



**IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH- I  
KOLKATA**

**I.A. (I.B.C)1176/KB/2022**

In

**Company Petition (IB) No. 163 of 2021**

*An application 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]*

**In the matter of:**

UCO Bank

...FINANCIAL CREDITOR

Versus

Mr. Akhilesh Pandey

...DEFENDANT/PERSONAL GUARANTOR

Versus

Mr. Naresh Agarwal

...RESOLUTION PROFESSIONAL/APPLICANT

Date of Pronouncement of Order: **04.011.2024**

**Appearances (via video conferencing/physically):**

Mr. Santosh Kr. Ray, Adv. ] For the Financial Creditor

Ms. Rituparna Sanyal, Adv. ]

Ms. Zeba Khan, Adv. ]

Ms. Muskan Saha, Adv. ]

Ms. Manju Bhuteria ] For the Personal Guarantor

Ms. Shreya Choudhary, Adv. ]

**O R D E R**

**Per: Bidisha Banerjee, Member (Judicial)**

1. The Court Convened in a hybrid mode.

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2. This CP (IB) No. 163/KB/2021 has been preferred by the Financial Creditor to seek initiation of Insolvency Regulation Process against the Respondent Personal Guarantor to Corporate Debtor Rule, 2019 (“Personal Guarantors Rules’) and regulation 4(2) of IBBI (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Regulations, 2019 (‘Personal Guarantors Regulations’).
3. The amount in default is Rs.152,15,92,468.42.
4. The Punjab National Bank filed an application under Section 7 of the IBC, 2016 against M/s Divine Alloys & Power Co Limited and the same was admitted by this Adjudicating Authority on 07.03.2019. Thereafter the Financial Creditor had issued a notice dated 12.07.2019<sup>1</sup> upon the borrowers and guarantors requesting them to pay the outstanding dues. The same was replied by the Personal Guarantor herein vide letter dated 29.07.2019.
5. Thereafter the Financial Creditor had filed an application under Section 19 of the Recovery of Debts and Bankruptcy Act, 1993 before the Learned DRT-I, Kolkata and numbered as O.A. No. 399 of 2019.
6. Subsequently, the Financial Creditor issued a demand notice dated 06.04.2021<sup>2</sup> under Rule 7(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process of Personal Guarantors to Corporate Debtor) Rules 2019. The Personal Guarantor failed to pay the outstanding dues and hence the present application came to be filed by the Creditor.
7. The application is complete as required under Section 95 read with rule 7 of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtor) Rules, 2019.

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<sup>1</sup> Annexure-K of the Application

<sup>2</sup> Annexure-L of the Application

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8. It is to be noted that Hon'ble Supreme Court in the judgment of **Dilip B. Jiwrajka V/s Union of India & Ors. In WP (civil) No. 1281 of 2021** dated 09.11.2023 has upheld the Constitutional Validity of the Sections 94 to 100 and the propositions that can be culled out from the Judgments inter-alia are as follows:
- i. *No judicial adjudication is involved at the stages envisaged in Sections 95 to Section 99 of the IBC;*
  - ii. *The Resolution Professional appointed under Section 97 serves a facilitative role of collating all the facts relevant to the examination of the application for the commencement of the insolvency resolution process which has been preferred under Section 94 or Section 95. The report to be submitted to the adjudicatory authority is recommendatory in nature on whether to accept or reject the application;*
  - iii. *No adjudicatory function of Adjudicating Authority is contemplated at the admission stage. To read in such a requirement at that stage would be to rewrite the statute which is impermissible in the exercise of judicial review;*
  - iv. *The resolution professional may exercise the powers vested under Section 99(4) of the IBC for the purpose of examining the application for insolvency resolution and CP/IB/337/AHM/2020 12 of 17 to seek information on matters relevant to the application in order to facilitate the submission of the report recommending the acceptance or rejection of the application;*
  - v. *There is no violation of natural justice under Section 95 to Section 100 of the IBC as the debtor is not deprived of an opportunity to participate in the process of the examination of the application by the resolution professional;*
  - vi. *No judicial determination takes place until the adjudicating authority decides under Section 100 whether to accept or reject the application. The report of the resolution professional is only recommendatory in nature and hence does not bind the adjudicatory authority when it exercises its jurisdiction under Section 100;*

