

IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI, COURT-III

CP(IB) 315(ND)/2022
&
IA No. 913/2024

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) 315(ND)/2022

M/s. INTEC CAPITAL LIMITED

.... Applicant/Financial Creditor

Versus

Ms. PARUL UPADHYAY

.... Respondent/Personal Guarantor

AND IN THE MATTER OF: - IA No. 913/2024

MR. MANOJ KUMAR ANAND

.... Resolution Professional/Applicant

Order pronounced on: 11.06.2024

CORAM:

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

SHRI ATUL CHATURVEDI, HON'BLE MEMBER (TECHNICAL)

APPEARANCES:

For the RP

: Mr. Nilesh Sharma, Ms. Swastika Kumari,
Mr/Ms. Adyasha Nanda, Advs a/w Mr. Manoj Kumar
Anand, RP.

For the Respondent: Ms. Mani Gupta, Mr. Aman Chaudhary,
Mr. Jasmeet S. Chadha, Advocates.

ORDER

PER: BACHU VENKAT BALARAM DAS, MEMBER (JUDICIAL)

1. The present application has been filed by Intec Capital Limited, the Applicant through Resolution Professional, Mr. Manoj Kumar Anand, 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 against Ms. Parul Upadhyay, the Personal Guarantor to the Corporate Debtor, i.e., M/s. IAP Company Private Limited having its Registered Office at 3F, Palam Triangle, Palam Vihar, Gurgaon, Haryana, 122001 for the total outstanding default amount of Rs. 85,00,000/- (Rupees Eighty-Five Lakhs) as on 31.08.2016.
2. M/s. Intec Capital Limited (hereafter referred to as 'Intec' or 'Financial Creditor' or 'Applicant') is a non-banking financial company engaged inter-alia in the business of providing financial facility.
3. M/s. IAP Company Private Limited (hereafter referred to as 'Corporate Debtor') is an entity engaged in the business of software development and Ms. Parul Upadhyay (hereinafter referred to as 'Respondent') is the Director of Corporate Debtor and has signed the loan documents in the capacity of the Personal Guarantor/ Co-borrower in the financial facility availed by the Corporate Debtor from Financial Creditor.
4. M/s. Intec Capital Limited was approached by the Corporate Debtor through its promoters/shareholders/directors/representatives and submitted application for the purpose of availing loan facility for business purposes. Pursuant to discussion between the parties based on the representations made, information provided, documents submitted and assurances given

regarding timely repayment of all money due along with agreed interest by Corporate Debtor and Respondent, M/s. Intec Capital Limited agreed to sanction and disburse loan/financial facility amounting to Rs. 85,00,000/- vide loan agreement dated 31.08.2016.

5. As per the Loan agreement ML-4336/LNGGN03316-170006891 dated 31.08.2016, the reference to the Borrower in the loan agreement includes the Co-Borrower/Guarantor.
6. As per the terms and conditions of the Loan Agreement and the sanction letter in the Loan Account, the loan facilities were granted and the Corporate Debtor was required to repay the said loan in equal monthly instalments of Rs. 2,82,3233/- at 12% PA.
7. That subsequent to the disbursement of the loan facility by the Financial Creditor, the Corporate Debtor failed to maintain adequate amount in the bank account, as a result of which the cheques/ECS/ACH mandates were dishonoured by the banker and the payments were not made to the Applicant as per repayment schedule.
8. The Respondent stood in the capacity of Personal Guarantor/ Co-borrower in Loan Agreement and various other transitional documents executed, including 'Demand Promissory Note' which states that 'jointly and severally and unconditionally promise to pay INTEC CAPITAL LIMITED at New Delhi or at such other place as INTEC CAPITAL LIMITED may designate or Order, the sum of Rs.85, 00, 000/- (Rupees Eighty Five Lakh Only) with interest thereon from this date onwards at a rate of Interest of 12% per annum or such other rate as may be determined by INTEC CAPITAL LIMITED from time to time compounding and payable with daily/ monthly/ Quarterly rests, for value

received. The Respondent has also provided security cheque/s for encashment for repayment on behalf of the Corporate Debtor.

