

IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH (COURT – II)

Item No. 210

RCP IB-21/ND/2024 Old No- IB-422/ND/2024

IN THE MATTER OF:

M/s. Mudraksh Investfin Pvt. Ltd. Through ... Applicant/Petitioner
RP

Versus

Gursev Singh ... Respondent

Under Section: 95(1) of IBC, 2016

Order delivered on 14.11.2024

CORAM:

SH. ASHOK KUMAR BHARDWAJ
HON'BLE MEMBER (J)

SH. SUBRATA KUMAR DASH
HON'BLE MEMBER (T)

PRESENT:

For the Applicant :

For the Creditor Bank : Adv. Harsh Garg, Adv. Ramneek Kaur Mann

For the PG : Adv. Iswar Mohapatra, Adv. M. Harshvardhan

Hearing Through: VC and Physical (Hybrid) Mode

ORDER

As can be seen from Part III of the application, apparently the amount of default is Rupees Ten Lakhs. The relevant excerpt of Part III of the application reads thus:

PART-III

PARTICULARS OF DEBT [CREDITOR WISE, AS APPLICABLE]		
1.	Total debt (including any interest or penalties	Rs 1000000/- (Rs. Ten Lacs Only) as on 15.10.2023
2.	Amount of debt in default	Rs 1000000/- (Rs. Ten Lacs Only) as on 15.10.2023
3.	Date when the debt was due	15.10.2023
4.	Date when the default occurred	15.10.2023
5.	Nature of the debt	Secured Debt, Guarantee was given to secure the loan credited to Mica Industries Limited

2. The moot question arises to be determined by us is, *“whether in such cases where the amount of default is less than 1 Crore, the Personal Guarantor can be treated as Insolvent and the application under Section 95 can be maintained against him”*. Mr. Mohapatra, the Ld. Counsel for the Applicant could draw our attention to Section 78 of IBC, 2016 and submitted that the threshold limit of default in respect of an individual under Part III of the Code is only Rs. One Thousand and thus, when in the present case the amount of default is more than Rs. Ten Lakhs, the application is maintainable and deserves to be admitted.

3. As can be seen from Section 78 (Part III of Insolvency and Bankruptcy Code, 2016), the default limit of Rs. One Thousand is fixed for fresh start, insolvency and bankruptcy of individuals and partnership firms. The Section 78 of the Code as also the proviso thereunder reads thus: -

“78. Application.— This Part shall apply to matters relating to fresh start, insolvency and bankruptcy of individuals and partnership firms where the amount of the default is not less than one thousand rupees:

Provided that the Central Government may, by notification, specify the minimum amount of default of higher value which shall not be more than one lakh rupees.”

4. While making reference to Section 78 of the Code, we cannot be oblivious of the provisions of Section 79(1) of the Code. The Section 79(1) clearly provides that the Adjudicating Authority in respect of the persons referred to Section 78 is Debt Recovery Tribunal (DRT) constituted under sub-section 1 of Section 3 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. The Section 79(1) of the Code reads thus: -

“79. Definitions.—In this Part, unless the context otherwise requires,—

(1) “Adjudicating Authority” means the Debt Recovery Tribunal constituted under sub-section (1) of section 3 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993);”

5. Here, it would not be out of context to make a reference to Rule 3(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency

Resolution Process for Personal Guarantor to Corporate Debtor), Rules 2019. The Rule reads thus: -

**“3. Definitions. — (1) In these rules, unless the context otherwise requires-
(a) “Adjudicating Authority” means-**

(i) for the purpose of section 60, the National Company Law Tribunal constituted under section 408 of the Companies Act, 2013 (18 of 2013); or

(ii) in cases other than sub-clause (i), the Debt Recovery Tribunal established under sub-section (1A) of section 3 of the Recovery of Debts and Bankruptcy Act, 1993 (51 of 1993);”

6. As can be seen from Rule 3 (1)(a)(ibid) for the purpose of Section 60, the National Company Law Tribunal constituted under Section 408 of the Companies Act, 2013 would be the Adjudicating Authority for a Personal Guarantor and in cases other than sub-clause (i) of clause (a) of sub-rule (1) of Rule 3, the Debt Recovery Tribunal established under sub-section (1A) of Section 3 of the Recovery of Debt and Bankruptcy Act, 1993 would be the Adjudicating Authority. Thus, both the Adjudication Authorities have jurisdiction regarding the Personal Guarantors.

