



INSOLVENCY & BANKRUPTCY

Financial Creditor Can Change Default Date via Rejoinder Affidavit Under Section 95 Application against Personal Guarantor

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Introduction:

In the case of **Sanjeeb Ranjeet Das v. Punjab National Bank and Anr.**^[1], The Hon'ble NCLAT held that a Financial Creditor through a rejoinder affidavit in the application filed under Section 95 of The Insolvency and Bankruptcy Code, 2016 is permitted to change the date of default against Personal Guarantor. The Financial Creditor is entitled to bring additional documents to supplement the adjudication of the Application. It was also observed that the Adjudicating Authority has provided the Personal Guarantor with many opportunities to file reply and oppose the new date of default provided by the Financial Creditor.

Brief facts of the case:

The Respondent – Punjab National Bank filed an Application under Section 95, sub-section (1) of the I&B Code, 2016 against the Appellant – Sanjeeb Ranjeet Das. The date of default was referred to as 01.12.2015. In that Application the Financial Creditor had relied on a Demand Notice dated 19.02.2022 issued under Section 13, sub-section (2) of the SARFAESI Act, 2002. The Corporate Debtor had filed a reply against the notice under Section 13(2) pleading that the notice cannot be notice for invoking the Personal Guarantee. In the reply, Personal Guarantor had also referred to a Demand Notice dated 22.12.2021, received by the Personal Guarantor.

Rejoinder Affidavit was filed by the Financial Creditor where the Financial Creditor has brought on record the Demand Notice dated 22.12.2021 calling for the Personal Guarantor to make the payment for the outstanding dues. It was further stated that the date of default mentioned as 01.02.2015 is in respect of the Corporate Guarantor and date of default in respect of Personal Guarantor is 22.12.2021. The Adjudicating Authority heard both parties on 03.05.2024 and Allowed the Financial Creditor to amend the date of default as mentioned in the rejoinder and provided liberty to Personal Guarantor to file a reply opposing the new date of default. The Appellant aggrieved by the order filed an Appeal before the Tribunal.

Contentions of both parties:

The Learned Counsel for the Appellant submitted that the Financial Creditor cannot be allowed to change the date of default as mentioned in the Application as it takes away the valuable right of defence available to the Personal Guarantor.

The Learned Counsel for the Respondent contended that the Notice under Section 13(2) was issued to the Corporate Guarantor and the guarantee was invoked vide Notice dated 22.12.2021 which was served on Personal Guarantor. It was submitted that Financial Creditor is fully allowed to bring on additional material on record by means of rejoinder affidavit, filed in reply of the Personal Guarantor which questioned the validity of invocation through Notice under Section 13(2).

Decision of the NCLAT:

The Hon'ble NCLAT considered submissions of learned Counsel for the parties and observed that the Demand Notice dated 19.01.2022 which is part of the Section 95 Application, mentioned date of default as 01.02.2015, was addressed to Guarantors / Mortgagors. The guarantee given was invoked the Guarantors and Mortgagors were asked to pay the outstanding dues. Copy of the said Application was also sent to the Appellant, who was Guarantor. It was clear that the notice addressed to Guarantors and Mortgagors was asking to make the payment as demanded.

The Hon'ble NCLAT further observed that in the reply filed by the Appellant to Section 95 Application, itself referred to Notice dated 22.12.2021. The rejoinder filed by the Financial Creditor brought on record mentioned date of default as to Corporate Guarantor as 01.12.2015 and date of default as to Personal Guarantor as 22.12.2021.

The Hon'ble NCLAT finally observed that the order by the Adjudicating Authority dated 03.05.2024, where the amendment of date of default as pleaded in rejoinder affidavit was permitted with liberty to Personal Guarantor to object the new date of default by filing a reply.

The Hon'ble NCLAT held that the date of default is relevant for determining the limitation period for filing Application under Section 95 for a Court. There is no error in the order of the Adjudicating Authority dated 03.05.2024 and Financial Creditor is permitted to amend the date of default 01.12.2015 which was mentioned in the Section 95 Application and the Notice under Section 13(2) dated 19.01.2022 was the notice to Guarantors and Mortgagors.

The Hon'ble NCLAT further said that it is well settled that parties / Applicants are entitled to bring additional materials on record, which can be accepted by the Adjudicating Authority for adjudication of Application. All disputes are yet to be decided by the Adjudicating Authority, thus, there was no reason to interfere with Order dated 03.05.2024. The impugned order is fully protecting the rights of the Personal Guarantor.

Thus, the Hon'ble NCLAT dismissed the appeal with no order as to costs, as there were no grounds to be entertained.

Conclusion:

While it is well settled that Financial Creditor is permitted to supplement the Application under Section 95 by filing the additional documents, the Personal Guarantor is at the liberty to file a reply to the amended petition and to oppose the new date of default before the Adjudicating Authority. The order allowing the amendment of date of default was without prejudice to the rights and contentions of the Personal Guarantor. The date of default is relevant for determining whether the Application filed under Section 95 is filed within limitation.

[1] Company Appeal (AT) (Insolvency) No. 1278 of 2024