



S.No.10

**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH – 1
VC AND PHYSICAL (HYBRID) MODE
ATTENDANCE CUM ORDER SHEET OF THE HEARING HELD ON
13-08-2024 AT 10:30 AM**

CP(IB) No. 385/95/HDB/2022
u/s. 95 of IBC, 2016

IN THE MATTER OF:

Union Bank of India

...Petitioner

AND

Smt. K Sridevi
(Personal Guarantor of M/s. Thexa Pharma Pvt Ltd)

...Respondent

C O R A M:-

**DR. VENKATA RAMAKRISHNA BADARINATH NANDULA, HON'BLE MEMBER (JUDICIAL)
SH. CHARAN SINGH, HON'BLE MEMBER (TECHNICAL)**

O R D E R

Orders pronounced. in the result, **this company petition is rejected. No costs.**

Sd/-

MEMBER (T)

Sd/-

MEMBER (J)



**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH – I**

CP (IB) No.385/95/HDB/2022

(Under Section 95(1) of the Insolvency and Bankruptcy Code, 2016 read with Rule 7(2) of Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019.

In the matter of Smt. K.Sridevi (Personal Guarantor to the Corporate Debtor – M/s.Thexa Pharma Private Limited)

Between:

Union Bank of India,
Stressed Asset Management Branch,
Union Bank of India Building,
Sultan Bazar, Koti, Hyderabad,
Represented by its Chief Manager
Mr. Harinath Motthala

... Petitioner/Financial Creditor

A N D

Smt. K.Sridevi
Plot No.222, Gayathri Hills,
Road No.10/C, MLA & MP Colony,
Jubilee Hills, Hyderabad – 500033
Also at:
Flat No.202, SSH Pride,
Plot No.273, Road No.78,
Jubilee Hills, Hyderabad.

... Respondent/Personal Guarantor

DATE OF ORDER: 13.08.2024

CORAM:-

**DR. VENKATA RAMAKRISHNA BADARINATH NANDULA,
HON'BLE MEMBER (JUDICIAL)
SHRI. CHARAN SINGH, HON'BLE MEMBER (TECHNICAL)**



Appearance:-

For the Petitioner : Mr. M.Srinivas, Counsel
For the Respondent/PG : Mr.G.Dinesh Kumar, Counsel
Resolution Professional : Mr. PVB Sudhakar Rao, RP
For Resolution Professional : Ms.Mummaneni Vazra Laxmi, Counsel

PER: BENCH

1. This instant petition is filed by the Financial Creditor Union Bank of India (Stressed Assets Management Branch) under Section 95(1) of Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “the Code”) read with Rule 7(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantor to Corporate Debtor) Rules, 2019 (hereinafter referred to as “Personal Guarantors Insolvency Rules, 2019), seeking an order for initiation of the Insolvency Resolution Process (“IR Process”) against Smt. K.Sridevi, who is the Personal Guarantor of M/s.Thexa Pharma Private Limited (hereinafter referred to as “Corporate Debtor”).



2. The averments of the Petition in brief as follows:

- 2.1 It is averred that the Corporate Debtor approached the Financial Creditor for Term loan of Rs.6.45 Crores towards setting up pellet manufacturing plant and OCC Limit of 18 Crores towards working capital requirement. Board of Directors of the Corporate Debtor vide its Resolution dated 02.05.2015 resolved to take loans and executed the loan documents in favor of the Financial Creditor.
- 2.2 It is stated that in the year 2016, working capital was enhanced to 31 Crores from 18 Crores and also an additional term loan of Rs.2 Crores was sanctioned to Corporate Debtor for setting up capsule plant. On 02.08.2016 the loan documents were executed by the Corporate Debtor and Personal Guarantors in favour of the Financial Creditor.
- 2.3 It is stated that in the year 2017, Unit II (capsule plant) of the Corporate Debtor was sold and the proceeds were adjusted towards closure of term loan 2 (Rs.2.00 cr) and the same was closed. As the Corporate Debtor failed to service interest and or principal in the OCC and Term Loan accounts, the accounts were



classified as NPA on 28.02.2018 and the Financial Creditor issued notice dated 03.03.2018 informing the same and also demanding for repayment of the loan accounts was duly served on the Corporate Debtor and Personal Guarantor.

