

IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI - BENCH-VI

CP (IB) No. 1138/MB/2023

&

CP (IB) No. 1139/MB/2023

[Under Section 95(1) of the Insolvency and Bankruptcy Code, 2016 r/w Rule 7(2) of the Insolvency and Bankruptcy (Application to the Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019]

IN THE MATTER OF:

CP (IB) No. 1138/MB/2023

BANK OF MAHARASHTRA LIMITED ...Applicant/Financial Creditor

Vs.

MS. RINKI PRAKASH KUMAR ...Respondent/Personal Guarantor

&

CP (IB) No. 1139/MB/2023

BANK OF MAHARASHTRA LIMITED ...Applicant/Financial Creditor

Vs.

MR. PRAKASH KUMAR ...Respondent/Personal Guarantor

Pronounced: 07.01.2025

CORAM:

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

HON'BLE SHRI SANJIV DUTT, MEMBER (TECHNICAL)

Hearing: Hybrid

Appearances:

**Financial Creditor: Adv. Subir Kumar a/w Adv. Disha Shah & Adv.
Abhinav Palsikar i/b SDS Advocates**

Personal Guarantor: None (ex-parte)

Resolution Professional: Adv. Kartikee Kongaonkar

COMMON ORDER

[PER: K. R. SAJI KUMAR, MEMBER (JUDICIAL)]

1. BACKGROUND

1.1 The facts and contentions in these two Company Petitions, **CP (IB) No. 1138/MB/2023**; and **CP (IB) No. 1139/MB/2023** (Applications) are identical, and, therefore, they are being dealt with together in this Common Order.

1.2 These Applications were filed on 13.11.2023 under Section 95 of the Insolvency and Bankruptcy Code, 2016 (IBC) 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 (PG to CD Rules) by Bank of Maharashtra Limited [Applicant/Financial Creditor (FC)] through Mr. Shailesh Ghule, Chief Manager of the Applicant *vide* Letter of Authority dated 07.11.2023, for the purpose of initiating insolvency resolution process against **Ms. Rinku Prakash Kumar and Mr. Prakash Kumar** (Respondents/Personal Guarantors (PGs) to 'M/s. RPJ Overseas & Exim Private Limited', the Corporate Debtor (CD/Principal Borrower), for default of Rs. 5,44,13,903/- (Five Crore Forty-Four Lakh Thirteen Thousand Nine Hundred and Three Rupees) as on 21.10.2023. The alleged debt fell due was on 31.12.2022, while the date of default as per Part-III of the two Applications is 28.02.2023.

1.3 The Applicant/FC is a Banking Company, incorporated on 16.09.1935 bearing CIN-U99999MH1935PTC002399, having its Branch Office at Industrial Finance Branch, Office No. 23 & 24, 2nd Floor, Maker Chamber-III, Nariman Point, Mumbai - 400021, Maharashtra.

1.4 The Respondents/PGs in the Applications are the directors as well as guarantors to the CD (CIN-U18109MH2014PTC254726), a company incorporated on 20.03.2004, having its registered office at 102, Nikunj Chhaya CHS Ltd, Mathuradas Road, near Asian Bakery, Kandivali (West), Mumbai-400067, Maharashtra. The registered offices of both the Applicants/FC and the PGs are within the jurisdiction of this Tribunal.

2. CONTENTIONS OF APPLICANT/FC

2.1 It is submitted that the CD sought credit facilities from the FC for the purpose of working capital as well as purchasing and instalment of new machinery. The CD sought credit facilities from the FC, for which it obtained loan of Rs.9,50,00,000/- (Nine Crore Fifty Lakh Rupees) from the FC and executed several documents for securing the same.

2.2 The FC had disbursed Rs.3,00,00,000/- (Three Crore Rupees) as Cash Credit facility to the CD upon its request, *vide* the Sanction Letter dated 27.11.2020. Later, the FC sanctioned the amount of Rs. 1,50,00,000/- (One Crore Fifty Lakh Rupees) as Working Capital Term Loan along with the amount of Rs. 47,00,000/- (Forty-Seven Lakh Rupees) as Funded Interest Term Loan *vide* the Sanction Letter dated 30.09.2021.

