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PERSONAL GUARANTOR INSOLVENCY UNDER INSOLVENCY BANKRUPTCY CODE

INTRODUCTION

The introduction of the Insolvency and bankruptcy code in 2016 came as a ray of hope to deal with insolvency and bankruptcy matters in a more elaborative and comprehensive manner. Before this, several laws dealt with the creditor-debtor relationship but the Insolvency and Bankruptcy code came intending to consolidate the existing framework by providing a single code to deal with insolvency and bankruptcy in India and it touched many unexplored areas and brought them into its ambit. Undoubtedly, since the code's introduction, it has proved its need and importance well.

IBC is ever-evolving and growing since its inception and on and off, amendments and changes keep on popping up in the code. On 15th November 2019, the Ministry of Corporate Affairs through a notification stated that insolvency and bankruptcy proceedings against personal guarantor shall be governed by the IBC, 2016. The notification is all set to come into force on 1st December 2019. Along with this, the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolutions Process for Personal Guarantors to Corporate Debtors) rules, 2019 and the Insolvency and Bankruptcy (Application to Adjudicating Authority for Bankruptcy Process for Personal Guarantors to Corporate Debtors) Regulations, 2019 have also come into effect for trouble-free functioning of the procedure.

UNDERSTANDING THE CONCEPT OF PERSONAL GUARANTOR

Before proceeding further, let's understand who is a personal Guarantor. As defined under section 5(22) of the IBC "a personal guarantor is an individual who is the surety in a contract of guarantee to the corporate debtor".

For understanding the definition of a personal guarantor, one need to comprehend the meaning of a contract of guarantee, a surety, personal guarantee, and corporate debtor, all of these find their mention in the definition of a personal guarantor.

The concept of a contract of guarantee originates from the Indian Contract Act, 1872. Section 126 of the said act states that a "Contract of guarantee" is a contract

where a third party discharges the liabilities of any of the parties to the contract in case such party fails to discharge his liability. Here, there is a contract between three parties, a surety, principal debtor, and creditor where the liability of the surety is secondary.

Whereas, a surety is a person who gives guarantee on behalf of the party to the contract to perform the contract in case of such party makes default in performance of his promise. It is to be noted that only when the principal requests the surety to provide a guarantee on his behalf, then the surety provides a guarantee for the performance of such liability. In case of personal guarantee, the surety himself will be responsible for any performance of a contract in case of default, not his decedents or legal representatives, and only his personal assets are acquired in such case.

Take into consideration the definition of a guarantor as per the Rule 39(e) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution process for Personal Guarantors to Corporate Debtors) Rules, 2019, "A guarantor means a debtor who is a personal guarantor to a corporate debtor in respect of whom the guarantee has been invoked by the creditors and remains unpaid in full or in part."

And "corporate debtor" means a corporate person who owes a debt to any person. (Defined under Section 3 (8), IBC.

INSOLVENCY PROCEEDINGS AGAINST THE PERSONAL GUARANTOR

A creditor or a resolution professional can initiate insolvency proceedings against the personal guarantor. This can be done by filing an application before the National Company Law Tribunal under section 95 of the IBC. Firstly, As per Rule 7(1) of the Rules, A demand notice is served by the creditors to the personal guarantor concerning the demand for payment in lieu of the default by the principal debtor. Counting fourteen days from the date of the receipt of the demand notice, the personal guarantor shall pay the debt amount to the creditors. If he fails to make the payment to the creditor, the creditor has a right to file an insolvency application against him before the National Company Law Tribunal. The Personal Guar-



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antor and the corporate debtor shall be notified by the creditor regarding such application through serving a copy of the application to them. After filing the application before NCLT, the period of interim moratorium shall commence starting from the date on which the application was filed concerning all the debts which would cease once the application is admitted. The major purpose of the interim moratorium is that in such period if any legal proceeding which already exists in relation to the debt in question shall be stayed and the creditors shall not initiate any legal action concerning such debt.

Also, In this case, it is upon the NCLT to direct the Insolvency and Bankruptcy Board of India (IBBI) to nominate a resolution professional for the creditors within seven days from the date of filing of the application and henceforth within ten days, the Insolvency and Bankruptcy Board of India (IBBI) shall nominate a resolution professional. The NCLT in turn will pass an order regarding the same mentioning the appointment of resolution professional as nominated by the Insolvency and Bankruptcy Board of India (IBBI). If the creditor is not satisfied with the nominated resolution professional and wants replacement, he has an option to apply before the NCLT for such replacement.

Secondly, if the application for insolvency has been filed by a resolution professional under section 95 of the IBC, It is the duty of the Insolvency and Bankruptcy Board of India (IBBI), upon the direction of the NCLT, to make sure that there is no disciplinary action pending against the resolution professional who filed the application. This should be done within seven days from the date of the filing of an application and within this period only, IBBI shall put up its decision regarding appointment or rejection of the resolution professional before the NCLT. If the resolution professional is rejected, then a separate resolution process will start for nominating another resolution professional.

After all the initial filing procedure, the Resolution professional is charged with the responsibility to examine the application so filed within ten days from the date of its appointment as resolution professional and submit a report to the NCLT mentioning the approval or rejection of the application along with reasons properly recorded by for acceptance and non-acceptance of the application. Once, such a report has been submitted to the NCLT, the NCLT shall pass an order for allowing or disallowing the application within 14 days from the date of submission of the report by the resolution professional. If the application is accepted, then NCLT, only on the request from the resolution professional, issues instructions regarding the negotiations and thereby arriving at a repayment plan. On the other hand, in case of rejection of the application by the NCLT, the creditor can file for a bankruptcy order.

