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IN THE HIGH COURT OF DELHI AT NEW DELHI

CIVIL EXTRAORDINARY JURISDICTION

WRIT PETITION (CIVIL) No. \_\_\_\_\_ OF 2020

IN THE MATTER OF:

LALIT KUMAR JAIN

...PETITIONER

VERSUS

UNION OF INDIA & ORS.

...RESPONDENTS

A WRIT PETITION UNDER ARTICLE 226 OF THE  
CONSTITUTION OF INDIA SEEKING A WRIT, ORDER OR  
DIRECTION DECLARING AS UNCONSTITUTIONAL AND  
STRIKING DOWN(A) THE NOTIFICATION BEARING S.O.  
4126 (E) DATED 15.11.2019 ISSUED BY RESPONDENT  
NO. 2; (B)THE INSOLVENCY AND BANKRUPTCY  
(APPLICATION TO ADJUDICATING AUTHORITY FOR  
INSOLVENCY RESOLUTION PROCESS FOR PERSONAL  
GUARANTORS TO CORPORATE DEBTORS) RULES, 2019  
AND (C) THE INSOLVENCY AND BANKRUPTCY BOARD  
OF INDIA (APPLICATION TO ADJUDICATING AUTHORITY  
FOR INSOLVENCY RESOLUTION PROCESS FOR  
PERSONAL GUARANTORS TO CORPORATE DEBTORS)  
REGULATIONS, 2019AND CONSEQUENTIAL RELIEFS

To,

THE HON'BLE CHIEF JUSTICE  
AND HIS COMPANION JUDGES OF THE  
HON'BLE HIGH COURT OF DELHI

THIS HUMBLE PETITION OF THE PETITIONER  
ABOVE-NAMED

MOST RESPECTFULLY SHEWETH:

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1. The Petitioner is filing the present writ petition seeking a writ, order or direction declaring as unconstitutional and striking down the Notification bearing S.O. 4126 (E) dated 15.11.2019 (hereinafter called "**the Impugned Notification**") and the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 (hereinafter called "**the Impugned Rules**") issued by Respondent No. 2; and the Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Regulations, 2019 (hereinafter called "**the Impugned Regulations**") issued by Respondent No. 4, for being *ultra vires* the Insolvency and Bankruptcy Code, 2016 (hereinafter called "**the Code**") and violative of Article 14 of the Constitution of India and for consequential reliefs.
2. The Petitioner was the Managing Director of Lakshmi Precision Screws Limited until its Board of Directors was suspended pursuant to the Orders passed by the Hon'ble NCLT, Chandigarh admitting insolvency proceedings against Lakshmi Precision Screws Limited under the Code. The Petitioner had stood as surety in his personal capacity for certain loans taken by Lakshmi Precision Screws Limited from Intec Capital Limited. The said company, while having submitted its claim against Lakshmi Precision Screws Limited before the IRP, which claim stands partly admitted, has simultaneously initiated insolvency proceedings against the Petitioner pursuant to the Impugned Notification, Rules and Regulations. Whilst reserving

his right to contest the proceedings initiated by Intec Capital Limited on merits before the appropriate forum, the Petitioner is constrained to file the present writ petition challenging the constitutional validity of the Impugned provisions, Notification, Rules and Regulations on several grounds, including on the ground of manifest arbitrariness and violation of Article 14 of the Constitution of India.