2.3 To buttress its case, the FC relied upon the following documents:

- a) CD's request letter dated 02.12.2020 for making credit facilities available as per Sanction Letter dated 27.11.2020;
- b) Sanction Letter dated 30.09.2021 for renewal of CD's credit facilities;
- c) Demand promissory note issued by the CD dated 30.09.2021;
- d) Deed of Hypothecation for all facilities dated 02.12.2020 & 30.09.2021;

- e) Deed for Guarantee dated 02.12.2020 and 30.09.2021 for credit facilities except agricultural facilities, executed by the directors of the CD including the Respondent in favour of the FC.
- 2.4 The Respondent/PGs executed personal guarantees as against the credit facilities, thereby guaranteeing the debt arising under it. Owing to non-payment of amounts due under the same, the loan account of the CD was classified as Non-Performing Asset (NPA) on 28.02.2023.
- 2.5 The Ld. Counsel for the Applicant submits that the FC invoked the guarantee against the Respondents/PGs by issuing recall notices on 20.04.2023. Later, the Applicant issued demand notices dated 06.09.2023 under Rule 7(1) of AA Rules in form B for recovery of Rs.5,33,44,891/- including interest and other charges till 04.09.2023. The demand notices were sent to the Respondents/PGs at their registered addresses in Mumbai and were delivered on 07.09.2023.
- 2.6 The Ld. Counsel for the Applicant further submits that the total outstanding amount including interest and penal interest on the loan accounts of the CD amounts to Rs.5,44,13,903/- as on 21.10.2023, and the Respondents, being the PGs as well as the CD's directors, are personally liable to pay the outstanding dues. The outstanding dues are tabulated as under:

Sr. No.	Particulars	Amount (In Rs.)
(A) Account No. 60373909081		
a)	Principal Overdue	2,99,94,917/-
b)	Interest Overdue	26,45,351/-

c)	Penal Interest, Discharge Fee & Tax Overdue	4,25,458/-
a+b+c	Sub-Total (A)	3,30,65,726/-
(B) Account No. 60396248794		
a)	Principal Overdue	1,48,61,000/-
b)	Interest Overdue	13,00,620/-
c)	Penal Interest, Discharge Fee & Tax Overdue	15,331/-
a+b+c	Sub-Total (B)	1,61,76,951/-
(C) Account No. 60396256884		
a)	Principal Overdue	44,76,702/-
b)	Interest Overdue	3,76,189/-
c)	Penal Interest, Discharge Fee & Tax Overdue	2,427/-
a+b+c	Sub-Total (C)	48,55,318/-
(D) Legal Charges		3,15,908/-
Grand Total (A+B+C+D)		5,44,13,903/-

2.7 The Applicant placed the statement of the CD's Loan Account Nos. 60396256884 & 60396248794 from 30.09.2021 to 21.10.2023 and 60373909081 from 04.12.2020 to 21.10.2023 on record along with Deed of Guarantee dated 30.09.2021 to prove liability by the Respondents of repayment of the outstanding dues to the Applicant/FC.

2.8 On account of non-payment of outstanding dues by the CD, the Applicant/FC filed the Original Application (OA) (Diary) No. 1417 of 2023 against the CD and its personal guarantors, including the Respondents, on 02.08.2023 before the Ld. Debt Recovery Tribunal-I (DRT) at Mumbai which is still pending.

2.9 The Applications were filed on 13.11.2023, which is within the limitation period as the guarantees were invoked against the Respondents/PGs *vide* recall notice dated 20.04.2023.

3. CONTENTIONS OF RESPONDENTS/PGs TO CD

3.1 Despite service of notice to the Respondents/PGs by the Applicant *vide* email dated 13.11.2023, the Respondents/PGs have neither appeared till date nor filed and placed on record any Affidavit-in-Reply, refuting the claims of the Applicant, pursuant to which the Respondents/PGs were set *ex-parte vide* order dated 04.12.2024 by this Tribunal.

