IN THE NATIONAL COMPANY LAW TRIBUNAL

PRINCIPAL BENCH, NEW DELHI

IA-2535/PB/2022

In

C.P. No. IB-750(PB)/2021

Under Section 95, 96, 99 & 100 of the Insolvency and Bankruptcy Code, 2016 r/w Rule 7(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantor to the Corporate Debtors) Rules, 2019.

IN THE MATTER OF
State Bank of India

.... Petitioner/Financial Creditor

VERSUS

Ms. Rashmi Saxena

.... Respondent/Personal Guarantor to Corporate Debtor

AND

IN THE MATTER OF
Rakesh Kumar Gupta,

.....Applicant / Resolution Professional

Order Pronounced on: 05.07.2022

JUSTICE RAMALINGAM SUDHAKAR
HON'BLE PRESIDENT

SH. AVINASH KUMAR SRIVASTAVA
HON'BLE MEMBER (TECHNICAL)

PRESENT:

For the Applicant	:	Ms. Ekta Choudhary, Adovcate.
For Personal Guarantor	:	Mr. Ishwar Mohapatra, Advocate
For the RP	:	Mr. Vinod Chourasia, Advocate with Mr. Rakesh Kumar Gupta, RP

ORDER

PER- SH. AVINASH KUMAR SRIVASTAVA HON'BLE MEMBER (T)

1. This is an application filed by State Bank of India under Section 95 r/w Rule 7(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantor to Corporate Debtor) Rules, 2019. The prayer made is to initiate the Insolvency Resolution Process against the Respondent / Guarantor Ms. Rashmi Saxena, who stood as Personal Guarantor to the various credit facilities availed by the Corporate Debtor namely M/s Zillion Infraprojects Pvt. Ltd. for total outstanding debt of Rs. 90,73,78,607.30 (Principal amount about Rs. 52 crores plus interest).

2. On presentation of the application, this Tribunal vide order dated 09.05.2022 appointed the Resolution Professional Mr. Rakesh Kumar Gupta, to file report under Section 99 of the Code, which has been filed through IA-2535/2022 in CP. No. IB-750(PB)/2021.

3. The applicant State Bank of India in its application under Section 95 has submitted that the applicant/financial creditor first sanctioned financial assistance to the extent of Rs. 17 Crores vide Sanction Letter dated 23.08.2006 to the Corporate Debtor M/s Zillion Infraprojects Pvt. Ltd. This was reviewed/ enhanced from time to time by executing loan and security documents under consortium arrangement and the last loan sanction was on 15.03.2017 of Rs. 100 crores. Accordingly, the loan and security documents were executed on 25.04.2017 and on the same date the deed of guarantee were last executed by the guarantor. The Corporate Debtor failed to maintain financial discipline and the account was classified as Non-Performing Assets (NPA).

4. The applicant bank issued a legal Demand Notice 14.06.2018 to the Principal Borrower alongwith Respondent's/ Guarantors calling upon them to repay the outstanding amount about Rs. 44.88 crores as on 31.05.2018 payable by the Principal Borrowers and Guarantors. However, despite receipt of the said notice, the Respondents failed to pay the outstanding amount.

5. It is further submitted that application under Section 7 of the IB Code filed by M/s L & T Finance Limited for initiation of Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor M/s Zillion Infraprojects Pvt. Ltd. was admitted by the Hon'ble NCLT on 05.02.2019 and Resolution Plan submitted by the Successful Resolution Applicant was approved by the Committee of Creditors and same is pending for approval before the Adjudicating Authority.

6. Further by virtue of deed of guarantee duly executed by Respondent/Guarantor Ms. Rashmi Saxena in order to secure the facility sanctioned and granted to the Corporate Debtor M/s Zillion Infraprojects Pvt. Ltd., the guarantor Ms. Rashmi Saxena is jointly and severally liable for the dues of the Corporate Debtor.

7. It is further submitted that the said guarantee was invoked by the State Bank of India against the Personal Guarantor / Respondent vide issuance of Demand Notice dated 09.09.2021 under clause (b) of Section 95(4) issued in Form-B, under Rule 7(1) of the Insolvency and Bankruptcy (Application to

Adjudicating Authority for Insolvency Resolution Process for Personal Guarantor to Corporate Debtor) Rules, 2019.

