

**IN THE NATIONAL COMPANY LAW TRIBUNAL
COURT-V, NEW DELHI BENCH**

C.P. IB NO. 493/ND/2023

An application under Section 95 of the Insolvency and Bankruptcy Code, 2016

IN THE MATTER OF:

INDIAN BANK

Through Ashish Jindal
Chief Manager, Sam Large Branch, 17,
Parliament Street, New Delhi – 110001.

APPLICANT

VERSUS

SH. NIMIT MAHAJAN

Address: 2, Avenue Casia, Westend
Green, Rajokari, New Delhi-110038.

... PERSONAL GUARANTOR

(Personal Guarantor to Corporate Debtor,
M/s Nimitaya Hotel & Resorts Limited.)

Order Delivered on: 07.05.2024

CORAM:

**SHRI MAHENDRA KHANDELWAL, HON'BLE MEMBER (JUDICIAL)
DR. SANJEEV RANJAN, HON'BLE MEMBER (TECHNICAL)**

Appearances (through Video Conferencing/physical hearing)

For the Applicant : Ms. Reema Khorana, Adv.

For the Respondent : Mr. P. Nagesh, Sr. Adv. with Mr. Kumar Anurag Singh, Mr. Nakul Mohta, Mr. Zain Khan, Mr. Akshay Sharma, Mr. Anish Ahlawat, Ms. Riya Dhingra, Ms. Vidhi Gupta, Advs.

ORDER

PER.: MAHENDRA KHANDELWAL, MEMBER (JUDICIAL)

1. The present Petition **CP (IB) No.493/ND/2023** is filed under section 95 of the Insolvency and Bankruptcy Code, 2016 (**'Code'**) read with rule 7 of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution process for Personal Guarantors to Corporate Debtor) Rules, 2019 (**'Personal Guarantors Rules'**) and regulation 4(2) of IBBI (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Regulations, 2019 (**'Personal Guarantors Regulations'**) filed by Indian Bank, Financial Creditor of Corporate Debtor (i.e M/s Nimitaya Hotel & Resorts Limited) (Applicant) for initiating the Insolvency Resolution Process (**'IR Process'**) against Sh. Nimit Mahajan (Personal Guarantor/Respondent).
2. The Applicant has filed the present petition seeking insolvency resolution process against the Respondent (Personal Guarantor). The petitioners contended that a copy of the application has already been served to the Personal Guarantor and the Corporate Debtor (Principal Borrower) for whom the Guarantor is a Personal Guarantor as per Section 95(5) of The Insolvency and Bankruptcy Code, 2016 read with Rule 7(3) of the Personal Guarantors Rules.
3. The Applicant has proposed the name of Mr. Debashis Nanda, IBBI Registration No.IBBI/IPA-003/IP-N00040/2017-2018/10316, email: dnanda.cma@gmail.com, to act as Resolution Professional. The applicant has filed Authorization for Assignment of the Resolution Professional. Authorization for Assignment is valid till 20.12.2024.
4. The Personal Guarantor (the "Respondent") through its counsel filed its reply and submitted that the aforesaid prayers sought in the present application are not maintainable on the ground of limitation as well as on the ground of non invocation of the personal guarantee and has also referred to the judgment of the High Court of Orissa at Cuttack passed on 27.07.2023 in W.P.(C) No. 49 of

2022 in the matter of *Sandeep Jajodia Vs. IDBI Bank Ltd. and Ors.* and judgment of the Hon'ble Supreme Court of India reported as (2021) 5SCC 705 in the matter of *Secunderabad Cantonment Board Vs. B. Ramachandraiah and Sons. Ld.*

