

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Comp. App. (AT) (Ins) No. 1622 of 2023 & I.A. No. 5860,
5861, 5862 of 2023

IN THE MATTER OF:

Neon Laboratories Ltd.

...Appellant

Versus

Mayank Shah & Anr.

...Respondents

Present:

For Appellants : Mr. Nikhil Goel, Sr. Adv, with Vaibhav Tomar, Adv.

For Respondent : Mr. Paras Mithal, Devashish Chauhan, Adv. for R1
 Mr. Malak Bhatt, Neeha Nagpal, Shreyansh Chopra, Adv. for R2

J U D G M E N T

Pre: Justice Rakesh Kumar Jain:

This appeal is filed by Neon Laboratories Ltd. (Operational Creditor), against the order dated 21.11.2023, passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench) by which I.A. No. 2044 of 2022, filed under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 (in short 'Code') by Mr. Mayank Shah (Intervenor) in CP (IB) No. 794/MB/2022, filed by the Operational Creditor for initiation of Personal Insolvency Resolution Process (in short 'PIRP') in the matter of Mr. Praful Nanji Satra (Personal Guarantor/Corporate

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Debtor) under Section 95 of the Code, has been disposed of and CP (IB) No. 794 of 2022 has been dismissed. Besides that the Adjudicating Authority has imposed a cost of Rs. 5,00,000/- upon the Appellant on the ground that CP (IB) No. 794 of 2022 has been filed by the Appellant in collusion with the Corporate Debtor to thwart the proceedings pending before the Hon'ble Bombay High Court and cost has been ordered to be deposited in Bharatkosh Account within 15 days from the date of the order.

2. In brief, a deed of personal guarantee dated 27.07.2011 was entered into between the Appellant (Lender), Satra Properties (India) Ltd. (SPIL) (Borrower) and Praful Nanji Satra (Corporate Debtor) as the personal guarantor of the Borrower.

3. Clause 3 of the said guarantee deed is relevant in this case which is reproduced as under:-

“The Guarantor agree that the amount hereby guaranteed shall be duly payable by the Guarantor to the Neon within 60 days from the date of demand notice served by the Neon requiring payment of the amount. Any such demand made by the Neon on the Guarantor shall be conclusive as regards the amount claimed therein having become due and payable by the borrower to the Neon in respect of the said ICD amount mentioned herein and also conclusive as regards the

default having been committed by the Borrower in repayment of the said amount to the Neon and will pay the amount demanded forthwith on receipt of the demand notice. Any such demand notice sent by the Neon by hand delivery or by post to the Guarantor at his address mentioned hereinabove or such address as may be known to the Neon shall be deemed to be duly served on the Guarantor at the time when the notice would in the ordinary course of the post be delivered at such address. It is agreed that the Neon may in its sole discretion invoke this Guarantee.”

4. Mr. Mayank Shah (Intervenor/Respondent No. 1) filed an Arbitration Petition No. 304 of 2021 before the Hon’ble Bombay High Court under Section 9 of the Arbitration and Conciliation Act, 1996 (in short ‘Act’), inter alia, for depositing the claim amount of Rs. 131,02,82,634/-.

5. It is alleged that when the arbitration petition, filed by Respondent No. 1, was at the stage of passing of the orders against Respondent No. 2 (personal guarantor/debtor), the Appellant filed a petition under Section 95 of the Code and in view of Section 96 of the Code, interim moratorium became operative and the arbitration proceedings were postponed by the Hon’ble Bombay High Court.

6. The Adjudicating Authority found that the demand notice in Form B under Rule 7 (1) of the IBBI (Application to Adjudicating Authority for Insolvency Resolution Process of personal guarantor to Corporate Debtor) Rules, 2019 (in short 'Rules') was alleged to have been served by the Appellant upon Respondent No. 2 by hand on 01.11.2021 whereas the petition under Section 9 of the Act was filed on 30.11.2021. It is also found that on 01.12.2021, the petition under Section 95 of the Code was served on Respondent No. 2 and filed before the Adjudicating Authority on 02.12.2021 which led to the adjournment of the arbitration proceedings sine-die on 03.12.2021 on account of moratorium became operated on 02.12.2021 in terms of Section 96 of the Code.

7. The CIRP proceedings against the Borrower were initiated by Vistra ITCL (India) Ltd. under Section 7 of the Code bearing CP (IB) No. 1632/MB/2019 which was admitted on 03.08.2020.

8. Case of the Appellant is that the Borrower owed a sum of Rs. 30,305,675/- being Rs. 1,75,00,000/- (Principal) and Rs. 1,28,05,675/- (Interest) for which the personal guarantee was invoked vide letter dated 01.12.2021 demanding the aforesaid amount and since no reply was filed to the demand notice, filed

the petition under Section 95 of the Code after 30 days though it could have been filed after 14 days in terms of Section 95(4)(b) of the Code. The Tribunal allowed the application filed by the Intervenor, inter alia, on the ground that not only the petition filed under Section 95 was premature because it was agreed between the parties, in terms of the personal guarantee dated 27.07.2011, that the Guarantor shall pay to the Lender the amount duly payable within 60 days from the date of demand notice served by the Lender requiring payment of the amount and the alleged demand notice was issued on 01.11.2021, treated as notice of invocation of guarantee and the petition was filed on 02.12.2021 before the expiry of period of 60 days and hence, it was premature but also it has been found that the Appellant was in collusion with the CD in initiating the proceedings under Section 95 in order to stall the proceedings initiated by Respondent No. 1 under Section 9 of the Act asking for depositing the amount of Rs. 131,02,82,634/- and the petition under Section 95 came to be filed when the matter was ripe before the Hon'ble Bombay High Court for decision but because of Section 96, the proceedings have been adjourned sine die and on that account not only the application no. 2044 of 2022 filed by

Respondent No. 1 has been disposed of in his favour but also CP (IB) No. 794 of 2022 filed by the Appellant was held to be premature and collusive, has been dismissed with costs of Rs. 5 lac.