3. The factual conspectus leading to the filing of the present writ petition is as follows :

**FACTUAL BACKGROUND**

**A. Insolvency Proceedings against the Principal Debtor**

4. The Petitioner, being the Managing Director and shareholder of Lakshmi Precision Screws Limited to the extent of 10.60%, stood as personal guarantor for three loans of Rs. 2, 14, 00, 000/-, Rs. 2, 95, 00, 000/- and Rs. 1, 36, 05, 400/-, availed by Lakshmi Precision Screws Limited from Intec Capital Limited for the purpose of buying machinery and equipment for the Company by way of Loan Agreement No. LNGGN01112-130001846 (Agreement No. 12/538) dated 30.11.2012, LNGGN00612-130002111 (Agreement No. 012/810) dated 28.02.2013 and LNGGN02714-150004078 dated 28.06.2014 respectively. True Copy of Loan Agreements bearing LNGGN01112-130001846 dated 30.11.2012, LNGGN00612-130002111 dated 28.02.2013 and LNGGN02714-150004078 dated 28.06.2014 are attached herewith as **ANNEXURE-P-1 (COLLY)**. True Copy of Deed of Guarantees/Guarantee Agreement dated 30.11.2012, 28.02.2013 and 28.06.2014 are annexed herewith as **ANNEXURE-P-2(COLLY)**.

5. In the year 2018, one of the operational creditors of Lakshmi Precision Screws Limited, i.e. Hind Tradex Ltd, filed an insolvency application under Section 9 of the Code, before the Hon'ble National Company Law Tribunal, Chandigarh Bench. The Insolvency Application was admitted by the Hon'ble National Company Law Tribunal on 18.07.2018. True Copy of Order dated 18.07.2018 passed by the Hon'ble NCLT, Chandigarh Bench in CP (IB) No. 155/Chd/Hry/2018 is annexed herewith as **ANNEXURE-P-3.**
6. Thereafter, vide Order dated 24.07.2018, Mr. Deepak Thukral was appointed as the Insolvency Resolution Professional (hereinafter called "the IRP") for conducting the Corporate Insolvency Resolution Process (CIRP) of Lakshmi Precision Screws Limited. True Copy of Order dated 24.07.2018 passed by the Hon'ble NCLT, Chandigarh Bench in CP (IB) No. 155/Chd/Hry/2018 is annexed herewith as **ANNEXURE-P-4.**
7. Pursuant thereto, a Committee of Creditors was constituted by the IRP in terms of Section 21 of the Code, which comprised of all financial creditors of the Principal Debtor. Intec Capital Limited is also a part of the Committee of Creditors.
8. In the Corporate Insolvency Resolution Process against the Principal Debtor, Intec Capital Limited made a claim of Rs. 13, 071, 710/- with Rs. 6, 198, 650/- as interest, which was admitted by the IRP to the extent of Rs. 1, 93, 45, 360/- in the List of Financial Creditors issued by him. True Copy of List of Financial Creditors issued by the IRP of Principal Debtor is annexed herewith as **ANNEXURE-P-5.**



9. The Insolvency proceedings against Laxmi Precision Screws Ltd. are currently pending before the Hon'ble NCLT, awaiting consideration by the NCLT of the resolution plan approved by the Committee of Creditors.

**B. Issuance of the Impugned Notification, Rules and Regulations**

10. On 15.11.2019, Respondent No. 2, in violation of the limited power conferred on it by the proviso to Section 1 (3) of the Code, issued a notification bearing S.O. 4126 (E), notifying that the following provisions of the Code will come into force from 01.12.2019 *only in so far as they relate to personal guarantors to corporate debtors*: Clause (e) of Section 2, Section 78 (except with regard to fresh start process) and Section 79, Section 94 to 187 (both inclusive), Clause (g) to Clause (i) of sub-section (2) of Section 239, Clause (m) to (zc) of sub-section (2) of Section 239, Clause (zn) to Clause (zs) of sub-section (2) of Section 239 and Section 249. True Copy of Notification bearing S.O. 4126 (E) dated 15.11.2019 issued by Respondent No.2 is annexed herewith as **ANNEXURE-P-6**
11. In pursuance of the unlawful notification dated 15.11.2019, the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process of Personal Guarantors to Corporate Debtors) Rules, 2019 were framed by Respondent No. 2, and notified to come into effect from 01.12.2019. True Copy of Notification bearing G.S.R. 854 (E) dated 15.11.2019 issued by Respondent No.2 is annexed herewith as **ANNEXURE-P-7.**

12. Thereafter, Respondent No. 4, on 20.11.2019, issued a Notification bearing No. IBBI/2019-20/GN/REG-050, publishing the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Regulations, 2019, with effect from 01.12.2019. True Copy of Notification bearing No. IBBI/2019-20/GN/REG-050 dated 20.11.2019 issued by Respondent No. 4 is annexed herewith as **ANNEXURE-P-8**.
13. It is respectfully submitted that to the best of the Petitioner's knowledge, the impugned rules and the impugned regulations have not been laid before Parliament as required under Section 241 of the Code.

