissions of the Applicant and perused the Report received under Section 99 of IBC, 2016 submitted by the RP recommending admission of the Section 95 Application and initiation of the insolvency resolution process against the Personal Guarantor and also considered the submissions made by the Personal Guarantor and heard the

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Ld. Counsels of the respective parties.

21. It is to be noted that Mr. Deepak Kumar Singhania provided a guarantee for the Corporate Debtor, M/s LML Limited, on 28.03.2005, for various credit facilities availed in terms of a Multi-Partite Agreement executed between the consortium of lenders and the Corporate Debtor. The Corporate Debtor defaulted on repayment obligations of these credit facilities under the agreement, with the date of default being 01.01.2007.

22. Subsequently, the Corporate Debtor was referred to BIFR under the SICA Act, but the proposed revival scheme could not be implemented due to the repeal of the said Act. The Applicant then initiated proceedings for recovery before the DRT, Allahabad, which is currently pending adjudication.

23. Further, after IBC, 2016 has been enacted in 2016, the Corporate Debtor itself filed an application u/s 10 of the said Code and consequently CIRP has been initiated against it by order dated 30.05.2017 of this Tribunal. As no resolution plan for the Corporate Debtor could be received during CIRP period, it went into liquidation and the same is still going on at present. During the pendency of the liquidation process, the Financial Creditor/Applicant Bank issued a Demand Notice dated 04.05.2022 against the present Respondent/Guarantor under Rule 7(1) of the Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtor) Rules 2019, for an amount of Rs. 125,05,28,848.56/-. Since no response was received from the Respondent within 14 days as prescribed in the said Rule, the Applicant filed the present application on 28.05.2022 under Section 95(1) of the Code through the Resolution

Professional, Mr. Chanchal Dua, with prayer for initiation of the Insolvency Resolution Process against the Respondent as Personal Guarantor.

24. During the course of the hearing, maintainability of the present Application has been challenged by the Personal Guarantor claiming that the guarantee against him was never invoked in terms of the Deed of Guarantee, and therefore the proceeding initiated against him u/s 95(1) of the IBC, 2016 is not maintainable. As pointed out, the Guarantor against whom notice under Rule 7(1) is to be issued in terms of Section 95(4)(b) before initiation of proceeding u/s 95(1) is defined in Rule 3(1)(e) as the Personal Guarantor to a Corporate Debtor in respect of whom guarantee has been invoked by the creditor and remains unpaid in full or part. Financial Creditor/Applicant Bank on being asked vide order dated 02.07.2024 to show the necessary

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fulfillment of the said condition before filing of the present Application u/s 95(1) of the Code, the Applicant Bank as we have already discussed earlier , has submitted in a supplementary affidavit dated 09.10.2024 that on filing of an OA before the DRT Allahabad, a notice was issued by the DRT in OA No. 238 of 2017, dated 30.03.2017, informing the Respondent of the outstanding amount of debt and directed the Respondent to show cause on payment of the outstanding debt. This order was duly served to the Respondent. Therefore, it has been asserted by the Financial Creditor/Applicant Bank that the effect of the order dated 30.03.2017, in itself, should be considered as an invocation of the guarantee against the Respondent for the payment of outstanding dues by the Corporate Debtor as defined for the Guarantor in Rule 3(1)(e) of the PG Rules, 2019. This supplementary affidavit

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has been replied by the Respondent and counter replied by the Applicant Bank in their respective written submission as we have discussed in para 16, 18 and 19 of this order.

25. The primary argument as raised by the Learned Counsel for the Respondent before us is on the maintainability of the present Application u/s 95 as discussed in previous para, we decided to deal with this point of maintainability before deciding other issues involved on admission of the present Application for the initiation of insolvency resolution process of the Respondent/Personal Guarantor.

26. Upon consideration of the submission made by the Learned Counsel for the respective parties on this preliminary issue of maintainability, we have noted that the Personal Guarantor, Mr. Deepak Kumar Singhania had executed a deed of guarantee on 28.03.2005, in respect of various credit facilities availed by the Corporate

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Debtor, LML Ltd. from the Financial Creditor, State Bank. The debt arising out of these credit facilities were defaulted by the Corporate Debtor on repayment on 01.01.2007 and consequently, the Corporate Debtor itself initiated the CIRP proceeding u/s 10 of the Code and the same was allowed by the Tribunal vide order dated 30.05.2017**.** As no resolution plan was received during CIRP period, the Corporate Debtor is presently under going liquidation. Subsequently, demand notice under Rule 7(1) of the PG Rules in Form B was issued by the Financial Creditor/Applicant Bank to the Personal Guarantor and on failure of the Personal Guarantor to pay the unpaid debt of the Corporate Debtor within 14 days in response to this notice, the present application u/s 95(1) of the Code has been filed claiming that conditions in terms of Section 95(4)(b) of the Code is satisfied. In this back ground, we have

