

IN THE NATIONAL COMPANY LAW TRIBUNAL

AHMEDABAD

COURT - 2

ITEM No.301 - **CP(IB)/236(AHM)2022**

With

ITEM No.302 - IA/39(AHM)2024

Order under Section 95 IBC

IN THE MATTER OF:

State Bank of India

.....Applicant

V/s

Anopsingh Kiritsinh Sarvaiya

.....Respondent

(Personal Guarantor)

Order delivered on: 07/03/2024

Coram:

Mrs. Chitra Hankare, Hon'ble Member(J)

Dr. Velamur G Venkata Chalapathy, Hon'ble Member(T)

ORDER

The case is fixed for pronouncement of the order. The order is pronounced in the open court, vide separate sheet.

-Sd-

**DR. V. G. VENKATA CHALAPATHY
MEMBER (TECHNICAL)**

-Sd-

**CHITRA HANKARE
MEMBER (JUDICIAL)**

**BEFORE THE ADJUDICATING AUTHORITY
THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD (COURT - II)**

**CP(IB) No. 236/ NCLT/AHM/ 2022
With
IA/39(AHM)2024**

(Filed under Section 95(1) of the Insolvency & Bankruptcy Code, 2016)

In the matter of :-

State Bank of India
Stressed Assets Management
Branch,
2nd Floor, Paramsiddhi Complex,
Opp. V. S. Hospital, Ellisbridge,
Ahmedabad-380006, Gujarat

.... Applicant /
Financial Creditor

Versus

Mr. Anopsingh Kiritsinh Sarvaiya
New Plot Area, Village Vekri,
Taluko Gondal-360311

... Respondent/
Personal Guarantor

Order pronounced on 07.03.2024

Coram:

Mrs. Chitra Hankare, Member (Judicial)

Dr. V. G. Venkata Chalapathy, Member (Technical)

Present:

For the Applicant : Mr. Biju Nair, Advocate

For the Respondent : Mr. Arjun Sheth, Advocate

For the RP : Mr. Saurabh Rachchh, Advocate

JUDGMENT

1. State Bank of India (Financial Creditor) has filed this Application under section 95 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as IBC,2016) 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, seeking to initiate Insolvency Resolution Process against Mr. Anopsingh Kiritsinh Sarvaiya, the Personal Guarantor of the Corporate Debtor namely M/s. Yogiraj Ginning and Oil Industries Pvt Ltd. for default of an amount of Rs.24,41,53,898.12/-.

2. As per letter of arrangement dated 07.01.2012, credit facilities were sanctioned to the Corporate Debtor. It was renewed from time to time i.e. on 15.04.2013, 09.05.2014 and 24.03.2015. The credit facilities were enhanced on 21.04.2016 and renewed on 26.04.2017 and 06.06.2018. The Respondent executed personal guarantee in favour of the applicant for securing various credit facilities to Corporate Debtor on 07.01.2012, 05.06.2014 and 24.03.2015. According to the applicant, as per the last guarantee

agreement executed by the respondent dated 24.03.2015, credit facilities aggregating to Rs.19.65 crores were secured. It includes interest, charges, expenses, commissions, etc. The respondent also executed revival letter on 19.09.2017, so limitation started from that date. The Corporate Debtor defaulted in the repayment, hence, its credit facility account becomes Non-Performing Asset (NPA) on 27.09.2018. The applicant, therefore, issued notice on 14.06.2019 under Section 13(2) of the SARFAESI Act to the corporate debtor and personal guarantor. They have not filed reply to said notice. Thereafter, they filed application before DRT for recovery of an amount of Rs.19,00,36,798.08. The applicant also filed application under Section 7 of the IBC against the corporate debtor which was admitted. The application for liquidation of Corporate Debtor is pending before this Tribunal. According to the applicant, the debt was due on 25.10.2019 and default was occurred on 24.12.2019. The total amount of default is mentioned as Rs.24,41,53,898.12 together with interest.

