IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH, BENGALURU
(Exercising powers of Adjudicating Authority under
The Insolvency and Bankruptcy Code, 2016)

C.P. (IB) No.08/BB/2021
Under Section 95(1) of the IBC, 2016
R/w Rule 7(2) of the Insolvency and Bankruptcy
(Application to Adjudicating Authority for Insolvency
Resolution Process for Personal Guarantors
to Corporate Debtors) Rules, 2019

IN THE MATTER OF:

State Bank of India
Rep. by its Asst. General Manager,
Stressed Assets Management Branch
2nd Floor,Office Complex Buildings,
Local Head Office Campus
No.65, St.Marks Road
Bengaluru 560 001. ...Applicant/Financial Creditor

Versus

Mr. Awaiz Ahamed
69-B, Shoba Malachite, Bellary Road,
Jakkur, Behind Shlip School,
Bengaluru – 560 064. ... Respondent/Personal Guarantor

Order delivered on: 07th June, 2022

CORAM: Hon'ble Shri. Ajay Kumar Vatsavayi, Member (Judicial)
Hon'ble Shri. Manoj Kumar Dubey, Member (Technical)

PRESENT:

For the Applicant/Financial Creditor: Smt. P Chithra Nirmala, Adv.

For the Respondent : Shri. G. Sridhar, Adv.

ORDER

Per: Ajay Kumar Vatsavayi, Member (Judicial)

1. The present Application is filed by State Bank of India**,** represented by its Assistant General Manager through Resolution Professional(for brevity **'Applicant/Financial Creditor'**), under Section 95(1) of the Insolvency and Bankruptcy Code, 2016, (for brevity **'IBC'/ 'Code'),** r/w Rule 7(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019with a prayer to initiate Insolvency Resolution Process against Mr.Awaiz Ahamed(hereinafter called as "**Respondent /Personal Guarantor**") who is the Personal Guarantor for the credit facilities extended by the Applicant, State Bank of India, to the Corporate Debtor**,** M/s.Scotts Garments Limited(hereinafter called as '**Corporate Debtor'**).

2. It is stated that the Financial Creditor had executed various credit facilities in favour of the Corporate Debtor for which the Respondent stood as the Personal Guarantor. However the Corporate Debtor failed to repay the credit facilities extended by the Applicant for which the Corporate Debtor was classified as Non-Performing Asset on 18.03.2018. It is further stated that, the Operational Creditor of the Corporate Debtor namely M/s. Saravana Distributors had initiated an application under Section 9 of IBC, 2016 r/w Rule 6 of Insolvency and Bankruptcy (Application to Adjudicating Authority) seeking Corporate Insolvency Resolution Process against the Corporate Debtor, numbered as CP(IB) No.68/BB/2018 which was admitted on 13.08.2018 and moratorium was imposed by this Tribunal. It is further submitted that in the Corporate Insolvency Resolution Proceedings, a Resolution Plan was submitted by a Resolution Applicant M/s Lenin Art Private Limited, and this Tribunal had approved the Resolution Plan vide Order dated 16.09.2019.However, it is submitted that the Resolution Applicant has failed in compliance of the Resolution Plan.

3. It is submitted that the Financial Creditor through the Lead Bank had invoked the Personal Guarantee of the Guarantor, Mr. Awaiz Ahmed by issuing guarantee invocation letter dated 07.11.2018 calling upon the guarantor to clear the outstanding liability of the Corporate Debtor. Further it is submitted that despite notice being duly served, the Guarantor had neither replied nor had made payment towards their dues. The Financial Creditor had issued a demand notice (Form B) dated 21.09.2020 to the Respondent to make the payment of his liabilities. However, the Guarantor has chosen to refute the claim and issued a reply notice on 08.10.2020. The Financial Creditor had suitably replied the said letter of the Personal Guarantor vide its letter dated 09.11.2020 wherein it had been highlighted that the liability of the Guarantor had been appropriately quantified after giving due credits to the payments received including those part payments received from the Resolution Applicant.