3.2 The service of notice as well as Applications were sent to the email IDs and the registered addresses of the Respondents/PGs, who are the directors of the CD, as verified from the Master Data of the CD. However, there was no response from the Respondents/PGs.

4. RECOMMENDATIONS OF RP

4.1 This Bench appointed Mr. Mahesh Sureka, a registered Insolvency Professional to act as Resolution Professional (RP) *vide* Order dated 04.12.2023 and directed him to prepare and file Report under Section 99 of the IBC. The Report submitted by the RP has been taken on record on 08.01.2024 and 22.03.2024 in the IA (I.B.C) No. 1268/MB/2024; and IA (I.B.C) No. 58/MB/2024, filed by the RP.

4.2 The RP, *vide* his Report *dated* 21.12.2023, after due examination of the application, documents filed along with the same, in addition to the compliance of Clauses (1) to (10) of Section 99 of the IBC, recommended

admission of these Applications. One sample recommendation is reproduced as under: -

“1. The Resolution Professional have gone through the section 95 application along with its annexures and it is in compliance with the provisions of section 95 of the IBC, 2016.

2. The applicant has provided information sought by the Resolution Professional and given explanation regarding the same but the guarantor has not provided any reply or information.

3. Hence, Resolution Professional would like to recommend the acceptance of the application for initiation of Resolution process under section 99(7) of IBC, 2016. And given reason for same as required under section 99(9).

A: The application filed by Petitioner is in compliance with regulations of section 95.

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

C: The Personal Guarantor have fixed asset as provided in Form C of application.”

4.3 The Ld. Counsel for the RP submits that neither the CD nor the Respondents/PGs gave any reply to the RP despite issuing intimation on 12.12.2023. This intimation was duly served on the Respondents on 14.12.2023 and also *vide* email dated 13.12.2023 sent to the CD.

5. ANALYSIS AND FINDINGS

5.1 We have perused all the documents and pleadings and heard both the Ld. Counsel for the Applicant/FC and the RP.

5.2 Upon perusal of the documents on record, it is established that the CD has committed default in repayment of loan amount granted by the FC. Ms. Rinki Prakash Kumar and Mr. Prakash Kumar, being the PGs to the CD and directors have also committed default in repayment of loan facility as demanded by the FC after invocation of Personal Guarantee *vide* recall notice dated 20.04.2023.

5.3 We have also gone through the report dated 21.12.2023 filed by the IRP. On a perusal of the report, we find that the RP has given reasonable opportunity following the principles of natural justice and has taken into consideration various documents and come to the conclusion that insolvency resolution process should be initiated against the Respondents/PGs.

5.4 The main issue in the present application is regarding limitation. Though the date of default, specifically mentioned by the Applicant/FC is 28.02.2023 in the Application, the said date pertains to the date of default qua the principal borrower i.e., RPJ Overseas & Exim Private Limited, the CD. The default in the case of PGs arises when the guarantee is invoked making them liable to pay the debt. Generally, the default date of the principal borrower is the date of default for the guarantor also. However, it may not always be the same, rather it depends upon the nature and contents of the deed of guarantee executed by the guarantor. In *Syndicate Bank Vs. Channaveerappa Belari and Ors.*, [Civil Appeal No. 6894 of 1997], the Hon'ble Supreme Court categorically held that a claim may be even time-barred against the principal debtor, but still enforceable against the guarantor. The parties may agree that the liability of a guarantor shall arise

at a later point of time than that of the principal debtor. In this case, the Ld.

Counsel for the Applicant/FC brought to our notice the date of invocation of guarantee against the Respondents/PGs being 20.04.2023, when the recall notice was issued.