**C. Invocation of the Impugned provisions against the Petitioner**

14. In complete disregard to its claim against the principal debtor, Intec Capital Ltd. has issued a totally unlawful Demand Notice dated 05.06.2020 under Rule 7(1) of the Impugned Rules, demanding an amount of Rs. 2, 77, 61, 648/- from the Petitioner for failure on the part of Lakshmi Precision Screws Limited (Principal Debtor) to repay the loan amount under Loan Agreement No. LNGGN01112-130001846 dated 30.11.2012, Loan Agreement No. LNGGN00612-130002111 dated 28.02.2013 and Loan Agreement No. LNGGN02714-150004078 dated 28.06.2014 by invoking the Personal Guarantees. True Copy of Demand Notice dated 05.06.2020 issued by Intec Capital Limited to the Petitioner is annexed herewith as **ANNEXURE-P-9**. The amount claimed against

the petitioner is higher than the amount claimed by it before the IRP of the Principal Debtor in the Insolvency Proceedings.

15. On receipt of the aforesaid notice, the Petitioner responded to it vide Reply dated 09.07.2020. In its Reply, the Petitioner mentioned that the liability of the guarantor is co-extensive with that of the borrower, and since Intec Capital Limited is expected to recover majority of its dues from Lakshmi Precision Screws Limited on account of the fact that its claim to the tune of Rs. 1, 93, 45, 360/- has been admitted by the Resolution Professional, the Demand Notice issued by it was false and frivolous and an attempt to illegally extract money from the Petitioner. More so, when a resolution plan had already been framed by a Resolution Applicant and was pending approval of the Hon'ble NCLT, Chandigarh. True Copy of Reply dated 09.07.2020 issued by the Petitioner to Intec Capital Limited is annexed herewith as **ANNEXURE-P-10**.
16. It is submitted that the petitioner reserves its right to contest on merits the proceedings that may be initiated against him before the Hon'ble NCLT under Section 95 of the Code.
17. However, in view of the fact that the insolvency proceedings against the petitioner have been initiated pursuant to the impugned notification, rules and regulations, which are unconstitutional and *ultra vires* the Insolvency and Bankruptcy Code, 2016, and that the petitioner cannot challenge the validity of the impugned provisions before the Hon'ble NCLT, the petitioner is constrained to file the present petition before this Hon'ble Court.

18. It is respectfully submitted that the Impugned Notification, the provisions of the Code brought into force from 01.12.2019, the impugned Rules and the Impugned Regulations are unlawful, arbitrary, unconstitutional and deserve to be struck down on the following

**GROUND**

- (A) **FOR THAT** as per the proviso to Section 1(3) of the Code, Parliament has delegated the power to enforce different provisions of the Code at different points in time to the Central Government. Section 1(3) reads as under:

*“It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint:*

*Provided that different dates may be appointed for different provisions of this Code and any reference in any such provision to the commencement of this Code shall be construed as a reference to the commencement of that provision.”*

It is respectfully submitted that the power delegated under Section 1(3) is only as regards the point(s) in time when different provisions of the Code can be brought into effect. It does not permit the Central Government to notify parts of provisions of the Code, or to limit the application of the provisions to certain categories of persons.

However, in the impugned Notification dated 15.11.2019, the Central Government has notified various provisions of the Code *only in so far as they relate to personal guarantors to corporate debtors*. Thus, the Notification dated 15.11.2019 is patently *ultra vires* the proviso to Section 1(3) of the Code.