- 2.4 It is stated that on 01.09.2018 the Financial Creditor filed Original Application bearing OA.No. 729 of 2018 against the Corporate Debtor and Personal Guarantees before the Hon'ble Debt Recovery Tribunal – Hyderabad for recovery of the outstanding loan amounts with interest.
- 2.5 It is stated that on 28.08.2018 the Hon'ble NCLT, Hyderabad admitted the Application under Section 9 of the Insolvency and Bankruptcy Code, 2016 bearing No. CP(IB) No. 414/9/HDB/2018. Copy of demand notice dated 12.08.2021 under Rule 7(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtor) Rule, 2019 i.e., Form B was sent to the Personal Guarantor. The total debt (including



interest or penalties) Rs.50,71,65,556.58/- as on 30.09.2022 mentioned in part-III of the petition.

3. The Counter filed by the Respondent/ Personal Guarantor, inter-alia stating that:

3.1 It is averred that the Respondent/Personal Guarantor has submitted that the date of default is 28th February, 2018 which is not maintainable under law. It is averred that the allegations that the respondent herein stood as Personal Guarantor to the Corporate Debtor/ Principal Borrower by executing a General Form of Agreements, Deed of Guarantee and Facility Agreement dated 04.05.2015, 02.08.2016, 27.06.2017 and 07.07.2017 respectively in favour of Financial Creditor during the sanction of credit facilities, additional term loan and hypothecation to the Principal Borrower is adjudicated under law and further the same is barred by limitation.

3.2 It is stated that when the matters were pending before the Hon'ble Debt Recovery Tribunal, Hyderabad for the recovery of the outstanding liabilities from the Principal Borrower and Personal



Guarantor filed by the Financial Creditor through an Original Application Vide O.A.No. 729/2018 this Hon'ble Tribunal has admitted an Application under Section 9 of the I&B Code, 2016 vide CP(IB) No. 414/9/HDB/2018 against the Principal Borrower/Corporate Debtor herein and initiated CIRP. When the matter stood thus, the Financial Creditor herein has filed the present application under Section 95 of I&B Code, 2016 for the initiation of insolvency resolution proceedings against the Personal Guarantor without serving a Demand Notice in Form-B.

- 3.3 It is stated that the Respondent/Personal Guarantor herein has not received any Demand Notice in Form-B and a copy of the present application and since the Financial Creditor has categorically failed to serve a Demand Notice and a copy of application to the Respondent, the present Company Petition cannot be maintainable as the Financial Creditor do not have locus standi to file their Company Petition before this Hon'ble Tribunal and seek for initiation of insolvency resolution proceedings against the Personal Guarantor. In the case whether if the Financial Creditor has served any of such Demand Notice in Form-B and a copy of



application on to the Respondent then the strict proof of the same have been found enclosed in the Company Petition. However, no such proof of service is found enclosed in the Company Petition and hence the present application is filed in a casual manner.

- 3.4 It is stated that the Hon'ble NCLT, New Delhi Bench-II in the matter of State Bank of India Vs. Ms. Jaya Singh (Personal Guarantor to M/s. Energo Engineering Projects Limited) in CP(IB) No. 411/ND/2021 dated 16.08.2021 observed that it is worthwhile to refer to the contents of the Rule 7(1) of the AAIRPPG Rules, 2019, which reads as below:

“7. Application by creditor:- (1) A demand notice under clause (b) of sub-section (4) of section 95 shall be served on the guarantor demanding payment of the amount of default, in Form B.”
Since the Applicant has not served the Demand Notice to the Personal Guarantor, as required mandatorily under Section 94(4)(b) of Insolvency and Bankruptcy Code, 2016 read with Rule 7(1) of the AAIRPPG Rules, 2019, we are not inclined to proceed further in the matter. That we also observe that the facts in the synopsis written at Page 1-2 of the Application are at variance with the facts mentioned in the Part III of the Application. Further, the date of NPA has also not been disclosed by the Applicant. Overall, the Application lacks material pleadings as to how the debt has become due and payable. That we are constrained to observe that the Application has been filed in a casual manner by the Applicant Bank. The Applicant should have been diligent enough in filing the Application under Section 95 of Insolvency and Bankruptcy Code, 2016, since under this section the moment the Application is filed, interim moratorium under Section 96(1)(a) of IBC, 2016 gets



triggered, which could cause prejudice to other creditors of the IBC Laws / www.ibclaw.in 31.07.23 Page: 2 Corporate Debtor. The Petition is Dismissed.”

3.5 It is stated that due to non-service of demand notice the opportunity of 14 days for paying the debt was not provided to the Personal Guarantor. Further, the details of the debt owed to the Financial Creditor stands undisclosed to the Personal Guarantor which is due to the absence of Form-B Demand Notice and documents related to such debt was not found to be served. Reverting again to Section 95(4) of the I&B Code, 2016, the provision mandates that the application under subsection (1) should be accompanied with details and such details are nothing but the documents disclosing “relevant evidence of the default or non-repayment of debt.”