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- vii. *The adjudicatory authority must observe the principles of natural justice when it exercises jurisdiction under Section 100 to determine whether to accept or reject the application; CP/IB/337/AHM/2020 13 of 17*
  - viii. *The purpose of the interim moratorium under Section 96 is to protect the debtor from further legal proceedings; and*
  - ix. *The provisions of Section 95 to Section 100 of the IBC are not unconstitutional as they do not violate Article 14 and Article 21 of the Constitution.*
9. The Applicant had proposed the name of the Mr. Naresh Agarwal, Insolvency Professional for appointment as Resolution Professional. In view of the above, Mr. Naresh Agarwal, Insolvency Professional , IBBI Registration No. IBBI/IPA-001/IP-P01155/2018-19/12168, email ID [ca.nareshagarwal@gmail.com](mailto:ca.nareshagarwal@gmail.com), was appointed as Resolution Professional.
10. The Resolution Professional was directed to file declaration within seven days to the effect that he fulfils all the requirements for being appointed as Resolution Professional in the matter which he has given, and to file his report in terms of Section 99 in two weeks.
11. The Resolution Professional Mr. Naresh Agarwal has vide his report dated 11.11.2021 referred to the following:

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ANNEXURE -A

BEFORE THE HON'BLE NATIONAL COMPANY LAW TRIBUNAL  
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C.P. (IB) No.163(KB) of 2021

IN THE MATTER OF:

UCO BANK

.....APPLICANT/PETITIONER

VERSUS


AKHILESH PANDEY (PERSONAL GUARANTOR OF M/s DIVINE  
ALLOYS AND POWER COMPANY LIMITED)

.....RESPONDENT

REPORT IN ACCORDANCE WITH THE PROVISIONS OF SECTION  
99(1) READ WITH 99(7) OF THE INSOLVENCY AND BANKRUPTCY  
CODE, 2016 RECOMMENDING THE APPROVAL OF THE  
APPLICATION BEARING C.P (IB) NO. 163(KB) 2021

The Application has been filed by UCO Bank ("hereinafter referred as  
"Applicant" or the "Creditor"). The Hon'ble National Company Law  
Tribunal, Kolkata Bench (hereinafter referred as "Hon'ble NCLT" or  
"this Hon'ble Tribunal") has been pleased to confirm the appointment  
of Mr. Naresh Agarwal as the Resolution Professional in the Insolvency  
Resolution Process for Personal Guarantor, Mr. Akhilesh Pandey, to the  
Creditors of M/s Divine Alloys and Power Company Limited (hereinafter  
maybe referred as "Corporate Debtor").

In accordance with Section 99 of The Insolvency and Bankruptcy Code,  
2016 (hereinafter referred as "Code"), a Report has to be filed by the RP  
with this Hon'ble Tribunal within 10 days from the appointment,  
recommending for approval or rejection of the Application as filed for the



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Insolvency of Mr. Akhilesh Pandey (hereinafter may be referred as "debtor").

**A. ORDER FOR APPOINTMENT OF THE RESOLUTION PROFESSIONAL**

That an Application (hereinafter referred as "main Application") to initiate the Insolvency Resolution Process of Mr. Akhilesh Pandey, Personal Guarantor to M/s Divine Alloys and Power Company Limited (hereinafter referred as "Debtor") was filed under Section(s) 95,96, 97(1) and 101 read with Rule 7(2) of The Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019. Vide order dated 15.09.2021(received by the undersigned on 02.11.2021), this Hon'ble Tribunal has been pleased to appoint Mr. Naresh Agarwal as the Resolution Professional in this matter. The copy of the said order dated 15.09.2021 is attached and marked as **Annexure-B**.

