

**NATIONAL COMPANY LAW TRIBUNAL
AMARAVATI SPECIAL BENCH**

CP (IB) No.49/95/AMR/2022

Under Section 95 of the Insolvency & Bankruptcy Code, 2016 read with Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for personal Guarantors to Corporate Debtors) Rules, 2019

**In the matter of
SEVEN HILLS HEALTH CARE PRIVATE LIMITED**

Between:

State Bank of India

(Through Resolution Professional Shri. Chillale Rajesh

SAMB- II Tulsiani chambers, 1st floor,

Free Press Journal Marg,

Nariman Point, Mumbai – 40002.

**.. Applicant/
Creditor**

Versus

Dr. Jitendra Das Maganti,

S/o Late Madhusudhana Rao,

Aged 64 Years,

R/o. 36, Balaji Baymount,

Tarakarama Layout, Pedda RushiKonda,

Vishakhapatnam-530045.

**.. Respondent No.1
Personal Guarantor**

M/s. Seven Hills Health Care Private Limited
Rockdale layout, Waltair Main Road, Visakhapatnam,
530002, A.P.

**.. Respondent No.2
Corporate Debtor**

Order dated: 22.07.2024

Coram:

**DR. VENKATA RAMAKRISHNA BADARINATH NANDULA
MEMBER (J)**

Parties/Counsels Present:

For Creditor	: Mr. Maharshi Viswaraj, Advocate
For Res. Professional	: Mr. Rajesh Chillale – RP in Person
For Personal Guarantor	: Mr. M. Sridhar, Advocate.

ORDER

[Per Bench]

The Present Application is filed under Section 95 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as IBC, 2016") 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 by State Bank of India (hereinafter referred to as ‘creditor’) for the

purpose of initiating Insolvency Process against Dr. Jitendar Das Maganti (hereinafter referred to as "Personal Guarantor (PG)") for a default amount of Rs.129,58,95,550.79/-.

1. Brief Facts, leading to filing of the present Application, are as follows:

1.1 The Respondent/Personal Guarantor stood as Guarantor in respect for repayment of the financial assistance availed by the CD. Guarantee Agreement dated 20-01-2015 in favour of Applicant.

1.2 It is stated that the Personal Guarantor entered into a Supplemental Consortium agreement with the Applicant/Creditor and with other creditors on 20.01.2010.

1.3 The Personal Guarantor entered into another Deed of Guarantee executed with the Creditor on 20.01.2015.

1.4 By order dated 13.03.2018, the Corporate Debtor was admitted and order of moratorium was passed by this Adjudicating Authority in TCP (IB) No.32/7/AMR/2019. Due to non-payment of the amount by the Corporate Debtor, the Applicant/ Creditor has filed this application for initiation of Insolvency Resolution Process against the Guarantor under Section 95(1) of IBC, 2016. The Applicant/ Creditor invoked the personal guarantee and issued demand notice to the Respondent on 03.09.2021 under Rule 7(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency

Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019. The demand notice was delivered to the Respondent on 08.09.2021.

1.5 On presentation of the application by the Applicant/Creditor, this Tribunal vide order dated 30.05.2022 appointed the Interim Resolution Profession (hereinafter referred to as "IRP") as suggested by the Creditor, Mr.Chillale Rajesh, to carry out Insolvency Resolution Process of CP (IB)/49/95/AMR/2022 State Bank of India v/s. Dr. Jitendar Das Maganti the Personal Guarantor as per section 97(3) of IBC, 2016. This Tribunal directed the IRP to file his report.

2. The Interim Resolution Professional has filed the report dated 05.12.2023 recommending the admission of the application filed under Section 95 of IBC, 2016. The grounds for admission of the application as per the Report are as follows:

- i. It is stated that the IRP had examined the application CP (IB) No.49 of 2022 and the same is found to be satisfying all the ingredients of Sec.95 of IBC.
- ii. It is stated that the IRP had not received any evidence of repayment of the debt claimed in Sec.95 petition from Dr. Jitendra Das Maganti. It is stated that the IRP had not received any document whereby the Personal Guarantee agreement dated 20.01.2015 was cancelled by both the parties.
- iii. It is stated that the IRP had not received any order of court or any other forum

whereby the personal CP (IB)/49/95/AMR/2022 State Bank of India v/s Dr. Jitendra Das Maganti (PG) guarantee agreement dated 20.01.2015 was cancelled or set aside.

- iv. It is stated that the IRP had already communicated the personal Guarantor through Email dated 31-05-2022 and speed post-dated 30-05-2022 giving him an opportunity to inform, if he has any objection for which IRP has received an email on 09.06.2022 from personal guarantor stating that not made any payments, and denied the other averments made in the IRP email.

The Respondent/Personal Guarantor filed counter affidavit and contending that the Applicant/ Creditor has not served the demand notice and copy of the petition on the correct address of the Personal Guarantor/Respondent

and also denying that the Personal Guarantor not given any guarantee.

- i. Further contended that the present petition is not maintainable.
- ii. No Evidence of any Guarantee given by the Respondent /Personal Guarantee being invoked and the guarantee was not invoked within the period of limitation.
- iii. The Respondent no.1 submits that the present petitioner is not a member of the consortium of lenders, and is not a beneficiary of the Guarantee. As such, it has no locus or authorisation to prosecute the present petition.

3. The Applicant/ Creditor has filed rejoinder, denies all the allegations averred in the counter and further contending all the new issues averred by the Personal Guarantor in their counter.