- 9.** The Corporate Debtor wrongfully withheld the legitimate monies owed to the Financial Creditor, thereby causing wrongful gain to itself and wrongful loss to the Applicant. The aforementioned acts of the Corporate Debtor constituted 'events of defaults' as defined under Clause 10 of the Loan Agreement. The Consequence of Default and Rights available to Applicant which inter-alia provided for demand of immediate repayment of loan dues. The Applicant recalled the Loan facility vide Loan Recall cum Arbitration Notice dated 09.01.2018 but neither the Corporate Debtor nor the Respondent has cleared the outstanding dues standing due till date.
- 10.** The Applicant had also preferred arbitration proceedings against the Corporate Debtor. The Ld. Arbitrator was pleased to pass Arbitral Award dated 28.12.2018.
- 11.** The Corporate Insolvency Resolution Process ("CIRP") for Corporate Debtor commenced on 28.02.2018 in CP (IB) No.446/ND/2017.
- 12.** The Applicant has also initiated the proceedings under Section 138 of Negotiable Instrument Act, 1881 against the respondents towards the security cheque issued by the personal guarantor for repayment of the dues at the time of recall of the financial facility by the Applicant which got dishonoured upon its presentation.
- 13.** After considering total loan amount, payments received, overdue instalments, principle outstanding, interest on delayed payments, other charges as per the agreed terms and conditions under various transitional documents &

deducting the payment received from the liquidation Proceeds on 21.03.2021, a total sum due and payable as on 31.03.2020 is as follows:

S.No.	Loan Account No.	Amount due & payable (INR)
1.	LNGGN03316170006891	Rs. 82,21,749 (SOD)- Rs. 10,31,432 (Liquidation Proceeds) = Rs. 71,90,317

14. The Applicant has also issued Demand Notice in prescribed Form B as per the provisions of Insolvency & bankruptcy, Code 2016 which duly stand delivered upon the Respondent and Corporate Debtor through Email (parul@iapcorp.com) and a reply date 13.03.2022 was also received on behalf of respondent, which confirms the delivery of the demand notice (Form B) on the respondent.

15. Hence, this application.

16. The Adjudicating Authority vide order dated 15.02.2022 appointed Mr. Manoj Kumar Anand as the Resolution Professional and directed the Resolution Professional to file Report under Section 99 of the IB Code, 2016. Consequently, the RP sent an email dated 25.02.2022 to the Respondent and sought various financial details from him. The Respondent sent an email dated 01.03.2022 to the RP raising various objections with respect to the initiation of insolvency proceedings against him including the maintainability of the Petition on the ground that he is not personal guarantor. This email was sent within prescribed time period under section 99(5) of the Code. The Resolution Professional submitted the report on 21.03.2022 vide IA-913/2024.

17. THE RECOMMENDATIONS OF THE RESOLUTION PROFESSIONAL ARE AS UNDER:

The Resolution Professional have formed an opinion to recommend the admission of section 95 petition pending before this Adjudicating Authority, based on following grounds: -

- a. *The Insolvency Application has been filed in the requisite form, Form C, in terms of Rule 7 (2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtor) Rules, 2019, supported by requisite fee and documents.*
- b. *Debtor was sent 7 E-Mails\Speed Post during the period 25.03.2022 to 10.03.2022 along with many telephone calls in compliance of Sec 99 (2) of the Code to prove repayment of debt of Rs. 71,90,317 but he failed to repay the same or provide any information of repayment as stated in Sec 99 (2) (a) (b) & (c) of the Code.*
- c. *Here it is pertinent to note that debt was registered with information utility as per Sec 99 (3) of the Code.*
- d. *RP sought information from debtor, Creditor & RP of CD in compliance of Sec 99 (4) of the Code.*
- e. *Debtor never provided information within 7 days in compliance of Sec 99(5) of the Code. On the other hand, he has filled petition dated 28.02.2022 for stay of order, which was later on withdrawn as on 11.03.2022.*
- f. *RP have examined the application as filled u/s 95 & state that It fulfils the requirements of sec 95 as asked in Sec 99 (6) (a) of the Code. Creditor (Applicant) has provided the information and given explanation as sought by RP in compliance of Sec 99 (6) (b) of the Code.*
- g. *RP recommends acceptance of application in the report as per Sec 99 (7) of the Code.*
- h. *RP finds that Debtor is not eligible for yet to be notified fresh start provisions u/s 80 to 93 as per Chapter II Part III of the Code. Here it*