8. The Respondent/Guarantor sent his response dated 28.09.2021 to the Demand Notice, which is annexed as Annexure P-28 of the CP-IB-750(PB)/2021. In its reply, the Respondent has stated that there is no Privity of contract between State Bank of India and the Respondent as the deed of Guarantee dated 09.09.2016 was executed by the Guarantor alongwith the other Guarantors in favour of SBICAP Trustee Co. Ltd. and that the Personal Guarantor has never executed any deed with SBI so as to entail any alleged liability under the IBC. Further, that there is no invocation of any guarantee by State Bank of India against the Respondent, since, the legal demand notice dated 14.06.2018 does not contain any reference of any deed of guarantee executed between State Bank of India and the Respondent / Guarantor, the Demand Notice dated 09.09.2021 is time barred, since the same has been issued after more than three years of the alleged date of default on 29.06.2018, the sum of outstanding

debt is incorrect, exaggerated and in contrary to the documents attached along with the demand notice.

9. The applicant State Bank of India sent its reply to the representation (at Annexure – 29) contesting and denying all the submission made in the reply.

10. It is further submitted that after receipt of Demand Notice issued under Rule 7(1) the period of 14 days has since lapsed, thereafter the application under Section 95(1) r/w Rule 7 of the Rules, 2019 has been filed.

11. In the application reliance has been placed on the documents appended including copy of deed of Personal Guarantee dated 09.09.2016 (Pages 217-241) and copy of letter of confirmation by the Personal Guarantors dated 25.04.2017 by the Guarantors including Ms. Rashmi Saxena (pages 307 and 308). As per this letter, the Respondent / Guarantor has agreed that the said guarantees are continuing one and have been executed to secure the entire working capital facilities. Clause 13 of the deed of Personal Guarantee dated 09.09.2016 reads as follows:

"13. *Continuing Guarantee: This Guarantee shall be a continuing one and shall remain in full force and effect till such time the Borrower repays in full the said working Capital Facilities together with all interest. Additional Interest, Liquidated damages, further interest, prepayment premium, all and any other fees, financing charges, fees / remuneration payable to the Secured Parties (including their representatives / trustees / agents) costs, charges, expenses and other monies whatsoever as stipulated in or payable under the Financing documents.*"

12. Further clause 15 of the deed of Personal Guarantee dated 09.09.2016 reads as under:

"15. *The rights under this guarantee can be invoked jointly and / or severally by the Lender. The Guarantors shall be liable to the Security Trustee and each of the Lenders jointly and severally for the repayment of guaranteed obligations under the Working Capital Consortium Agreement and other Financing Documents.*"

13. Vide order dated 11.02.2022, this Adjudicating Authority allowed the Personal Guarantor to file the reply within 2 weeks. The Respondent/Guarantor filed its reply and raised following objections.

i. The SBI has no locus standi as the guarantee deed was signed with the SBI Cap Trustee Company Limited and not the SBI, the applicant who has invoked personal guarantee.

ii. The guarantee cannot be invoked as the debt is time barred as the date of default was 29.06.2018 and the demand notice dated 09/09/2021 has been served after more than three years from the alleged date of default.

iii. In para 9 of his reply the guarantor has stated that the principal amount as per loan statement attached with the application depicts Rs. 45,67,30,046.83 whereas the amount mentioned in Part-III (Pg 24) of the application claims principal amount of Rs. 52,05,62,213.80.

iv. The guarantor has stated that the amount cannot be claimed from them as the Bank is a part of CoC which has approved the Resolution Plan of the CD and the plan is pending for the approval of this Adjudicating Authority and have also relied upon the judgment of DRT Ahmedabad dated 11.03.2022 in the matter of M/s.

Arcelor Mittal India Pvt. Ltd. vs. SBI and Others bearing OA/650/2018, wherein, it was held that, to invoke personal guarantees by a secured creditor, underlying debt due from the borrower acts as a precondition.

14. The Resolution Professional filed report in terms of Section 99 of IBC vide IA-2535/2022 in which the Resolution Professional has submitted that it had issued notice to the Personal Guarantor on 15.05.2022 to prove repayment of the debt, but the Respondent failed to reply within the notice period of 7 days. The Resolution Professional received reply of the Guarantor after filing this report on 24.05.2022.

15. The Resolution Professional after complying with the requirement under section 99 and after examining the affairs of the personal guarantor as per section 95(1) application, has recommended the admission of the application filed under section 95 of IBC, 2016. The grounds for admission of the application recorded in the Report are as follows:

- The Insolvency Petition satisfies the requirement of Section 95 of IBC, 2016 and has been filed in the

requisite form, in terms of Rule 7(2) of the Rules, 2019, supported by requisite fee and documents.