3.1 It is submitted that the Personal Guarantor is merely trying to divert the attention of the Hon'ble Tribunal by raising baseless reason for the application not being maintainable. The present Application is perfectly maintainable under section 95 of Insolvency and Bankruptcy Code, 2016 as Respondent No.1 is the Personal Guarantor for the CD which committed default in repaying the loan amounts, the Applicant/Creditor can initiate insolvency resolution process against the Personal Guarantor.

3.2 It is submitted that the creditor has issued Demand Notice in Form – B to the Personal Guarantor through Indian Post on 03.09.2021 (RM720292576IN) and same was delivered on the Personal Guarantor on 08.09.2021. The Personal Guarantor after receipt of the above said Demand Notice failed to give any reply

in spite of receiving the demand notice nor cleared the due amount. The track report issued by the postal department which was annexed at page no. 29 of the company application reveals that the notice was delivered on the Personal Guarantor on 08.09.2021. It is utter false to say that the demand notice under Form-B is not issued to the Personal Guarantor. It is pertinent to mention that the tracking reports filed along with the counter at page no. 6 and 7 are relating to notices sent by resolution professional seeking documents and information from the Personal Guarantor's. Those tracking reports are no way concerned with Demand Notice in Form – B sent by the Applicant/Creditor. The Personal Guarantor's filed those tracking reports with a view to mislead this Hon'ble Tribunal and prejudice the mind of this Hon'ble Tribunal. This type

of attempt by the Personal Guarantor has to nipped in the bud. The documents filed by the Petitioner categorically reveals that the Applicant/Creditor issued Demand Notice and same was delivered to the Personal Guarantor.

3.3 It is submitted that present application is not barred by limitation as contended by the Personal Guarantor. It is humbly submitted that Personal Guarantor has signed the Revival Letter Dated 14.08.2017 and acknowledges the debt. Therefore, the present application is within the period of limitation. Further the CIRP of the Corporate Debtor was initiated on 13.08.2018 and demand notice was delivered was sent on 03.09.2021 with in the period of limitation. It is further submitted that as per decision of Hon'ble Supreme Court of India given in **SMW(C) No.3 of**

2020 in Respondent:- Cognizance for extension of Limitation the period from 15.03.2020 till 28.02.2022 shall stand excluded for deciding the period of Limitation. The Personal Acknowledges the debt and default vide letter dated 21.12.2020. The Principal borrower also acknowledges the debt. It is humbly submitted that the liability of the Personal Guarantor was terminus with that of the principal borrower, all acknowledgements made by the principal borrower are also binding upon the Personal Guarantor.

3.4 It is submitted that Personal Guarantor has not denied the execution of Personal Guarantee in favour of the Applicant/ Creditor. The Personal Guarantor has executed Personal Guarantee dated 20.01.2015 in favour of the lenders mentioned in the Schedule 1. The State Bank of Hyderabad, State Bank of Mysore, State

Bank of Travancore and State Bank of Patiala has merged with State Bank of India (Creditor) with effect from 01.04.2017 vide gazette notification G.S.R. 157, 158, 159 and 160(E). Pursuant merger all the loan accounts of erstwhile State Bank of Hyderabad, State Bank of Mysore, State Bank of Travancore and State Bank of Patiala stand transferred to State Bank of India (Applicant/ Creditor). It is humbly submitted as per gazette notification all contracts, deeds, bonds, guarantees, agreements, assurances, powers-of-attorney and other instruments of whatsoever nature and working arrangements subsisting immediately before the effective date shall be as of full force and effect against or in favour of the Transferee Bank (i.e., State Bank of India) and enforceable as fully and effectually as if, instead of the Transferor Bank (i.e.,

State Bank of Hyderabad, State Bank of Mysore, State Bank of Travancore and State Bank of Patiala).

3.5 It is submitted that the Corporate Debtor in order to avail the financial assistance has executed various loan documents and the Guarantor of the Corporate Debtor in order to secure the repayment of the financial assistance availed by the Corporate Debtor has executed Guarantee Agreements in favour of the Creditor. Copies of sanction letters, Joint Term Loan Agreement, Guarantee Agreement, Certificate under Bankers Book of Evidence Act, 1891 are enclosed to the application which show that the loan was availed by the Corporate Debtor which was guaranteed by the Personal Guarantor. It is further submitted that one of the Creditors (Axis Bank Limited, Consortium Member) has filed Section 7 application against the

Corporate Debtor for initiating Corporate Insolvency Resolution process before the Hon'ble NCLT, Hyderabad Bench (Now Amaravati bench). The Hon'ble NCLT, Hyderabad Bench (Now Amaravati Bench) admitted Section 7 application vide order dated 13.03.2018 in CP(IB)No.282/7/HDB/2017 and initiated Corporate Insolvency Resolution Process against the CD.

3.6 It is submitted that in terms of clause 3.3 of Personal Guarantee agreement, the Guarantee shall be available to all the members of consortium and they shall be entitled to call upon the Guarantors to perform the terms of the Guarantee. As per the Personal Guarantee Agreement it not mandatory for initiating proceedings against the Personal Guarantor by all the members of

consortium together. Each member of consortium is entitled to initiate proceedings independently.

3.7 It is submitted that the Applicant/ Creditor has sufficiently established that there is a lawful financial debt due to the Petitioner being unpaid by the Corporate Debtor and Personal Guarantor. The present petition filed by the Applicant/Creditor lucidly outlines the nature and description of the unpaid Financial Debt in accordance with the provisions of the Insolvency and Bankruptcy Code, 2016. It is therefore submitted that the instant petition is fit for admission as envisaged by the Insolvency and Bankruptcy Code, 2016 and satisfied all the conditions for admission.

