# NATIONAL COMPANY LAW TRIBUNAL
# NEW DELHI BENCH (COURT-II)
# IA. NO. 593/ND/2023
# IN
# Company Petition No. (IB)-769(ND)/2022

**IN THE MATTER OF:**
**State Bank of India** **... Applicant/Creditor**

**Versus**

**Mr. Nakul Gupta** **... Respondent/Personal Guarantor**

**AND IN THE MATTER OF IA. NO. 593/ND/2023:**

**Mr. Rajesh Mittal**
(Resolution Professional)
C 56, Ground Floor,
Soami Nagar,
New Delhi-110017 **... Applicant**

**Order Delivered on: 27.02.2024**

**Under Section: 99-100 r/w Section 95 of IBC 2016**

**CORAM:**

**SH. ASHOK KUMAR BHARDWAJ, HON'BLE MEMBER (J)**
**SH. SUBRATA KUMAR DASH, HON'BLE MEMBER (T)**

**PRESENT:**

| | | |
|---|---|---|
| **For the Applicant** | **:** | Adv. Bheem Jain |
| **For the Respondent** | **:** | Adv. Joby P Varghese, Adv. Shreesh Chadha |
| **For the RP** | **:** | Adv. Kunwarpreet Singh and Adv. Prakul Thadi, PCS for Mr. Rajesh Mittal Adv. |

# <u>ORDER</u>

The present IA No. 593 of 2023 has been filed by Mr. Rajesh Mittal (hereinafter referred to as the 'RP'), qua Personal Guarantor, Mr. Nakul Gupta (hereinafter referred to as the Respondent/ Personal Guarantor) enclosing therewith the Report prepared by him under Section 99 of IBC, 2016.

2. The CP (IB)- 769/ND/2022 has been preferred by State Bank of India against the Personal Guarantor, Mr. Nakul Gupta under Section 95 of IBC 2016, to initiate the IR Process. Vide order dated 07.12.2022, this Adjudicating Authority had appointed Mr. Rajesh Mittal as Resolution Professional (RP) qua the Personal Guarantor and directed him to file its Report under Section 99 of IBC, 2016.

3. As a consequence, the order dated 07.12.2022 passed by this Adjudicating Authority, the RP performed the function in terms of the provisions of Section 99 of IBC, 2016 and submitted his report by way of the present IA-593/ND/2023, recommending admission of the Application viz. IB-769/ND/2022 in respect of the Personal Guarantor.

4. The conclusive recommendation made by the RP reads thus: -

*"9.(e) The Application filed by the Applicant Bank is complete and satisfies the requirements as set out in Section 95 of the Code as explained in Para 8.G. Considering the above,* ***it is recommended by the RP that the application for initiation of insolvency resolution process filed by State Bank of India against Mr. Nakul Gupta Respondent***

***Personal Guarantor to Technofab Engineering Limited be hereby admitted under the orders and directions of this Hon'ble Tribunal."***

5. While making its recommendation for admission of the Application filed qua the Personal Guarantor under Section 95 of IBC, 2016, the RP has espoused thus: -

I. There is nothing on record to prove that the Respondent /Personal Guarantor had denied the existence of debt or default, as explained.

II. It is established that the Respondent Personal Guarantor, viz., Mr. Nakul Gupta has committed default in repaying an amount of more than INR 1,000 / - (Rupees One Thousand only).

III. A demand notice demanding payment of the amount in default has been served on the Respondent Personal Guarantor dated 13.05.2022 before filing the Application.

IV. The RP has stated the following with respect to the fulfilment of requirements of Section 95 of IBC, 2016.

| Requirement(s) | Observation(s) |
|---|---|
| **Section 95(4)**<br>An Application filed under section 95(1) shall be accompanied with details and documents relating to-<br>(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. | Relevant information, details and supporting documents are accompanied with the Application |

| | |
|---|---|
| **Section 95(4)** (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 | Refer Para 8.E |
| **Section 95(4)** (c) relevant evidence of such default or non-repayment of debt. | Refer Para 8.D |
| **Section 95(5)** The creditor shall also provide a copy of the application made under section 95 (1) to the debtor | The Applicant Bank has served the copy of the Insolvency Application to the Respondent Personal Guarantor on 19.10.2022, via email. |
| **Section 95(6)** The application shall be in such form and manner and accompanied by such fee as may be prescribed. | The application submitted by the Applicant Bank is in the prescribed form, i.e., 'Form - C' of the Rules and it is accompanied by the prescribed fee of Rs. 2000/-. |
| **Section 95(7)** The details and documents required to be submitted under section 95(4) shall be such as may be specified. | IBBI is yet to specify any regulation in this regard. |