3. This Tribunal vide order dated 29.08.2022 appointed Mr. Vikas Gautamchand Jain as Resolution Professional (RP) in respect of

Personal Guarantor. The RP has filed his report dated 01.01.2024. RP Recommended for initiation of insolvency resolution process against the personal guarantor.

4. The personal guarantor objected to the application contending that the application is not maintainable as it is barred by limitation. He has submitted that in the record of default to the Information Utility (IU), the date of default is mentioned as 30.06.2018 while the application is E-filed on 31.03.2022. The application is filed after delay of more than five years. The application is also defective as all relevant documents are not placed on record. No revival letter dated 19.09.2017, as alleged by the applicant, is filed on record. He further submitted that the applicant has not issued any notice invoking the personal guarantee. Applicant has only issued notice under Section 13(2) of the SARFAESI Act. According to the respondent, the notice issued under SARFAESI Act is for the purpose of enforcement of security interest by the banks and it cannot be construed as notice invoking guarantee under Section 95 of the Code. Moreover, the respondent has not received said notice. The applicant has no proof to show that said notice was received by

the personal guarantor. He has further submitted that affidavit of applicant supporting the application is not filed. The respondent has relied upon the judgment of Hon'ble Supreme Court in the matter of *S.P. Chengalvarya Naidu by L.Rs and Ors. in Civil Appeal No.994/ 1972* wherein it is observed that

“A litigant who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party”.

He has also relied upon the judgment of Hon'ble Supreme Court in the matter of *Prestige Lights Limited vs. State Bank of India* wherein it is observed that

“If there is suppression of material facts on the part of the applicant or twisted facts have been placed before the Court, the Writ Court may refuse to entertain the petition and dismiss it without entering into merits of the matter”.

He has also relied upon the judgment of Hon'ble Supreme Court in the matter of *K.D. Sharma vs. Steel Authority of India Ltd. and Ors.* wherein it is held that

“ The jurisdiction of the Supreme Court under Article 32 and of the High Court under Article 226 of the Constitution is extraordinary, equitable and discretionary. Prerogative writs mentioned therein are issued for doing substantial justice. It is, therefore, of utmost necessity that the petitioner

approaching the Writ Court must come with clean hands, put forward all the facts before the Court without concealing or suppressing anything and seek an appropriate relief. If there is no candid disclosure of relevant and material facts or the petitioner is guilty of misleading the Court, his petition may be dismissed at the threshold without considering the merits of the claim”.

The respondent has not placed on record any emphasis on the aforementioned judgments. The respondent prayed for dismissal of the application.

5. The applicant filed rejoinder explaining objections raised by the respondent.
6. Heard Ld. Counsel for the applicant and Ld. Counsel for the respondent. Also perused the written submissions filed by the applicant and respondent as well as RP.
7. The applicant submitted that Demand Notice under SARFAESI Act was delivered at the address of the respondent by registered post 29.06.2019. The proof of services is not attach with the application but subsequently filed in rejoinder dated 05.02.2024.
8. The respondent also disputed revival letter dated 19.09.2017 which according to the respondent he has never signed this

revival letter. He has also requested to send signature to forensic expert and disputed the signature. He has submitted that the alleged revival letter is not produced along with the application. On perusal of the documents annexed with application, it appears that the revival letter is not produced by the applicant. After the objection taken by the respondent, the applicant produced copy of the same along with rejoinder. Thus, at the time of filing of the application revival letter was not produced and it was filed without permission of this Adjudicating Authority afterwards.

9. It is pertinent to note that nowhere in the report of RP there is mentioning of revival letter dated 19.09.2017 given by the respondent which creates doubt about signing of revival letter by the respondent. Therefore, contention of the respondent shows that he has never signed any such revival letter appears to be genuine. No reason is given by the applicant for non-filing of revival letter along with the petition or giving to the RP as it is not mentioned in the RP report nor copy annexed. In spite of that, RP in his written submission stated that he has considered revival letter as it was mentioned in the notice under SARFAESI Act.

This means that the RP has not seen any such revival letter during the course of inquiry. Revival letter is an important document so as to extend period of limitation. It was the duty of the RP to take it into consideration before finalising the report.