is pertinent to note that these provisions are applicable only for persons having annual income upto Rs 60,000/- & debtor has provided no details of his income despite repeated reminders.

- i. RP hereby records all above stated reasons for recommendation of acceptance of the application after examination in terms of sec 99 (7) in compliance of Sec 99 (9) of the Code.*
- j. RP has sent the true copy of this report to Debtor and Creditor in compliance of Sec 99 (10) of the Code as on 17.03.2022.*

18. THE OBJECTIONS OF THE PERSONAL GUARANTOR:

- i. The Petitioner was one of the co-borrowers which is evident from the fact that the Petitioner has been referred to as co-borrower everywhere in the Loan Agreement. The Loan Agreement does not mention Respondent as personal guarantor. This clearly shows that the parties always intended Respondent to be co-borrower and not personal guarantor to the Company while entering into the Loan Agreement.
- ii. The Sanction Letter refers to the Respondent as Co-Applicant for the Credit Facility and no where he has been referred to as personal guarantor of the Company. Moreover, the Petitioner, in paragraph no. 3 of its loan recall notice dated 27.01.2018 has itself stated that the Respondent "stood as co -borrower to the said loan agreement". There is no mention of any guarantee in the said notice.
- iii. The Respondent has not signed any guarantee deed or other contract of guarantee or agreed to act as surety. His liability, if any, is joint and several in his capacity as co-borrower which is also clear from clause 2.13 of the Loan Agreement and thus, he does not fall under the category of a 'personal guarantor' as envisaged under the Code.
- iv. The Petitioner has relied upon an arbitral award dated 28.12.2018 (Annexure 9 of the Petition) which was also mentioned in the demand notice dated 03.06.2020 (Annexure 6 of the Petition). The alleged arbitration proceedings were initiated by the Petitioner against the Company and the Respondent.

The said arbitral award has been obtained by the Petitioner by fraud. The Respondent was provided no notice of the alleged arbitration proceedings, and he was kept in dark till the time final arbitral award was passed. Further, the said arbitral award has been passed in violation of moratorium imposed on the Company under section 14 of the Code pursuant to initiation of corporate insolvency resolution process on 28.02.2018. The said arbitral award has been challenged by the Petitioner under section 34 of Arbitration and Conciliation Act, 1996 before Ld. District Court, Saket, New Delhi vide petition titled Vipul Kant Upadhyay & Anr. vs. Intec Capital Ltd. & Ors. OMP (COMM) No. 12/22.

- v. It is submitted that the RP has filed his Report without taking into consideration the submissions made by the Respondent in response to queries raised by RP for preparation of the Report. The RP has intentionally ignored the contentions of the Respondent with sole motive of initiating insolvency proceedings against the Respondent. The RP has acted in a biased manner due to which the Respondent had also filed an application bearing I.A. No. 2366 of 2022 for removal/replacement of RP.
- vi. The Petitioner and the RP have not disclosed material facts before this Hon'ble Adjudicating Authority It is submitted that the Petitioner has claimed a debt of Rs. 82,21,749/- which is exorbitantly higher than the claim admitted by the resolution professional of the Company for the same transaction. The Respondent is a co-borrower for the same loan facility which was availed by the Company from the Petitioner. After the initiation of corporate insolvency resolution process of the Company, the Petitioner had submitted a claim of Rs. 98,04,050/- to the resolution professional of the Company. The resolution professional of the Company had admitted a claim of Rs. 51,19,260/- out of total claim of Rs. 98,04,050/-.
- vii. The RP has failed to consider that the Petitioner has filed the Petition claiming inflated amount and that for the same loan transaction it has sought different claim amounts for the Company and the Respondent.