V. Para 8D and Para 8E referred to above are extracted below:

*"**D. Default Amount***

*"**I.** In the Insolvency Application, the Applicant Bank has claimed an amount of INR 69,48,96,010.33/-(Rupees Sixty-Nine Crore Forty-Eight Ninety-Six Thousand Ten and Paise Thirty-Three*

*only) in default as on 15.10.2022, from the Respondent Personal Guarantor in respect of the credit facilities availed by the Corporate Debtor.*

***II.*** *According to section 78 of the Code, Part III relating to Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms (which is currently made applicable for Personal Guarantors to the Corporate Debtors), shall apply where the minimum amount of default by the debtor is not less than INR 1,000/- (Rupees One Thousand Only).*

***III.*** *After examining the Application along with the supporting documents thereof, including the following, the* ***RP is of the opinion that there is a default of more than INR 1,000/- Rupees One Thousand Only)*** *and hence, the provisions of Part-III shall apply:*

*(a) Letter of Arrangement dated 11.10.2017.*

*(b) Inter- Se Agreement dated 17.10.2017.*

*(c) Undertaking dated 17.10.2017*

*(d) Working Capital Consortium dated 17.10.2017*

*(e) Joint Deed of Hypothecation dated 17.10.2017*

*(f) Omnibus Counter Guarantee dated 17.10.2017*

*(g) Omnibus Indemnity for Bank Guarantee dated 17.10,2017*

*(h) Deed of guarantee dated 17.10.2017*

*(i) Agreement for Pledge of shares dated 16.10.2017*

*(j) Memorandum of Entry dated 31.05.2014*

*(k) Balance Confirmation Letter dated 18.10.2018*

*(1) Revival letters dated 19.06.2020 and 26.09.2020*

*(m) Loan Recall Cum Demand Notice Dated 15.11.2021*

*(n) Copy of the Demand notice dated 13.05.2022 under Section 95 (4) (B) of the Insolvency and Bankruptcy Code, 2016 (FORM-B) Upon the Respondent*

*(o) Application filed by State Bank of India under section 7 of the Code against the Corporate Debtor*

*(p) Order dated 18.11.2022 passed by Hon'ble NCLT, New Delhi Bench, wherein the corporate insolvency resolution process against the Corporate Debtor is initiated*

*(q) Statement of Accounts and*

*(r) Certificate by State Bank of India under Bankers' Book Evidence Act, 1891*

***IV. As per the Application, it is stated that the debt in respect of which the Application is filed, does not include any of the excluded debts and further the RP didn't come across any information or document which proves the contrary.***

***E. DEMAND NOTICE***

***I.*** *As required under Rule 7(2) of the Rules,* ***the Applicant Bank has served the demand notices dated 13.05.2022 in respect of both the Corporate Debtors, in "Form B: Form of Demand Notice" via registered post to the Respondent Personal Guarantor*** *for demanding payment of the amount* *in default within a period of fourteen days of the receipt of said demand notices.*

***II.*** *On failure to pay the debt by the debtor within a period of fourteen days of the service of the demand notice, the Applicant Bank has filed the Application under Section 95 of the Code in requisite form, i.e.,* ***Form C: Application by Applicant Bank to initiate Insolvency Resolution Process,*** *for initiation of Insolvency Resolution Process against the Respondent Personal Guarantor to the Corporate Debtor and* ***the application is complete in all respects.***

***F. LIMITATION***

***I.*** *As mentioned above, the loan account of the Corporate Debtor i.e., Technofab Engineering Limited was declared Non-Performing Asset by the Applicant Bank on 27.06.2019. Subsequently, the outstanding loan amount was recalled by the Applicant Bank by issuing a Loan Recall and Demand Notice dated 15.11.2021*

