

**NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH-V**

(IB) 161 (ND)/2021

In the matter of:

M/s INTEC CAPITAL LIMITED

CIN: L74899DL1994PLC057410

At 708, Manjusha Building

57, Nehru Place, New delhi-110019

Email: ibc@inteccapital.com

...Applicant / Financial Creditor

V/s

M/S EASTERN EMBROIDERY COLLECTIONS PRIVATE LIMITED

CIN: U17291DL1998PTC091787

At: A-254, Okhla Industrial Area,

Phase-I, New Delhi-110020

...Respondent/Corporate Debtor

SECTION: U/S 7 of IBC, 2016

Order delivered on: 27.04.2021

Coram:

SH. ABNI RANJAN KUMAR SINHA, HON'BLE MEMBER (J)

SH. KAPAL KUMAR VOHRA, HON'BLE MEMBER (T)

PRESENT:- Adv. Sagar Bansal and Adv. Aabhas Singh



ORDER

Mr. Abni Ranjan Kumar Sinha, Member (Judicial)

1. The present petition is filed under Section 7 of the Insolvency & Bankruptcy Code, 2016, (hereinafter referred to as the "Code"), praying for initiation of Corporate Insolvency Resolution Process of the Corporate Debtor on grounds of its inability to liquidate its financial debt.
2. Intec Capital Limited (hereafter referred to as 'Financial Creditor' or 'Applicant' or 'Petitioner') is a Non-Banking Financial Company engaged inter-alia in the business of providing financial facility.
3. M/s Eastern Overseas is a Partnership firm with Pan No. AADFE3101H (hereafter referred to as 'Borrower') is engaged in the business of Embroidery and similar activities and approached Intec for loan facilities originally along with M/s Eastern Embroidery Collections Private Limited (hereinafter referred to as 'Respondent' or 'Corporate Debtor') who furnished Corporate guarantee in the financial facility availed and stepped into shoes of borrower subsequently.
4. On 07.10.2013, Applicant was approached by Borrower through its Partners/ representatives and submitted application for the purpose of availing loan facility for acquiring movable assets. Pursuant to discussion between the parties based on the representations made, information provided, documents submitted and assurances given regarding timely repayment of all money due along with agreed interest by Borrower and its guarantor Corporate Debtor, Applicant agreed to sanction and disburse two loan/financial facilities, details of which are as follows:



Sl.	Loan Account	Sanction Date	Loan Agreement Date	Amount (INR)
1.	LNNOI01413- 140002997	09.10.2013	28.11.2013	82,20,000
2.	LNNHP00713- 140003387	18.02.2014	24.02.2014	34,65,000
			TOTAL	1,26,85,000

5. The Corporate Debtor executed Loan Agreement dated 28.11.2013 and 24.02.2014 along with other transitional documents for availing above mentioned said loan/financial facilities. Subsequent to execution of aforesaid agreements, the loan amount was disbursed to Corporate Debtor/machinery vendor as per the agreed terms.

6. The Respondent had stood as Corporate Guarantor for the financial facilities provided to the Borrower and further executed a Deed of Guarantee along with Guarantor's Form and other relevant documents thereby undertaking to guarantee the repayment of all the amounts payable by the Borrower/Corporate Debtor and the due performance of the terms and conditions of the Loan Agreement as Guarantor. The Respondent has also provided security cheque/s for encashment for repayment on behalf of Corporate Debtor.

7. As per the terms and conditions of the Loan Agreements and counter signed sanction letters the terms of loan facilities sanctioned are as follows:

SI.	Loan Account	NO. of EMI	Interest Rate	EMI (INR)
1.	LNN0101413- 140002997	60 Months	14%	1,89,059
2.	LNNHP00713- 140003387	60 Months	14%	79,695

8. Subsequent to the disbursement of the loan facilities of granting the financial facilities by the Financial Creditor, the borrower failed to maintain adequate amount in the bank account, as a result of which the cheques/ECS/ACH mandates were dishonoured by the banker and the payments were not made to the Applicant as per the repayment schedule.

9. The Applicant contends that the Applicant made repeated requests to the borrower, however, despite repeated requests, the borrower failed to regularize the loan account. Further, the borrower wrongfully withheld the legitimate monies owed to the Financial Creditor, thereby causing wrongful gain to itself and wrongful loss to the Applicant. The aforementioned acts of the borrower constituted 'events of defaults' as defined under Clause 11 of the Loan Agreements and Clause 12 are Consequence of Default and Rights available to Applicant which inter-alia provided for demand of immediate repayment of loan dues. Thus, the Applicant was compelled to recall the Loan facilities sanctioned, details of which is as follows:



Sl.	Loan Account	Date of Loan Recall Notice/ Arbitration Notice	Last Payment in respect of Loan Account
1.	LNNOI01413- 140002997	01.04.2015	-Amount Received Mode RTGS Instrument NO - ICICR520181016004911 -Instrument Amount - Rs. 3,50,000/- -Date - 16th-Oct-2018
2.	LNNHP00713- 140003387	06.02.2016	-Amount Received Mode RTGS Instrument NO - ICICR520181016004911 -Instrument Amount - Rs. 1,00,000/- -Date - 16th-Oct-2018

10. Even after the Loan recall cum Arbitration Notices were served recalling the entire monies due from the Borrower and Corporate Guarantor, neither the Borrower nor its guarantor has cleared the outstanding dues standing in the loan account till date. Last payment received from borrower acknowledging the debt was through RTGS as mentioned in above table. The arbitration initiated in respect of loan accounts also resulted in favour of Financial Creditor and Ld. Sole Arbitrator proposed in LRN passed on 20.10.2015 and 24.05.2016.

11. The Applicant has also initiated the proceedings under Section 138 of Negotiable Instrument Act, 1881 against the respondent/Corporate Guarantor towards the security cheque issued by the Corporate Guarantor for repayment of the dues at the time of recall of the financial facility by the Applicant which got dishonoured upon its presentation.



12. After considering total loan amount, payments received, overdue installments, principal outstanding, interest on delayed payments and other charges as per the agreed terms and conditions under various transitional documents a sum of Rs.1,55,78,592/-, in Loan A/c No. LNN0101413-140002997 and Rs.54,78,444/- in Loan A/c No. LNNHP00713-140003387 as on 31.10.2020, stands due and payable. The total amount dues is Rs. 2,10,57,036/- as on 31.10.2020.

13. We have heard the Ld. Counsel for the applicant on the point of issuance of notice upon the respondent and perused the averments made in the application.

14. Ld. Counsel for the applicant submitted that since the Corporate Debtor has failed to repay the loan, therefore, the present application is filed against the personal guarantor to initiate the CIRP against the personal guarantor. He further submitted that on the date of recall of loan the guarantee was also invoked.

15. Before making any comment on the submissions made on behalf of the applicant, at this juncture, we would like to refer Rule 3 of Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 (w.e.f 01.12.2019)9 herein after referred as Rules). Rule 3(1)(f) of the said Rules defines the word guarantors i.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.***

16. A bare perusal of the definition shows to file an application against the personal guarantors, two things is required to establish, (i) a person is a personal guarantor to a corporate debtor and (ii) in respect of that the creditor has invoked the guarantee and same is remain unpaid in full or part.



17. At this juncture, we would also like to refer Rule 7 of Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 and the same is **quoted below**:-

- (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.

18. A bare perusal of Rule 7 shows that before filing an application under Section 95 of the IBC, a demand notice under clause (b) under Sub Section 4 of Section 95 of the IBC shall be served upon the guarantor demanding the payment of amount of default in Form B and the application under Sub Section 1 of Section 95 of IBC shall be submitted in Form C.

19. At this juncture, we would also like to refer Section 95 of the IBC 2016 and the same is quoted below:-

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 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.

20. A bare perusal of the provision shows that an application by the creditor against the personal guarantor shall be filed under Section 95 (1) of the IBC and according to Section 95(4) IBC2016 (i)an application under sub-



section (1) shall be accompanied with details and documents relating to the debts owed by the debtor to the creditor or creditors submitting the application for insolvency resolution process as on the date of application, (ii) it shall only be filed on failure by the debtor to pay the debt within a period of fourteen days of the service of the notice of demand and (iii) supported with relevant evidence of such default or non-repayment of debt.

21. On co-joint reading of Section 95 of IBC with Rule 7 of Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019, made it clear, an application under Section 95 shall only be filed, on failure of debtor to pay the debt within the period of 14 days of service of the demand notice, served u/s 95(4) IBC2016. which means an application u/s 95(1) IBC 2016 can only be filed after the expiry of period 14 days from the date of service of demand notice under Section 95(4)(b) of the IBC.

22. **Applying the aforesaid provisions, when we consider the application filed by the applicant then we noticed that the applicant/creditor has filed under Section 7 of the IBC not under Section 95 of IBC. Secondly, the applicant has filed the application for initiation of CIRP not against the Corporate Debtor rather against the personal guarantor. Therefore, the applicant is required to submit an application in Form C under Section 95(1) of the IBC and that too after service of demand notice as required under Section 95(4)(b) read with Rule 7 of Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 and if the debt is not paid within 14 days from the date of service of demand notice.**

23. Herein the case in hand, the application has not produced any document to show that the demand notice as required under Section 95(4)(b) of the IBC read with Rule 7 of Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 was ever served upon the personal guarantor. Therefore, in our considered view, the present application is filed by the applicant is not maintainable.



24. Accordingly, the present application stands dismissed.
25. However, the applicant is at liberty to file a fresh application in accordance with the provisions of law.

Sd/-

K. K. Vohra

Member (Technical)

Sd/- 24
21.04.2021

Abni Ranjan Kumar Sinha

Member (Judicial)