4. On presentation of the Application by the Financial Creditor, under Section 95(1) of the Insolvency and Bankruptcy Code, 2016, for initiating Insolvency Resolution Process against the Personal Guarantor, this Tribunal vide order dated 02nd December 2021 has appointed the Resolution Professional viz., Mr. Hem Chandra, Registration No. IBBI/IPA-003/IP-N00155/2018-19/11845, and directed him to file report under section 99 of Insolvency and Bankruptcy Code, 2016. The Resolution Professional had filed his report dated 20-12-2021 vide Diary No 3681 recommending 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:-

(i) The Personal Guarantor had committed default in repayment of his debts.

(ii) The RP submits that the present application satisfies the requirements of provisions of section 95 of the Code.

(iii) The RP submits that based on his examination the present application deserves to be admitted under section 100 of the Code.

(iv) The RP submits that considering the facts of the case and the debtor/ personal guarantor does not satisfy the requirement under section 80(2) and hence is not eligible for a "fresh start" under Chapter II.

(v) The RP submits that the report is presented to this Tribunal with a recommendation of accepting the present application as the Personal Guarantor has not repaid the debt due to the Creditor.

5. From the report of the Resolution Professional, there does not appear any request for issuance of any direction for the purpose of conducting negotiations between the Financial Creditor and the Personal Guarantor for arriving at the repayment plan.

6. The Respondent/Personal Guarantor has filed its objection to the RP Report vide Diary No.658. On 23.02.2022, the Learned Counsel for the respondent after arguing for a while seeks permission to file written submission and to place certain decisions in support of the submission. And the same is allowed by this tribunal, for which the respondent has filed written arguments vide Diary No. 971 dated 10.03.2022.

7. The Respondent in his written argument has submitted that the Corporate Debtor, M/s Scotts Garments Ltd has successfully undergone CIRP in CP(IB) No.68/BB/2018. The Resolution Applicant submits that the Resolution plan was approved by this Tribunal vide order dated 16.09.2019 and on approval of the resolution plan all the pre-existing debts of the corporate debtors stands extinguished and there exists no default of any debt due against the corporate debtor as on date of filing of the Petition. Hence, it is submitted that M/s.Scotts Garments Limited does not come under the ambit of the definition of "Corporate Debtor" as envisaged under section 3(8) of the IBC, 2016. Further, the respondent herein cannot be

termed as a "Personal Guarantor of the Corporate Debtor" to invoke Section 95 of the IBC,2016.

8. The Learned Counsel for the respondent further submits that, Clause 5 of Annexure-III of the Approved resolution plan takes away the subrogation rights of all guarantors of the Corporate Debtor, thereby impairing the eventual right and remedy of the surety/guarantor against the principal debtor. The counsel relied on section 139 and 140 of the Indian Contract Act, 1872 for the above submission, wherein section 139 states about the discharge of surety respondent by the acts of creditor by which the eventual remedy of the surety against the principal debtor is impaired. It is submitted that the Applicant should not be permitted to initiate proceedings against the Respondent in her capacity as M/s Scotts Garments Limited personal guarantor as she stands discharged as surety.

9. It is further submitted that, on assuming that the Personal Guarantor is not discharged, the Financial Creditor along with Canara Bank and IDBI Bank have initiated recovery proceedings bearing case No. OA 1218/2019 against the M/s Scotts Garments Ltd, before the Debt Recovery Tribunal, Bengaluru claiming an aggregate sum of Rs. 557.48 Crores which is pending as on date. It is submitted that the Respondent has denied the debt and her liability in the aforesaid proceedings. Hence the Respondent's "debt" as claimed by the Applicant has not been crystallised and there exists a genuine dispute with respect to the same.And the Application is liable to be dismissed as the debt claimed is disputed.

10. The Learned Counsel for the respondent further submits that, on assuming that the Personal Guarantor is not discharged, the liability of the Personal Guarantor is co-extensive with that of the principal borrower in terms of Section 128 of the Indian Contract Act, 1872. It is submitted that, on approval of the Resolution Plan, the liability of the Personal Guarantor stands reduced to the extent stated in the Resolution Plan. Furthermore, if

held liable, the personal guarantor can be held liable only to the extent contemplated in the approved Resolution Plan. It is submitted Section 134 of the Indian Contract Act, 1872 provides that a surety is discharged when creditor releases the principal debtor resulting in the discharged of the principal debtor. It is submitted that this principle be applied pro-rata when a part of the debt is discharged in the hands of the principal debtor.