- The Personal Guarantor has committed default in repayment of the debts; therefore, the requirement as set out under Section 95(1) is satisfied.

16. We have heard Ld. Counsels for the Resolution Professional as well as the Personal Guarantor as also for the applicant State Bank of India and perused all the documents submitted by the parties concerned.

17. The Resolution Professional has stated that the application filed by the Financial Creditor is within limitation as Hon'ble Supreme Court (in suo moto writ petition 3/2020) vide order dated 10.01.2022 has excluded the period from 15.03.2020 till 28.02.2022 for the purposes of limitation.

18. Further, the Resolution Professional has stated that the liability of the guarantor is coextensive with the Principal Debtor and Guarantee is continuing Guarantee in terms of clause 13 of the deed of Guarantee dated 09.09.2016. As regards the objection that SBI has no locus standi as the guarantee deed was signed with SBI CAP Trustee Co. Ltd. and

not the SBI, the contention of the Respondent is incorrect, as per clause 15 of the Deed of Personal Guarantee dated 09.09.2016, the rights under the guarantee can be invoked jointly and / or severally by the lenders and the Guarantors shall be liable to the Security Trustee and each of the lenders jointly and severally for the repayment of Guaranteed obligations.

19. Contention of the Guarantor that the sum of Principal Amount claimed by the applicant is incorrect, since the Bank Statement of the loan account attached at Annexure P-32 Page 372 of the petition deputes about Rs. 45.67 crores, whereas the amount mentioned in the Part-III (page 24 of the petition) claims Principal amount is about Rs. 52.05 crores. The contention of the Guarantor is incorrect as the amount mentioned in the Bank Statement is calculated upto 03.03.2018, whereas the amount mentioned in the Part-III of the petition is calculated as on 10.09.2021.

20. Further the contention of the Guarantor is that the amount cannot be claimed from them, as the Bank is a part of the CoC, which has approved the Resolution Plan and has also relied

upon the judgement of DRT, Ahmadabad dated 11.03.2022 in the matter of *Arcelor Mittal India Pvt. Ltd. vs SBI & Ors.,* wherein it was been held that, to invoke the Personal Guarantees by a secured creditor, underlying debt due from the borrower, acts as a precondition. The reliance of the Respondent is misplaced as in this case the debt is not get extinguished and thus as per law, the bank can seek amount from the borrowers as well as from the Guarantors.

21. Therefore, based on the reasons recorded in the report submitted by the Resolution Professional, as also the arguments presented in the course of hearing, the application bearing No. CP-IB-750(PB)/2021 is hereby admitted under Section 100 of the IB Code, 2016. The Insolvency Resolution Process is initiated against the Respondent / Guarantor and the moratorium is declared, which begins with the date of admission of the application and shall cease to have effect at the end of the period of the 180 days, as provided Under Section 101 of the Code. During the Moratorium Period:

a. Any pending legal action or proceeding in respect of any debt shall be deemed to have been stayed; and

b. The creditors of the debtor shall not initiate any legal action or proceedings in respect of any debt; and

c. The debtor shall not transfer, alienate, encumber, or dispose of any of his assets or his legal rights or beneficial interest therein;

d. The Provisions of this Section 101 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

22. The Resolution Professional viz. Mr. Rakesh Kumar Gupta, who has been appointed under Section 97 vide Order dated 09.05.2022, is directed to cause a public notice published within 7 days of uploading of this Order on website of the NCLT, inviting claims from all Creditors, who shall register their claims as provided under Section 103 of the Code within 21 days of such issuance. The notice shall contain necessary information as provided under Section 102 (2) of the Code. The Resolution Professional is directed to take steps as mandated under the Code specifically mentioned under Part-III, Chapter-III of the Code.

23. The Resolution Professional shall prepare report of the meeting of the creditor(s) on repayment plan with all details as provided under Section 112 and submit the same to this Authority, copies of which shall be provided to the Debtor and Creditors. It is made clear that the Resolution Professional shall perform his functions and duties in compliance of Code of conduct provided under Section 208 of the Code.

24. In terms of the above the present application stands Admitted.

25. A copy of this order shall be communicated to the Financial Creditor, the Debtor and the Resolution Professional by the Court Officer/Registry of this Tribunal.

-Sd-

RAMALINGAM SUDHAKAR
(PRESIDENT)

-Sd-

AVINASH KUMAR SRIVASTAVA
MEMBER (TECHNICAL)