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examined the provisions of Section 95, Rule 3(1)(e) and Rule 7(1) of the PG Rules, 2019. The relevant provision is reproduced below for ready reference-

"Section- 95. Application by creditor to initiate insolvency resolution process. –

(1) A creditor may apply either by himself, or jointly with other creditors, or through a resolution professional to the Adjudicating Authority for initiating an insolvency resolution process under this section by submitting an application.

(2) A creditor may apply under sub-section (1) in relation to any partnership debt owed to him for initiating an insolvency resolution process against- (a) any one or more partners of the firm; or (b) the firm.

(3) Where an application has been made against one partner in a firm, any other application against another partner in the same firm shall be presented in or transferred to the Adjudicating Authority in which the first mentioned application is pending for adjudication and such

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Adjudicating Authority may give such directions for consolidating the proceedings under the applications as it thinks just.

(4) An application under sub-section (1) shall be accompanied with details and documents relating to-

(a) the debts owed by the debtor to the creditor or creditors submitting the application for insolvency resolution process as on the date of application;

(b) the failure by the debtor to pay the debt within a period of fourteen days of the service of the notice of demand; and

(c) relevant evidence of such default or non-repayment of debt.

(5) The creditor shall also provide a copy of the application made under sub-section (1) to the debtor.

(6) The application referred to in sub-section (1) shall be in such form and manner and accompanied by such fee as may be prescribed.

(7) The details and documents required to be submitted under sub-section (4) shall be such as may be specified.

Rule 7. Application by creditor. —

(1) A demand notice under clause (b) of sub-section (4) of section 95 shall be served on the guarantor demanding payment of the amount of default, in Form B.

(2) The application under sub-section (1) of section 95 shall be submitted in Form C, along with a fee of two thousand rupees.

(3) The creditor shall serve forthwith a copy of the application referred to in sub-rule (2) to the guarantor and the corporate debtor for whom the guarantor is a personal guarantor.

(4) In case of a joint application, the creditors may nominate one amongst themselves to act on behalf of all the creditors.

Rule 3(1)(e)- *"guarantor" means a debtor who is a personal guarantor to a corporate debtor and in respect of whom guarantee has been invoked by the creditor and remains unpaid in full or part;"*

27. In accordance with the above provisions, for initiating proceeding against the Personal

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Guarantor for his Insolvency Resolution under Section 95(1) of the Code, the conditions enumerated in its sub-section (4) is to be fulfilled, which includes in its sub-clause(b) as regards the failure of the Personal Guarantor being a debtor to pay the debt within a period of fourteen days of the service of the notice of demand that is issued under Rule 7(1) as per which it is issued to the Guarantor as defined under Rule 3(1)(e). Rule 3(1)(e) provides that that "guarantor" means a debtor who is a personal guarantor to a corporate debtor and in respect of whom guarantee has been invoked by the creditor and remains unpaid in full or part. Therefore, for the guarantor to whom notice under Rule 7(1) can be issued, two conditions have to be satisfied, first he should be a personal guarantor to the corporate debtor, and second in respect of whom guarantee has been invoked by the creditor and remains unpaid in full or

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part. Thus, invocation of the guarantee is a mandatory requirement against the personal guarantor before issuing of notice in Form B under Rule 7(1), and only after such invocation can the statutory requirement of serving the demand notice arise in Form B under Rule 7(1) before filing of Application under Section 95(1).

28. Reliance is placed on the order of the *Hon'ble NCLAT in Edelweiss Asset Reconstruction Company vs Orissa Manganese and Minerals Limited & Ors., Company Appeal No. 437/2018,* wherein the Hon'ble NCLAT held that, although the Corporate Debtor had issued a corporate guarantee, such guarantee was not invoked in favor of the Appellant as of the date of admission or the filing of the claim. Accordingly, the RP was justified in rejecting the Appellant's claim due to the non-invocation of the guarantee. Further reliance is placed on the decision of the *NCLT Hyderabad Bench in Union Bank of India vs Smt.*

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K Sridevi (Personal Guarantor of M/s Thexa Pharma Pvt. Ltd.), CP (IB) No. 385/95/HDB/2022, wherein it was unequivocally held as follows-:

> "***The sine qua non for initiating insolvency resolution under Section 95 of the Insolvency and Bankruptcy Code, 2016, is the 'due invocation' of the personal guarantee executed by the respondent/guarantor****. The burden lies on the applicant/creditor to establish that the guarantee has been duly invoked; failing which, the 'debt' under the guarantee payable by the guarantor will not exist, and the application under Section 95 of the I&B Code, 2016, is liable to be rejected."*
>
> [*Emphasis Supplied*]

29. This view has been further affirmed by the *NCLT Mumbai Bench in State Bank of India vs Shaliwahan Farms Private Limited, CP(IB)-1280(MB)/2022, through its order dated 10.04.2024*, wherein the Bench observed that:

"The Financial Creditor has not made any demand upon the Guarantor. Mere dispatch of notice addressed to the Corporate Debtor recalling the facility cannot be deemed a demand upon the Guarantor. In the absence of a direct demand upon the Guarantor to pay the amount in default of the Principal Borrower, it cannot be said that the Guarantor is in default of payment of debt owed to the Financial Creditor by the Principal Borrower."

30. Agreeing with the above judicial pronouncements and also taking into account the relevant provisions as discussed in para 26 and 27 above, we are also of the view that before initiating action under the IBC, 2016 against the Personal Guarantor, invoking of guarantee against the Personal Guarantor as per the terms of the Deed of Guarantee is a mandatory requirement.

31. The Applicant Bank could not produce any such notice issued by it to the Personal Guarantor vide which it invoked the guarantee against the Personal Guarantor. However, in a Supplementary Affidavit filed by it on 09.10.2024, it has claimed that the notice issued to the Personal Guarantor by the DRT u/s 19(4) during the proceeding under Section 19 of the Recovery of Debts and Bankruptcy Act, 1993 (hereinafter referred to as the "**RDB Act, 1993**") should be treated as invocation of guarantee and the same will fulfill the requirement of invocation of guarantee against the Personal Guarantor as envisaged in Rule 3(1)(e) of the Code. On perusal of the said Supplementary Affidavit, we found that the notice issued u/s 19(4) by the Hon'ble DRT in its order dated 30.03.2017 is part of the proceedings under Section 19 of the RDB Act, 1993. The relevant portions of the order dated

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30.03.2017 passed by the DRT are reproduced below:

> "*...The applicant bank has filled this Original Application u/s 19 of Recovery of Debts Due to Banks & Financial Institutions Act, 1993 for recovery and in support of its claim and relief sought the bank has filed Affidavit. The Affidavit so filed is being treated as evidence on behalf of the applicant bank. However, the applicant bank will be at liberty to file further evidence, if need be.*
>
> *Let notice be issued to the defendants with following directions: -*
>
> *(i) To show cause within 30 days of the service of summons as to why relief prayed for should not be granted.*
>
> *(ii) With direction to the defendants to disclose particulars of properties or assets other than properties and assets specified by the applicant bank under serial No. 3A of the O.A.*
>
> *(iii) With further direction to the defendants to restrain from dealing with or disposing of secured assets or such other assets and properties disclosed*

under Sl. No. 3A of the O.A. pending hearing and disposal of the application for attachment of properties with further direction not to transfer by way of sale, lease or otherwise except in the ordinary course of his business any of the assets over which security interest is created and/or other assets and properties specified or disclosed under Sl. No.3A of the O.A. without the prior approval of this Tribunal.

(iv) *With direction to account for the sale proceeds realized by sale of secured assets or other assets and properties in the ordinary course of business and deposit such sale proceeds in the loan account maintained with the bank or Pl holding security interest over such assets.*

(v) *Further direction to the defendants to appear on the date mentioned in the notice along with written statement, failing which the application shall be heard and decided in favour of bank."*

32. On reading of the above order, we are of the opinion that such order passed by the DRT

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cannot be said to have been passed for invocation of guarantee as provided in clause 2 and clause 21 of the Deed of the Guarantee. The order/notice in question is merely a summoning notice issued by the DRT to the Respondent u/s 19(4) of the RDB Act, 1993, intended solely to require their response to the O.A as it is clear from the said provision as reproduced below:-

"19(4) On receipt of application under sub-section (1) or sub-section (2), the Tribunal shall <u>issue summons</u> with following directions to the defendant—

(i) to show cause within thirty days of the service of summons as to why relief prayed for should not be granted;

(ii) direct the defendant to disclose particulars of properties or assets other than properties and assets specified by the applicant under clauses (a) and (b) of sub-section (3A); and

(iii) to restrain the defendant from dealing with or disposing of such assets and properties disclosed under clause (c) of sub-section (3A) pending the hearing and disposal of the application for attachment of properties."