**B. BRIEF BACKGROUND OF THE MATTER**

1. That the Respondent is a Personal Guarantor of the Corporate Debtor, which is engaged as dealer of high quality industrial products in various industries. Corporate Insolvency Resolution Process was initiated against the Corporate Debtor vide order by this Hon'ble Tribunal dated 07.03.2019 bearing CP (IB) No. 1412/KB/2018. The application against Mr. Akhilesh Pandey, the personal guarantor to the Corporate Debtor was filed by UCO Bank before this Hon'ble Tribunal on 22.04.2021.



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2. The Corporate Debtor has now been sent into liquidation vide orders of this Hon'ble Tribunal dated 11.05.2021 bearing **IA (IB) No. 136/KB/2020** in CP (IB) No. 1412/KB/2018.
3. That the RP understands that the default is for sum amounting to Rs. 152,15,92,468.42 (Rupees One Hundred Fifty Two Crores Fifteen Lakhs Ninety Two Thousand Four Hundred Sixty Eight and Forty Two paise only) as on Insolvency Commencement date i.e. 15.09.2021.
4. That as per the requirements of the Code the debts owed by the Creditor shall be as on date of filing of the application by the Creditor i.e. as on 22.04.2021. The default amount as on date of filing of application is Rs. 152,15,92,468.42 (Rupees One Hundred Fifty Two Crores Fifteen Lakhs Ninety Two Thousand Four Hundred Sixty Eight and Forty Two Paise only) as mentioned by the applicant.
5. That a Deed of Guarantee dated 30.04.2015 were signed and executed in the favour of UCO Bank along with other banks that form part of the consortium which provided credit facilities to the Corporate Debtor i.e. the Creditors of M/s Divine Alloys & Power Company Limited by the Respondent Mr. Akhilesh Pandey and Mr. Rajesh Pandey. The deed of guarantee is attached with this Report and marked as **Annexure - C**.
6. Due to default of payment against the Credit Facility availed by the Corporate Debtor, the accounts of the Corporate Debtor were declared as Non-Performing Asset (NPA) on **31.03.2016**.



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7. That a Notice dated 12.07.2019 was sent to Mr. Akhilesh Pandey for Invocation of guarantee in relation to the Guarantee Agreements guaranteeing the repayment of the Financial Facilities in case the Corporate Debtor failed to repay the outstanding loan amounts when the same fell due for repayment. The said letter is attached and marked with the main Application as **Annexure-K**
8. That upon failure of repayment by the Corporate Debtor, UCO Bank called on the Respondent, Mr. Akhilesh Pandey, to pay the outstanding amount in his capacity as that of the Personal Guarantor to the Corporate Debtor vide a Demand Notice dated 06.04.2021 in accordance with Rule 7(1) of The Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019. The said demand notice is attached and marked as **Annexure-L to the main application.**
9. That the relevant list of dates with respect to the debt due is as follows:

Dates	Events	Annexures
23.08.2010	Agreement for loan executed between Corporate Debtor and UCO Bank	Annexure B to main Application
02.02.2015	Restructuring Agreement executed between Corporate Debtor and UCO Bank	Annexure C to main Application
30.04.2015	Date of Deed of Guarantee	Annexure-C of the report





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31.03.2016	The Corporate Debtor, M/s Divine Alloys and Power Company Limited became an NPA	-
12.07.2019	Notice for invocation of guarantee on non-payment of the default amount (14 days period provided for payment)	Annexure K to main Application
06.04.2021	Demand Notice issued by the Creditor to the Guarantor under Rule 7 (1) of Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019	Annexure L to main Application
22.04.2021	Date of Application for Insolvency for the personal guarantors	Annexure F of the report
11.05.2021	Date of order of the Adjudicating Authority sending the Corporate Debtor into Liquidation.	Annexure G of the report



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**C. EXAMINATION OF THE MAIN APPLICATION BY THE  
RESOLUTION PROFESSIONAL**

Vide Order dated 15.09.2021, the RP is required to examine the Application as per Section 99 (7) of the Code. The relevant extract of the Section is as follows:

*"Section 99 (7). After examination of the application under sub-section (6), he may recommend acceptance or rejection of the application in his report"*

**a) Examination of the Application as required under Section 99  
(6)(a) of the Code**

That the Application is required to satisfy the requirements as set out under Section 95 of the Code:

1. In accordance with Section 95 (4)(a) of the Code, the application is required to be accompanied with details and documents relating to the debts owned by the debtor to the creditor(s) who has submitted the Application for Insolvency Resolution Process as on date of Application.