- (B) **FOR THAT** the provisions of the Code brought into effect by the notification dated 15.11.2019 are not severable, in the sense that they do not specifically or separately deal with or govern insolvency proceedings against personal guarantors to corporate debtors. The provisions only deal with individuals and partnership firms. From a bare reading of the provisions it is not possible to carve out a limited application of the provisions only in relation to personal guarantors to corporate debtors. Thus, the unlawful attempt of the Central Government to enforce Sections 78, 79, 94 to 187, etc. only in relation to personal guarantors to corporate debtors is an exercise of legislative power by the Central Government, which is wholly impermissible in law. The same amounts to an unconstitutional usurpation of legislative power by the executive.
- (C) **FOR THAT** the Impugned Notification dated 15.11.2019 is manifestly arbitrary and suffers from complete non-application of mind, insofar as it purports to bring into effect Section 2(e) of the Code with effect from 01.12.2019. In fact, Section 2(e) of the Code, as amended by Act 8 of 2018, had already come into force with retrospective effect from 23.11.2017. This is duly noted by the Hon'ble Supreme Court in the case of **SBI v. V. Ramakrishnan, (2018) 17 SCC 394**, where it records in para 13, "*Though the original Section 2(e) did not come into force at all, the substituted Section 2(e) has come into force w.e.f. 23.11.2017.*" True Copy of Act No. 8 of 2018 dated 19.01.2018 issued by Respondent No.1 is attached



herewith as **ANNEXURE-P-11**. Therefore, the Notification dated 15.11.2019 deserves to be set aside.

- (D) **FOR THAT** the Impugned Notification dated 15.11.2019 is manifestly arbitrary and suffers from complete non-application of mind, insofar as the Central Government has failed to bring into effect Section 243 of the Code, which would have repealed the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920. Prior to issuance of the notification dated 15.11.2019, insolvency proceedings against an individual could be initiated only in terms of the aforesaid two Acts. After enactment of the Code, insolvency proceedings against personal guarantors to corporate debtors would lie before the Hon'ble NCLT, in terms of Section 60 of the Code, although they would be governed by the aforesaid two Acts (See ***SBI v. V. Ramakrishna, (2018) 17 SCC 394, Para 24***).

With the enforcement of the impugned provisions, rules and regulations, insolvency proceedings can now be initiated against personal guarantors to corporate debtors under Part III of the Code, and also under the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920 since Section 243 of the Code has not been brought into force. Thus, the impugned notification dated 15.11.2019 has the absurd effect of creating two self-contradictory legal regimes for insolvency proceedings against personal guarantors to corporate debtors. This is contrary to the legislative intent of repealing the Presidency Towns Insolvency Act, 1909 and

the Provincial Insolvency Act, 1920, which is clear from Section 243 of the Code. Accordingly, the notification dated 15.11.2019 is arbitrary and liable to be set aside.

- (E) **FOR THAT** the impugned Notification dated 15.11.2019 is *ultra vires* the provisions of the Insolvency and Bankruptcy Code, 2016 insofar as it purports to notify provisions of part III of the Code in respect of personal guarantors to corporate debtors. It is submitted that Part III of the Code governs "*Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms*". Part III does not anywhere deal with a personal guarantor of a corporate debtor. Further, Section 2(g) of the Code defines an individual to mean "*individuals, other than persons referred to in clause (e)*". Clause (e) of Section 2 relates to personal guarantors to corporate debtors. Thus, a combined reading of Section 2(e) with Section 2(g) and Part III of the Code would show that personal guarantors to corporate debtors are not covered by Part III of the Code. Part III of the Code deals only with individuals and partnership firms, and personal guarantors to corporate debtors stand specifically excluded from the definition of individuals. This is further apparent from Section 95 of the Code, which permits a creditor to invoke insolvency resolution process against an individual only in relation to a partnership debt. Section 95 reads as follows:

**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."

Thus, there is no provision in Part III of the Code which permits the initiation of the insolvency resolution process against a personal guarantor to a corporate debtor. Accordingly, the Notification dated 15.11.2019, which alludes to the contrary, is *ultra vires* and liable to be set aside.