viii. Moreover, the RP has ignored the fact that the Petitioner has recovered substantial amount of money pursuant to the liquidation proceedings of the Company. As per information available with the Respondent, more than Rs. 20,00,000/- have been recovered by the Petitioner. The RP has also conveniently overlooked this aspect in its Report.

19. ANALYSIS AND FINDINGS:

- i. We have heard the Ld. Counsel for the Resolution Professional and the Personal Guarantor and perused the records. We have perused the report submitted by the Resolution Professional and the objections filed by the Personal Guarantor.
- ii. The Resolution Professional has recommended that the Insolvency and Resolution Process be initiated against the Personal Guarantor. On the other hand, the Ld. Counsel appearing for the Personal Guarantor has submitted that the present petition is filed under Section 95 of IBC is not maintainable as the Respondent is not a Personal Guarantor but a Co-Borrower.
- iii. The Ld. Counsel for the Respondent/ Personal Guarantor submitted that under Section 5(22) of the IBC the word “Personal Guarantor” has been defined as follows:-

5(22) “Personal Guarantor” means an individual who is the surety in a contract to guarantee to a Corporate Debtor.

- iv. Learned Counsel for the Resolution Professional has also referred to Clause 2.13 of the Contract which is reproduced below:-

“Notwithstanding anything herein stated, where the Loan is provided to more than one Borrowers/ Co-Borrowers, the liability of the Borrowers to pay, repay and/or discharge obligations and to observe the terms and conditions of this Agreement and/or any other agreements and documents which may be or may be

executed by the Borrower with INTEC in respect of this Loan, is joint and several"

- v. The above-mentioned provision makes it clear that the liability of the borrowers and co-borrowers under the contract to pay, repay and/or discharge obligations and to observe the terms and conditions of the agreement is joint and several. Thus, a perusal of the loan application form, the sanction letter dated 31.08.2016 and the record of default issued by the NESL makes it very clear that Ms. Parul Upadhyay, the Respondent/Personal Guarantor is not the Personal Guarantor. We, therefore, are unable to accept the submissions of the Resolution Professional as well as the Applicant that Ms. Parul Upadhyay, is a Personal Guarantor and the proceedings under Section 95 can be initiated against her.
- vi. She submitted that the Respondent has not executed any guarantee deed or any other contract of guarantee or agreed to act as a surety. She submitted that in the loan agreement, the Respondent has been shown as a Co-borrower. Further in the record of default issued by NESL also the Respondent has been shown as a Co-obligant. A perusal of these documents show that the Respondent has not been described as a Personal Guarantor or surety in any of these documents. We find force in the argument of the Ld. Counsel appearing for the Personal Guarantor. We are therefore, of the view that the Respondent is not a Personal Guarantor in the present case and therefore, the present application under Section 95(1) of the Code is not maintainable which is accordingly dismissed.
- vii. We find that the Respondent in the loan application form dated 12.08.2016 has been described as the Co-Borrower and not the Personal Guarantor. Extract of the application form is given below:

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intec
Lupa Aqha, Bharosa Agna Ka

PERSONAL DETAILS OF CO-BORROWER

Name: PIARUL VIMADHYA

Father's /Spouse Name: VIJUL KANT VIMADHYA

Date of Birth: 17 / 07 / 1978 Gender: Male Female Marital Status: Married

No. of Children: Residential Status: Resident Indian NRI PIO Total work experience: _____ years

Education: Graduate Under Graduate Professional Post Graduate Others (to be specified) _____


Qualification (if professional): CA Doctor MBA Lawyer Engineer Others (to be specified) _____