5.5 Upon perusal of documents, we find that the Applicant issued recall notice on 20.04.2023 through its advocate, clearly indicating the names of CD and both the personal guarantors i.e., the Respondents. Paragraph 6 of the recall notice unambiguously calls upon the Respondents/PGs to pay the amount of Rs.2,99,94,917/- on or before 28.04.2023. There is sufficient proof to suggest that the Respondents/PGs have received the recall notices. Since the Deed of Guarantee dated 30.09.2021 specifically mentioned that it is in the nature of an on-demand guarantee as per Clause 2 of the Deed of Guarantee, the default was to arise on a demand notice being served on them. In view of the foregoing, the notice dated 20.04.2023 has to be treated to be invocation of guarantee as contemplated in the Deed of Guarantee. Clause 2 of the Guarantee deed clearly state that the guaranteed amount shall be due and payable by the Guarantors jointly and severally to the Bank (Applicant/FC), two days after demand and without any demur merely upon the Bank sending to the Guarantors a demand notice requiring payment of the amount. The said clause also stated that the Bank may in its sole discretion invoke the Guarantee as regards the amounts due from the Borrowers and any such demand made by the Bank to the Guarantors shall be conclusive as regards the amount claimed therein as well as default having been committed by the Borrowers in repayment of the said amount to the Bank. The Hon'ble NCLAT, New Delhi in *Mavjibhai Nagarbhai Patel*

Vs. State Bank of India & Anr. [Company Appeal (AT) (Ins.) No. 1702 of 2024], held that a deed of guarantee entered between the bank and personal guarantor is an independent, distinct and a special contract, which has to be construed on its own terms. In view of the above, we conclude that the guarantee was rightly invoked by the Applicant against the Respondents/PGs through the recall notice dated 20.04.2023. These Applications were filed on 13.11.2023. Hence, it emerges that the Applications stand filed within the prescribed limitation period under law. The Applications satisfy the requirements as set out in Section 95 of the IBC.

5.6 As far as the liability of paying the debt by the guarantor is concerned, upon perusal of Clause 6 and 7 of the deed of guarantee dated 30.09.2021, we find that it is a continuing guarantee and the Respondents/PGs waived all the rights provided in Section 140 and 141 of the Indian Contract Act, 1872 (ICA) and the guarantee is payable on demand which was not refuted by the Respondents/PGs till the filing of these Applications. The liability of the guarantor is coextensive with the principal borrower as per section 128 of the ICA. The debt became due when the default was committed by the principal borrower on 28.02.2023, but there was no default on the part of Guarantor. The debt is alive as long as the amount is not settled and there is no refusal on the part of the guarantor to carry out the obligation of the guarantee deed. The period of limitation starts only when the guarantor refused or failed to carry out the obligations. In the present matter, the Applicant first invoked the guarantee against the Respondents/PGs by issuing the recall notice dated 20.04.2023 to the CD as well as its guarantors

and later issued the demand notice on 06.09.2023 in Form B in terms of Rule 7(1) of PG to CD Rules. The limitation against the guarantor shall thus start after the expiry of last date for payment i.e., 28.04.2023, hence these Applications filed on 13.11.2023 are well within the period of limitation and are maintainable. In view of the above factual and legal considerations, we hold that the Applications filed under Section 95 of the IBC deserve to be admitted.

ORDER

In the result, these two Applications, **CP (IB) No. 1138/MB/2023; and 1139/MB/2023** filed under Section 95(1) of the IBC, by Bank of Maharashtra, the Applicant/FC, for initiating insolvency resolution process against **Ms. Rinki Prakash Kumar and Mr. Prakash Kumar**, the Respondents/PGs are **admitted**. We further direct:

- I. Initiation of Insolvency Resolution Process against the Respondents/PGs and declaration of moratorium in relation to all the debts declared, from today i.e. date of admission of the application, which shall cease to have effect at the end of the period of 180 days, or until this Tribunal passes order on the repayment plan under Section 114 of the IBC, whichever is earlier, as provided under Section 101 of the IBC. During the moratorium period-
 - a) Any pending legal action or proceeding in respect of any debt shall be deemed to have been stayed;
 - b) The creditors of the debtors shall not initiate any legal action or proceedings in respect of any debt;

c) The debtors shall not transfer, alienate, encumber, or dispose of any of their assets or legal rights or beneficial interest therein;