3.6 It is stated that the Hon’ble NCLAT in ***Ravi Ajit Kulkarni Vs. State Bank of India [(Company Appeal (AT) (Insolvency) No. 316 of 2021)] dated 12.08.2021***, wherein it was held at Para 22 that an Application under section 95 shall be filed post issuance of demand notice. The notice of demand was sought to be issued as



per Rule 7 in Form-B and the service of notice to be affected as

per Rule 3(1)(g). Para 22 of the Judgment is reproduced below:

“22. Coming back to Section 95(4), the application under Section 95(1) needs to be accompanied with details and documents relating to (a) the debts owed by the Debtor to the Creditor or Creditors submitting the application for insolvency resolution process as on the date of application; and (b) the details and documents relating to failure by the debtor to pay the debt within a period of 14 days of service of notice of demand. The notice of demand as per Rule 7(1) has to be in Form C (Supra). The service of notice has to be effected as per Rule 3(1)(g). “Service” has been defined in the Rules as follows:

“(g) – service means sending any communication by any means, including registered post, speed post, courier or electronic means, which is capable of producing or generating an acknowledgement of receipt of such communication: Provided that where a document cannot be served in any of the modes, it shall be affixed at the outer door or some other conspicuous part of the house or building in which the addressee ordinarily resides or carries on business or personally works for gain.

4. On presentation of this instant petition, in terms of the Section 99 of the Code, 2016 and directed the Resolution Professional/Shri P.V.B.Sudhakara Rao to issue notice to the Personal Guarantor and notice was send through registered post and the same was delivered. The Application vide IA.No.149 of 2024 filed by the Resolution Professional, recommending the admission of the Petition under Section 95 of the Code, 2016 and the Resolution Professional in the application stated that the Petitioner has sent the demand notice in Form-B dated 12.08.2021 and reissued on 03.04.2023. Based on the facts the RP is recommending for approval of the Petition filed by



through RP of financial creditor against the personal guarantor Smt. K.Sridevi to the corporate debtor M/s.Thexa Pharma Private Limited.

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

Whether an application under Section 95 of Insolvency and Bankruptcy Code, 2016 can be rejected upon the failure of the creditor in establishing 'due' service of demand notice on the guarantor?

6. We have heard Mr. M.Srinivas for the Petitioner Bank, Learned Counsel Mr.G.Dinesh Kumar for Respondent/Personal Guarantor, Learned Resolution Professional Mr.P.V.B.Sudhakara Rao and Learned Counsel Ms.Mummaneni Vazra Laxmi for the Resolution Professional, perused the records and the Written Submissions.

POINT:

Whether an application under Section 95 of Insolvency and Bankruptcy Code, 2016 can be rejected upon the failure of the creditor in establishing 'due' service of demand notice on the guarantor?



7. Since the central issue in the case on hand being alleged *non service* of notices of demand alleged to have been issued on 12.08.2021 and reissued on 03.04.2023 on the Personal Guarantor, which plea is stoutly denied by the creditor, it is imperative for this Tribunal to find, whether ‘due’ service of notice of demand by the creditor on the guarantor demanding payment of the amount due and payable under the subject contract of guarantee is ‘*sine qua non*’ for maintaining the present company petition U/s. 95 IBC? If so, what are the consequences of non-service of the notice of demand on the personal guarantor/respondent herein?
8. Before we proceed with our discussion on the point above, we usefully refer to the following sections of the Insolvency & Bankruptcy Code, 2016.

Section 95:

Application by creditor to initiate insolvency resolution process.

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

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



(a) any one or more partners of the firm; or

(b) the firm.

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

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

(a) the debts owed by the debtor to the creditor or creditors submitting the application for insolvency resolution process as on the date of application;

(b) the failure by the debtor to pay the debt within a period of fourteen days of the service of the notice of demand; and

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

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

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

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

Section 99:

Submission of report by resolution professional.

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

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

(a) evidence of electronic transfer of the unpaid amount from the bank account of the debtor;



(b) evidence of encashment of a cheque issued by the debtor; or

(c) a signed acknowledgment by the creditor accepting receipt of dues.

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

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

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

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

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

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

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

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

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

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

9. A bare perusal of *Sub Clause 4 (b)* of Section 95 makes it clear that the creditor in an application filed under section 95 of IB Code, shall



enclose the documents relating to the “debt” owned by the debtor to the applicant/creditor, and also the documents relating to failure by the debtor to pay the said ‘debt’ within a period of 14 days from the date of *service* of notice of demand.

