NATIONAL COMPANY LAW TRIBUNAL
AMARAVATI BENCH
(Video Conference)

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

TC/CP. Nos.	CA/IA No.	Section/ Rule	Name of Parties
CP(IB) No.31/95/AMR/2022	IA(IBC)/314/2022	95 of IBC	State Bank of India Vs. Ms. N. Sai Gayathri (in the matter of Prathyusha Resources & Infra Private Limited)

ORDER

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

CP(IB) No.31/95/AMR/2022 is dismissed, vide separate orders.

IA(IBC)/314/2022:

CP(IBC) No.31/95/AMR/2022 is dismissed, hence IA(IBC)/314/2022 becomes infructuous and is hence dismissed.

Sd/-
JUSTICE TELAPROLU RAJANI
MEMBER JUDICIAL

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

CP (IB) No.31/95/AMR/2022

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

AND

In the matter of MS. N.SAI GAYATHRI

BETWEEN:

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

...Petitioner/ Financial Creditor

AND

Ms.N.Sai Gayathri,
H.No.49-54-8/7, Triveni Towers,
Balayya Sastry Layout,
Near More Supermrket,
Seethammadhara, Visakapatnam,
Andhra Pradesh - 530013.

... Respondent /Personal Guarantor

Date of Orders pronounced on: 22.12.2022

CORAM:

Justice Telaprolu Rajani, Member Judicial.

Appearance:

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

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

ORDER

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

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

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

Crore vide sanction letter dated 03.02.2012. The FC executed a Supplemental Agreement of Loan dated 15.02.2012 for Increase in Overall Limit and the Respondent executed a Supplemental Deed of Guarantee on 15.02.2012 in favour of the FC. On 07.01.2014, a revival letter was executed by both the CD and the Respondent. On 28.03.2015, a restructuring sanction letter was signed by both the CD and the Respondent. Thereafter on 31.03.2015 a letter regarding grant of individual limit was executed by the applicant. On 31.03.2015 a restructuring agreement was executed between the CD and the applicant. On 31.03.2016, an advance sanction for continuation of existing limits was signed by the applicant. On 21.12.2016 a revival letter was signed by both the CD and the respondent. On 28.06.2016 the account was declared as NPA. The CD, after fully availing the said credit facilities, failed to adhere to the repayment terms of the sanctioned credit facilities, even after several reminders. FC filed an Original Application against the CD before the Debt Recovery Tribunal – I, Chennai and the same is pending.

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

Hence, the OTS was cancelled by the FC vide letter dated 03.07.2019. Thus, the default occurred on 29.06.2019.

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

3. But however, at the stage of appointing the Resolution Professional (RP) since, there is no right of audience to the Respondent, no opportunity for filing counter was given. RP was appointed by virtue of the order dated 30.05.2022 and the RP submitted his report, stating that the Guarantor has committed default in payment of his dues in respect of the guarantees extended to the CD. Hence, this Petition.

4. Counter is filed by the Personal Guarantor, stating that she along with other legal heirs namely Mrs.N.Madhavi, Ms.N.Sai Gayathri are claiming as Personal Guarantors. The property mortgaged to the Petitioner/FC stood in the name of her father Mr.N.Sambasiva Rao,

which was taken as security for the loan given to the CD by the FC. Her contention is that she did not inherit any property from her deceased father other than the above mentioned property and she is in no way connected with the CD. She did not sign Annexure -A/18 dated 31.03.2016 which is Sanction for Continuation of Existing Limits for a period of 6 months. The Petitioner disposed of her father's property during November, 2020. There is no mortgage deed on record to enable the Petitioner to sell the above property, the property was not mutated in the joint names of legal heirs of Mr. N.Sambasiva Rao for facilitating creation of any charge in favour of the Petitioner. As the sale is without her consent, she is discharged from all kinds of liabilities of the CD. She also filed modified counter, however with almost the same contentions, that OTS approval dated 01.04.2019 without prejudice and once it is not accepted it became *non est.*

5. FC filed Rejoinder, denying the contents of the counter further contending that the Respondent/Personal Guarantor is well versed with all the events that have taken place subsequent to the Loan Agreement. Hence, he cannot claim of not signing a document which is a part of the series of contract. He consciously executed the documents in capacity of the Personal Guarantor. The OTS letters are linked to one another creating chain of events. The judgement of the Supreme Court in ***Dena Bank vs. C.Shivakumar Reddy & Another (2021) 10 SCC 330,*** *held that OTS proposal falls within the ambit of*

acknowledgement of debt as defined under section 18 of the Limitation Act, 1963. Hence, the Company Petition has to be admitted for initiation of CIRP against the Respondent/Personal Guarantor.

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

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

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

A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor,

discharges the surety, unless the surety assents to such contract."

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

7. The Personal Guarantor was not a party to the said OTS proposal and no signatures are taken from the Personal Guarantor in respect of the said OTS proposal. The judgment relied upon by the Counsel for the FC which is rendered by the Hon'ble Supreme Court of India in Civil Appeal No.1650 of 2020 between Dena Bank (now Bank of Baroda) vs. C.Shivakumar Reddy & Anr., is on the point whether OTS proposal would amount to an acknowledgment on the part of the CD. The judgment does not pertain to the Personal Guarantor. A judgment is relied upon by the Counsel for the Personal Guarantor which is rendered by the NCLT, Kolkata Bench -I, between *Bank of Baroda vs. Ms.Divya Jalan in CP(IB) No.363/KB/2021, which is to the effect that "Whether Petitioner is entitled to recover dues of the Corporate Debtor from the legal heirs of the Personal Guarantors."* In the considered opinion of this Tribunal, the above judgement does not apply to the facts of this case as the Respondent herein is the Personal Guarantor herself and not the legal heir of the Personal Guarantor since she herself has signed on the revival letter.

However, without going into the disputed questions of fact, the question of limitation can be first answered. The question whether Section 18 of the Limitation Act, applies to the proceedings under IBC is too well settled that it is applicable. But on facts, it has to be seen whether there is any acknowledgment on the part of the Personal Guarantor, when alone Section 18 of the Limitation Act, can be made applicable. So far as the revival letter dated 21.12.2016 is concerned since there is no denial of the fact of execution of the revival letter, it amounts to acknowledgment of debt as on that date. Hence the limitation would be three years from 21.12.2016 which would expire on 20.12.2019. The company Petition is filed on 28.02.2022. Since the above-mentioned judgment does not apply to the Personal Guarantor, the OTS to which the Personal Guarantor is not a party cannot be construed as an acknowledgment on the part of the Personal Guarantor. On the other hand, according to section 135 of the Indian Contract Act, it discharges the guarantors. Hence on the basis of the above said facts, it has to be concluded that the Company Petition is beyond the period of limitation and hence is not maintainable and is consequently dismissed.

JUSTICE TELAPROLU RAJANI
MEMBER JUDICIAL

Swamy Naidu