***II.*** *The Applicant Bank served a Demand Notice in Form-B dated 13.05.2022 under Section 95(4) (b) of the Insolvency and Bankruptcy Code, 2016 upon the Respondent Personal Guarantor demanding payment of default amount of INR 66,35,91,232.18 (Rupees Sixty-Six Crores Thirty- Five Lakhs Ninety-One Thousand Two Hundred Thirty-Two and paise Eighteen Only) as on 30.04.2022 along with applicable interest and charges from 30.04.2022 onwards."*

6. The Respondent has filed its Reply as also Written Submissions espousing therein: -

I. The Personal Guarantee given vide deed of guarantee dated 17.10.2017 stands discharged/revoked by operation of the provisions of Section 130 of the Indian Contract Act 1872.

II. The Respondent had resigned from the directorship of the company on 08.03.2018 and had written letter to the other banks and the lead bank of the consortium viz. Bank of India on multiple occasions from March 2018 onwards seeking his discharge and replacement/substitution as guarantor with another individual of equal net worth.

III. The credit facilities sanctioned in favour of the corporate debtor were due for renewal in October 2018. The loan was renewed on completely new terms with an enhancement of the credit facilities i.e., from Rs. 907 crore to Rs. 1075 crore. In this respect, a sanction dated 24.10.2018 was issued by the lead bank, being Bank of India, and the same was also accepted by the Company. A bare perusal of the sanction letter shows renewal on new terms and payments. Further, a sanction letter dated 01.01.2019 bearing the number CBND/AMT-IV/18-19/214 issued by the Applicant bank/SBI records enhancement of credit facilities by the consortium bank fund-based facilities enhanced from Rs. 115 Crores to Rs. 175 Crores and non-fund-based facilities enhanced from Rs. 792 Crores to Rs. 900 Crores, resulting in enhancement of credit facilities from a total of Rs. 907 Crores (as claimed by the Applicant bank) to Rs. 1075 Crores. The renewal also provided for the guarantee of the Personal Guarantor, Mr. Nakul Gupta, which was admittedly not signed by him. The credit facilities availed by the corporate debtor after 2018 qua which the corporate debtor was in default, is in terms of the renewed sanction, to which the personal guarantor Mr. Nakul Gupta never consented to remain the guarantor. The credit facilities granted were renewed on terms to which the personal guarantor Mr. Nakul Gupta was not a party and thereby there has been a novation of contract. The banks and the corporate debtor have entered into a new contract of debt to which the personal guarantor, Mr. Nakul Gupta has never been a party. He has admittedly not signed on any document relating to renewal of guarantee. It is well settled that the variance in the terms and conditions of the contract of debt by the creditor without notice or consent of the surety would discharge the surety of the liability. Reliance is placed on Section 62 of Indian Contract Act, 1872 (Novation of Contract).

7. It is contended by the Applicant that even though the Personal Guarantor Mr. Nakul Gupta has not signed the renewal of guarantee, he would not get discharged because the renewal was signed by the Company and its director Arjun Gupta.

8. In this regard, it is an admitted fact that Mr. Nakul Gupta ceased to be director qua the corporate debtor from March 2018. He has admittedly not consented to be a guarantor for the renewed limits as well as its enhancement granted to corporate debtors by the consortium from October 2018 onwards. Moreover, the Corporate Debtor had also asked for the replacement of the guarantee of Mr. Nakul Gupta with a surety of like amount. Thus, in such

circumstances, Applicant bank cannot bind Mr. Nakul Gupta by stating that with the corporate debtor agreeing for renewal and enhanced sanctions, Mr. Nakul Gupta is also bound. Owing to variance in the terms of the contract of debt, on account of the novation of the contract, as Mr. Nakul Gupta, having neither noticed nor consented to the same, stands discharged.

