

**IN THE NATIONAL COMPANY LAW TRIBUNAL
SPECIAL BENCH, NEW DELHI**

IB-29(PB)/2022

Item No. 128

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

In the matter of:

IDBI Bank Limited

.... Applicant

Vs.

Manoj Gaur

(Personal Guarantor of Corporate Debtor-
Jaypee Infratech Limited)

.... Respondent

MEMO OF PARTIES

IDBI Bank Limited, a company within the meaning of Companies Act 2013 and a banking company within the meaning of the Banking Regulation Act, 1949 and having its registered office at IDBI Tower, WTC Complex, Cuffe Parade, Colaba, Mumbai-400 005 and a branch office inter alia at 7th Floor, NPA Management Group, World Trade Center Complex Cuffe Parade, Colaba, Mumbai 400 005

Through Resolution Professional:

Mr. Vikram Kumar
IBBI/IPA-001/IP-P00082/2017-2018/10178
J 6A, Kailash Colony,
New Delhi-110048

...Applicant

VERSUS

MANOJ GAUR
(Personal Guarantor of Corporate Debtor-
Jaypee Infratech Limited)
R/o A-9/27,
Vasant Vihar
New Delhi-110057

...Respondent

Order delivered on: 5.05.2022

Coram:

**SH. DHARMINDER SINGH,
HON'BLE MEMBER (JUDICIAL)**

**SHRI AVINASH K. SRIVASTAVA,
HON'BLE MEMBER (TECHNICAL)**

Appearance

For the Applicant
For the Respondent

Mr. Ankur Mittal, Adv. Meera Murali, Adv. Aishwarya
Adv. Krishnan Venugopal Sr, Adv. a/w Vishal Gupta
Dheeresh K Dwivedi Gaurav Ray Pallavi Srivastav
Rajesh Advs.

ORDER

Per: Oral Order: SHRI AVINASH K. SRIVASTAVA

This application has been filed by Financial Creditor IDBI Bank Limited through Resolution Professional Mr. Vikram Kumar under Section 95 and other applicable provisions of IBC read with rule 7(2) of the IBBBI (application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules 2019, (hereinafter referred to as the Rules, 2019) against Mr. Manoj Gaur Suspended Managing Director of the Corporate Debtor namely Jaypee Infratech Ltd., who stood as personal guarantor to the facilities availed by the Corporate Debtor, and is indebted to

the Applicant Bank in an aggregate of amount of Rs. 7917,62,06,468/- (Rs. Seven Thousand Nine Hundred Seventeen crores sixty-two lakh six thousand four hundred sixty-eight only) including interest and penalties as on 30.11.2021, in respect of the loan facilities sanctioned by the Financial Creditor to the Corporate Debtor.

2. It is stated by the Applicant that the Corporate Debtor, pursuant to Common Loan Agreement dated 30.04.2015, Facility Agreement dated 30.04.2015 and the First Amendment Agreement to the Common Loan Agreement dated 22.05.2015 executed amongst the Applicant Bank, other lenders and the Corporate Debtor had availed four loans from the Applicant Bank aggregating to Rs. 4650,00,00,000/- (Four thousand six hundred fifty crores). Thereafter an amount of INR- 900,00,00,000/- (Rs. Nine Hundred Crores) was down sold by the Applicant Bank to India Infrastructure Finance Company and the total principal loan amount granted to the Corporate Debtor by the Applicant Bank was reduced to INR 3750,00,00,000 (Three thousand seven hundred and fifty crores).

3. Further under Security Trustee Agreement dated 30.04.2015 executed amongst, inter alia, the Applicant Bank and the Corporate Debtor, IDBI Trusteeship Service Limited was appointed to act as Trustee for and on behalf of the Applicant Bank and other lenders and to hold the security to be created pursuant to the Financing Documents.

4. In respect of these loan facilities, the Respondent Mr. Manoj Gaur had executed a Deed of Guarantee dated 25.05.2015 wherein the personal guarantor has irrevocably and unconditionally guaranteed repayment of the

aforesaid facilities availed by the Corporate Debtor. The Corporate Debtor committed default in repayment of dues to the Applicant Bank. Accordingly, the loan account of the Corporate Debtor was classified as NPA by the Applicant Bank on 31.03.2016. Further, the Company petition-(CP-IB-77/ALD/2017) was filed by the Applicant Bank against the Corporate Debtor under Section 7 of the IBC and by order dated 9th August, 2017, the application was admitted and CIRP was initiated against the Corporate Debtor.