5. Further, the Respondent submitted that the instant petition is premature at this stage of the proceedings, as the I.A. No. 2594 of 2023 in CP(IB) No. 1913 of 2019 is still pending. That the I.A. No. 2594 of 2023 in CP(IB) No. 1913 of 2019 application was filed by the ex-Management of the Corporate Debtor (i.e., M/s Nimitaya Hotel and Resorts Private Limited) against the Settlement Proposal dated 21.03.2023, which was rejected by the Resolution Professional.
6. At this juncture, it is important to refer the recent judgment of the Hon'ble Supreme Court of India in the matter of **Dilip B Jiwrajka Vs. Union of India & Ors.** in Writ Petition (Civil) No. 1281 of 2021 more particularly para nos. 72 & 74 and in terms of para 86 (i), & (iii) no adjudication is involved at the stage of 95-99 (1) Sections. Para 72, 74 & 86 reads as follows:-

72. *We are of the view that the submission that an adjudicatory role should be interposed at the stage of Section 97(5) cannot be accepted. The power which is conferred on the adjudicating authority at the stage of filing of an application is to appoint a resolution professional. The appointment of a resolution professional is for the purpose of a facilitative exercise which is contemplated by Section 99 which, as we have noted, eventually ends in a report either recommending the acceptance or rejection of the application. Bearing in mind the statutory scheme, it would be impermissible for this Court to allow for the adjudicatory intervention of the adjudicating authority in adjudicating what is described as a jurisdictional question at the stage of Section 97(5).*

.....

74. *The true adjudicatory function of the authority commences under Section 100 after the submission of the report. Another reason why we are not inclined to accept the submission is that what is described as a jurisdictional question by the petitioners may not be a simple matter to be decided as a question of law.*

The jurisdictional questions of the nature which have been suggested by the petitioners, namely, on whether there is a subsisting debt or whether the relationship of debtor and creditor subsists, would involve a decision on mixed questions of law and fact. The entire scheme of Sections 99 and 100 implicates time lines which have been laid down by Parliament. The entire process of implementing these time lines would be rendered nugatory if an adjudicatory role were to be read into the provisions of Section 97(5). The final reason which would militate against accepting the submission is that the provisions of Section 99 do not as such implicate any adverse civil consequences particularly if those provisions are read in the manner in which we now propose to elucidate.

86. We summarise the conclusion of this judgment below:

(i) No judicial adjudication is involved at the stages envisaged in Sections 95 to Section 99 of the IBC;

.....

(iii) The submission that a hearing should be conducted by the adjudicatory authority for the purpose of determining 'jurisdictional facts' at the stage when it appoints a resolution professional under Section 97(5) of the IBC is rejected. No such adjudicatory function is contemplated at that stage. To read in such a requirement at that stage would be to rewrite the statute which is impermissible in the exercise of judicial review;

7. The Hon'ble Supreme Court of India in the above referred judgment has further concluded that no judicial adjudication is involved at the stage when it appoints a Resolution Professional u/s 97(5) of IBC. The above mentioned judgment of High Court of Orissa in *Sandeep Jajodia Vs. IDBI Bank Ltd. and Ors.* and the Judgment of Hon'ble Supreme Court in *Secunderabad Cantonment Board Vs. B. Ramachandraiah and Sons* was decided prior to the Supreme Court Judgment in *Dilip B Jiwrajka Vs. Union of India & Ors.* Therefore, in the light of the above judgment of Hon'ble Supreme Court, at this stage, we are unable to consider the issued raised by the Personal Guarantor.

Needless to say, Personal Guarantor may raise all these issues at the time of hearing of admission of Section 95 petition under Section 100 of the Code.

8. The Adjudicating Authority hereby appoints Mr. Debashis Nanda as the Resolution Professional in the matter. The Resolution Professional is to file the Assignment Declaration` within 7 (seven) days from today with the Registry.
9. The Resolution Professional is directed to file his report in terms of Section 99 of the Code and the relevant Regulations within the stipulated time period.
10. A copy of the Report by the resolution professional under Section 99 to be filed shall be forthwith provided to the Personal Guarantor, and Financial Creditors of the Respondent.
11. List the matter on 04.07.2024 for the perusal of the Report of the RP and further proceedings.
12. Let a copy of this order be served to the Resolution Professional and the IBBI.

Sd/-
(DR. SANJEEV RANJAN)
MEMBER (T)

Sd/-
(MAHENDRA KHANDELWAL)
MEMBER (J)