

IN THE NATIONAL COMPANY LAW TRIBUNAL

NEW DELHI, COURT-III

IA-3290/2024

And

IB-156(ND)2024

Under Section 95(1) of the Insolvency and Bankruptcy Code, 2016 read with Rule 7 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 CP (IB)-156/ND/2024:

CENTRAL BANK OF INDIA

Having its registered office at:

Press Area Branch,
3-Link House, Bahadur Shah Zafar Marg,
New Delhi-110003.

Through Authorized Signatory: -

Mr. Anil Kumar Suman

..... Applicant/Financial Creditor

VERSUS

Mr. KUSHAN MITRA

R/o J-1813, Chhitranjan Park
New Delhi-110019.

..... Respondent/ Personal Guarantor

AND IN THE MATTER OF IA-3290/2024:

Mr. DEVVART RANA

(Having IBBI Registration No. IBBI/IPA-002/IP-N00680/2018-2019/12025).

Order delivered on: 24.10.2024

CORAM:

SHRI BACHU VENKAT BALARAM DAS, HON'BLE MEMBER (JUDICIAL)

SHRI ATUL CHATURVEDI, HON'BLE MEMBER (TECHNICAL)

PRESENT:

For Applicant: Mr. Brijesh Kumar Tamber, Mr. Prateek Kushwaha Advs.

For Respondent: Mr. Saurabh Kalia, Mr. Yatinder, Ms. Tanvi Bansal Advs.

For the RP: Mr. Devvart Rana (RP), Ms. Purti Singhal Adv.

ORDER

PER: ATUL CHATURVEDI, MEMBER (TECHNICAL)

1. The present application has been filed by Central Bank of India, the Applicant through its Authorized Signatory, Mr. Anil Kumar Suman under Section 95(1) of the Insolvency and Bankruptcy Code, 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 against Mr. Kushan Mitra, the Personal Guarantor to the Principal Borrower/Corporate Debtor, i.e., M/s. CMYK Printech Limited for the total outstanding default amount of Rs. 11,50,98,244/- (Rupees Eleven Crore Fifty Lakh Ninety-Eight Thousand and Two Hundred and Forty-Four Only) as on 02.02.2024.
2. The Applicant, Central Bank of India at the request of Corporate Debtor, M/s. CMYK Printech Limited had sanctioned the following credit Facilities totaling to a sum of Rs. 14,64,78,592/- vide different sanction letters. Details of the credit facilities/Bank Guarantee as per records are: -

S. No.	Nature of Facility	Amount of Facility	Sanction Letter
1.	Overdraft/Cash Credit Facility	Rs. 1.95 Crore	01.01.2001
2.	Overdraft/Cash Credit Facility	Rs. 9 Crore	12.08.2011
3.	Bank Guarantee Facility	Rs.13,78,592/-	17.06.2020
4.	Overdraft/Cash Credit Facility	Rs. 3.56 Crore	13.08.2020
	TOTAL	Rs. 14,64,78,592/-	

3. The above said credit facilities were secured by creating security interest in favour of the Applicant by: -

Primary Security: -

EM of Industrial land & building at Plot no. 41,

Block - F, Sector – 6, Noida G. B Nagar, Uttar Pradesh.

(Area 796.05 sq. mts.) (Leasehold Property)

Owner: - M/s. CMYK Printech Ltd. through Mr. Amit Goel

Collateral Security: -

EM of Industrial Land & building at Plot no. C-33,

Amousi Industrial Area, Lucknow, Uttar Pradesh.

(Area 4462.00 sq mts) (Lease hold Property)

Owner: - M/s. CMYK Printech Ltd. through Chandan Mitra

4. The Corporate Debtor and the Guarantors in consideration of grant of said loan had executed loan and security documents on 16.03.2020 which included Guarantee Agreements executed by Mr. Chandan Mitra, Mr. Kushan Mitra and Mr. Amit Goel dated 16.03.2020.
5. The Corporate Debtor was admitted to CIRP vide Order dated 19.01.2021 in CP (IB)-1018/ND/2020 passed by this Adjudicating Authority on the application filed under Section 7 of the Code by one of its Director, Mr. Amit Goel claiming that the Corporate Debtor has committed default in making payment to the Applicant/Financial Creditor.
6. The corporate debtor failed to maintain the financial discipline; the loan account of the Corporate Debtor was classified as Non-Performing Asset (NPA) by the Financial Creditor on 22.03.2022 the said date can be considered as a date of default for the purpose of present Section 95 application. Although the default is still continuing.
7. The Applicant served a Demand Notice in Form-B dated 08.06.2023 under section 95(4)(b) of the Insolvency and Bankruptcy Code, 2016 read with Rule 7(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 on the Personal Guarantor seeking repayment of dues along with interest to the tune of Rs. 10,66,83,033/-, vide the said demand notice the guarantees were invoked.
8. The demand notice was successfully served by way of affixation of the notice on the premises of the guarantor on 13.12.2023. The limitation of 14 days to repay the outstanding dues expired on 28.12.2023 which was granted to the Personal Guarantor in respect of unpaid debt in default as Personal Guarantor did not take steps for remitting the outstanding dues accrued notified to them qua the Demand Notice issued by the Applicant bank.