11. The Applicant/Financial Creditor vide diary No.1242 has filed Rejoinder in reply to the statement of objections filed by the respondent. The Learned Counsel for the Applicant submits that the liability of the Guarantor is co-extensive with that of the borrower. The creditor can proceed against the principal debtor or against the sureties, unless it is otherwise provided in the contract. The applicant relied on the judgment of Hon'ble Supreme Court of India in the matter of "*Industrial Finance Corporation of India Ltd., v Cannanore Blending & Weaving Mills Ltd"., (2002) SCC Online SC 451*wherein it is held that the liability of the Surety is co-extensive with that of the Borrower and discharge of the Principal Debtor by operation of Law does not discharge the Guarantor. The Applicant also relied on the Law Committee report dated 20.02.2020 wherein the law committee held that the "creditor is at liberty to proceed against either the debtor alone, or the surety alone, or jointly against both the debtor and the surety. Therefore, restricting a creditor from initiating CIRP against both the principal borrower and the surety would prejudice the right of the creditor provided under the contract of guarantee to proceed simultaneously against both of them". It is therefore submitted by the Applicant that that the Financial Creditor is entitled to proceed both against the principal debtor and the personal guarantor simultaneously.

12. The Learned Counsel for the Applicant further submits that one of the grounds of contentions raised by the Respondent is that, once the Resolution Plan is accepted and approved in the CIR process, the

Respondent as guarantor gets discharged of his liabilities. It is submitted that the I&B Code, has specifically under Sec.31 provides that once a Resolution Plan takes effect it shall be binding on the Corporate debtor, its employees and Guarantors. It is submitted that, once the Resolution plan is approved, it does not absolve the liability of the guarantors. The Counsel also relied on the judgement of Hon'ble Supreme Court in the matter of *"State Bank of India v. V. Ramakrishnan"., (2018) 17 SCC 394*wherein the Apex court ruled that under the Contract Law, the guarantor is discharged of liability if there is a variance in terms of Contract between the Borrower and Creditor, without the knowledge of the Guarantor. However, approval of the Resolution Plan with or without the knowledge of the Guarantor is not considered as a variance in terms since such process is of involuntary nature and also arising out of a statute. It was further held that upon payment as per the Resolution Plan the Corporate Debtor is completely discharged of all liabilities, while the liability of the guarantors continues. The counsel further cited the judgment of Hon'ble NCLAT in the matter of *"Lalit Mishra and Ors. v. Sharaon Bio Medicine Ltd"., (2021) SCC Online SC 396*wherein it is held that restructure of Financial debt as part of resolution plan approved by NCLT under the Code, did not envisage complete discharge of the liability of the personal guarantee of the guarantor of the Corporate Debtor.

13. It is further submitted that the liability of the Guarantor does not get absolved by the acceptance of the Resolution Plan or by liquidation of the Corporate Debtor as contended by the Respondent. The Applicant further cited the judgment of the Hon'ble Apex Court in the matter of *"Maharashtra State Electricity Board v. Official Liquidator", AIR 1982 SC 1497*wherein it is held that a discharge which the principal debtor may secure by operation of law in bankruptcy or in liquidation proceedings in the case of a company does not absolve the surety of his liability. The apex court has considered the interplay of Sec. 128 and 134 of the Contract Act and went to hold that,

the fact that the company which is the Principal debtor has gone into liquidation would not have any effect on the liability of the Guarantor. It is submitted by the applicant that the liability of the respondent will continue even after the Resolution Plan has been sanctioned by the Adjudicating Authority.

14. It is further submitted that the pendency of any application before the Debt Recovery Tribunal will not affect any proceeding before this Hon'ble tribunal under I&B Code 2016. It is submitted that with the admission of this application, the moratorium will set in and all proceedings pending before the various forums will be kept in abeyance.