5. On account of non-payment of the outstanding amounts in relation to the facilities by the Corporate Debtor, the Applicant Bank/Security Trustee issued a demand notice dated 09.07.2018 to the Respondent. Mr. Manoj Gaur, seeking repayment of the amounts for discharge of personal guarantor obligations under the Deed of Personal Guarantee. Thereafter the Applicant Bank issued two demand notices dated 12.11.2021 & 09.12.2021 in Form-B under Rule 7(1) of the Rules of 2019. But the Respondent failed to pay the dues within the statutory period of 14 days from the service of the said notice. Accordingly, the Applicant Bank has filed the present application dated 14.01.2022 under Section 95 of IBC through the Resolution Professional.

6. As per the application, the personal guarantor is also the Suspended Managing Director of the Corporate Debtor i.e. Jaypee Infratech Limited and his list of assets as on the date of application (to the extent known) has been given.

7. The Applicant IDBI Bank also filed IA No.782/2022 under Section 60(5) of IBC read with Rule 11 of NCLT Rules seeking modification of order passed

by this Adjudicating Authority on 08.02.2022, praying that this order is same as the one passed on 24.01.2022 vide which limited notice was issued to the Respondent, and prayed for appointment of Resolution Professional (RP) along with direction to RP to submit a report under Section 99 of IBC, 2016.

8. The Respondent appeared through Ld. Counsel and filed reply to the Application **IB-29(PB)/2022** challenging it on the ground of maintainability and also filed reply to IA No.782/2022, stating that the Application IB-29/2022 under Section 95 has been filed by a stranger to the contract-the Deed of Guarantee, and IDBI Bank has no locus standi to file the application. Respondent has submitted that the Applicant Bank has also concealed the vital fact that the Security Trustee has already filed similar application under Section 95 of IBC, 2016 i.e. (IB)-83(PB)/2022 titled (IDBI Trusteeship Services Ltd. Vs. Manoj Gaur) in which notice has already been issued by this Adjudicating Authority. As per the Respondent, the application has not been filed by Creditor but by some third-party having no privity of contract with the Respondent. Similar reply has been filed in IA-782/2022 upholding the order of 08.02.2022 on the ground that further step under Section 99 of the Code can be taken only after first deciding upon the locus of Applicant to file the Petition. Therefore, this Adjudicating Authority heard the arguments for and against the **IA No. 782/2022** together with the main Application CP-IB-29/2022.

9. We have heard Ld. Counsels for both the sides at length and perused the record thoroughly.

10. Ld. Counsel for the respondent contended that the personal guarantor, had executed the deed of personal guarantee on 25.05.2015 in favour of IDBI Trusteeship Services Limited (the Security Trustee). The Security Trustee entered into the Personal Guarantee pursuant to the powers conferred to the Security Trustee collectively by all the JIL Lenders under a Security Trustee Agreement dated 30.04.2015. The Security Trustee and the Applicant Bank are independent entities and the Applicant Bank is not a signatory to the deed of personal guarantee executed by Mr. Manoj Gaur as the Guarantor of JIL with IDBI Trusteeship Limited (As the security trustee) dated May 25, 2015. There is no privity of contract between the Applicant and the Respondent in the personal guarantee which can only be enforced by the Security Trustee, with the consent of all the Creditors/Lenders of JIL (who are party to the said Security Trustee Agreement in Schedule-1)

11. Further, in the proceedings in IDBI Bank Vs. JIL CP-(IB)-77/ALD/2017 under Section 7 of IBC, the financial institutions who extended loans to the Corporate Debtor/JIL are:

- i) IDBI Bank Limited (i.e. The Applicant Bank),
- ii) Union Bank of India,
- iii) India Infrastructure Finance Company Limited,
- iv) Life Insurance Corporate of India
- v) State Bank of India,
- vi) Canara Bank,
- vii) Bank of Maharashtra,
- viii) ICICI Bank Limited,

- ix) IFCI Limited,
- x) The Jammu & Kashmir Bank Limited.

12. Further, the demand notice dated 09.07.2018 (Annexure A-5) of the Application (Vol-1, Pg-85 to 87) issued by IDBI Trusteeship Services Limited contains the list of only 4 lenders viz.