9. The Respondent despite having been served with the Demand Notice did not pay the outstanding amount. Even after regular follow up, the repayment of loan has not been made by the Personal Guarantor, even the reply of the Demand Notice is not yet received by the Applicant from the Personal Guarantor of the Corporate Debtor.
10. The Personal Guarantor has failed to repay the debt amount of the Financial Creditor and in view of this default the Financial Creditor had preferred the present Insolvency Application under Section 95(1) of the IBC. The total debt including any interest or penalties as claimed by the Applicant Bank is **Rs. 11,50,98,244/-** (Rupees Eleven Crore Fifty Lakh Ninety Eight Thousand Two Hundred Forty Four Only) as on the date of filing of the present Application under Section 95.
11. This Adjudicating Authority vide order dated 05.12.2023 appointed Mr. Devvart Rana (having IBBI Registration IBBI/IPA-002/IP-N00680/2018-2019/12025 as the Resolution Professional and the Resolution Professional was directed to submit a report in terms of Section 99 IBC.
12. The Resolution Professional submitted that in accordance with Section 99(2) of the Code, he requested the Personal Guarantor to furnish any document proving repayment of the debt claimed, as unpaid, by the Creditor in its application dated 05.02.2024 within 7 days from the date of receipt of Letter and E-mail dated 30.05.2024. The reply was received by the Resolution Professional through E-mail dated 03.06.2024.
13. The Resolution Professional submitted that in accordance with Section 99(4) of the Code, intimation was sent to the Financial Creditor by E-mail and Letter dated 01.06.2024. The Financial Creditor replied that post issuance of Form B, no payment has been made by the Personal Guarantor.
14. The Resolution Professional vide **IA-3290/2024** has filed its report dated 06.06.2024 before this Adjudicating Authority and a copy of the said report has been duly served on the Personal Guarantor via E-mail dated 07.06.2024 after detailed examination of the application along with the supporting documents thereof. The Resolution Professional has recommended that the Application filed by the creditor, viz., Indian Bank under Section 95(1) of the Code vide **IB-156(ND)/2024** be **admitted** under Section 100(1) of the Code

and the Insolvency Resolution Process be commenced against the Personal Guarantor, viz. Mr. Kushan Mitra on the following grounds: -

- A. *“That the application filed by Central Bank of India satisfies the requirement as set out in section 95 of the Code;*
- B. *That Principal Borrower, M/s CMYK Printech Limited has committed default in repayment of Loan Facility granted by the aforesaid banks and/or financial institution, on account of CIRP;*
- C. *That Mr. Kushan Mitra, Personal Guarantor of M/s CMYK Printech Limited (Principal Borrower) has also committed default in repayment of Loan Facility granted by the aforesaid banks after invocation of Personal Guarantee;*
- D. *That, in light of the above, it is just and equitable that insolvency resolution process be initiated against Mr. Kushan Mitra, personal guarantor to M/s CMYK Printech Limited, under the orders and directions of this Hon'ble Tribunal”.*

15. In response to the Report filed by the Resolution Professional, the Personal Guarantor filed its reply and raised the following objections: -

- i. The Liability of the Personal Guarantor is directly contingent upon the Principal Borrower/Corporate Debtor's default as the guarantor's obligation does not exist independently.
- ii. There exists no default prior to CIRP of the Corporate Debtor/Principal Borrower. This Adjudicating Authority vide Order dated 19.01.2021 initiated CIRP against the Corporate Debtor and moratorium was declared under Section 14 of the Code. The Principal Borrower had not defaulted on loan repayments to the Applicant Bank until the CIRP was admitted. The moratorium under Section 14 of the Code prohibits filing of any claim of default during the moratorium period. Therefore, no 'default' has incurred by the Principal Borrower as required under the provisions of the Code.
- iii. The Applicant Bank's incorrectly classified the Principal Borrower as a NPA during the moratorium period and the date of default being 22.03.2022, i.e., more than a year after CIRP Admission is erroneous. The declaration of an account as an NPA does not ipso facto amount to 'default'.
- iv. The Applicant Bank's conduct is tainted with evident mala fide intent. During the moratorium period, the affairs of the Principal Borrower are placed under the control and management of the RP appointed by this Adjudicating Authority who acts in accordance with the advice of the Committee of

Creditors (“CoC”) is the sole member of the CoC of the Principal Borrower and being in control of CoC is itself responsible for any default by the Principal Borrower and is now attempting to unjustly shift the liability onto the Respondent.