7. If we accept the plea of Mr. Mohapatra that even in such cases where the default is Rs. 10 Lakhs, this Tribunal would be Adjudicating Authority qua the Personal Guarantor, for the simple reason that he or she is the Personal Guarantor qua Corporate Debtor, then an anomalous situation would be created. When a reference is made to Section 78 of IBC, 2016, regarding the threshold limit for invoking jurisdiction of this Tribunal under Section 95 of IBC, 2016, apparently the reference would be to the Debt Recovery Tribunal and not to this Tribunal. When this Tribunal is referred to as Adjudicating Authority, as is referred in Rule 3(1)(a)(i) (ibid), a reference may be made to Section 60(1) of IBC, 2016. The Section 60(1) of the Code reads thus: -

“60. Adjudicating authority for corporate persons.— (1) The Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall

be the National Company Law Tribunal having territorial jurisdiction over the place where the registered office of the corporate person is located.”

8. When we refer to a Personal Guarantor qua the Corporate Debtor, then in order to arrive at the threshold limit, we will have to make a reference to Section 4 of the Code, as amended by Notification No. S.O. 1205(E) dated 24.03.2020. The Section 4(1) along with proviso thereunder and the Notification No. S.O. 1205(E) dated 24.03.2020, as referred in the footnote below the Sections, read thus: -

4. Application of this Part.—*(1) This Part shall apply to matters relating to the insolvency and liquidation of corporate debtors where the minimum amount of the default is ¹[one crore rupees]:*

Provided that the Central Government may, by notification, specify the minimum amount of default of higher value which shall not be more than one crore rupees.

²[Provided further that the Central Government may, by notification, specify such minimum amount of default of higher value, which shall not be more than one crore rupees, for matters relating to the pre-packaged insolvency resolution process of corporate debtors under Chapter III-A.]

5. Definitions.—*In this Part, unless the context otherwise requires,—*

1. Subs. by Notification No. S.O. 1205(E), for “one lakh rupees” (w.e.f. 24-3-2020).

The Notification No. S.O. 1205(E) dated 24.03.2020 reads thus:

MINISTRY OF CORPORATE AFFAIRS

NOTIFICATION

New Delhi, the 24th March, 2020

S.O. 1205(E).—In exercise of the powers conferred by the proviso to section 4 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Central Government hereby specifies one crore rupees as the minimum amount of default for the purposes of the said section.

[F. No. 30/9/2020-Insolvency]

GYANESHWAR KUMAR SINGH, Jt. Secy.

9. When a reference to Corporate Debtor for the purpose of CIRP is to be made, the same needs to be made with reference to the provision of Section 4 (as amended) (ibid) and only in such cases where threshold limit is Rs. 1 Crore or more, this Tribunal would have jurisdiction. When a mention to Personal Guarantor in Section 60 of the Code is made along with the Corporate Debtors, we may not read the threshold limit for Personal Guarantor qua Corporate Debtor

different from the one which is mentioned for Corporate Debtor. The limit of Rs. One Thousand, under Section 78 of the Code, is in respect of such entities/persons/individuals which are referred to in the said Section. Even in Section 54A(2) of the Code, the threshold limit is same as is given in Section 4. The Section 4, Section 54A(2) and Section 60 are contained in Part II of the Code. Section 54A(2) of the Code reads thus: -

“54A. Corporate debtors eligible for pre-packaged insolvency resolution process.—

[...]