- i) IDBI Bank Limited,
- ii) Union Bank of India,
- iii) Syndicate Bank of India,
- iv) Bank of Maharashtra

13. However, it is submitted by the Respondent that the version of the Security Trustee Agreement, which includes all the Lenders of the Corporate Debtor has not been placed on the record by the Applicant Bank, the copy of the Security Trustee Agreement which has been placed on record by the Applicant Bank in the present proceedings does not include any of the Lenders mentioned above apart from IDBI, State Bank of Hyderabad and India Infrastructure Finance Company Limited. It has been submitted that para 3.4 of the Security Trustee Agreement containing the provisions for enforcement of Security requires that the Security Trustee may act only upon receiving unanimous written instructions from all the lenders. Para 3.4 reads as follows:

3.4 Enforcement of Security

The Security created under each Security Document may be enforced on the written instructions received from a Lender/the Lenders' Agent in

accordance with the provisions of the Financing Documents. Under such circumstances, the Security Trustee shall immediately, in writing, along with a copy of the written instructions received from a Lender and/or the Lenders' Agent, inform all the other Lenders of the course of action proposed to be initiated by the Security Trustee towards enforcement of Security. In the event of the Security Trustee receiving conflicting instructions from the Lenders and/or the Lenders' Agent the Security Trustee shall seek clarifications therefore from such Lenders and/or the Lenders' Agent giving such instructions and in the absence of unanimous instructions the Security Trustee shall not be obliged to act on such instructions.

14. Another important para to which our attention has been attracted is **para 8.5** "Performance by the Lenders" of the Security Trusteeship Agreement. The same is quoted below:

Para 8.5 Performance by the Lenders

Any duty or obligation of the Security Trustee hereunder or under any Security Document or other agreement, document or instrument contemplated herein or therein may be performed by the Lenders and any such performance shall not be construed as a revocation of the trusts or agency created thereby.

| Original Refinancing Facility Lenders | Original Refinancing Facility Lenders | Original RTL-A Facility Lenders | Original RTL-B Facility Lenders |
|--|--|--|--|
| I | II | | |
| IDBI | IDBI | IDBI | IDBI |



| | | | |
|----------|--|-----|----------------|
| SBH | | SBH | SBH |
| Borrower | | | Lenders' Agent |

15. Further the definition of 'Lenders' as per Security Trustee Agreement is as follows:

Lenders shall mean collectively the refinancing lenders and the RTL facility Lenders (Vol-IV, Pg-560).

16. The deed of personal guarantee is given at pages 598-617(Annexure A-12 of Volume-IV of the application). Perusal of the same shows that the deed of personal guarantee is executed by Mr. Manoj Gaur as Guarantor for JIL(as Borrower) in favour of the IDBI Trusteeship Services Limited(as the Security Trustee), and as per **clause 5** it is stated that:

5. Demand

Any demand given by the Security Trustee to the Guarantor shall be conclusive evidence that the Guarantor's liability has accrued and that the extent of the Guarantor's liability is the amount show therein. Such demand shall be made by delivery of a demand certificate issued by the Security Trustee substantially in the form and manner as provided in Schedule I hereto ("Demand Certificate"). Such Demand Certificate shall be conclusive evidence against the Guarantor of the amount for the time being due to the Lenders from the Borrower in any action or proceeding brought on this Guarantee against the Guarantor.



17. Some other important provisions of the Security Trustee Agreement to which our attention has been attracted by the Ld. Counsel for the Respondent are as follows:

2.4 Authority for certain Actions

2.4.1(c)

enforce the Security in accordance with the provisions of the Security Documents by following the procedure laid down in the Inter Creditor Agreement and receive and distribute/apply the proceeds thereof in accordance with the Inter Creditor Agreement and/or any sharing arrangement amongst the Lenders;

Article 3 Duties of the Security Trustee

3.1(g) *take all appropriate actions on such written instructions received from the Lenders/the Lenders' Agent as it deems fit to enforce and foreclose the Security Interest under the Security Documents and recover and hold upon trust the monies thereon for the Lenders and disburse/distribute proceeds of any Security Interest created in its favour in accordance with the provisions of the Financing Documents and the Inter Creditor Agreement;*