10. Thus, undoubtedly, Section 99(1) in I&B Code imposes a legal obligation on the resolution professional to examine the application under Section 94 or Section 95, as the case may be, within ten days of his appointment, and submit a report to the Adjudicating Authority recommending for *approval or rejection* of the application.
11. It is trite law that the guarantee becomes a debt once the said guarantee is invoked, wherein after the guarantor becomes liable. Here, we usually refer to the ruling of Hon’ble NCLAT, in Edelweiss Asset Reconstruction Company vs Orissa Manganese and Minerals Limited and others, Company Appeal No 437/2018 wherein it has been held that:

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



12. Precisely, for this reason only *Sub Clause 4 (a) (b) (c)* of Section 95 IBC, mandates filing of documents relating to (a) the debts owed by the debtor to the creditor or creditors submitting the application for insolvency resolution process as on the date of application; (b) the failure by the debtor to pay the debt within a period of fourteen days of the service of the notice of demand; and (c) relevant evidence of such default or non-repayment of debt.
13. Therefore, unhesitatingly, the *sine qua non*, for initiation of insolvency resolution under section 95 IB Code 2016 is the ‘*due invocation*’ of the personal guarantee executed by the respondent/ guarantor. The ‘burden’ lies on the applicant/creditor to establish that the subject general form of guarantee dated 04.05.2015 and guarantee dated 27.06.2017 executed by K.Sridevi along with other Personal Guarantors has been duly invoked, *lest* the “debt” under the guarantee payable by the guarantor will not exist and the application under section 95 of I&B Code, 2016 will be liable for *rejection*.
14. Here it is pertinent to note that though the creditor has contended that the Demand Notice, purportedly sent to the Personal Guarantor, on



12.08.2021 and 03.04.2023, no proof of service of the same has been filed along with Company Petition.

15. As rightly contended by the Learned Counsel for the Personal Guarantor, unless and until the petitioner is able to show that the address mentioned in the postal cover matches the admitted address of the petitioner, it is not required for the respondent to establish non service of the demand notice on the respondent.
16. The Resolution Professional who is under the legal obligation to verify the due compliances of the provisions of IB Code by the creditor before submitting his report to the Adjudicating Authority in terms of Section 99(1) of I&B Code, which is as below:

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

in his report dated 04.01.2024 in column 4(b) of the report stated as below:

“1. The financial creditor issued notice of demand on 12.08.2021 and reissued on 03.04.2023 under Rule 7(1) of Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process of Personal Guarantor to Corporate Debtor) Rules, 2019 calling upon the Guarantor herein to pay the unpaid debt within 14 days from the date of the receipt of the notice.



2. The Personal Guarantor has not replied the demand notice nor come forward to pay the outstanding amounts.

3. The Resolution Professional through email dated 23.12.2023 requested the Financial Creditor herein to confirm the repayment of the debt claimed is unpaid and the financial creditor replied on stating that the balance pending in the two accounts of the Corporate Debtor is Rs.51,93,55,782.75”

Further in para 10(f) of the report of the RP has stated as below:

“The debtor failed to repay the debt within a period of fourteen days of the service of the notice of demand dated 12.08.2021 and reissued demand notice on 03.04.2023 (as the proof of service has not been filed for the earlier demand notice).

17. Here we wish to point out that, in terms of sub sections 4, 5, 6 & 7 of

Section 99 of the I&B Code, 2016 which are as below:

Section 99 :

Submission of report by resolution professional:

“99 (1), (2), (3)

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

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

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

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

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

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



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

18. Admittedly, when no proof of service of the Demand Notice on the Personal Guarantor has been filed along with Company Petition, the Resolution Professional in this case ought to have ascertained from the creditor regarding the proof of service of the demand notices dated 12.08.2021 and 03.04.2023 as part of his verification process. Instead, despite non-compliance of subsection (4) of section 95 I&B Code, 2016 is *ex facie*, apparent and unequivocal, the Resolution Professional had ventured to observe that demand notice to the Personal Guarantor has been served and recommend the 'admission' of the present application,



which in our considered opinion is a sheer mechanical act, without any application of mind.

19. Therefore, in light of our discussion as aforementioned, we are of the firm view that the applicant/ creditor failed in establishing compliance of subsection (4)(a) of section 95 I&B Code, 2016. As such the “debt” as claimed under the impugned Guarantee Agreement does not “exist” as on the date of filing of the present application.
20. The Point is answered accordingly.
21. In light of our discussion and finding above the report of the Resolution Professional and the Company Petition are hereby rejected, moratorium order passed earlier stands vacated forthwith.
22. In the result CP (IB) No.385/95/HDB/2022 is hereby rejected. No costs.

Sd/-

Charan Singh
Member Technical

Sd/-

Dr. Venkata Ramakrishna Badarinath Nandula
Member Judicial

Sridher