- (F) **FOR THAT** Rule 7 read with Rule 3(e) of the Impugned Rules are *ultra vires* Section 95 of the Code for the reason that they purport to

permit a demand notice and application under Section 95 to be issued against a guarantor, which is defined under Rule 3(e) as a debtor who is a personal guarantor to a corporate debtor. In so doing, Rule 7 read with Rule 3(e) is contrary to and *ultra vires* Section 95 of the Code, which only permits the creditor to apply under Section 95(1) in respect of a partnership debt. Thus, since Section 95 does not permit any application to be filed against a personal guarantor to a corporate debtor, Rule 7 and Rule 3(e) which provide to the contrary are *ultra vires* and liable to be set aside.

- (G) **FOR THAT** the demand notice dated 05.06.2020 issued under Rule 7(1) of the Impugned Rules against the petitioner is wholly without jurisdiction, being based on a patently unconstitutional and unlawful Rule, which is contrary to the provisions of Section 95 of the Code.
- (H) **FOR THAT** the provisions of the Code brought into effect by the Notification dated 15.11.2019 [Clause (e) of Section 2, Section 78 (except with regard to fresh start process), Section 79, Section 94 to 187 (both inclusive), Clause (g) to Clause (i) of sub-section (2) of Section 239, Clause (m) to (zc) of sub-section (2) of Section 239, Clause (zn) to Clause (zs) of sub-section (2) of Section 239 and Section 249] read with the impugned Rules and the impugned regulations, when enforced only in respect of personal guarantors to corporate debtors, are manifestly arbitrary and violative of Article 14 for the following reasons:



- (i) There is no intelligible differentia or rational basis on which personal guarantors to corporate debtors have been singled out for being covered by the impugned provisions, particularly when the provisions of the Code do not separately apply to one sub-category of individuals, i.e., personal guarantors to corporate debtors. Rather, Part III of the Code does not apply to personal guarantors to corporate debtors at all.
- (ii) The provisions of Part III of the Code, which are partly brought into effect by the impugned notification dated 15.11.2019, provide a single procedure for the insolvency resolution process of a personal guarantor, irrespective of whether the creditor is a financial creditor or an operational creditor. Treating financial creditors and operational creditors on an equal footing in Part III of the Code is in contrast to Part II of the Code, which provides different sets of procedure for different class of creditors. In ***Swiss Ribbons (P) Ltd. vs. Union of India***, (2019) 4 SCC 17, the Hon'ble Supreme Court has upheld the difference in procedure for operational creditors and financial creditors on the basis of inherent differences between the two classes of creditors, which require them to be treated separately. It was held by the Hon'ble Supreme Court as follows:

*"50. According to us, it is clear that most financial creditors, particularly banks and financial institutions, are secured creditors whereas most operational creditors are unsecured, payments for goods and services as well as payments to workers not being secured by mortgaged documents and the like. The distinction between secured and unsecured creditors*



is a distinction which has obtained since the earliest of the Companies Acts both in the United Kingdom and in this country. Apart from the above, the nature of loan agreements with financial creditors is different from contracts with operational creditors for supplying goods and services. Financial creditors generally lend finance on a term loan or for working capital that enables the corporate debtor to either set up and/or operate its business. On the other hand, contracts with operational creditors are relatable to supply of goods and services in the operation of business. Financial contracts generally involve large sums of money. By way of contrast, operational contracts have dues whose quantum is generally less. In the running of a business, operational creditors can be many as opposed to financial creditors, who lend finance for the set up or working of business. Also, financial creditors have specified repayment schedules, and defaults entitle financial creditors to recall a loan in totality. Contracts with operational creditors do not have any such stipulations. Also, the forum in which dispute resolution takes place is completely different. Contracts with operational creditors can and do have arbitration clauses where dispute resolution is done privately. Operational debts also tend to be recurring in nature and the possibility of genuine disputes in case of operational debts is much higher when compared to financial debts. A simple example will suffice. Goods that are supplied may be substandard. Services that are provided may be substandard. Goods may not have been supplied at all. All these qua operational debts are matters to be proved in arbitration or in the courts of law. On the other hand, financial debts made to banks and financial institutions are well-documented and defaults made are easily verifiable.