3.9 Segregation of Funds and property Interest:

Monies and other property received by the Security Trustee pursuant to this Agreement/ Security Documents shall, until used or applied as herein provided, be held in trust for the purposes for which they were received, and shall be segregated and held distinct from the Security Trustee's own monies and

assets and the Security Trustee shall not be liable for any interest thereon. For the avoidance of doubt, the parties agree, acknowledge and confirm, that the monies and other assets constituting or representing Security held by the Security Trustee being trust property shall not be considered as part of the assets of the Security Trustee and shall not, in the case of bankruptcy or liquidation of the Security Trustee, be considered as its assets and shall not be available to the Liquidator, bankruptcy trustee or other creditor of the Security Trustee and such monies and properties shall be wholly excluded from the assets of the Security Trustee in such bankruptcy or liquidation.

| Original Refinancing Facility Lenders I | Original Refinancing Facility Lenders II | Original RTL-A Facility Lenders | Original RTL-B Facility Lenders |
|--|---|--|--|
| IDBI | IDBI | IDBI | IDBI |
| SBH | | SBH | SBH |
| Borrower | | | Lenders' Agent |

4.8 Action of the Security Trustee

The Security Trustee shall only undertake an enforcement action that it considers to be in the best interests of all the Lenders, acting reasonably.

18. As per the Respondent, all the Lenders have to act together through the Security Trustee whereas no other bank has filed application under Section 95. As per the Security Trustee Agreement, one lender cannot act alone. Further the Applicant Bank has tried to rely to **clause 1.2** of the common loan agreement dated 30.04.2015 (Vol-II pg-193) which states that:

1.2 principal of Interpretation.

(d) "the words importing singular shall include plural and vice versa".

19. Ld. Counsel for the Applicant Bank although argued that IDBI Bank has got a big share i.e. 43% of the total loan and no other lender has submitted against the action of the Applicant Bank. As per Para 8.5 titled "Performance by the Lenders" of the Security Trustee Agreement (pg-582, Vol-IV of Application) the duty of the Security Trustee may be performed by the lenders and as per the "Principles of Interpretation" **Para 1.2(d) (Pg-193, Vol-II)** the words importing Singular shall include plural & vice versa, hence 'Lenders' may be interpreted as a Lender i.e. IDBI Bank.


20. Apparently, a trustee is appointed to hold the trust property for the benefit of the beneficiaries of the trust, who have a beneficial interest in the trust property. Where, there are multiple beneficiaries, the trustee is bound to execute the trust for the benefit of all the beneficiaries in accordance with the Trust Deed only after taking consent of other co-lenders. This clause was apparently incorporated with an intent to save the guarantor from being harassed at the hands of unscrupulous individual lender. In the matter in hand, there were other banks which extended loan facilities to corporate debtor apart from the applicant bank although it was having major share in comparison to other co-lenders. The security agreement clearly lays down **Lenders shall mean collectively the refinancing lenders and the RTL facility Lenders (Vol-IV, Pg-560)**. The, word "lender" herein cannot be interpreted to be used as plural, once all the lenders to be taken as collectively. Hence, all the bankers must decide together to revoke the

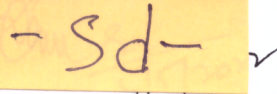
guarantee. In the absence of the same, an individual Beneficiary (such as the Applicant Bank) was under obligation to take consent of co-lenders/beneficiaries.

21. No doubt, the deed of personal Guarantee has been executed by Mr. Manoj Gaur, (the Respondent) in favour of IDBI Trusteeship Services Limited as the Security Trustee, but we are unable to agree with the contention raised by the Applicant Bank that IDBI can act on behalf of all the Lenders without obtaining their formal consent and it can act in place of the Security Trustee. The invocation of Personal Guarantee and the application under Section 95 can be maintained by Security Trustee as per the clause laid down in the deed of Personal Guarantee dated May, 25, 2015. The Applicant Bank neither can itself invoke the Personal Guarantee, accordingly, nor can maintain the application under Section 95 against personal guarantor Mr. Manoj Gaur.

22. Resultantly, we hold that the present application under Section 95 on behalf of the applicant bank is not maintainable, **accordingly, the same stands dismissed, with no order as to costs.**

File be consigned to records.


AVINASH KUMAR SRIVASTAVA
MEMBER (TECHNICAL)


DHARMINDER SINGH
MEMBER (JUDICIAL)