

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No.1278 of 2024

Arising out of Order dated 03.05.2024 passed by the Adjudicating Authority (National Company Law Tribunal), Court Room No.1, Mumbai Bench C.P.(IB)/1285(MB)2022)

IN THE MATTER OF:

Sanjeeb Ranjeet Das
Having its Address At: 244/A,
Block – A, Bangur Avenue, Kolkata - 700055 ... Appellant

Versus

1. M/s Punjab National Bank
Having its Address At:
Zonal Sastra Centre, Mumbai
181-A1, 18th Floor, Maker Tower, E Wing,
Cuff Parade, Mumbai – 400055
2. Mr Manoj Mainkar
Interim Resolution Professional
Having Its Address At: B- 203,
Durvankur Coop Hsg Society Ltd,
Sant Janabai Road, Near Greater Mumbai Bank,
Ville Parle East, Mumbai Suburban, Maharashtra ... Respondents

Present:

For Appellant : Mr. Amey Hadwale, Advocate.

**For Respondent : Mr. Yash Dhruva and Ms. Ruchita Jain,
Advocates.**

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal by Personal Guarantor of the Financial Creditor has been filed challenging order dated 03.05.2024 passed by National Company Law Tribunal, Court Room No.1, Mumbai Bench, by which order, the Adjudicating Authority has permitted the Financial Creditor to amend the date of default

as pleaded in the rejoinder affidavit, with the liberty to the Personal Guarantor to oppose the new date of default by filing a reply.

2. Brief facts of the case necessary to be noticed for deciding this Appeal are:

- (i) Punjab National Bank (“**PNB**”) filed an Application under Section 95, sub-section (1) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the “**IBC**”) against the Appellant – Personal Guarantor of the Corporate Debtor – M/s Poscho Steels Pvt. Ltd., claiming a default of Rs.192,59,70,919.51/- as on 30.04.2022. In the Application filed under Section 95, the Financial Creditor has relied on Demand Notice under Section 13, sub-section (2) of the SARFAESI Act, 2002 dated 19.01.2022. The copy of the Demand Notice was also annexed as Exhibit-16 of the Application.
- (ii) Reply was filed by the Corporate Debtor to the Application, where it was pleaded that Notice under Section 13(2) cannot be noticed for invoking the Personal Guarantee. It was stated that Notice under Section 13(2) was Notice issued by the Bank to enforce its security interest on the mortgage property, hence, cannot be notice for invoking personal guarantee. In the reply, Personal

Guarantor has also referred to Notice dated 22.12.2021 received by the Personal Guarantor.

- (iii) Rejoinder affidavit was also filed by the Financial Creditor, where the Financial Creditor has brought on record the Demand Notice dated 22.12.2021 issued by the Financial Creditor, calling upon the Personal Guarantor to make payment of the outstanding amount due. With regard to notice dated 19.01.2022, it was mentioned that it was the notice sent to the Guarantors/ Mortgagor of the Corporate Debtor. It was further stated that the date of default mentioned as 01.12.2015, in the Company Petition is date of default in respect of Corporate Guarantor and date of default in respect of Personal Guarantor is 22.12.2021.
- (iv) The Adjudicating Authority heard the parties on 03.05.2024 and allowed the Financial Creditor to amend the date of default as pleaded in the rejoinder with liberty to Personal Guarantor to oppose the new date of default by filing a reply.
- (v) The Appellant aggrieved by the order has come up in this Appeal.

3. We have heard learned Counsel for the parties and perused the record.

4. The learned Counsel for the Appellant submits that Financial Creditor cannot be allowed to change the date of default as claimed in the Application, which takes away the valuable right of defense available to the Personal

Guarantor. It is submitted that the Respondent cannot be allowed to change the date of default in Application.

5. The submission of the Appellant has been refuted by the learned Counsel for the Respondent Bank. It is contended that Notice, which was relied in the Application was Notice under Section 13, sub-section (2), which was issued to the Corporate Guarantor and the guarantee was invoked of the Personal Guarantor vide notice dated 22.12.2021, which was served on Personal Guarantor. It is submitted that Financial Creditor is fully entitled to bring additional material on record by means of rejoinder affidavit, which was filed in reply of the Personal Guarantor, where Notice under Section 13, sub-section (2) dated 19.01.2022 was questioned as not been valid invocation of the guarantee.

6. Before we proceed to consider the submission of learned Counsel for the parties, it is relevant to notice the pleadings and date of default as mentioned in the Application, which is 01.12.2015. Notice under Section 13, sub-section (2) of SARFAESI Act, which was referred to in the Application dated 19.01.2022, which copy of the Application has been brought on record as Annexure 'B' to the Appeal was attached as Exhibit-16 and while referring to Exhibit-16, , following was pleaded:

“Demand Notice under Section 13(2) of SARFAESI Act, 2002 dated 19.01.2022 issued by the Financial Creditor invoking the guarantee given by the guarantors is enclosed herewith and marked as **“Exhibit-16”**.”

7. Exhibit-16, which is part of the Section 95 Application, mentions notice to Guarantors/ Mortgagors. Notice was addressed to M/s. Rockdude Management Consultants Pvt. Ltd. (Guarantors and Mortgager) and M/s Phoenix Realtors Pvt. Ltd. (Guarantors and Mortgager). The guarantee given by Guarantors and Mortgagers was invoked and they were asked to pay the amount of Rs.181,27,26,781.51/-. Copy of the said Application was also sent to the Appellant, who was Guarantor. When we look into the Notice dated 19.01.2022, it is clear that it is a Notice addressed to Guarantors and Mortgagers, who were asked to make the payment as demanded.