**51.** Most importantly, financial creditors are, from the very beginning, involved with assessing the viability of the corporate debtor. They can, and therefore do, engage in restructuring of the loan as well as reorganization of the corporate debtor's business when there is financial stress, which are things operational creditors do not and cannot do. Thus, preserving the corporate debtor as a going concern, while ensuring maximum recovery for all creditors being the objective of the Code, financial creditors are clearly different from operational creditors and therefore, there is obviously an intelligible differentia between the two which has a direct relation to the objects sought to be achieved by the Code."

Thus, the act of clubbing financial creditors and operational creditors in relation to procedure for insolvency resolution of Personal Guarantors to Corporate Debtors amounts to treating unequals equally and amounts to collapsing the classification that is carefully crafted by the Legislature in Part II of the Code. The same is therefore manifestly arbitrary and violative of Article 14 of the Constitution.

- (iii) Sections 96 and 101 of the Code when applied in the manner enforced by the notification dated 15.11.2019 are manifestly arbitrary as they result in the absurd consequence of staying the insolvency proceedings against the corporate debtor, as soon as insolvency proceedings are initiated against the personal guarantor. Section 96 of the Code envisages an interim-moratorium in relation to the debt immediately on filing of an insolvency application before the Adjudicating Authority, while Section 101 envisages a moratorium on admission of the application by the Hon'ble NCLT. Under both provisions, all pending proceedings or legal actions in respect of the debt are deemed to have been stayed, and no new proceedings in respect of the debt can be initiated.

Since the 'debt' for which insolvency proceedings are initiated against the personal guarantor is indeed the 'debt' of the Corporate Debtor (Principal Debtor), all legal proceedings with respect to the said 'debt' against Corporate Debtor, including the corporate insolvency resolution process against the Corporate Debtor, are deemed to have been stayed. This is a

totally absurd consequence arising out of the application of Part III of the Code to personal guarantors of corporate debtors, which could never have been the intent of the legislature.

Therefore, it is respectfully submitted that the impugned notification, provisions, rules and regulations are manifestly arbitrary and violative of Article 14 of the Constitution.

- (I) **FOR THAT** a combined reading of Sections 99 and 100 of the Code, read with Regulation 7 of the Impugned Regulations shows that the resolution professional, while recommending the approval / rejection of the application, and the Tribunal while accepting the same, are not required to consider whether the underlying debt owed by the corporate debtor to the creditor stands satisfied or extinguished. Thus, it is possible, under the provisions brought into effect by the notification dated 15.11.2019 and the Rules and Regulations framed in consequence thereof, for a creditor to successfully initiate insolvency proceedings against a personal guarantor of a corporate debtor, when it has already made a claim against the corporate debtor (as in the petitioner's case) or when it has no subsisting right to make a claim against the corporate debtor.

Insofar as the impugned provisions, rules and regulations enable a creditor to initiate insolvency proceedings against a personal guarantor of a corporate debtor irrespective of the fact that in respect of the same debt, proceedings against the corporate debtor have been initiated under Part II of the Code is totally unjust, arbitrary and violative of Article 14 of the Constitution.