*The Applicant has annexed the documents evidencing the debts owned by the Debtor to the Creditor*

2. In accordance with Section 95 (4)(b) of the Code, the application is required to be accompanied with details and documents evidencing the failure by the debtor to pay the debt within a period of fourteen days of service of the notice of the Demand.

*The Applicant has served a demand notice to the debtors dated 06.04.2021 wherein the Creditors had demanded to pay off the debts as per the deed of guarantee dated 30.04.2015, executed between the parties. The demand notice and the proof of service of the said demand notice are attached with the main Application and marked as Annexure L.*



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3. In accordance with Section 95 (4)(c) of the Code, the application is required to be accompanied with details and documents evidencing the default or non-repayment of debt.

*The Applicant has annexed the statement of accounts along with the loan statement which depicts that no payment of debt has been made after the demand notice has been served which is annexed with the main application and marked as Annexure-M.*

4. In accordance with Section 95(5) of the Code, the copy of application filed by the Applicant is required to be sent to the Debtor.

*The Applicant has served the advance copy of the Application.*

5. In accordance with Section 95 (6) of the Code, the Application should be in such form and manner and accompanied by such fee as prescribed.

*The Application is filed in the prescribed form i.e. Form-C as per Rule 7(2) of The Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019. The fee of Rs. 2,000 (Rupees Two-Thousand only) has been duly paid and the same is declared by the Applicant on Page no. 26 of the main application.*

**b) Examination of the Application as required under Section 99 (6)(b) of the Code**

That the Applicant has provided information and given explanation sought by the RP as required.

*The RP has asked for the information and explanation from the Applicant in this matter for which the RP has not received requisite answers.*

**c) Examination of the Application as required under Section 99 (2) of the Code :**



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The debt is unpaid and the applicant who is a Creditor has provided relevant proof which is annexed with the main application and marked as Annexure-N.

**d) Examination of the Application as required under Section 99**

**(4) of the Code :**

1. The RP has sought information from the debtor which requires following confirmation/documents and the subsequent reply by the Debtor is as follows:

Queries by the Resolution Professional	Reply by Personal Guarantor
<p>The amount of default as claimed by the Creditor i.e. UCO Bank as on 22.04.2021 is <u>Rs. 1,52,15,92,468.42 (Rupees One Hundred Fifty Two Crores Fifteen Lakhs Ninety Two Thousand Four Hundred Sixty Eight and Forty Two paise only).</u></p> <p>Please confirm if there is any repayment of the debt as claimed by the Creditor. In case there is any repayment done, kindly provide us the following:</p> <ul style="list-style-type: none"><li>- evidence of electronic transfer of the unpaid amount from the bank account of the debtor;</li><li>- evidence of encashment of a cheque issued by the debtor; or</li><li>- a signed acknowledgment by the creditor accepting receipt of dues.*</li></ul>	<p>Email dt 6<sup>th</sup> Nov 2021, 8<sup>th</sup> Nov 2021 and 10<sup>th</sup> Nov 2021 was sent to the Personal guarantor. However no reply was received by the RP.</p>
<p>The assets which are mortgage with the Creditors against the Guarantee, if any</p>	<p>Email dt 6<sup>th</sup> Nov 2021, 8<sup>th</sup> Nov 2021 and 10<sup>th</sup> Nov 2021 was sent to the Personal guarantor. However no reply was received by the RP.</p>
<p>Income Tax returns for last 3 years</p>	<p>Email dt 6<sup>th</sup> Nov 2021, 8<sup>th</sup> Nov 2021 and 10<sup>th</sup> Nov 2021 was sent to the Personal guarantor. However no reply was received by the RP.</p>