- v. The Applicant Bank’s decision to selectively proceed against the Respondent, Mr. Kushan Mitra, while sparing the other guarantors to the Original Loan including Mr. Amit Goel and legal heirs of Late Mr. Chanda Mitra raises concern of malafide intent.
 - vi. The loan advanced by the Applicant Bank is secured by assets of the Principal Borrower worth over Rs. 20 Crores, which significantly exceeds the outstanding loan amount. Once, the Hon'ble Supreme Court adjudicates the appeal filed against the Order of CIRP against the Principal Borrower, the Applicant/Bank's outstanding dues are likely to be settled either by restructuring the loan or liquidating the secured assets.
16. We have heard the submissions made by Ld. Counsel for the Applicant, Resolution Professional and Personal Guarantor and perused the report.
17. The Ld. Counsel for the Personal Guarantor has raised an objection that there can be no automatic trigger of Guarantor’s liability without a clear and distinct default by the Principal Borrower. The CIRP proceedings against the Principal Borrower was initiated by one of the directors of the Principal Borrower and not by the Applicant/Bank. There was no default on the repayment by the Principal Borrower towards the loan advanced by the Applicant/Bank and the same was regularly being paid by the Principal Borrower till the Order of Admission of CIRP Proceedings dated 19.01.2021. The date of default for the Respondent/Personal Guarantor is the date on which the Principal Borrower was classified as NPA i.e. 22.03.2022. It is crucial to highlight that the date of NPA i.e. 22.03.2022 (date of default) is more than a year after the admission of CIRP against the Principal Borrower and declaration of moratorium. During the moratorium, the Bank is prohibited from recovering or debiting any amount from the Corporate Debtor, and the Company was making regular debt instalment payments prior to the commencement of CIRP, no default can occur during the CIRP according to established legal principles. The cause of action for initiating proceedings against the Principal Borrower or the Guarantor arises only upon a default committed by the Principal Borrower. In

the present case, as no default has been committed by the Principal Borrower, the proceedings against the Guarantor are not maintainable and devoid of merits.

18. On the contrary, the Ld. Counsel for the Applicant Bank submitted that the Corporate Debtor/Principal Borrower has admitted into the Insolvency vide an Order dated 19.01.2021 and due to the non-payment of dues for the period of 90 days the account of the principal borrower/corporate debtor was classified as Non-Performing Asset (“**NPA**”) as per the guidelines of the RBI on 22.03.2022. Upon the initiation of the Corporate Insolvency Resolution Process, moratorium as per Section 14 was triggered. Section 14 mandates only for the stay of proceedings for recovery but not for the classification of account as NPA. There is no embargo or legal impediment in not classifying the account of the corporate debtor as NPA when there is no payment for the period of 90 days in the present case. The date of default will be the date of NPA as held by the Hon’ble Supreme Court in the case of **Laxmi Pat Surana v. Union Bank of India & Anr.**, reported in (2021) 8 SCC 481.
19. The Ld. Counsel for the Applicant placed reliance upon the judgment of Hon’ble Supreme Court in the case of **Syndicate Bank v. Channaveerappa Beleri & Ors.**, reported in (2006) 11 SCC 506 wherein it was held that the date of default of the Principal Borrower can be different from the date of default of the guarantors. The date of default will be when the demand is made by the Creditor on the guarantor, under a guarantee which requires a demand, as a condition precedent for the liability of the guarantor, such demand should be for payment of a sum which is legally due and recoverable from the Principal Debtor. It is submitted that the as per the terms of the Guarantee Deed, the guarantee was payable on demand and demand was raised vide Demand Notice dated 08.06.2023 which was served by affixation on 13.12.2023, if period of 14 days are counted from the date of service of application, then 14 days will expire on 27.12.2023.
20. We are of the considered view that the Personal Guarantor has raised an objection regarding classification of account of the corporate debtor as NPA after the commencement of the CIRP being illegal and any action subsequent to the classification of account as an NPA will not sustain based on which the present application is filed under Section 95. The provisions of Insolvency &