3.8 I have heard the learned counsel for the both the parties and perused the documents on record. I have

also gone through the report dated 05.12.2023 filed by the IRP.

4. The main contention of the Respondent is that the Creditor has not issued the demand notice on the Respondent with the correct address and the same has contended the applicant/Creditor and filed an IA (IBC)/85/2024 to take on record the service of notice with the correct address and the same has allowed by this Tribunal vide order dated 10.062024. By stating that the objection as raised are in respect of genuineness, relevancy and admissibility of this documents are taken on record. As such these objections are not relevant, for the purpose of deciding whether or not to receive the documents. Therefore, under these circumstances, the documents are ordered to be received however, on

payment of cost of Rs.15, 000/- payable by the applicant to the “PMNRF” within 2 days from today and shall file compliance and also on further condition that the submissions, if any on the documents shall be made on 12.06.2024, in default IA(IBC)/85/2024 shall stands dismissed.

5. It is seen from the petition that the present application is filed within the period of limitation as the Personal Guarantor/Respondent has signed the Revival Letter dated 14.08.2021 and the section 7 application being TCP(IB)/32/7/AMR/2019 was filed against the Corporate Debtor in which the order of admission was passed on 13.08.2018.

6. Further as per record furnished by the Applicant Bank, Demand Notice dated 03.09.2021 and same was

delivered on the Personal Guarantor/Respondent on 08.09.2021 within the period of limitation. The Personal Guarantor/Respondent filed writ Petition (W.P (c) No. 941/2022 challenging the Constitutional validity of section 95,96,97,99 and 100 of the IBC before Hon'ble Supreme Court of India where categorically admitted the receipt of Demand Notice in the relevant para below:-

“(Xiv) That the Financial Creditor-State Bank of India issued Demand Notice to the petitioner- Personal Guarantor in respect of unpaid debt in default due from M/s. seven hills Health Care pvt.Ltd- Debtor for an amount of Rs.129,58,95,550.79/- on 17.08.2021”

7. The present Application was filed before this Tribunal on 11.04.2022. The date of default as stated to be on the Revival Letter dated 14.08.2021 and the section 7 application being TCP(IB)/32/7/AMR/2019 was filed against the CD in which the order of admission was passed on 13.08.2018. As noted under section 128 of

Indian Contract Act, 1872 that when a default is committed the principal Borrower and surety are jointly and severally liable to creditor and Creditor has the right to recover its dues from either of them or from both of them simultaneously. The Personal Guarantee was invoked by the Applicant Bank Demand Notice dated 03.09.2021 with in the period of limitation. Hon'ble Supreme Court *in Suo Moto WP (Civil) No. 3 of 2022 in Re: Cognizance for Extension of Limitation* held that the period i.e. 15.03.2020 to 28.02.2022 is excluded for calculating the period of limitation. Therefore, we find that the present Application is well within the limitation period.

8. In the light of the contest put forth as above, the point that emerges for the consideration of this Tribunal is:

POINT:

Whether 'due' service of notice of demand by the creditor on the guarantor demanding payment of the amount due and payable under the guarantee, is the '*sine qua non*' for initiation of insolvency resolution process under section 95 of I&B Code 2016? if so, whether the said application can be rejected upon the failure of the creditor in establishing 'due' service of demand notice on the guarantor?

9. We have heard Mr. Maharshi Viswaraj, learned counsel for the creditor, Mr. Rajesh Chillale, Resolution Professional and Mr. M. Sridhar, Ld. Counsel for Personal Guarantor, perused the records and the Written Submissions.

POINT:

Whether ‘due’ service of notice of demand by the creditor on the guarantor demanding payment of the amount due and payable under the guarantee, is the ‘*sine qua non*’ for initiation of insolvency resolution process under section 95 of I&B Code 2016? if so, whether the said application can be rejected upon the failure of the creditor in establishing ‘due’ service of demand notice on the guarantor?

10. Since the central issue in the case on hand being alleged *non service* of notice of demand on the Personal Guarantor, which plea is stoutly denied by the creditor, it is imperative for this Tribunal to find, whether ‘due’ service of notice of demand by the creditor on the guarantor demanding payment of the amount due and payable under the subject contract of guarantee is ‘*sine qua non*’ for maintaining the present company petition U/s. 95 IBC? If so, what are the consequences of non-service of the notice of demand on the personal guarantor/respondent herein?

11. Before I proceed with my discussion on the point above, I usefully refer to the following sections of the Insolvency & Bankruptcy Code, 2016.

Section 95:

Application by creditor to initiate insolvency resolution process.

“(1) A creditor may apply either by himself, or jointly with other creditors, or through a resolution professional to the Adjudicating Authority for initiating an insolvency resolution process under this section by submitting an application.

(2) A creditor may apply under sub-section (1) in relation to any partnership debt owed to him for initiating an insolvency resolution process against—

- (a) any one or more partners of the firm; or*
- (b) the firm.*

(3) Where an application has been made against one partner in a firm, any other application against another partner in the same firm shall be presented in or transferred to the Adjudicating Authority in which the first mentioned application is pending for adjudication and such Adjudicating Authority may give such directions for consolidating the proceedings under the applications as it thinks just.