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The Net Worth of the Debtor	Email dt 6 <sup>th</sup> Nov 2021, 8 <sup>th</sup> Nov 2021 and 10 <sup>th</sup> Nov 2021 was sent to the Personal guarantor. However no reply was received by the RP.
Apart from above, following <u>confirmation</u> is required from you:  a) That your Insolvency is being passed for the first time and it is undergoing a fresh start  b) That you have not undergone an insolvency resolution or bankruptcy process earlier  c) That you are not an undischarged bankrupt	Email dt 6 <sup>th</sup> Nov 2021, 8 <sup>th</sup> Nov 2021 and 10 <sup>th</sup> Nov 2021 was sent to the Personal guarantor. However no reply was received by the RP.

*\*The debt due as on date of filing of application i.e. as on 22.04.2021 is Rs.152,15,92,468.42 (Rupees One Hundred Fifty Two Crores Fifteen Lakhs Ninety Two Thousand Four Hundred Sixty Eight and Forty Two paise only) along with interest.*

**D. REASONS FOR ACCEPTING THE APPLICATION AND INITIATING  
THE INSOLVENCY PROCEEDING AGAINST MR. AKHILESH  
PANDEY**

1. That the RP has gone through the contents of the main Application and it confirms that the default has been made by the debtor who is a Personal Guarantor to the Corporate Debtor.
2. That the Debtor despite several requests has not replied to the queries of RP relating to debt and thereon preferred to ignore the reminders given by the RP seeking information.

Hence, the RP considering the requirements of the admission of Personal Guarantee as stipulated in the Code opines and confirms that Insolvency Resolution Process for Personal Guarantor, Mr. Akhilesh Pandey, to the Corporate Debtor, M/s Divine Alloys and Power Company Limited should





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12. The Personal Guarantor by way of his reply has refuted/ contradicted the statements of the RP in the following manner:
- i. The application filed by the applicant is not maintainable and liable to be dismissed. It was on 06.11.2021 when the Personal Guarantor received an email from one Naresh Agarwal and got informed that the Corporate Debtor went into CIRP but no copy of the application was served to him in fact they had served the copy at the corporate office of the Corporate Debtor in place of the Personal Guarantor.
  - ii. Later on, the Personal Guarantor had appointed an Advocate who requested the Advocate on record of the Financial Creditor to provide a copy of the application to the Personal Guarantor. Thereafter a copy was served by mail but no proof of service was provided and it is for this reason that no representation could be made on 15.09.2021. He also stated that notice of demand which is mandatory prior to filing the application was also not served upon him.
  - iii. The guarantee which was given by the Personal Guarantor was a conditional guarantee. A CDR package was approved in the Corporate Debtor in Liquidation and a master restructuring agreement was entered into between the Corporate

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Debtor and the Financial Creditor. In terms of the approved CDR package, additional financial assistance was to be extended by the Financial Creditor to the Corporate Debtor as also the consortium of banks was to provide Rs. 18 crores towards Fresh Term Loan. The Financial Creditor in terms of the approved CDR was required to provide its share of Rs. 3.94 crore, however, the Financial Creditor failed to provide the same.

- iv. In para 3(ix) of the Reply Affidavit, it is stated that clause (E) of the guarantee agreement provides that

*"The Guarantor, in consideration of CDR Cell having approved the "Approved CDR Package" in respect of the Financial Assistance/debts granted to / of the Borrower and the Lenders having agreed to grant / granted certain reliefs and concessions to the Borrower and having restructured / agreed to restructure the Financial Assistance / debts as mentioned in Schedule II hereto, pursuant to the Approved CDR Package, have agreed to give the guarantee in the manner hereinafter expressed."*

The above clause clearly stipulates that the guarantor provided the guarantee in consideration of lenders having agreed to grant reliefs and restructure the debts, however, the CDR failed and the guarantee does not exist and is invalid and therefore no proceedings can be filed on the basis of the said guarantee.