15. It is further submitted that a Guarantor does not have a right of subrogation under I & B Code, 2016, will not in any way vitiate their liability under the Code or the Contract. The Learned Counsel further submits that the Hon'ble Supreme Court in the matter of "*Committee of Creditors of Essar Steels v. Satish Kumar Gupta*"., *(2019) SCC Online SC 1478*held that the liability of the guarantor will not get extinguished upon approval of resolution plan and the guarantors do not have the right of subrogation. It is further submitted that the said legal position is reiterated by the Hon'ble Supreme Court in the matter of *"State Bank of India v V Ramakrishnan"*(supra).

16. Heard Smt. P. Chithra Nirmala, learned Counsel for the Petitioner and Mr. G Sridhar, learned Counsel for the Personal Guarantor/Respondent and pursued the entire case records/documents and have gone through the report dated 20.12.2021 filed by the Resolution Professional.

17. We find force in the submission made by the Learned Counsel appearing for the petitioner and the various decisions relied on by Learned Counsel supports her contentions. Hence, we are of the view that the instant petition is liable to be admitted under section 100 of IBC, 2016.

18. Hence, based on the reasons recorded in the report submitted by the Resolution Professional, the application i.e., CP(IB) No.08/BB/2021 filed under Section 95 of IBC, 2016 is hereby admitted under Section 100 of the IBC, 2016. The Insolvency Resolution Process is initiated against the Respondent/Personal Guarantor and moratorium is declared in place of interim moratorium, which begins with the date of admission of the application and shall cease to have effect at the end of the period of 180 days, as provided under Sec 101 of IBC, 2016.

19. During the moratorium period;

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

(ii) The creditors of the debtor shall not initiate any legal action or proceedings in respect of any debt; and

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

(iv) The provisions of this section shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

20. The Resolution Professional viz., Mr. Hem Chandra, who has been appointed under section 97 vide Order dated 02.12.2021, is directed to cause a public notice published on behalf of the Adjudicating Authority within 7 days of uploading of this Order on the website of the NCLT, Bengaluru inviting claims from all Creditors, who shall register their claims as provided under Section 103 within 21 days of such issuance. The notice shall contain the necessary information as provided under Section 102(2) of IBC, 2016. The publication of notice shall be made in newspaper, one in English and other in Vernacular which have wide circulation in the State where the Corporate Debtor and Personal Guarantor resides. The Resolution Professional shall furnish two copies of the notice to the Registry.

21. The Resolution Professional in exercise of the powers conferred under Section 104of IBC, 2016shall prepare a list of creditors within 30 days from the date of notice. The debtor shall prepare a repayment plan in consultation with the Resolution Professional as provided under Section 105of IBC, 2016which shall include provisions for payment of fee to the Resolution Professional. The Resolution Professional shall submit the repayment plan along with his report on the plan to this Authority within a period of 21 days from the last date of submission of claims, as provided under Section 106 of IBC, 2016.

22. In case the Resolution Professional recommend that a meeting of the creditors is not required to be summoned, he shall record the reasons therefor. If the Resolution Professional is of the opinion that the meeting of the creditors should be summoned, he shall specify the details as provided under Section 106(3) of the IBC, 2016. 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 IBC, 2016 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 IBC, 2016.

23. The meeting of the creditors shall be conducted in accordance with Sections 108, 109, 110 & 111 of IBC, 2016. The Resolution Professional shall prepare a report of the meeting of the creditors on repayment plan with all details as provided under Section 112 of IBC, 2016 and submit to this Authority, copies of which shall be provided to the Debtor and the Creditors. It is made clear that the Resolution Professional shall perform his functions and duties in compliance with the Code of Conduct provided under Section 208 of the IBC,2016.

24. In terms of the above, CP(IB) No.08/BB/2021 filed under section 95 (1) of the IBC, 2016is admitted and the Insolvency Resolution Process stands initiated against the Respondent/Personal Guarantor.

25. The Resolution Professional shall submit his periodic reports before this Tribunal, as per rules.

[redacted]

(MANOJ KUMAR DUBEY)
MEMBER (TECHNICAL)

[redacted]

(AJAY KUMAR VATSAVAYI)
MEMBER (JUDICIAL)