10. The revival letter as well as acknowledgement of service of notice was not filed along with application. No reason given for not filing the same. Those were filed later-on, which creates doubt of their genuineness. Hence, the application is not within the period of limitation without revival letter. However, it will be in the interest of justice to decide the matter on other aspects so as to avoid remand of matter.

11. The next point to be considered is of limitation. According to applicant, demand notice under Section 13(2) of the SARFAESI Act is to be treated as invocation of guarantee as it was issued to guarantors also. According to applicant, the date of default as recorded with NeSL was 30.06.2018 and date of NPA was 27.09.2018. The obligation of guarantor is co-extensive and co-terminus with that of the principal borrower as per Section 128 of the Indian Contract Act. The applicant in its written

submission submitted that even if the limitation period is counted from the date of default or from the date of NPA or the date of receipt of demand notice, the application is within the period of limitation. From the date of notice, the application is filed beyond two years. They have relied upon exclusion of limitation period in terms of orders of Hon'ble Supreme Court in *Suo Motu Writ Petition (C) No.3 of 2020* and *MA 21 of 2022*. They have mentioned that when the limitation period has been expired between 15.03.2020 to 28.02.2022 only limitation period of 90 days with effect from 01.03.2022 is available, which is frivolous argument.

12. According to the applicant, the period between 15.03.2020 to 28.08.2022 should be excluded totally and balance period of limitation will be available. They have relied upon following rulings of Hon'ble Supreme Court:-

(i) *Prakash Corporates vs. Dee Vee Projects Limited [(2002) 5 SCC 12]*, wherein at paragraph-28.1 and 28.2 are held as under:-

“28.1 *Having regard to the purpose for which this Court had exercised the plenary powers under Article 142 of*

the Constitution of India and issued necessary orders from time to time in SMWP No.3 of 2020, we are clearly of the view that the period envisaged finally in the order dated 23.09.2021 is required to be excluded in computing the period of limitation even for filing the written statement and even in cases where the delay is otherwise not condonable. It gets perforce reiterated that the orders in SMWP No.3 of 2020 were of extraordinary measures in extraordinary circumstances and their operation cannot be curtailed with reference to the ordinary operation of law.

28.2 *It would be unrealistic and illogical to assume that while this Court has provided for exclusion of period for institution of the suit and therefore, a suit otherwise filed beyond limitation (if the limitation had expired between 15.03.2020 to 2.10.2021) could still be filed within 90 days from 3.10.2021 but the period for filing written statement, if expired during that period, has to operate against the defendant”.*

In this case, the respondent was not granted time to file written statement by condoning delay on the ground that there was no power to condone delay beyond the period of limitation. Moreover, respondent also relied upon same observations.

(ii) *Aditya Khaitan and Others vs. IL and FS Financial Services Limited [Civil Appeal nos.3411-3418/2023 in SLP (C) nos.4789-4796 of 2021] wherein at paragraph-27 it is held as under:-*

“27. As has been set out hereinabove, while summons was served on 7-2-2020, the 30 days’ period expired on

8-3-2020 and the outer limit of 120 days expired on 6-6-2020. The application for taking on record the written statements and the extension of time was filed on 20-1-2021. Applying the orders of 8-3-2021 and the orders made thereafter and excluding the time stipulated therein, the applications filed by the applicants on 19-1-2021 are well within time”.

13. It is necessary to mention that these orders only consider exclusion of period between 15.03.2020 to 02.10.2021. However, thereafter, again directions were issued by the Hon'ble Supreme Court in MA No. 21/2022 in MA 665 of 2021 in Suo Motu Writ Petition (C) No.3 of 2020. The facts of these cases are totally different than the facts of the present case. Hence, the ruling is not helpful to the applicant.