(4) An application under sub-section (1) shall be accompanied with details and documents relating to—

- (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;*
- (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*
- (c) relevant evidence of such default or non-repayment of debt.*

(5) The creditor shall also provide a copy of the application made under sub-section (1) to the debtor.

(6) The application referred to in sub-section (1) shall be in such form and manner and accompanied by such fee as may be prescribed.

(7) The details and documents required to be submitted under sub-section (4) shall be such as may be specified.”

Section 99:

Submission of report by resolution professional.

“(1) The resolution professional shall examine the application referred to in section 94 or section 95, as the case may be, within ten days of his appointment, and submit a report to the Adjudicating Authority recommending for approval or rejection of the application.

(2) Where the application has been filed under section 95, the resolution professional may require the debtor to prove repayment of the debt claimed as unpaid by the creditor by furnishing—

- (a) evidence of electronic transfer of the unpaid amount from the bank account of the debtor;
- (b) evidence of encashment of a cheque issued by the debtor; or
- (c) a signed acknowledgment by the creditor accepting receipt of dues.

(3) Where the debt for which an application has been filed by a creditor is registered with the information utility, the debtor shall not be entitled to dispute the validity of such debt.

(4) For the purposes of examining an application, the resolution professional may seek such further information or explanation in connection with the application as may be required from the debtor or the creditor or any other person who, in the opinion of the resolution professional, may provide such information.

(5) The person from whom information or explanation is sought under sub-section (4) shall furnish such information or explanation within seven days of receipt of the request.

(6) The resolution professional shall examine the application and ascertain that— (a) the application satisfies the requirements set out in section 94 or 95; (b) the applicant has provided information and given explanation sought by the resolution professional under sub-section (4).

(7) After examination of the application under sub-section (6), he may recommend acceptance or rejection of the application in his report.

(8) Where the resolution professional finds that the debtor is eligible for a fresh start under Chapter II, the resolution professional shall submit a report recommending that the application by the debtor under section 94 be treated as an application under section 81 by the Adjudicating Authority.

(9) The resolution professional shall record the reasons for recommending the acceptance or rejection of the application in the report under sub-section (7).

(10) The resolution professional shall give a copy of the report under sub-section (7) to the debtor or the creditor, as the case may be.”

12. A bare perusal of *Sub Clause 4 (b)* of Section 95 makes it clear that the creditor in an application filed under section 95 of IB Code, shall enclose the documents relating to the “debt” owned by the debtor to the applicant/creditor, and also the documents relating to failure by the debtor to pay the said ‘debt’ within a period of 14 days from the date of *service* of notice of demand.

13. Section 99(1) in I&B Code imposes a legal obligation on the resolution professional to examine the application under Section 94 or Section 95, as the case may be, within ten days of his appointment, and submit a

report to the Adjudicating Authority recommending for *approval or rejection* of the application.

14. It is trite law that the guarantee becomes a debt once the said guarantee is invoked, wherein after the guarantor becomes liable. Here, we usually refer to the ruling of Hon'ble NCLAT, in Edelweiss Asset Reconstruction Company vs Orissa Manganese and Minerals Limited and others, Company Appeal No 437/2018 wherein it has been held that :

“A contract of guarantee matures in to a binding obligation only upon its invocation. Contract of Guarantee is an autonomous contract and the admission of the principal debtor to CIRP does not mean that the debt stands proved as against the Guarantor in a Section 7 proceeding against the Corporate Guarantor automatically. The guarantee has to be invoked and the debt and default proved separately in the proceeding against the Guarantor.” (Emphasis is supplied).

15. Precisely, for this reason only *Sub Clause 4 (a) (b) (c)* of Section 95 IBC, mandates filing of documents relating to (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; (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 (c) relevant evidence of such default or non-repayment of debt.

16. Therefore, I am of the considered view that the *sine qua non*, for initiation of insolvency resolution under section 95 IB Code 2016 is the ‘*due invocation*’ of the personal guarantee executed by the respondent/guarantor. The ‘burden’ lies on the applicant/creditor to establish that the subject guarantee dated 20.01.2015 has been duly invoked, *lest* the “debt” under the guarantee payable by the guarantor will not exist and the application

under section 95 of I&B Code, 2016 will be liable for *rejection*.

17. Clause 21 of the subject guarantee agreement, the due execution of which is not seriously in dispute, states that the notice of its invocation shall be given to the guarantor as below:

“Any notice, demand or other communication required to be given to the Guarantors and the Lenders shall be in accordance with Section 9.1, 9.2 and 9.6 of the Restructuring Agreement and the provisions of Section 9.1, 9.2 and 9.6 of the Restructuring Agreement shall apply to this Guarantee and all references to the term 'this Agreement' shall be deemed to be a reference to this Guarantee and all references to the Borrower shall be deemed to be reference to the Guarantors. All notices to the Guarantors shall be delivered at the addresses mentioned above.”