Bankruptcy Code specifically Section 14 does not give any immunity to the Corporate Debtor from classification of account as NPA when the payments are not regular. Section 14 only mandates that no recovery action can be continued or be initiated against the Corporate Debtor but the said protection is not in favour of the Personal Guarantor who can be proceeded against after the classification of account as an NPA and on the basis of default in terms of Demand Notice sent under Rule 7 of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process of Personal Guarantor to Corporate Debtor) Rules, 2019 when the payment was not made within 14 days by the Personal Guarantors. Therefore, the present Application filed by the Applicant Bank on 02.03.2024, both the dates identified as date of default, i.e., date of classification of the loan account of Principal Borrower as NPA or 14 days from the date of service of Demand Notice, i.e., 27.12.2023 fall well within the three-year limitation period. Hence, both "dates of default" will not render the present petition non-maintainable.

21. The Ld. Counsel for the Personal Guarantor raised an objection that a Personal Guarantor's liability is co-extensive with the Principal Borrower's liability but can only be invoked upon a clear and distinct default by the Corporate Debtor. There can be no independent default by the Principal Borrower occurred prior to the initiation of the CIRP by this Adjudicating Authority, the Applicant Bank's attempt to commence Insolvency Proceedings against the Respondent, in his capacity as a Personal Guarantor is legally unsustainable. Consequently, the report submitted by the Resolution Professional must be set aside, as it is inconsistent with judicial precedents that mandate the necessity of proving a default by the Principal Borrower before proceeding against the guarantor. Reliance has been placed on Order dated 19.06.2024 of NCLT, Kochi Bench in CP(IBC)/36/KOB/2023 titled as Piramal Trusteeship Services Private Limited v. Mr. Kakkanattil Ibrahimkutty Mohammed Rafi Mather.

22. The Ld. Counsel for the Applicant Bank submitted that the Guarantor is liable to pay the amount outstanding in the term loan account of Corporate Debtor as the liability of the Guarantor is co-extensive and joint and several with the Corporate Debtor and other guarantors. Since, the liability is several and co-extensive, if applicant bank has invoked the guarantee and demanded the

money back from only one of the Guarantor, Mr. Kushan Mitra, (leaving the other two guarantors, one of whom have deceased), non-payment of the same is still a **DEFAULT** by the personal guarantor which is an admitted fact.

23. We are of the considered view that the Deed of Guarantee dated 16.03.2020 is a continuing guarantee deed payable on demand.

The relevant clauses of the Guarantee Deed are reproduced as below:

“ (2) It is also agreed that any admission or acknowledgment in writing by the principal debtor of the amount of indebtedness of the principal debtor or otherwise in relation to the subject matter of this guarantee or any judgement or award obtained by you against the principal debtor shall be binding on me/ us and I/We accept the correctness of any statement of account served on the principal debtor which is duly certified by any manager or officer of the Bank, and the same shall be binding and conclusive as against me/us also and I/ We further agree that in making an acknowledgment or making a payment he shall be treated as my/our duly authorised agent for the purposes of the Indian Limitation Act of 1963.

(3) I/ We agree that the amount hereby guaranteed shall be due and payable to you on your serving me/us with notice, requiring payment of the amount, and such notice shall be deemed to have served on me/us either, by actual delivery thereof to me/us or by despatch thereof to me/us by registered post at my/our address written hereunder or any other address in India to which I/ We may be written intimation given to the Bank request notices addressed to me/us to be dispatched.

Any notice despatched by the Bank by registered post to me/us the address to which it is required to be despatched by this clause shall be deemed to have been duly served on me/us at the time when the notice would in the ordinary course of post be delivered at the address, notwithstanding that the notice may not in fact have been delivered 'to me/us or that the address to which it is despatched may have ceased to be may/our address.

(7) This guarantee shall not be revoked by me/us and shall remain in force till the amounts due and payable to you by the principal(s) are paid up in full inclusive of interest, charges etc. I/ We further specifically agreed that this guarantee shall continue to be liable thereunder for all the amounts due and payable to you by the principal(s) even though the principal(s) has/ have

not renewed the documents and even though the amounts due Principal(s) gets time barred and you can not recover the same from the principal(s) by filing a suit or any legal proceeding against the principal(s).”