II. **The RP viz. Mr. Mahesh Sureka**, having **Registration No. IBBI/IPA-001/IP-P00413/2017-2018/10736**, having address at **173, Udyog Bhavan Sonawala Road, Goregaon (East), Mumbai-400063, Maharashtra, [Email: mahesh@mrsureka.com]** is directed to cause public notice published on behalf of this Adjudicating Authority within 7 days of passing this Order on the website of the NCLT Mumbai Bench, inviting claims from all creditors, within 21 days of such publication. The notice under Sub-Section (1) of Section 102(2) of the IBC shall include:

- a. details of this Order admitting the Applications;
- b. particulars of the RP with whom the claims are to be registered;
and
- c. the last date for submission of claims.

III. The publication of notice shall be made in two newspapers, one in English and other in Vernacular, which have wide circulation in the State where the CD has its registered office and the Respondents/PGs reside. The RP shall furnish two spare copies of the notice to the Registry for record.

IV. The RP, in exercise of the powers conferred under Section 104 of the IBC, shall prepare a list of creditors on the basis of:

- a) the information disclosed in the Applications;
- b) claims received by the RP under Section 102 of the IBC within 30 days from the date of the notice;

- c) The debtor shall prepare a repayment plan under Section 105 of the IBC, in consultation with the RP, containing a proposal to the creditors for restructuring of his debts or affairs;
- d) The repayment plan may authorise or require the RP to:
- (i) carry on the debtor's, business or trade on their behalf or in their name: or
 - (ii) realise the assets of the debtors; or
 - (iii) administer or dispose of any funds of the debtors;
- e) The repayment plan shall include the following, namely-
- a) justification for preparation of repayment plan and reasons based on which the creditors may agree upon the plan;
 - b) provision for payment of fee to the RP;
 - c) such other matters as may be specified.
- V. The RP shall submit the repayment plan along with his Report on the plan to this Tribunal within a period of 21 days from the last date of submission of claims, as provided under Section 106 of the IBC.
- VI. In case the RP recommends that a meeting of the creditors is not required to be called, he shall record the reasons thereof. If the RP is of the opinion that a meeting of the creditors should be summoned, he shall specify the details as provided under Section 106(3) of the IBC. The date of meeting should not be less than 14 days or more than 28 days from the date of submission of the Report under sub-section (1) of Section 106 of the IBC, for which at least 14 days' notice to the creditors (as per the list prepared) shall be issued by all modes. Such notice must contain the details as provided under the provisions of Section 107 of the IBC.

- VII. The meeting of the creditors shall be conducted in accordance with Sections 108, 109, 110 and 111 of the IBC. The RP shall prepare Report of the meeting of the creditors on repayment plan with all details as provided under Section 112 of IBC, and submit the same to this Tribunal, copies of which shall be provided to the debtor and the creditors. It is made clear that the RP shall perform his functions and duties in compliance with the Code of Conduct provided under Section 208 of the IBC and the Rules and Regulations made thereunder.
- VIII. The RP shall submit his periodic reports before this Tribunal every 30 days.
- IX. In exercise of the powers conferred on this Tribunal under Rule 11 of the NCLT Rules, 2016, the Applicant is directed to deposit Rs.2,00,000/- (Two lakh Rupees) to the bank account of the RP within one week, towards his fees.
- X. The designated Registrar is directed to forward electronic version of this Order to the IBBI for information, dissemination for the stakeholders and for maintenance of data.
- XI. The Registry is directed to communicate a copy of order, report and application within seven working days and upload the same on the website immediately after the pronouncement of order.

Sd/-
SANJIV DUTT
MEMBER (TECHNICAL)

Sd/-
K. R. SAJI KUMAR
MEMBER (JUDICIAL)

//Tanmay Jain//