It is settled law that the liability of a guarantor is co-extensive with that of the principal debtor (Section 128 of Indian Contract Act, 1872). Further, it is settled law that upon conclusion of insolvency proceedings against a principal debtor, the same amounts to extinction of all claims against the principal debtor, except to the extent admitted in the insolvency / liquidation process itself. This is clear from Section 31 of the Code, which makes the resolution plan approved by the Hon'ble NCLT binding on the corporate debtor, its creditors and its guarantors. The Hon'ble Supreme Court, in the case of ***Committee of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta***, 2019 SCC OnLine SC 1478, has held that “Section 31(1) of the Code makes it clear that once a resolution plan is approved by the Committee of Creditors it shall be binding on all stakeholders... This is for the reason that this provision ensures that the successful resolution applicant starts running the business of the corporate debtor on a fresh slate...” [Para 86] and that “All claims must be submitted to and decided by the resolution professional so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor. This the successful resolution applicant does on a fresh slate...” [Para 88].

It is therefore respectfully submitted that once an approved resolution plan in respect of the corporate debtor amounts to extinction of all outstanding claims against the corporate debtor, the liability of the guarantor, which is co-extensive with that of the corporate debtor, would also be extinguished.



This is more particularly so because under Part II of the Code, the resolution plan approved in respect of the corporate debtor may well include provisions as to payments to be made by the guarantor. That is the reason that Annexure VI(E) to Form 6 contained in Regulation 36(2) of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2016 requires information as to personal guarantees that have been given in relation to the debts of the corporate debtor. This position has been approved by the Hon'ble Supreme Court in ***SBI v. V. Ramakrishna*, (2018) 17 SCC 394, Para 25**.

Thus, in view of the fact that:

- (a) a duly approved resolution plan amounts to extinguishment of all claims against the corporate debtor, and
- (b) the resolution plan can require personal guarantors to a corporate debtor to make payments in respect of its dues, and
- (c) the liability of a guarantor is co-extensive with that of a principal debtor,

it is respectfully submitted that the impugned provisions, rules and regulations, insofar as they permit initiation of insolvency process against a personal debtor irrespective of the status of the proceedings against the principal corporate debtor are manifestly arbitrary and illegal. Reliance in this regard is placed on the judgment of Hon'ble Punjab and Haryana High Court in the case of ***Kundanlal Dabriwala v. Haryana Financial Corporation*, (2012)**



**171 Comp Cas 94**, where it was held that “*on a fair reading of the provisions of the Contract Act, I am inclined to hold that as the liability of the surety is co-extensive with that of the principal debtor, if the latter’s liability is scaled down in an amended decree, or otherwise extinguished in whole or in part by statute, the liability of the surety also is pro tanto reduced or extinguished.*” Reliance is also placed on the judgment of the Hon’ble NCLAT in the case of ***Dr. Vishnu Kumar Agarwal v. Piramal Enterprises Ltd., 2019 SCC Online NCLAT 542***, where it was held that “*for the same set of debt, claim cannot be filed by same financial creditor in two separate corporate insolvency resolution processes.*”

- (J) **FOR THAT** the Impugned provisions, rules and regulations create a situation where the creditor can unjustly enrich itself by making a claim in the Insolvency Process of the Guarantor without accounting for the amount realized by it in the Corporate Insolvency Resolution Process of the Corporate Debtor under Part II of the Code. Therefore, the impugned provisions, rules and regulations are unlawful.
- (K) **FOR THAT** the Impugned Rules, being a subordinate piece of legislation, could not have traversed beyond the parent statute in defining the term “guarantor” as ‘a debtor who is a personal guarantor to a corporate debtor and in respect of whom guarantee has been invoked by the creditor and remains unpaid in full or part’ when there is no definition whatsoever in the parent statute which defines the term “guarantor”. It is pertinent to note that Section 239

(1) of the Code, although empowers Respondent No. 1 to make rules to carry out the provisions of the Code, the Rules framed thereunder cannot define a term that is not defined in the Code, when the same is likely to result in class legislation for one category of guarantors, i.e., Personal Guarantors to Corporate Debtors. Therefore, the Impugned Rules insofar as they amount to making a class legislation with respect to Personal Guarantors to Corporate Debtor are *ultra vires* the Parent Statute and are liable to be struck down.