14. The respondent submitted that before Information Utility, the applicant has stated the date of default as 30.06.2018. As per notice under SARFAESI Act the date of default is shown as 27.09.2018, the date of default is the date of NPA. He has relied upon the judgment of Hon'ble NCLAT in *Jagdish Prasad Sarada vs. Allahabad Bank in Co. Appeal No. 183 of 2020* wherein it was observed that the limitation period starts from the date of default. He has relied upon observations of various other judgments on

this point but emphasis is not supplied. According to respondent, even if the date of default is taken as 30.06.2018 or 27.09.2018, the petition is time barred. He has submitted that the limitation orders by the Hon'ble Supreme Court are not come to aid of the petitioner as three year period would end in 2021 and, therefore, the petitioner would get time till May 2022 only.

15. On perusing IU certificate dated 23.06.2021 produced by the applicant, the date of default is mentioned as 30.06.2018 wherein the applicant has given default information mentioning the date of default as 30.06.2018 while in the application they have mentioned date of default as 24.12.2019. There is no explanation how the date of default has been changed from 30.06.2018 to 24.12.2019. It is also pertinent to note that the applicant has issued notice under SARFAESI Act on 14.06.2019 and are relying upon same. No further notice is issued by the applicant, when they have mentioned date of default as 24.12.2019 there was no reason for the applicant to issue notice prior to default i.e. on 14.06.2019. It means that the applicant has issued notice dated 14.06.2019 without there being default in repayment. Therefore, to consider default dated 24.12.2019,

notice dated 14.06.2019 cannot said to be invocation of guarantee by the applicant. If we consider date of default as 24.12.2019, no further notice of invoking guarantee was issued thereafter to the guarantor. Considering these important dates, it appears that the guarantee is not invoked when the default occurred so the petition is liable to be dismissed.

16. If we consider another contingency that the date of default mentioned in NeSL as 30.06.2018, the period of limitation would have expired in June 2021. According to the applicant, they are covered by the judgment of Hon'ble Supreme Court in Suo Motu Writ Petition i.e., MA 29 of 2022 in MA 665 of 2021 in Suo Motu Writ Petition (C) No.3 of 2020. Hon'ble Supreme Court has given directions regarding excluding limitation period, which are as under:-

- (I) *The order dated 23.03.2020 is restored and in continuation of the subsequent orders dated 08.03.2021, 27.04.2021 and 23.09.2021, it is directed that the period from 15.03.2020 till 28.02.2020 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings.*
- (II) *Consequently, the balance period of limitation remaining as on 03.10.2021, if any, shall become available with effect from 01.03.2022.*

(III) 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, that longer period shall apply.

(IV)

17. In short, in para-I, it is directed that the period the from 15.03.2020 till 28.02.2022 shall stand excluded for the purpose of limitation in respect of proceedings and balance period, if any, available from 03.10.2021 will be available from 01.03.2022. It is also directed that in cases where the limitation would have expired in between 15.03.2020 & 28.02.2022, irrespective of actual balance period the persons shall have limitation period of 90 days from 01.03.2022 and so on. Thus, it is clear that when the limitation period expired during 15.03.2020 till 28.02.2022, the directions in Para-III will be applicable.

18. The case in hand, the date of default mentioned is 30.06.2018 and the date of demand notice is 14.06.2019. When a limitation period is expired during the period between 15.03.2020 to 28.02.2022 the directions are specifically given in para-III of the order. The directions clearly give 90 days further period from

01.03.2022. It is also mentioned that in the event of actual balance period of limitation remains is greater than 90 days from 01.03.2022 in that case longer period shall apply. So if the date of default is taken into consideration as 30.06.2018 the applicant will have only 90 days limitation period to file an application. If the date of notice is considered, i.e. 14.06.2019. If date of default as per application as 24.12.2019 is considered there is no invocation of guarantee. The strange thing is that the applicant has given different dates of default, the dates and notice are not co-relating to each other. It shows that the applicant itself is not sure that when there was default. The correct procedure is not followed to invoke guarantee.

19. Hence, the petition itself is defective as well as not within the period of limitation. Hence, we pass the following order:-

ORDER

- I. Accordingly, CP(IB)/236(AHM)2022 with IA/39(AHM)2021 is rejected.

-Sd-

-Sd-

DR.V. G. VENKATA CHALAPATHY
MEMBER (TECHNICAL)

CHITRA HANKARE
MEMBER (JUDICIAL)