9. We have heard the submissions of both the parties and have perused the application, reports, and replies filed by the parties. The Respondent has contended that he had resigned from the directorship of the company on 08.03.2018. Thereafter, it is also a matter of record that the Corporate Debtor had written to the other banks and the lead bank of the consortium Bank of India on multiple occasions from March 2018 onwards seeking discharge of the Respondent as guarantor and his replacement with another individual of equal net worth. Per Contra the RP had contended that the Respondent shall not be discharged as guarantor merely on the ground that he had resigned from the Directorship of the Corporate Debtor. Further, no replacement of guarantee was provided which indicates that the Respondent still stands as the guarantor.

10. We note that the sanction letter dated 01.01.2019 bearing number CBND/AMT-IV/18-19/214 issued by the Applicant bank/SBI records enhancement of credit facilities by the consortium bank -fund-based facilities enhanced from Rs. 115 Crores to Rs. 175 Crores and non-fund-based facilities enhanced from Rs. 792 Crores to Rs. 900 Crores, resulting in enhancement of credit facilities from a total of Rs. 907 Crores (as claimed by the Applicant bank)

to Rs. 1075 Crores. The renewal also provided for guarantee of the Personal Guarantor Mr. Nakul Gupta, which was admittedly not signed by the Respondent. The credit facilities availed by the corporate debtor after 2018, to which the corporate debtor was in default, is in terms of the renewed sanction, to which the personal guarantor, Mr. Nakul Gupta never expressly consented to remain the guarantor.

11. From a perusal of the Guarantee Deed executed on 17.10.2017, annexed to the Bank Application, which is duly signed by the Respondent, it is observed that the Respondent has signed the original Deed of Guarantee. The relevant excerpts of the same reads as under:

**DEED OF GUARANTEE**

THIS DEED OF GUARANTEE made at New Delhi the 17th **day of October, 2017**

BY

(1) **Shri AVINASH CHANDER GUPTA S/o Late Shri B. R. Gupta residing at S-481 Greater Kailash II New Delhi 110 048.**

(2) **Shri ARJUN GUPTA S/o Shri Avinash Chander Gupta residing at S-481 Greater Kailash II New Delhi 110 048.**

(3) **Shri NAKUL GUPTA S/o Shri Avinash Chander Gupta residing at S-481 Greater Kailash II New Delhi 110 048.**

(hereinafter referred to as "the Guarantors" which expression shall unless repugnant to the context or meaning thereof be deemed to include in the case of individuals their respective heirs, executors, administrators and legal representatives and in the case of the company, its successors and assigns) in favour of **Bank of India, New Delhi Mid Corporate Branch, New Delhi** being the Lead Bank of **"BOI Consortium"** as defined in the Working Capital Consortium Agreement dated 17th **day of October, 2017** (hereinafter referred to as **"Lead Bank"** which expression shall unless repugnant to the context or meaning thereof be deemed to include the Bank of India and other consortium member Banks constituting the " BOI Consortium" from time to time or each of them or anyone or more of them and their respective successors and assigns).

WHEREAS in terms of the Working Capital Consortium Agreement dated 17th day of October, 2017, and Joint Deed of Hypothecation dated 17th day of October, 2017 executed by M/s TECHNOFAB ENGINEERING LIMITED, a company within the meaning of Companies Act, 1956, and having its registered office at 507, Eros Apartments, 56, Nehru Place, New Delhi (hereinafter referred to as "the Borrower" which expression shall unless repugnant to the context or meaning thereof be deemed to include its successors and permitted assigns) with the Lead Bank of the Other Part on the 17th day of October, 2017 executed between the Borrower and the Lead Bank (hereinafter the said Working Capital Consortium Agreement, Joint Deed of Hypothecation collectively referred to as "the said Agreement of Loan") the Lead Bank has agreed to grant/granted to the Borrower all or some or any of the credit facilities either in Indian or foreign currencies by way of overdrafts, cash credits, term loans, pre-shipment and post-shipment credits, opening of letters of credit, issuing of guarantees including deferred payment guarantees and indemnities negotiations and discounting of demand and/or usance bills and cheques inland as well as foreign and such other facilities as may be agreed upon from time to time between the Bank and the Borrower (hereinafter called the "abovementioned credit facilities") for sums not exceeding in the aggregate the sum of **Rs. 907.00 cr. (Rupees Nine hundred seven Crores only)** (hereinafter for the sake of brevity referred to as "the Principal Sum") on the original overall limit terms and conditions specified and contained therein (said Agreements of loans) .