24. This Adjudicating Authority vide Order dated 19.01.2021 in CP (IB)-1018/ND/2020 admitted the application filed under Section 7 of the Code. An appeal was filed before the Hon'ble NCLAT bearing Company Appeal (AT)(Ins) No. 128 of 2021 challenging the admission order dated 19.01.2021 in which the Appellate Tribunal initially granted an interim order which was vacated by an order dated 03.08.2021. Aggrieved by the said order, Civil Appeal No. 4666 of 2021 was filed where the Hon'ble Supreme Court vide its order dated 02.09.2021 refused to interfere with the order dated 03.08.2021. Subsequently, Appeal No. 128/2021 was dismissed by this Tribunal vide its order and judgment dated 16.12.2021 against which an appeal was filed before the Hon'ble Supreme Court being Civil Appeal Diary No. 4333/22 titled Shobori Ganguly Vs. Amit Goel & Ors. which is still pending adjudication. Be that as it may, the existence of a "Financial Debt" in respect of the Principal Borrower stands established. This serves as a judicial imprimatur on the validity of the "debt" and precludes the Respondent from relitigating the issue in this present proceeding. Since, the Respondent/Personal Guarantor did not raise any objection as to the validity of the Guarantee Deed dated 16.03.2020. Therefore, the Respondent is to be held liable for repayment of "debt" as the liability of the Personal Guarantor is joint and co-extensive with that of the Principal Borrower in terms of the provisions of Section 128 of the Indian Contract Act, 1872. Accordingly, the Financial Creditor/Applicant Bank vide its Demand Notice dated 08.06.2023, invoked the said Guarantee and demanded the outstanding loan amount along with interest thereon which the Personal Guarantor did not pay within 14 days of the said Notice. Therefore, the debt and default with regard to the Personal Guarantor/Respondent is established and the present application filed under Section 95 is complete.
25. On a perusal of the report, we find that the Resolution Professional has given reasonable opportunity following the principle of Natural Justice and has taken into consideration the various documents and has come to a conclusion that the Personal Insolvency Resolution Process be initiated against the Personal Guarantor.

26. The Objections raised by the Personal Guarantor are not substantiated with adequate evidence and are not tenable. We are satisfied with the grounds/reasons given by the Resolution Professional for the initiation of the Personal Insolvency Resolution Process against the Personal Guarantor. Having regard to the facts and circumstances of the case, we are of the view that the Personal Insolvency Resolution Process ought to be initiated against the Personal Guarantor. Hence, the Main Petition **IB-156(ND)/2024** is **admitted** and the Personal Insolvency Resolution Process is initiated against the Respondent/Personal Guarantor- Mr. Kushan Mitra.
27. Resultantly, the moratorium which had kicked in as per Section 96 of the Code shall cease and a fresh moratorium will begin in terms of Section 101 of IBC, 2016. During the moratorium period, the following provisions shall be in effect:
- 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.
28. The Resolution Professional is directed to cause a public notice to be published within 7 days of uploading this order on the website of this Adjudicating Authority for inviting claims from all Creditors, who shall register their claims as provided under Section 103 of IBC within 21 days of such issuance. The notice shall contain the necessary information as provided under Section 102(2) of IBC. The publication of the notice shall be made in newspapers, one in English and the other in Vernacular which have wide circulation in the state.
29. The Resolution Professional in exercise of the powers conferred under Section 104 of IBC shall prepare a list of creditors within 30 days from the date of the notice. The Debtor shall prepare a repayment plan in consultation with the Resolution Professional as provided under Section 105 of IBC which shall

include the 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 Adjudicating Authority within a period of 21 days from the last date of submission of claims as provided under Section 106 of IBC.

30. In case the Resolution Professional recommends that a meeting of the creditors is not required to be summoned, he shall record the reasons thereof. 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 IBC. The date of the 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, for which at least 14 days' notice to the creditors (as per the list prepared) shall be issued by all relevant/feasible modes. Such notice must contain the details as provided under the provisions of Section 107 of IBC.
31. The meeting of the Creditors shall be conducted in accordance with Sections 108, 109, 110 & 111 of IBC. The Resolution Professional shall prepare a report of the meeting of the creditors on the repayment plan with all details as provided under Section 112 of IBC and submit the same to this Adjudicating Authority, copies of which shall be provided to the debtor and the creditors.
32. The Financial Creditor shall pay the Resolution Professional an amount of Rs. 2,00,000/- for the expenses to be made to undertake further proceedings as per the Code.
33. In view of the above **IA-3290/2024** stands **disposed of**.
34. Copy of this Order and the Report of the Resolution Professional be sent to the Creditors of the Respondent.
35. Copy of the Order shall also be sent by the Registry to IBBI.

-Sd-
(ATUL CHATURVEDI)
MEMBER (TECHNICAL)

-Sd-
(BACHU VENKAT BALARAM DAS)
MEMBER (JUDICIAL)