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33. For a ready reference, the Clause (2) and clause (21) of the Deed of Guarantee regarding invocation of guarantee and service of the notice of guarantee, is also reproduced as under :-

Clause 2: "*in the event of any default on the part of the Borrower Respondent/Personal Guarantor shall upon demand, forthwith pay to the Lender without demur all the amounts payable by the Borrower to it under the said Multi-Partite Agreement*"

Clause 21: "*Any demand for payment or notice under this Guarantee shall be sufficiently given if sent by post to or left at the last known address of the Guarantors, their respective heirs, executors and administrators, as the case may be, such demand or notice is to be made or given, and shall be assumed to have reached the addressee in the course of post or given by post, and no period of limitation shall commence to run in favour of the Guarantors until after demand for payment in writing shall have been made or given as aforesaid and in proving such notice when sent by post, it shall be sufficiently proved that the envelope containing the notice was*

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posted and a certificate by any of the responsible officers of the Lender that to the best of his knowledge and belief, the envelope containing the said notice was so posted shall be conclusive as against the Guarantors lien though it was returned un-served on account of refusal of the Guarantors or otherwise."

34. The Applicant Bank submitted that the word "any" used in Clause 21 of the deed of guarantee dated 28.03.2005 has a broader scope, thus encompassing the order dated 30.03.2017. Furthermore, all mandatory requirements under the Code have been fulfilled. Given that there is a clear default in payment by the Respondent, the application is within the limitation period and complete in all respects. Therefore, the application filed under Section 95 of the Code should be admitted.

35. We do not agree with such interpretation of clause 21 of the Deed of Guarantee as the Guarantee can be invoked by the Creditor only

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with whom the Personal Guarantor has executed the Deed of Guarantee, giving the guarantee for repayment of the unpaid debt of the Corporate Debtor for whom he has stood as Guarantor. No other person who is not part of the Deed of the Guarantee can issue demand notice for the purpose of invoking the guarantee. Moreover , the order passed by the DRT on 30.03.2017 cannot be said to be demand notice by any stretch of imagination as in this order only a show cause is issued to the Personal Guarantor as to why relief prayed for in the OA filed by the Financial Creditor should not be granted, which is in respect of issuing of the summons to the Personal Guarantor as required under Section 19(4) of the RDB Act, 1993 for carrying out the proceeding under Section 19 of that Act , and not for making of any demand as provided under clause 2 or for service of such demand notice under clause 21 of the Deed of

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the Guarantee. The word “any” used in clause 21 is with respect to service of any such demand notice issued in terms of clause 2 and the above mentioned order of the DRT cannot be said to be any demand notice issued as contemplated in clause 2 of the Deed of the Guarantee.

36. With our above findings, it is clear that the submission of the Financial Creditor in respect of invocation of guarantee, co-relating it with the order of DRT in terms of clause 21 of the Deed of Guarantee is totally misplaced. It is quite evident that the notice issued by the Hon'ble DRT during its proceeding u/s 19 of the Recovery of RDB Act, 1993 and the invocation of the guarantee in terms of the Deed of Guarantee are operating with respect to two different sets of actions, the former is a summon issued to the debtor for the purpose of recovery of debt while the latter is for the purpose of making the demand to invoke the guarantee of a Personal

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Guarantor. Therefore, the notice issued by the Hon'ble DRT cannot be considered as an invocation of the guarantee, as it is not in terms of the Deed of Guarantee dated 28.03.2005 and also for the purpose of the IBC, 2016, such order of the DRT has not been envisaged as the invocation of guarantee against the Personal Guarantor for the purpose of Rule 3(1)(e) of PG Rule, 2019.

37. In view of our above findings, we are of the considered opinion that the Applicant has failed to comply with Clause 2 of the deed of guarantee dated 28.03.2005 executed by it with the Personal Guarantor, which specifically states that in the event of any default on the part of the Borrower, **Respondent/Personal Guarantor shall upon demand**, forthwith pay to the Lender without demur all the amounts payable by the Borrower to it under the said Multi-Partite Agreement.

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38. The Hon'ble Apex Court in ***Syndicate Bank versus Channaveerappa Beleri & ors – (2006) 11 SCC 506*** has clarified that period of limitation shall begin to run from the date of demand by the Creditor or when the breach of contract occurs and the same has been refused by the guarantors. The guarantee has to be sued within the period of three years from such refusal. The relevant paras of the judgment are reproduced below: -

"...