AND WHEREAS one of the conditions specified and contained in the said Agreement of Loan is that the Borrower shall procure and furnish to the Lead Bank a guarantee guaranteeing due payment by the Borrower of the said **Principal Sum** ***(not exceeding Rs. 907.00 cr. (Rupees Nine hundred seven Crore only)*** together with interest costs charges expenses and/or other money due to the Lead Bank in respect of or under the abovementioned credit facilities or any of them on demand by the Lead Bank.

AND WHEREAS the Guarantors have at the request of the Borrower and in consideration of the Lead Bank having agreed to grant or granted at the request of the Guarantors the above mentioned credit facilities to the Borrower, have agreed to execute this Guarantee in favour of the Lead Bank on the terms and in the manner hereinafter appearing.

NOW THIS DEED WITNESSETH that inconsideration of the above premises it is hereby covenanted and agreed (the Guarantors covenanting and agreeing jointly and severally) as follows:

1. If at any time default shall be made by the Borrower in payment of the **Principal Sum** (not exceeding ***Rs. 907.00 cr. (Rupees Nine hundred seven Crore only)*** together with interest, costs, charges, expenses and/or other money for the time being due to the Lead Bank in respect of or under the above mentioned credit facilities or any of them the Guarantors shall forthwith on demand pay to the Lead Bank the whole of such **Principal Sum** (not exceeding ***Rs. 907.00 cr. (Rupees Nine hundred seven Crore only)*** together with interest, cost, charges, expenses and/or any other money as may be then due to the Lead Bank in respect of the abovementioned credit facilities and shall indemnify and keep indemnified the Lead Bank against all losses of the said **Principal Sum**, interest or other money due and all costs, charges and expenses whatsoever which the Lead Bank may incur by reason of any default on the part of the Borrower.

2. The Guarantors agree and confirm that the interest shall be charged on the out-standings in the account(s) opened in respect of the abovementioned credit facilities at such rate(s) as maybe determined by

***XXX***

We further agree, undertake, and assure that we shall promptly inform you in writing of any change in the above particulars of our legal heirs that may be occasioned by birth, death, marriage, etc., and/or, on account of any Amendment / change in the general statutes/laws of the country.

30. We also hereunder submit the particulars of immovable properties belonging to us, which have not been charged to the Bank as also not charged to any other Bank/Financial Institution/Creditor as security for financial assistance granted to us.

| Item No. | Particulars of immovable properties with full address | In whose name the property | Present Encumbrance | Whether lease hold or ownership | Present Market Value (Rs. In lacs) |
|---|---|---|---|---|---|
| 1. | House No S-481 Greater Kailash – II, New Delhi – 110 048 | Avinash C Gupta | Nil | Ownership | |
| 2. | Residential Land at Sangam Vihar, New Delhi | Avinash C Gupta | Nil | Ownership | |
| 3. | Commercial Property at Khasra No 522/4, Village Jonapur, Mehrauli, New Delhi | Arjun Gupta | Nil | Ownership | |
| 4. | ------ | Nakul Gupta | ------ | ------ | ------ |
| | | | | | |

IN WITNESS WHEREOF the Guarantors (above mentioned) have executed these presents the day and year first herein above written.

(Avinash Chander Gupta)

12. As can be seen from Clause 8 of the Guarantee deed (ibid), the Guarantee was continuing in nature. The contents of Clause 8 read thus:

> *"8. The Guarantee herein contained* ***is a continuing one for all amounts advanced by the Lead Bank to the Borrower*** *in respect of or under the abovementioned credit facilities as also for all interest, costs and other money which may from time to*

*time become due and remain unpaid to the Lead Bank thereunder and shall not be determined or in any way be affected by any account or accounts opened or to be opened by the Lead Bank becoming nil or coming into credit at any time or from time to time or by reason of the said account or accounts being closed and fresh-account or accounts being opened in respect of fresh facilities being granted within the overall limit sanctioned to the Borrower."*

***(Emphasis Supplied)***

In the circumstances, even if there is any increase in the sanction limit, without the consent of the Guarantor, then also he shall still be liable for the debt which existed prior to its variance.