Pan No. AAAR0678A Passport No.: _____ Aadhar Card No.: _____ Voter ID Card No.: _____

Residence Address: C-27, DLF Ph-1, Gurgaon - 122002

City: Gurgaon District: Gurgaon State: Haryana

Pincode: 122002



viii. It is also observed that the applicant, has approached other legal forums including this Adjudicating Authority. The Applicant had initiated Arbitration proceedings under the Arbitration and Conciliation Act, 1996. The Applicant has also initiated the proceedings under Section 138 of Negotiable Instrument Act, 1881 which evidences that applicant has approached all the possible forums for remedy therefore the applicant is indulging in the forum shopping and hence we are of the view that the applicant has not approached this Adjudicating Authority with clean hands.

20. In light of the above facts and circumstances, it is hereby ordered as follows: -

- i. The Application seeking initiation of the Personal Insolvency Resolution Process against the Personal Guarantor is **rejected**. Resultantly, the interim moratorium period in terms of Section 96 of IBC comes to an end from the pronouncement of this Order. Mr. Manoj Kumar Anand (having IBBI Registration: IBBI/IPA-001/IP-P-00084/2017-2018/10180), The RP appointed by this Adjudicating Authority vide order dated 08.04.2022 stands discharged from the pronouncement of this order.
- ii. In view of the above **IA-913/2024** and **CP(IB)315(ND)/2022** stands **dismissed**.

- iii. The Registry is directed to send a copy of this order to the Insolvency and Bankruptcy Board of India (“IBBI”) for their record.
- iv. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

No order as to costs.

-Sd-

**(ATUL CHATURVEDI)
MEMBER (TECHNICAL)**

-Sd-

**BACHU VENKAT BALARAM DAS
MEMBER (JUDICIAL)**

IN THE NATIONAL COMPANY LAW TRIBUNAL

NEW DELHI, COURT-III

IA-1565/2024

IN

CP(IB)-315(ND)/2022

Order under Section 98 of the Insolvency and Bankruptcy Code, 2016.

IN THE MATTER OF: - CP(IB)-315(ND)/2022

M/s. INTEC CAPITAL LIMITED LTD.

.... Corporate Debtor

VERSUS

MR. PARUL UPADHYAY

.... Debtor

AND IN THE MATTER OF: - IA-1565/2024

MR. PARUL UPADHYAY

.... Applicant

VERSUS

MR. MANOJ KUMAR ANAND

.... Resolution Professional

Order Pronounced On: 11.06.2024

CORAM:

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

SHRI ATUL CHATURVEDI, HON'BLE MEMBER (TECHNICAL)

APPEARANCES:

For the Applicant: Mr. Dhruv Parwal a/w Adv. Manish Kumar

For the RP: Mr. Nilesh Sharma and Swastika Kumari, Advs

ORDER

PER: BACHU VENKAT BALARAM DAS, MEMBER (JUDICIAL)

1. This is an Application filed before this Adjudicating Authority Order under Section 98 of the Insolvency and Bankruptcy code, 2016 for seeking the following reliefs:

- (a) Refuse to admit the insolvency resolution proceedings against the Applicant on the basis of the Report;*
- (b) declare the Report is unsubstantiated, false, and does not meet the statutory criterion under the Code;*
- (c) Reject the Report and dismiss the same;*
- (d) Pass an order for removal of the Resolution Professional by making a reference to the Insolvency and Bankruptcy Board of India;*
- (e) In the event that prayer (a) is refused, appoint an independent Resolution Professional by making a reference to the IBBI;*
- (f) Pass any such order/directors/as this Ld. Adjudicating Authority may deem fit and proper in the facts and circumstances of the case.*

2. In view of the order passed in **CP(IB)-315(ND)/2022**. We are not inclined to entertain this application **IA-1565/2024**.

Sd/-

**(ATUL CHATURVEDI)
MEMBER (TECHNICAL)**

Sd/-

**(BACHU VENKAT BALARAM DAS)
MEMBER (JUDICIAL)**