- v. Further, he placed reliance on the minutes of the Joint Lenders' Forum ("JLF") meeting held on 6th October, 2015<sup>3</sup> which would make it evident that the Financial Creditor did not release the term loan which it was required to do under the approved CDR package and the Financial Creditor was requested to release the enhanced portion of Working Capital Limit. It would appear from the said minutes that the lenders unanimously decided that the Financial

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<sup>3</sup> Annexure C of the application

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Creditor herein will ensure that the Term Loan is released tentatively by 31st October, 2015. The said minutes also recorded that "undue delay by any lender will not only affect implementation of CDR package but also the stake of all the lenders." It was unanimously decided that the Financial Creditor will ensure that the Working Capital Limit is released immediately. UCO bank was not represented in the said meeting. It is recorded in the said minutes that the copy of the said minutes should be sent to UCO bank for implementation of the package as decided in the said meeting.

- vi. A letter dated 19.01.2015 was issued by CDR cell to Punjab National Bank which recorded that the company will not be able to meet the viability ratios without the funding and the funds were to be disbursed by way of additional term loans by the Financial Creditors. An inter se agreement dated 30.04.2015 recorded that – *“By consent of all parties Punjab National Bank is designated and recognized as the lead Bank of the Punjab National Bank consortium”* In accordance with the said agreement each bank was to consult and act in accordance with the directions given by the Lead Bank but inspite of repeated reminders by the lead bank to disburse the amount, the Financial Creditor did not abide by its directions.
- vii. The CDR Cell issued a letter dated 31st March, 2016 intimating the decision taken by CDREG. By the said letter the Bank of India and the UCO Bank was directed to release Working Capital Limits and Fresh Term Loan Limits as approved under CDR. The Corporate Debtor in liquidation informed the CDR Cell that the Financial Creditor has not complied with the approved CDR package. The Corporate Debtor vide a letter dated 27th December, 2016 informed that the Financial Creditor has not complied with the approved CDR package but inspite of the decision taken in JLF meeting, the Financial Creditor did not act in terms of the approved CDR Package, reason whereof the CDR Package failed and pursuant to the same the Corporate



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Debtor and the directors of the Corporate Debtor including the Personal Guarantor filed a suit being Title Suit. No. 368 of 2018 against the Lenders wherein UCO Bank is defendant no. 2 inter alia praying for following reliefs:-

- a. For a decree for realization of the sum of Rs.1150.30 crores from each of the defendants and their consortium as per schedule of the claim.
  - b. A Decree for interest pendent lite after ascertainment of the amount as prayed in the schedule hereunder written;
  - c. A Decree for mandatory injunction directing the defendants and their officers to perform, discharge, fulfill and comply with their obligation towards the schedule of the claim;
  - d. Injunction
  - e. Receiver
  - f. Attachment before judgment
  - g. Ad interim orders
  - h. Costs of suit
- viii. The said suit is still pending as such steps for initiating Insolvency Process and hence the present application is not maintainable and liable to be dismissed.
- ix. The application is not maintainable as the person who has filed the said application has no authority to file the application and the Power of Attorney attached to the application is undated.

***Rejoinder by the Financial Creditor***

13. In the rejoinder, the Financial Creditor has stated that the copy of Reply Affidavit was received on 15.12.2021 and have refuted all the contentions of the Personal Guarantor.
14. It has also been asserted that the copy of application as also the demand notice was served on the Personal Guarantor on the last-named address. It has been further

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contended by the Bank that the change in address, if any, was never intimated to the banks and anyhow since Reply Affidavit has been filed by the Personal Guarantor, this objection is not sustainable.