13. *What then is the meaning of the said words used in the guarantee bonds in question? The guarantee bond states that the guarantors agree to pay and satisfy the Bank "on demand". It specifically provides that the liability to pay interest would arise upon the guarantor only from the date of demand by the Bank for payment. It also provides that the guarantee shall be a continuing guarantee for payment of the ultimate balance to become due to the Bank by the borrower. The terms of guarantee, thus, make it clear that the liability to pay would arise on the guarantors only when a demand is made. Article*

55 provides that the time will begin to run when the contract is "broken". Even if Article 113 is to be applied, the time begins to run only when the right to sue accrues. In this case, the contract was broken and the right to sue accrued only when a demand for payment was made by the Bank and it was refused by the guarantors. When a demand is made requiring payment within a stipulated period, say 15 days, the breach occurs or right to sue accrues, if payment is not made or is refused within 15 days. If while making the demand for payment, no period is stipulated within which the payment should be made, the breach occurs or right to sue accrues, when the demand is served on the guarantor.

***14.** We have to, however, enter a caveat here. When the demand is made by the creditor on the guarantor, under a guarantee which requires a demand, as a condition precedent for the liability of the guarantor, such demand should be for payment of a sum which is legally due and recoverable from the principal debtor. If the debt had already become time-barred against the principal debtor, the question of creditor demanding payment thereafter, for the first time, against the guarantor would not arise. When the demand is made against the guarantor, if the claim is a live claim (that is, a claim which is not*

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barred) against the principal debtor, limitation in respect of the guarantor will run from the date of such demand and refusal/non-compliance. Where guarantor becomes liable in pursuance of a demand validly made in time, the creditor can sue the guarantor within three years, even if the claim against the principal debtor gets subsequently time-barred. To clarify the above, the following illustration may be useful:

Let us say that a creditor makes some advances to a borrower between 10-4-1991 and 1-6-1991 and the repayment thereof is guaranteed by the guarantor undertaking to pay on demand by the creditor, under a continuing guarantee dated 1-4-1991. Let us further say a demand is made by the creditor against the guarantor for payment on 1-3-1993. Though the limitation against the principal debtor may expire on 1-6-1994, as the demand was made on 1-3-1993 when the claim was "live" against the principal debtor, the limitation as against the guarantor would be 3 years from 1-3-1993.

On the other hand, if the creditor does not make a demand at all against the guarantor till 1-6-1994 when the claims against the principal debtor get time-barred, any demand against the guarantor made *thereafter say on 15-9-1994 would not be valid or enforceable....”*

39. Reliance is also placed on the judgment in *B.K. Educational Services Pvt. Ltd. v. Parag Gupta and Associates* (2019) 11 SCC 633, wherein it was held that the right to sue arises when a default occurs. If the default took place more than three years prior to the filing of the application, the application would be barred under Article 137 of the Limitation Act.

40. In light of the aforementioned ruling, in the present case, as the guarantee was not invoked in accordance with the applicable provisions by issuing demand notice in terms of clause 2 of the Deed of Guarantee to the Personal Guarantor after default is committed by the Corporate Debtor in repayment of its debt, it is quite clear that no unpaid debt remains in default in respect of the Personal Guarantor due to being unpaid in full or part. Therefore, the Respondent as defined in Rule 3(1)(e) would not be a Guarantor to whom notice under Rule 7(1) can be issued.

41. Considering the above facts and judicial pronouncements and extant provisions of IBC, 2016 as discussed above, and also upon perusal of the documents on record, we are satisfied that the Respondent shall not fall within the definition of "guarantor" as defined in Rule 3(1)(e) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 as the Applicant has failed to invoke the guarantee on the default of the Corporate Debtor in paying the outstanding debt , thus, the present application does not satisfy the mandatory prerequisites under Section 95 of the Code of issuing a legally valid demand notice under Rule 7(1) of the PG Rules before filing of such application.

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42. Therefore, the **CP (IB) No.74/ALD/2022** filed under Section 95 of the IBC, 2016 is not maintainable and is hereby dismissed with no costs.

43. As the present Application has not been found maintainable on the preliminary issue of the validity of issuance of notice under Rule 7(1), other issues raised on admission of the Application have not been dealt with by us for adjudication.

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(Ashish Verma)	**(Praveen Gupta)**
Member (Technical)	**Member (Judicial)**

Date: 28th November, 2024