The address as given in the contract of guarantee is as below:

“Dr. Jitendra Das Maganti, resident of House No. 36, Balaji Baymount, Tarakarama Layout, Peda Rushikonda, Visakhapatnam-530045”

18. The applicant in the present company petition at column No.15 of the application had stated that the copy

of the demand notice dated 17.08.2021 along with proof of delivery has been filed as Annexure-F. A bare perusal of the said demand notice which is dated 17.08.2021, discloses that the same has been addressed to the following address,

“Dr. Jitendra Das Maganti, 28, Kirlampudi Layout, Door No 7-23-7 Sanjeevayya Nagar Visakhapatnam 530023.Tarakarama Layout, Pedda Rushikonda, Visakhapatnam-530045”

19. Admittedly, the above is not the address that is mentioned in the guarantee agreement and the proof of sending demand notice to the above address also has not been filed by the creditor. The petitioner in Para No.7 of its brief “synopsis”, submitted along with this application, has stated that the ‘demand notice’ to the Personal Guarantor was ‘sent through India Post on 03.09.2021’ and that the same was delivered on 08.09.2021, and despite receipt of the notice dated

17.08.2021 the respondent/guarantor failed to pay the amount. The applicant also filed a photo copy of the postal dispatch receipt dated 03.09.2021 and the postal track consignment report for the said consignment wherein it was confirmed that the said letter has been delivered on 08.09.2021 to the addressee.

20. Here it is pertinent to note that the Demand Notice, purportedly sent to the Personal Guarantor, on 03.09.2021, and which is filed before this Tribunal discloses that the same has been addressed to:

Dr. Jitendra Das Maganti, resident of House No. 36, Balaji Baymount, Tarakarama Layout, Peda Rushikonda, Visakhapatnam-530045.

Whereas, the Postal Slip and the Track Report for the above despatch discloses that the same was sent to the following address on 03.09.2021 to the address:

“Dr. Jitendra Das Maganti, Pothinamallayya Palem,
Pin Code No 530041”.

21. While it was so, post completion of the pleadings, the applicant vide IA No 85/2024 sought leave to file additional documents, and in para 4 of the affidavit filed in support of the said petition had stated that:

“It is humbly submitted that the Financial Creditor has sent Demand Notice to the address mentioned in the Personal Guarantee Agreement through India Post and said notice was delivered on the Personal Guarantor. It is further submitted that inadvertently and due to bona fide mistake, the copy of Demand Notice which was addressed to Kirlampudi Layout address was filed along with the Company Petition at Page No. 24 to 27 instead of the Copy of the Demand Notice sent to the address mentioned in the Personal Guarantee Agreement i.e. Rushikonda Address. The Postal Receipt and Tracking Report pertaining to address mentioned in Personal Guarantee Agreement i.e. Rushikonda Address are attached along with the Company Petition at Page No. 28 and 29. The Financial Creditor is filing along with the Present Application the Demand Notice sent to the address mentioned in the Personal Guarantee Agreement i.e. Rushikonda Address.”

22. The said IA was allowed and the documents were received subject proof and relevance and also by conferring a right on the personal guarantor to comment on these documents.

23. Placing reliance on the ‘Postal Receipt dated 03.09.2021’ and the ‘Tracking Report dated 08.09.2021’, Ld. Counsel for the applicant contends that the address mentioned in the above documents pertains to the personal guarantor/ respondent mentioned in Personal Guarantee Agreement *i.e Rushikonda Address*, as such the plea that the address mentioned in the postal slip and also in the postal track report is different from the address mentioned in the guarantee agreement or that the same does not belong to the respondent or that the respondent guarantor was not served with the said notice of demand is untenable .

24. Ld. Counsel further contended that the *presumption* under section 27 of General Clauses Act, as regards the ‘delivery’ of the demand notice dated 17.08.2021 on the

personal guarantor can be drawn in this case in favour of the applicant and even though the said presumption is rebuttable, the personal guarantor on whom the ‘burden’ lies to prove *non service of the demand notice*, since failed to place any acceptable piece of material before this Tribunal, due service of demand notice on the respondent/guarantor stands established.

25. Ld. Counsel also contended that the personal guarantor has admitted the receipt of the demand notice in the Writ Petition (Civil) No.843 of 2022 filed by him before Hon’ble Supreme Court of India, and an ‘admission’ being the best form of ‘proof’, service of demand notice on the personal guarantor in the case on hand stands established.

26. However, the Ld. Counsel for the Personal Guarantor would contend that, the alleged demand notice produced by way of IA.No.84 of 2024 is ‘manufactured’ recently, and was neither *sent* nor *delivered* to the personal guarantor /respondent which is evident from the following:

“(i). There would be no record of the demand notice annexed to the petition if it was found to be signed by mistake. It would have been disposed immediately, and it is highly unlikely that it would be retained and submitted for filing. There is no explanation as to why there are two identical notices in the first place,

(ii). The demand notices are both dated 17.08.2021, but have the same reference number. They are also signed with different ink pens. There is a different seal on two pages, and no seal of the petitioner on the last page of the "new" demand notice. It is very unlikely that there would be such differences between two documents purported to be signed at the same time. The differences are extracted and filed herewith.

(iii). The new demand notice has been made recently to match the address appearing in the postal receipt which is “Pothinamallayapalem-530041”. Such an address is not found in the Personal Guarantee or in any other document. The correct address of the I” respondent is as follows:

“36, Balaji Baymount, Tarakarama Layout, Pedda Rushikonda, Vishakhapatnam-530 045”.

(iv). The same is rightly stated in the petition (Pg.6 of the CP), and the same address is also found in the Personal Guarantee dated 20.01.2015 (Pg. 100 of the CP). It appears that whichever document was sent on 03.09.2021 was sent to a wholly different third address, and now such a demand notice has

been made up in order to match the postal receipt and has been filed along with I.A.No.84 of 2024.

(v). Both the alleged notices are dated 17.08.2021, but the postal receipt is dated 03.09.2021. There is no explanation offered at all for the inordinate 17-day delay.