(2) Without prejudice to sub-section (1), an application for initiating pre-packaged insolvency resolution process may be made in respect of a corporate debtor, who commits a default referred to in section 4, subject to the following conditions-

(a) it has not undergone pre-packaged insolvency resolution process or completed corporate insolvency resolution process, as the case may be, during the period of three years preceding the initiation date;

(b) it is not undergoing a corporate insolvency resolution process;

(c) no order requiring it to be liquidated is passed under section 33;

(d) it is eligible to submit a resolution plan under section 29A;

(e) the financial creditors of the corporate debtor, not being its related parties, representing such number and in such manner as may be specified, have proposed the name of the insolvency professional to be appointed as resolution professional for conducting the pre-packaged insolvency resolution process of the corporate debtor, and the financial creditors of the corporate debtor, not being its related parties, representing not less than sixty-six per cent. in value of the financial debt due to such creditors, have approved such proposal in such form as may be specified: Provided that where a corporate debtor does not have any financial creditors, not being its related parties, the proposal and approval under this clause shall be provided by such persons as may be specified;

(f) the majority of the directors or partners of the corporate debtor, as the case may be, have made a declaration, in such form as may be specified, stating, inter alia, that—

(i) the corporate debtor shall file an application for initiating pre-packaged insolvency resolution process within a definite time period not exceeding ninety days;

(ii) the pre-packaged insolvency resolution process is not being initiated to defraud any person; and

(iii) the name of the insolvency professional proposed and approved to be appointed as resolution professional under clause (e)

(g) the members of the corporate debtor have passed a special resolution, or at least three-fourth of the total number of partners, as the case may be, of the corporate debtor have passed a resolution, approving the filing of an application for initiating pre-packaged insolvency resolution process.”

10. Our attention could be drawn to Notification No. S.O. 4126(E) dated 15.11.2019, in terms of which, in exercise of the powers referred by sub-section (3) of Section 1 of IBC, 2016, the Central Government appointed 01.12.2019 as the date from which certain provisions of the Code only in so far as they relate to Personal Guarantors to Corporate Debtor came into force. The notification reads thus: -

NOTIFICATION

New Delhi, the 15th November, 2019

S.O. 4126(E).—In exercise of the powers conferred by sub-section (3) of section 1 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Central Government hereby appoints the 1st day of December, 2019 as the date on which the following provisions of the said Code only in so far as they relate to personal guarantors to corporate debtors, shall come into force:—

- (1) clause (e) of section 2;
- (2) section 78 (except with regard to fresh start process) and section 79;
- (3) sections 94 to 187 [both inclusive];
- (4) clause (g) to clause (i) of sub-section (2) of section 239;
- (5) clause (m) to clause (zc) of sub-section (2) of section 239;
- (6) clause (zn) to clause (zs) of sub-section (2) of section 240; and
- (7) section 249.

[F. No. 30/21/2018-Insolvency Section]
GYANESHWAR KUMAR SINGH, Jt. Secy.

11. From the notification it does not appear that the threshold limit for Personal Guarantor qua Corporate Debtor for the purpose of present application under Section 95 of IBC, 2016 would be Rs. One Thousand.

12. In view of the aforementioned discussion and analysis we are of the considered view that a conjoint reading of Rule 3(1)(a) of Insolvency and Bankruptcy (Application to Adjudication Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) 2019, Section 4 and Section 60(1) of the Code reveals that the threshold limit for invoking the provisions of Section 95 of IBC, 2016 qua the Personal Guarantor to Corporate Debtor would be Rs. One Crore only.

13. Here, a question may arise regarding the remedy available to such Personal Guarantor qua Corporate Debtor, who stood as security for an amount of less than Rs. 1 Crore. To address this issue, it is noted that the object of Sections 94 & 95 of the IBC, 2016 is to initiate the Insolvency Resolution Process of the Personal Guarantors and the same cannot be perceived as a process for recovery of debt. One may wonder that when Section 105 of the Code provides for repayment plan, the proceedings under Section 95 may, in a way, be treated as proceedings for recovering debt. We observe that when the repayment plan is submitted, the same is for the concession to be made by all the Guarantors qua the Personal Guarantor regarding the amount of debt so that the Insolvency of Personal Guarantor is resolved and not to introduce a mechanism for return of debt. It goes without saying that where the amount defaulted to be paid by the Corporate Debtor and Personal Guarantor is less than Rs. 1 Crore, proceedings before this Adjudicating Authority for the purpose of Section 7, 9, 10, 94 & 95 of Code cannot be maintained. In view of the aforementioned, **the application is dismissed** with the liberty to Applicant to resort to appropriate remedy in accordance with law.

Sd/-
(SUBRATA KUMAR DASH)
MEMBER (T)

Sd/-
(ASHOK KUMAR BHARDWAJ)
MEMBER (J)