9. Counsel for the Appellant has vehemently argued that period of service of demand notice has to be counted in terms of Section 95(4)(b) of the Code and the period mentioned in the guarantee agreement should not be taken into consideration. It is submitted that Section 238 of the Code overrides the provisions of Indian Contract Act and in this regard, reference has been made to a decision of this Court in the case of K.V Jayaprakash Vs. State Bank of India & Anr., CA (AT) (Ins) No. 362 of 2022 decided on 30.09.2022. He has also submitted that the allegation of collusion has to be proved on the basis of the evidence and relied upon a decision of the Hon'ble Supreme Court in the case of Ratnagiri Gas and Power (P) Ltd. Vs. RDS Projects Ltd., (2013) 1 SCC 524.

10. On the other hand, Counsel for Respondent No. 1 has submitted that he has filed the arbitration proceedings on 30.11.2021 which was fully heard on the same day and was adjourned to 03.12.2021 for passing of the orders but the

Appellant issued a demand notice in Form B of back date i.e 01.11.2021 served upon Respondent No. 2 by hand and filed the application under Section 95 of the Code on 01.12.2021, two days before the date fixed by the Hon'ble High Court in the arbitration proceedings i.e. 03.12.2021, as a result thereof, the proceedings pending before the Hon'ble High Court were adjourned sine die in view of Section 96 of the Code. It is further submitted that in the 11th meeting of the CoC of SPIL held on 26.08.2021, attended by all the Financial Creditors in which the Appellant was represented by Rakesh Parmar in his capacity as the director. Respondent No. 2 sought permission for submitting resolution plan before the CoC. The Chairman of the said meeting, considering the request made by the personal guarantor observed that IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 do not permit the consideration of any plan received after the last date of submission in terms of the Expression of Interest (EOI) unless the process commence afresh and since the last date for completion of CIRP was 23.09.2021, adequate time was not available for issuance of fresh EOI unless excluded by the Tribunal. It was also stated that when the resolution plan was pending for consideration, such permission

was not given unless the CoC decided to scrap the process and restart the process afresh. At that time, Rakesh Parmar, representative of the Appellant supported Respondent No. 2 stating that he should be permitted to submit a resolution plan. He has further submitted that the judgments relied upon by the Appellant are not applicable in as much as the judgment in the case of K.V Jayaprakash (Supra) is on the issue that the approval of the resolution plan does not ipso facto discharge a personal guarantor of a Corporate Debtor of her or his liabilities under the contract of guarantee and the decision in the case of Ratnagiri Gas and Power (Supra) is on the administrative law. It is further submitted that the parties are bound by the terms and conditions of the guarantee in which it has been specifically provided that after the demand is raised, the amount shall be payable by the guarantor within 60 days which means that the period of 60 days is provided to the personal guarantor from invocation of the guarantee by the lender. In case the amount is paid within this period then no petition under Section 95 could have been filed and in case the amount is not paid within 60 days, despite demand having been raised, the petition under Section 95 can be filed.

11. We have heard Counsel for the parties and perused the record with their able assistance.

12. The facts are not in dispute that a personal guarantee deed was executed on 27.07.2011 amongst the Appellant as a lender, SPIL as the Borrower and Respondent No. 2 as the Guarantor. Clause 3 of the said agreement categorically lays down that the Guarantor would pay the amount of ICD of Rs. 1 Cr. 75 Lac to the lender within 60 days from the date of demand notice served by the Lender requiring the payment. Therefore, from the plain reading of this clause it is apparent that the liability to pay by the Guarantor to the lender shall arise only in two circumstance firstly, on the service of demand notice and secondly, within the period of 60 days from the receipt of demand notice. In fact the time was provided in the agreement to the guarantor to arrange payment of the lender to avoid legal complications. The right to file the petition under Section 95 thus would not arise after 14 days of service of the notice in view of the specific agreement between the parties that after the demand notice is served, 60 days time shall remain available with the guarantor for discharging his liability whereas in the present case the demand notice is dated 01.11.2021 and the application was

filed on 01.12.2021, just after the expiry of one month, which is contrary to clause 3 of the agreement. In so far as the finding of the Tribunal about the collusiveness is concerned, not only Respondent No. 2 has been helping the Appellant in the CoC for extension of time to submit the resolution plan but also the petition under Section 95 was timed in such a manner that the proceedings filed by Respondent No. 1, pending before the Hon'ble Bombay High Court, in respect of a petition filed under Section 9 of the Act, may be stayed automatically in view of the operation of Section 96 of the Code. It is obvious from the dates because the petition under Section 9 of the Act was filed by Respondent No. 1 on 30.11.2021 and when the case was adjourned to 03.12.2021 for orders, the petition under Section 95 was filed on 01.12.2021 as a result of which the petition filed under Section 9 had to be adjourned by the Hon'ble Bombay High Court.

13. In these facts and circumstances, we do not find any error in the findings recorded by the Tribunal for not only allowing the application of the Respondent No. 1 but also dismissing the application filed under Section 95 of the Code by the Appellant and imposition of cost.

14. No other point has been raised.

15. In view of the aforesaid facts and circumstances, we do not find any merit in the present appeal and hence, the same is hereby dismissed. No costs.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Indevar Pandey]
Member (Technical)

New Delhi
08th August, 2024

Sheetal