(vi). The alleged tracking report is a screenshot taken from a phone with no evidence to show that it is from the India post website, or has the official India post logo, nor does it show to which addressee it is delivered to. It is quite far-fetched to believe that the petitioner would use an unofficial and unverified phone screenshot as evidence of alleged delivery.

(vii). Both the demand notices were allegedly sent through Speed Post with acknowledgement due, but there is no such acknowledgement which shows the receipt of either of the alleged notices.”

27. Ld. Counsel also placed reliance on the following rulings;

- i. B. Viswanathan vs Seshasayee Paper and Boards Ltd. [(1992) 73 Comp Cases 136], where in Hon’ble Madras High Court, has held as follows:

“23. [...] The registered office of the company is at Pallipalayam, Salem District as can be seen from the Postal Index Number Code of Delivery Post Offices in Tamil Nadu Circle, marked as Ex.R-6, the Pin Code Number of Pallipalayam is 638 006. The notice purporting to have been issued under Section 434 is not only one addressed to the Managing Director, but also the PIN Code Number given is 538007. Therefore the statutory (Ex.P-9) notice does not conform to the mandatory requirements of Section 434(1)(a) of the Act. [...]”

ii. A.Sathyannarayana Versus C. Nagaraj [(1999) SCC OnLine Kar 572] wherein Hon'ble Karnataka High Court held that,

“11. [...] It is also pointed out by the learned Counsel for the appellant that the appellant has also sent a copy of the notice under certificate of posting to the same address, which is marked as Ex. P. 5. He, therefore, contended that a presumption should be drawn that the said notice sent under certificate of posting must have been received by the respondent in the ordinary course. But it is pointed out by the learned counsel for the respondent that the address furnished on Ex. P5, the certificate of posting is not the same address as found on the postal cover, Ex. P6. According to him, the door number furnished in Ex. P5 is 381, but not, 38. It is further pointed out by him that the Pin Code number is given as 23 on Ex. P5, whereas the correct Pin Code No. is 93. The 1st appellate Court, has no doubt, accepted the contention of the learned Counsel for the respondent and concluded that the address given on Ex. P5 is not the correct address of the respondent. But on a careful perusal of the Ex. P5, it is found that the door number is given as 38, but, not 381, since a comma is put after No. 38 and the same is wrongly read as Door No. 381. However, the pin code number is found to be 23, instead of 93, which is the correct pin code number; So, it is not possible to draw an inference that the notice sent under the certificate of posting must have reached the respondent and that he must have received the same. [...]

As regards the application of Section 27 of the General Clauses Act, 1897, which reads as below:

“27. Meaning of service by post: Where any Central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, where the expression "serve" or either of the expressions "give" or "send" or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.”

to the case on hand, Ld. Counsel submits that the presumption under S.27 would only apply where it is proved that the document was *properly addressed and posted*, and in the present case there is no such proof has been filed.

28. According to the ld. Counsel there is no similarity in the addresses at all, as the address in the postal receipt reads as:

'Pothinamallaya palem-530041. whereas, the correct address of the 1st respondent is: '36, Balaji Baymount, Tarakarama Layout, Pedda Rushikonda, Vishakhapatnam-530045'.

29. Ld. Counsel submits that neither the name of the layout is correct, nor does the 1st Respondent stay in Vishakhapatnam (Rural), or at Pothinamallaya Palem. Even the Pin Code is incorrect. As such, unless the address is correct, there can be no presumption of service

drawn under S.27, and it would have no application to the facts of this case.

30. Ld. Counsel states that the Petitioner has *belatedly and for the first time* after arguments in the matter and after filing of written submissions of the 1st Respondent, has come up with a new document, namely, Demand Notice with an address as follows:

House No-36, Balaji Bay Mount, Tarakarma Layout,
Peda Rushikonda, Vishakhapatnam (Rural),
Pothinamallayapalem-530 041.

31. Ld. Counsel submits that until the petitioner is able to show that the address mentioned in the postal cover matches the admitted address of the petitioner, it is not required for the respondent to establish non service of the demand notice on the respondent. According to the learned counsel, the petitioner has added

Pothinamallayapalem-530041 to the address in the Demand Notice at this stage solely in order to match it with the postal Pin code.

32. As regards the contention that the personal guarantor has admitted the receipt of demand notice in the WP No.843 of 2022, Ld. Counsel, submits that there is no proof of any statement made by the 1st respondent at any stage except a bald averment to that effect by the petitioner. Merely not stating the same in a preliminary counter would neither amount to admission, nor would it preclude the 1st respondent from stating so at the time of filing objections to the report of the Resolution Professional, especially when the Hon'ble Supreme Court has held that the 1st Respondent had no right to raise objections at that stage.

33. Having heard the Ld. Counsels and on perusal of the documents, supra, I am to state that, apparently, there is a mismatch of the address

‘Dr Jitendra Das Maganti, Pothinamallayya Palem S.O. PIN 530041’

mentioned in the **postal despatch slip** dated 03.09.2021, with the address mentioned in the guarantee agreement, i.e. House No-36, Balaji Bay Mount, Tarakarma Layout, Pedarushikonda, Vishakhapatnam (Rural), Pothinamallayapalem-530 041. In fact, barring the name of the personal guarantor, all the other particulars mentioned in the above address including the Pin Code number, does not match with the address mentioned in the contract of guarantee.