13. In this context a reference is made to the provisions of Section 133 of Indian Contract Act 1872, extracted as below: -

> ***"133. Discharge of surety by variance in terms of contract.—.***
> *Any variance, made without the surety's consent, in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance."*

14. In the present case there was an initial credit to the tune of Rs. 907 Crore and the Respondent has admitted to have signed the guarantee deed. Thus, even if the Respondent has not signed the Guarantee Deed for the enhanced amount, he shall still be liable for the initial amount, which existed prior to its variance.

15. Though the Respondent had written to the Bank for substitution of Guarantee, there is nothing brought on record by the Respondent that his

Guarantee was either actually replaced or released. Hence, we are of the view that in the absence of any communication from the Bank to the contrary, the Guarantee of the Respondent continues.

16. Further, the Creditor sent the Demand Notice dated 13.05.2022 in Form B under Rule 7(1) of Insolvency & Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process of Personal Guarantors to Corporate Debtors) Rules, 2019 to the Personal Guarantor. The service of notice is not disputed by the Respondent. The Guarantee was invoked by the Creditor vide Loan Recall notice dated 15.11.2021.

17. In the sequel to the aforesaid discussion, we hold that the Creditor has been able to establish the 'debt' and 'default' beyond doubt in respect of the Guarantee given by the Respondent/Personal Guarantor. Hence, we have no reason to disagree with the recommendation given by the RP for admitting the Application. Thus, we accept the report of the RP given by him in terms of the provisions of Section 99 of the IBC, 2016, and admit the CP (IB)-769/ND/2022 fild by the Creditor. Ergo we order the initiation of the IR process in respect of Mr. Nakul Gupta, Respondent/Personal Guarantor with immediate effect.

18. Consequent to the admission of the present application, a moratorium under Section 101 of IBC, 2016 shall commence in relation to all the debts of the Respondent/Personal Guarantor. During the moratorium period –

(a) Any pending legal action or proceedings in respect of any debt qua the Respondent shall be deemed to have been stayed;

(b) the creditors shall not initiate any legal action or legal proceedings in respect of any debt qua the Respondent; and

(c) the Respondent shall not transfer, alienate, encumber, or dispose of any of the assets or his legal right or beneficiary interest therein.

The moratorium shall cease to have effect at the end of the period of 180 days.

19. A public notice shall be issued by the RP, within seven days of passing of this order, inviting claims from all creditors within 21 days of such notice. The notice shall include details of the present order, particulars of the Resolution Professional with whom the claims have to be registered, and the last date for the submission of the claims. The said notice shall be –

(a) published in two national newspapers, one in English and another one in Vernacular, in circulation in the State where the debtor resides;

(b) affixed at the visible place in the premises of this Adjudicating Authority; and

(c) placed on the website of the Adjudicating Authority.

20. The RP shall discharge all such duties as are incumbent upon him in terms of the provisions of Sections 104, 105, 106, 107, 108, 112, and 113 of IBC, 2016, with due deference to the procedure enshrined in Regulations 5, 7, 8, 9, 11, 12, 13, 14, 15 and 17 of IBBI (Insolvency Resolution Process for Personal Guarantor to Corporate Debtors) Regulations, 2019 and also in terms of the other extent provisions of the aforementioned code/ regulations and/or any other provisions of law applicable to him, in the discharge of his duties as RP.

21. A copy of this order along with a copy of the application as also the report of the Resolution Professional shall be provided to the Creditor (Applicant), Respondent/Personal Guarantor, and IBBI, by the Registry/Court Master within 7 days from today by e-mail.

22. **IA 593/ND/2023 is disposed of accordingly. To come up for consideration of Status Report to be filed by RP, within 8 weeks**.

| | |
|---|---|
| **Sd/-** | **Sd/-** |
| **(SUBRATA KUMAR DASH)** | **(ASHOK KUMAR BHARDWAJ)** |
| **MEMBER (T)** | **MEMBER (J)** |