A moratorium period of 180 days runs from the date the application was admitted by NCLT or on the date NCLT pass order regarding repayment plan and shall cease on the completion of 180 days.

Coming to the claims from the creditors, it's upon the NCLT that it should issue a public notice inviting claims from the creditors within seven days. Thereon, twenty-one days from the issuance of public notice will be provided to the creditors to come up with claims. All the creditors shall submit their claims to the resolution professional with their personal information. The resolution professionals will then create a list of creditors within 30 days.

After all this, the debtor prepares a repayment plan in consultation with the resolution professional which will also include a proposal for the creditors. The proposal shall be a reconstruction of all the debts. It shall also include all the terms and conditions, implementation schedule, source of funding, and all other relevant information. Now the resolution professional shall prepare a report on the repayment plan and submit its report to NCLT within 21 days from the date of submission of claims of the creditors. This report shall also include summoning a meeting of the creditors. The purpose of the meeting is that the creditors can discuss their views on approval, modification, or rejection of

the repayment plan. This meeting shall take place not less than fourteen days and not more than twenty-eight days from the date of submission of the report with the NCLT. For conducting such a meeting, the resolution professional shall issue a notice to the creditors which are to be sent at least fourteen days before the date of the meeting so fixed. As per Regulation 11, IBBI (Insolvency Resolution Process for Personal Guarantors of Corporate Debtors) Regulations, 2019, a meeting of the creditors shall be convened by the resolution professional by creditors having 33% of the voting share. More than 50% voting shares of the creditors shall be required for approval of any decision in the meeting. A majority of three-fourth of creditors among the all shall be required for approval of the repayment plan or any modification therein.

Now the resolution Professional will put the repayment plan before the NCLT and NCLT may either approve or reject it and pass the order for the same. The order so passed by the NCLT shall be binding on the debtors and creditors. Once the repayment plan is completed, the resolution professional will forward a notice to the persons bound by the repayment plan that "the repayment plan" has been completely implemented and it should be accompanied by the report mentioning all the receipts and payments made therein. A 7 days grace period may be awarded by the NCLT to the resolution professional for submission of the notice. In case the repayment plan is not successfully implemented, it is called the "premature end" of the repayment plan. Here also, the resolution professional has to submit a report to the NCLT mentioning the reasons for the premature end of the repayment plan.

Finally, in the last step, the resolution professional shall apply to the NCLT for a discharge order regarding the debts as claimed in the repayment plan, and accordingly, NCLT may pass the discharge order. Though, the discharge order won't discharge any person from any liability for his debt.

Therefore, if a situation arises when a corporate debtor takes a loan, and a guarantor is provided in case of non-payment by the principal debtor, the creditor following the above procedure can seek a remedy against the personal guarantor.

PERSONAL GUARANTOR LIABILITY AND PRECEDENTS BY SUPREME COURT

As it is well understood now that as per the new regime the creditors can initiate insolvency proceedings against the corporate debtor and personal guarantor simultaneously, which in turn will provide a fast remedial process for the recovery of due debts of creditors. Though looking at the other side of the picture, these dual proceedings against debtor and personal guarantor may cause chaos and conflicts as many gaps still need to look upon. For example, nothing is said in the code regarding the resolutions professionals under both the proceedings shall be different or same.

However, in *Dr. Vishnu Kumar Agarwal v. Piramal Enterprises Ltd.*, NCLT held that it is very much clear the IBC provides no bar for filing two applications simultaneously against the principal debtor and corporate guarantor, though once the same claims are set out in an application and such application is admitted against any of the corporate debtors, the second application by the same creditor for exactly same claims cannot be taken in against the other corporate debtor. NCLT also evidently mentioned that applications for claims can be filed simultaneously for the CIRPs against both principal debtor and personal guarantor but no such application can be filed once CIRP has been already invoked against any one of them. This comes in conflict with section 14 of the code which states that the moratorium shall not apply to the guarantor and the creditor can proceed against the corporate guarantor during CIRP of the principal debtor.

Though, contrary to this, in *Committee of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta case*, the Supreme Court shed light on many issues and reiterated the decision in *State Bank of India v*

Ramakrishna, stated that the creditor has a right to invoke contracts of guarantees during the insolvency proceedings. It elucidates the point that CIRP against a corporate guarantor can begin even when a CIRP has already existed against a principal debtor. This came in contradiction to what was held in Piramal Enterprises Ltd. Case.

Though the appeal against *Piramal Case* is still pending before the Supreme Court and many issues are still to be thrown light upon.

An important point that needs to be noted that the liability of both the principal debtor and the personal guarantor is joint and several as implied from section 128 of the Indian Contract Act. The liability of the guarantor will be immediate and will arise only when the creditor has exhausted his remedy against the debtor.

CONCLUSION

While concluding, it can be said that there are many untouched stones under the concept of personal guarantor liability and insolvency proceedings against him. The Supreme Court is yet to hear the plea in December 2020 regarding the provisions under IBC related to insolvency proceedings against the personal guarantor. Several questions will be answered once the decision is out and it is important that a clarified and simplified version of the new regime over Personal Guarantor Insolvency comes out.