Hon'ble Supreme Court of India, in K. Bhaskaran vs Sankaran Vaidhyan Balan And Anr , AIR 1999 Supreme 3762, held that,

“Nonetheless the principle incorporated in Section 27 (quoted above) can profitably be imported in a case where the sender has despatched the notice by post with the correct address written on it. Then it can be deemed to have been served on the sendee unless he proves that it was not really served and that he was not responsible for such non-service. Any other interpretation can lead to a very tenuous position as the drawer of the cheque who is liable to pay the amount would resort to the strategy of subterfuge by successfully avoiding the notice”. (emphasis is supplied)

34. The applicant had not placed any acceptable record to show that the addresses, i.e. ***Dr Jitendra Das Maganti, Pothinamallayya Palem S.O. PIN 530041***’ is the correct **address of the respondent.** Therefore, the ‘mismatch’ of the address mentioned in the postal slip with the address mentioned in the guarantee agreement being as clear as crystal, the question of drawing presumption in terms of section 27 of the General Clauses Act does not arise in this case.

35. There is yet another formidable reason that made me to disbelieve the ‘connectivity’ between the addresses mentioned in the postal slip dated 03.09.2021 and the demand notice dated 17.08 2021 said to have been posted on 03.09.202, which the Ld. Counsel for the applicant tried to bring in, which I explain herein. The Resolution Professional who is under the legal obligation to verify the due compliances by the creditor before submitting his report to the Adjudicating Authority in terms of Section 99(1) of I&B Code, which is as below:

“99(1) The resolution professional shall examine the application referred to in section 94 or section 95, as the case may be, within ten days of his appointment, and submit a report to the Adjudicating Authority recommending for approval or rejection of the application”.

in his report dated 15.06.2022 had stated that the demand notice in *Form-B* has been **sent on 17.08.2021**, to the Personal Guarantor intimating him to pay the outstanding

amount including penalties due as on 31.07.2024. The relevant paragraph of the report is extracted here under.

“The Creditor has sent demand notice in form - B [under Rule 7(1) IBBI Application to Adjudicating Authority of Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019] on 17.08.2021 to the Personal Guarantor to the Corporate Debtor, intimating the amount due and payable including interest or penalties due as on 31.07.2021 is Rs. 129,58,95,550.79 (Annexure - 6).”

36. The above statement of the Resolution Professional, cuts at root the theory that the demand notice dated 17.08,2021 has been dispatched only on 03.09.2021 propounded by the creditor post filing of this company petition. That apart, admittedly, the Resolution Professional in his report whereunder he recommended the admission of this application did not even *whisper about* the ‘date of despatch of the demand notice on 03.09.2021’ and its purported ‘delivery on 08.09.2021’. On the other hand, he categorically mentioned in his

report that the demand notice was *sent on 17.08.2021* which notice was addressed to :

‘Dra Jitendra Das Maganti, 28, Kilmuir Layout, Door No 7-23-7 Sanjeewa Nagar Visakhapatnam 530023’.

which indisputably was not the address that has been mentioned in the postal despatch slip dated 03.09.2021 and the postal track report dated 08.09.2021.

37. In fact, the so called ‘existence’ of the demand notice bearing the *admitted address* of the respondent/guarantor. i.e. House No-36, Balaji Bay Mount, Tarakarama Layout, Peda Rushikonda, Vishakhapatnam (Rural), Pothinamallayapalem-530 041, leave alone its purported despatch on 03.09.2021, was not even made known to the Resolution Professional, let alone furnishing the copy of the same. As already stated the copy of the same has seen the light of the day for the first time ‘post filing of the

report’ by the resolution professional and after completion of submissions by the Ld. Counsels, through IA 45/2024 filed by the creditor.

38. Here I wish to point out that, in terms of sub sections 4, 5, 6 & 7 of Section 99 of the I&B Code, 2016 which are as below:

Section 99 :

Submission of report by resolution professional:

“99 (1), (2), (3)

(4) For the purposes of examining an application, the resolution professional may seek such further information or explanation in connection with the application as may be required from the debtor or the creditor or any other person who, in the opinion of the resolution professional, may provide such information.

(5) The person from whom information or explanation is sought under sub-section (4) shall furnish such information or explanation within seven days of receipt of the request.

(6) The resolution professional shall examine the application and ascertain that—

(a) the application satisfies the requirements set out in section 94 or 95;

(b) the applicant has provided information and given explanation sought by the resolution professional under sub-section (4).

(7) After examination of the application under sub-section (6), he may recommend acceptance or rejection of the application in his report.

the resolution professional while examining the application, in order to ascertain whether the application satisfies the requirements set out in section 94 or 95 of the I&B Code, 2016 as the case may be, is entitled to seek such further information or explanation in connection with the application as may be required from the debtor or the creditor or any other person who, in the opinion of the resolution professional, may provide such information and the person from whom information or explanation is sought under sub-section (4) shall furnish such information or explanation within seven days of receipt of the request.

39. So much so, the Resolution Professional here in, having been furnished with the copy of the demand notice dated 17.08.2021 which admittedly does not

contain the address, which has been mentioned in the contract guarantee, ought to have asked for documents showing proof of sending the said notice to the address which was mentioned in the Guarantee Agreement, especially as service of Demand Notice on the guarantor being mandatory. Admittedly, no proof of service of the Demand Notice at the address mentioned in the notice has been traced by the Resolution Professional in his report. So much so, it is “clearer than crystal” that the report of the Resolution Professional is completely silent on the service of the Demand Notice dated 17.08.2021, relied on by the Resolution Professional himself. Therefore, when non-compliance of subsection (4) of section 95 I&B Code, 2016 is *ex facie*, apparent and unequivocal, it is strange that the Resolution Professional had ventured to recommend the ‘admission’ of the present application,

which in my considered opinion is a sheer mechanical act and due to non-application of mind.