15. Other contentions raised by the Personal Guarantor have been summarily denied & disputed by the Financial Creditor. We find that contention of lack of authorisation to file the petition to be of technical nature and the same is not fatal to the CP. However, in regard to the other principal defence advanced by the Personal Guarantor i.e. on the reasons of default, we would like to rely on the judgment of Hon'ble NCLAT in the matter of NS Engineering on the aspect of the cause of default. The PG in its reply has relied heavily The Hon'ble NCLAT, Principal Bench, New Delhi in the matter of **State Bank of India vs. N.S. Engineering Projects Pvt. Ltd.**<sup>4</sup> has held:

*“24. Under the Scheme of IBC, when a Corporate Debtor is unable to pay its debt, which becomes payable, it is a warning signal for Corporate Debtor and when an Application is filed by a Financial Creditor to initiate CIRP under Section 7 and there are ample material that Corporate Debtor is unable to pay its debt and has committed default, the Adjudicating Authority is not required to go into the reasons of default and ignore the real status of the Corporate Debtor and close its eyes to the fact that the Corporate Debtor needs insolvency resolution. Red signal having been flagged by the Applicant, ignoring the precarious financial situation and status of the Corporate Debtor and not taking remedial action to bring back the Corporate Debtor on its track by adopting resolution process as per IBC and reject the Application on the reasons of default, is clearly contrary to the whole Scheme of the IBC. There being sufficient material before the Adjudicating Authority that consistent defaults have been committed by the Corporate Debtor and it is unable to pay its debt, rejection of Section 7 Application on the ground that for default committed by the Corporate Debtor, the Financial Creditors have also to be blamed is closing the eyes to the Scheme of the insolvency resolution.”*

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<sup>4</sup> (2023) ibclaw.in 79 NCLAT

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16. In regard to the plea of limitation taken, we find that the JLF meetings with the Personal Guarantor and Promoters continued till September 2017, the account with the Applicant bank became NPA on 31<sup>st</sup> March, 2016. In Pooja Ramesh Singh Hon'ble NCLAT has held as under:

*“24. The scheme of I&B Code clearly indicate that both the Principal Borrower and the Guarantor become liable to pay the amount when the default is committed by the Principal Borrower the amount becomes due not only against the Principal Borrower but also against the Corporate Guarantor, which is the scheme of the I&B Code. When we read with as is delineated by Section 3(11) of the Code, debt becomes due both on Principal Borrower and the Guarantor, as noted above. The definition of default under Section 3(12) in addition to expression ‘due’ occurring in Section 3(11) uses two additional expression i.e. “payable” and “is not paid by the debtor or corporate debtor”. The expression ‘is not paid by the debtor’ has to be given some meaning. As laid down by the Hon’ble Supreme Court in “Syndicate Bank vs. Channaveerappa Beleri & Ors.” (supra), a guarantor’s liability depends on terms of his contract. There can be default by the Principal Borrower and the Guarantor on the same date or date of default for both may be different depending on the terms of contract of guarantee. It is well-settled that the loan agreement with the Principal Borrower and the Bank as well as Deed of Guarantee between the Bank and the Guarantor are two different transactions and the Guarantor’s liability has to be read from the Deed of Guarantee.”*

Form B under Rule 7(1) was issued on 06.04.2021, whereafter the Financial Creditor invoked contract of guarantee by serving demand notice on Personal Guarantor. In

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view of Pooja Ramesh Singh (Supra), wherein it has been held that the date of default can be different for the Corporate Debtor and the PG, therefore in this case, the liability of a Personal Guarantor would be taken to be effective from the service of notice Form B under Rule 7(1) of IB Guarantor to Corporate Debtor Rules, 2019, it is seen that the Petition being filed on 22.04.2021 is within limitation period.