19. That the present writ petition raises the following SUBSTANTIAL QUESTIONS OF LAW:

- I. Whether the enforcement of Sections 78, 79, 94 to 187, etc. of the Insolvency and Bankruptcy Code, 2016 only in relation to personal guarantors to corporate debtors is *ultra vires* the power conferred on the Central Government under Section 1 (3) of the Code?
- II. Whether Respondent No. 2 could have partially enforced certain provisions of Part III of the Code by making them applicable only to Personal Guarantors to Corporate Debtors when the Legislature had enacted them as a whole for all Individuals and Firms?
- III. Whether Part III of the Insolvency and Bankruptcy Code can apply to personal guarantors to corporate debtors, by way of a Notification issued under Section 1(3), and Rules framed under Section 239 of the Code?

- IV. Whether Sections 95, 96, 99, 100 and 101 of the Insolvency and Bankruptcy Code, 2016, if applied to personal guarantors to corporate debtors, are manifestly arbitrary and deserve to be struck down?
  - V. Whether Rule 7 read with Rule 3(e) of the 2019 Rules is *ultra vires* Section 95 of the Code?
  - VI. Whether Sections 95, 99 and 100 are manifestly arbitrary and unconstitutional insofar as they treat financial creditors and the operational creditors on an equal footing as regards the procedure for insolvency resolution of a personal guarantor of a corporate debtor?
  - VII. Whether Sections 96 and 101, when applied to personal guarantors of corporate debtors, are manifestly arbitrary resulting in absurd consequences?
20. The petitioner submits that he does not have any alternative remedy except to approach this Hon'ble Court by way of the present writ petition.
  21. This Hon'ble Court has the territorial jurisdiction to entertain the present writ petition, since the petitioner resides in Delhi, and the Impugned Notification, Rules and Regulations have been passed by the Respondents having their principal place of business in Delhi.
  22. The Petitioner has not filed any other petition seeking the same/similar relief.

PRAYER

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In view of the facts and circumstances stated hereinabove, it is most respectfully prayed that this Hon'ble Court may graciously be pleased to:-

- (a) Issue a writ, order or direction declaring as unconstitutional and striking down the Notification bearing S.O. 4126(E) dated 15.11.2019 issued by Ministry of Corporate Affairs, Government of India; AND
- (b) Issue a writ, order or direction declaring as unconstitutional and striking down Sections 95, 96, 99, 100 and 101 of the Insolvency and Bankruptcy Code, 2016, insofar as they apply to personal guarantors of corporate debtors; AND
- (c) Issue a writ, order or direction declaring as unconstitutional and striking down the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 issued by way of notification bearing G.S.R. 854 (E) dated 15.11.2019 issued by Ministry of Corporate Affairs, Government of India; AND
- (d) Issue a writ, order of direction declaring as unconstitutional and striking Rules 7 and 3(e) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019, being *ultra vires* Section 95 of the Code; AND

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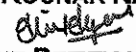
- (e) Issue a writ, order or direction declaring as unconstitutional and striking down the Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Regulations, 2019 issued by way of notification No.IBBI/2019-20/GN/REG050 dated 20.11.2019 issued by Insolvency and Bankruptcy Board of India; AND
- (f) Hold and declare that the Demand Notice dated 05.06.2020 issued by Intec Capital Limited to the Petitioner under Rule 7(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 is without jurisdiction, being issued pursuant to an unlawful provision; and
- (g) Grant such other reliefs as this Hon'ble Court may deem fit and proper in light of the facts and circumstances of the case.

AND FOR THIS KINDNESS THE PETITIONER AS IN DUTY BOUND SHALL EVER PRAY.



[ PETITIONER ]

NEW DELHI  
DATED: 29.07.2020

FILED BY:  
  
(ROHIT SHARMA) (ROUNAK NAYAK)  
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