40. Moreover, the demand notice dated 17.08.2021 relied on by the resolution professional, admittedly covered the amount claimed as due and payable by the guarantor (including interest or penalties) upto 31.07.2021 only. However, it is case of the creditor that this demand notice dated 17.08.2021 was actually despatched on 03.09.2021, ‘after changing the address of its recipient’. If that be so, the sum due and payable by the guarantor shall cover the period up to 31.08.2021 and cannot be only up to 31.07.2021. Strangely, the demand notice purportedly despatched on 03,.09.2021 contains the same amount as claimed in the demand notice relied on by the resolution professional. No explanation has

been forthcoming from the creditor as to why the interest and penalties were claimed only up to end of July only, when the notice was sent on 03.09.2021. This serious ‘flaw’ on the part of the creditor certainly strengthens the contention of the Ld. counsel for the respondent/guarantor that demand notice dated 17.08.2021 addressed to the admitted address of the respondent/guarantor was subsequently ‘manufactured’.

41. Before I part with, I must say, that, the approach of the creditor in filing the ‘proof’ relating to the ‘due’ service of the “demand notice” straightway before this Adjudicating Authority, without placing the same before the resolution professional, is improper and of no ‘avail’ to the applicant/creditor, inasmuch as, it is the ‘duty’ in terms of section 99 of IB Code, *supra*, of the Resolution

Professional while preparing his report, recommending *admission or rejection* of the application, to examine whether the applicant has complied *sub section 4* of section 95 of I&B Code, 2016 and this Tribunal, cannot be called upon to perform their function of the Resolution Professional.

42. Here, I wish to say that the reliance placed by learned Counsel for the creditor, on the ruling of the Hon'ble Apex Court in judgement dated 04.08.2021 in Civil Appeal No.1650 of 2020, re ***Dena Bank (now Bank of Baroda) versus C. Shivakumar Reddy and another***, wherein it was held as under:

“144. There is no bar in law to the amendment of pleadings in an application under Section 7 of the IBC, or to the filing of additional documents, apart from those initially filed along with application under Section 7 of the IBC in Form-1. In the absence of any express provision which either prohibits or sets a time limit for filing of additional documents, it cannot be said that the Adjudicating Authority committed any illegality or error in permitting the Appellant Bank to file additional documents. Needless however, to mention that depending on the facts and circumstances of the case, when there is inordinate delay, the Adjudicating Authority might, at its discretion, decline the request of an

applicant to file additional pleadings and/or documents, and proceed to pass a final order. In our considered view, the decision of the Adjudicating Authority to entertain and/or to allow the request of the Appellant Bank for the filing of additional documents with supporting pleadings, and to consider such documents and pleadings did not call for interference in appeal.”

in my considered opinion, is thoroughly misplaced, inasmuch as the above ruling of the Hon’ble Supreme Court deals with the situation where the documents required to be placed before the Adjudicating Authority by the parties after filing of the petition or where pleadings filed before the Adjudicating Authority require amendments and the said ruling has never dealt with the “requirements that a “creditor” in an application filed under section 95 of the I&B Code, 2016 is required to comply” before the Resolution Professional appointed by this Tribunal.

43. Insofar as the contention of the learned counsel for the creditor that the Personal Guarantor had admitted the

receipt of ‘Demand Notice’ in Writ Petition (Civil) No.843 of 2022 filed by him, as such the Personal Guarantor cannot be allowed now to plead that he is not served with the Demand Notice, is concerned I am not inclined to accept the same for more than one reason. First and foremost is that the above Writ Petition has been filed challenging the Constitutional validity of certain provisions of the I&B Code, 2016 relating to Personal Guarantor. As such it was not the occasion for the Personal Guarantor to state therein whether or not the Demand Notice has been served on the Personal Guarantor. Moreover, there is no “admission” much less “unequivocal” anywhere in the said Writ Petition on the part of the Personal Guarantor as regards service of Demand Notice on the Personal Guarantor. Even assuming that there is an admission, yet an admission can

be explained, and I found the explanation/ reasons in the objections filed to the Resolution Professional's Report, on the alleged admission. At any rate, while raising objection to the Resolution Professional's report, the Personal Guarantor had raised the plea of non-service of Demand Notice on the Personal Guarantor.

44. Therefore, I disagree with the submission of he learned counsel for the creditor that the Personal Guarantor had admitted service of Demand Notice dated 17.08.2021 on him in the Writ Petition supra, as such the Personal Guarantor cannot be now allowed to contend that he was not served with the Demand Notice.

45. Therefore, in light of my discussion as aforementioned, I am of the firm view that the applicant/ creditor failed in establishing compliance of subsection

(4)(a) of section 95 I&B Code, 2016. As such the “debt” as claimed under the impugned Guarantee Agreement does not “exist” as on the date of filing of the present application. The Point is answered accordingly.

46. In light of my discussion and finding above the report of the Resolution Professional is hereby rejected. Moratorium order passed earlier stands vacated forthwith. However, this order does not preclude the creditor from initiating fresh process under section 95 of the I&B Code, 2016, as per law.

47. In the result CP (IB) No.49/95/AMR/2022 is hereby rejected. No costs.

SD/-
Dr. VENKATA RAMAKRISHNA BADARINATH NANDULA
MEMBER (J)

Reddy Pavani, LRA/ karim