17. We have heard the Ld. Counsel appearing on both the sides and perused the pleadings and gone through the Report of the Resolution Professional.
18. The Petition C.P. (IB)/163 (KB)2021 filed by the financial Creditor for initiating IRP against the Personal guarantor is **admitted** under **Section 100** of IBC 2016 with following directions

- (1) The RP shall conduct the Insolvency Process for the Personal Guarantor as per the provisions of Chapter III of IBC 2016. [Section 100-120] read with IBBI (Insolvency resolution process for Personal Guarantors to Corporate Debtors) Regulations , 2019. Some of the important provisions are extracted hereunder:

**(1) Moratorium In terms of Section 101 :**

- (2) When the application is admitted under section 100, a moratorium shall commence in relation to all the debts and shall cease to have effect at the end of the period of one hundred and eighty days beginning with the date of admission of the application or on the date the Adjudicating Authority passes an order on the repayment plan under section 114, whichever is earlier.*

**(3) During the moratorium period—**

- (a) any pending legal action or proceeding in respect of any debt shall be deemed to have been stayed;*
- (b) the creditors shall not initiate any legal action or legal proceedings in respect of any debt; and*

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- (c) the debtor shall not transfer, alienate, encumber or dispose of any of his assets or his legal rights or beneficial interest therein;*
- (4) Where an order admitting the application under section 96 has been made in relation to a firm, the moratorium under sub-section (1) shall operate against all the partners of the firm.*
- (5) 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.*

**102. Public notice and claims from creditors:**

- (1) The Adjudicating Authority shall issue a public notice within seven days of passing the order under section 100 inviting claims from all creditors within twenty-one days of such issue.*
- (2) The notice under sub-section (1) shall include—*
- (a) details of the order admitting the application;*
  - (b) particulars of the resolution professional with whom the claims are to be registered; and*
  - (c) the last date for submission of claims.*
- (3) The notice shall be—*
- (a) published in at least one English and one vernacular newspaper which is in circulation in the state where the debtor resides*
  - (b) affixed in the premises of the Adjudicating Authority; and*
  - (c) placed on the website of the Adjudicating Authority.*

**103. Registering of claims by creditors:**

- (1) The creditors shall register claims with the resolution professional by sending details of the claims by way of electronic communications or through courier, speed post or registered letter.*

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*(2) In addition to the claims referred to in sub-section (1), the creditor shall provide to the resolution professional, personal information and such particulars as may be prescribed.*

**104. Preparation of list of creditors:**

*(1) The resolution professional shall prepare a list of creditors on the basis of—*

*(a) the information disclosed in the application filed by the debtor under section 94 or 95, as the case may be;*

*(b) claims received by the resolution professional under section 102.*

*(2) The resolution professional shall prepare the list mentioned in sub-section (1) within thirty days from the date of the notice.*

**105. Repayment Plan**

*(1) The debtor shall prepare, in consultation with the resolution professional, a repayment plan containing a proposal to the creditors for restructuring of his debts or affairs.*

*(2) The repayment plan may authorise or require the resolution professional to—*

*(a) carry on the debtor's business or trade on his behalf or in his name; or (b) realise the assets of the debtor; or (c) administer or dispose of any funds of the debtor.*

*(3) The repayment plan shall include the following, namely:—*

*(a) justification for preparation of such repayment plan and reasons on the basis of which the creditors may agree upon the plan;*

*(b) provision for payment of fee to the resolution professional;*

*(c) such other matters as may be specified.*

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- 19.** The RP appointed in the matter is directed to issue a public notice as envisaged in Section 102, on behalf of the Adjudicating Authority and invite claims from creditors, list of creditors etc and hold regular meeting and conduct the entire IR process as per Chapter -III of IBC 2016 read with the IBBI regulations cited above.
- 20.** The Financial creditor shall deposit **Rs 1,00,000/- {Rupees One Lac}** with the RP for meeting all initial expenses. These expenses have to be adjusted in the final account to be rendered by the RP against remuneration and other expenses and is subject to final approval by the Financial Creditor /Creditors as the case may be.
- 21.** Registry is directed to send a copy of this order to the Financial Creditors in terms of Section 100(3) of the Code.
- 22.** **Company Petition No. 163 of 2021** is thus **admitted**. **I.A. (I.B.C)1176(KB)/2022** is **dismissed**.
- 23.** Post this matter for further consideration on **13.12.2024**.

**Balraj Joshi**  
**Member (Technical)**

**Bidisha Banerjee**  
**Member (Judicial)**

Singed on this, the 04<sup>th</sup> of November, 2024

*MB/FA*

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