8. In the reply, which was filed by the Appellant to Section 95 Application, in paragraph-5, the Appellant itself has referred to Notice dated 22.12.2021. Paragraph 5 of the reply is as follows:

“5. The respondent states that demand notice dated 10.05.2022 in Form B was sent by the applicant to the respondent. In response to the same, the respondent in its reply dated 24.05.2022 stated that a similar notice dated 22.12.2021 was received by him on 28.12.2021, to which he submitted his detailed reply on 07.01.2022. The contents of the reply dated 07.01.2022 shall be treated to be as part and parcel of the present Affidavit in reply. The said contents are not recited below for the sake of conciseness. Copy of reply dated 24.05.2022 along with acknowledged copy of reply dated 07.01.2022, is attached herewith and marked as **“Annexure A”**.

9. The Appellant further questioned the Notice under Section 13, sub-section (2) dated 19.01.2022 and notice for invoking the personal guarantee and objecting to the said notice, it was pleaded that the said notice was not

for invoking personal guarantee. In paragraphs 15 and 16 of the reply, following was pleaded:

“15. In the present case, sec 13(2) notice dated 19.01.2022 has been issued by the applicant to enforce security interest on the mortgaged property. Further the respondent states that issuance of sec 13(2) notice is a statutory requirement to intimate borrowers/ guarantor about the default and invoking the security interest and it has nothing to do with invocation of guarantee. Further, mere issuance of notice u/s 13(2) under SARFAESI Act cannot be treated as invocation of guarantee. Therefore it can be concluded that demand notice sent by the applicant u/s 13(2) for invoking personal guarantee of the corporate debtor is bad in eye of law.

16. Further, the respondent states that as per clause 17 of the guarantee agreement dated 22.06.2011, in order to invoke personal guarantee, the applicant ought to have sent demand notice under the said guarantee agreement dated 22.06.2011 and not otherwise. Hence the present petition fails for non invocation of guarantee.”

10. A rejoinder was filed by the Financial Creditor to the reply of the Personal Guarantor, where notice dated 22.12.2021 was pleaded and brought on record in paragraph 5 (g). It was further pleaded in paragraph 9 (c) that the date of default is mentioned as 01.12.2015, is the date of default in respect of the Corporate Guarantor and date of default in respect of Personal Guarantor is 22.12.2021. Paragraph 9 (c) of the rejoinder is as follows:

“9(c) The date of default is mentioned as December 1, 2015 in the Company Petition as it is the date of default in respect of the Corporate Guarantor. It is reiterated and clarified that the date of default in respect of the Respondent/ Personal Guarantor is December 22, 2021, for the reasons stated hereinabove.”

11. It was in the above background that Adjudicating Authority permitted the amendment of date of default as pleaded in rejoinder affidavit with liberty to the Personal Guarantor to object to the new date of default. It is useful to extract the entire order dated 03.05.2024 of the Adjudicating Authority, which is as follows:

- “1. Mr. Yash Dhruva, Ld. Counsel for the Petitioner present. Mr. Amey Hadwale. Ld. Counsel for the Respondent present.
2. Ld. Counsel for the Petitioner seeks liberty from this Bench to amend the Petition to state the correct the date of default as pleaded in rejoinder. Counsel for the Respondent vehemently objects to it. However, this Bench considers it allow the amendment without prejudice rights and contentions of the Personal Guarantor to oppose the new date of default to be inserted by the Petitioner.
3. The Personal Guarantor is at liberty to file reply to the amended Petition within two weeks after duly serving the copy to the other side.
4. List this matter for further consideration on 13.06.2024.”

12. The date of default is relevant for computing the limitation for filing Application under Section 95 for a Court, before whom any Application is filed, to determine as to whether the Application is filed within the limitation. It is well settled that Financial Creditor is permitted to supplement the Application by filing the additional documents. Present is a case where the issue of invocation of guarantee of Personal Guarantor was specifically raised in the reply of the Personal Guarantor. Hence, the Appellant in the rejoinder, brought relevant materials and pleadings on the record. The question of date of invocation of personal guarantee of the Personal Guarantor is yet to be decided by the Adjudicating Authority. The Adjudicating Authority has

granted time to the Personal Guarantor to file reply to the amended petition and “*to oppose the new date of default to be inserted by the Petitioner*”. By virtue of the order dated 03.05.2024, the date of new default, which is inserted by the Appellant is 22.12.2021 and when the Demand Notice was sent to the Personal Guarantor by which the guarantee was invoked. The Personal Guarantor has ample opportunity to oppose the date of default and satisfy the Court that it is not the correct date of default and raise all contentions with regard to limitation.

13. In the facts of the present case, we do not find any error in the order of the Adjudicating Authority, permitting the Financial Creditor to amend the date of default, specially when the date of default 01.12.2015, which was mentioned in Section 95 Application is date of default of Corporate Guarantor and the Notice dated 19.01.2022, which was relied under Section 13, sub-section (2), was the notice to Guarantors and Mortgagers. It is well settled that parties/ Applicants are entitled to bring additional materials on record, which can be accepted by the Adjudicating Authority for adjudication of Application. Materials brought on the record by rejoinder affidavit, refers to Notice dated 22.12.2021, which is being relied by the Applicant as a date on which guarantee of Personal Guarantor was invoked. All disputes are yet to be decided by the Adjudicating Authority, we see no reason to interfere with the order dated 03.05.2024 as extracted above. The order allowing the amendment is without prejudice to the rights and contentions of the Personal

Guarantor, as recorded in the order itself. The rights of the Personal Guarantor being fully protected by order impugned, we do not find any ground to entertain this Appeal. The Appeal is dismissed with the above observations.

There shall be no order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

[Arun Baroka]
Member (Technical)

NEW DELHI

16th July, 2024

Ashwani