



**ORDER**

**Per: D. Arvind, Member (Technical)**

1. The court is convened through hybrid mode.
2. Learned counsel appearing for the parties were heard in extenso.
3. The application has been preferred to seek following relief:  
The **Tata Capital Financial Services Limited** being Financial Creditor as per section 5(7) of the Insolvency and Bankruptcy Code, 2016 (“code”) requests that the Tribunal under section 95(1) of the Insolvency and Bankruptcy Code, 2016 read with rule 7(2) of the Insolvency and Bankruptcy ( application to Adjudicating Authority for insolvency Resolution Personal Guarantor to Corporate Debtor) Rules, 2019 to initiate insolvency Resolution process in respect of the Personal Guarantor of **Narayani Steels Limited, Bina Choudhary**.
4. The CP (IB) No. 242/KB/2021 has been filed under section 95 of the IBC, 2016 by **Tata Capital Financial Services Limited** for Initiating Insolvency Resolution Process of **Bina Choudhary**, the Personal Guarantor to Corporate Debtor.
5. **Facts in a Nutshell:-**
  - 5.1 The Corporate Debtor is **Narayani Steels Limited** in **CP (IB) No. 986/KB/2020** under section 7 of the IBC filed by **ICICI Bank Limited** against **Narayani Steels Limited**. The CIRP was initiated in **CP (IB) No. 986/KB/2020** on **24<sup>th</sup> March 2021**. **Bina Choudhary** is the Personal Guarantor of **Narayani Steels Limited**.
  - 5.2 This Adjudicating Authority was pleased to pass interim order moratorium against **Bina Choudhary** in CP (IB) No. 242/KB/2021 on 7/10/2021.
  - 5.3 **Mr. Immaneni Eswara Roa** was appointed as RP to file its report under section 99(7) of the IBC , 2016.
6. The Contentions are noted.

7. A Report under section 99 of the code has been prepared and filed by the RP. As per the RP report the total outstanding debt is Rs 13,38,35,376 ( Rs Thirteen Crore thirty eight lakh thirty five thousand three hundred sixty six only) as on 15<sup>th</sup> June 2021. However the applicant i.e Tata Capital Financial Services Limited has received Rs 31,60,000 (Rs Thirty one Lakh sixty thousand) from the approval of Resolution Plan of Corporate Debtor by the Hon'ble NCLT, Kolkata Bench. Therefore, Rs 31,60,000 (Rs Thirty one Lakh sixty thousand) shall be reduced from the total outstanding debt.
8. The Personal Guarantor in his reply affidavit has made the following submission:
- a. That approval of Resolution plan by Adjudicating Authority extinguishes any liability of the Personal Guarantor, which may have been harboured in the past for money borrowed by Corporate Debtor i.e Narayani Steels Private Limited from its lender i.e **Tata Capital Financial Services Limited**. The Personal Guarantor relied on the order dated 11.01.2022 approving the Resolution plan wherein it has been explicitly mentioned under the sub heading "Waiver of liabilities":

***“liabilities claimed by Financial Creditor – approval of Resolution plan will be treated as a specific order to the secured Financial Creditor that all the debts of the lenders be it due and pending on any account, gets fully and finally satisfied and extinguished, in terms of this Resolution plan against all underlying securities of the Corporate Debtor and there remains nothing to be recovered out of such dues, either from the Resolution Applicant, Corporate Debtor or any anyone else against such loans on payment of the Resolution plan payment***

***amount in full to the Financial Creditor.” [ Emphasis Supplied].***

- b. The application of section 95 has filed before the approval of Resolution plan.
  - c. The RP has failed to take into proper account in his report dated 04.03.2022, the Resolution plan approved on 11.01.2022 in respect of the Narayani Steels Limited who is admitted to be the principal borrower in respect of the alleged contract of guarantee alluded by him in the report.
  - d. Hence the report of RP to initiate insolvency Resolution process in respect to the Personal Guarantor is incorrect and liable to be ignored.
  - e. The Respondent specifically denies and dispute any imputation and/or allegation in the said report that she is liable to pay a debt of Rs 13,38,35,376/- less 31,60,000/- or any part thereof to the Financial Creditor/ applicant as nothing is due and payable by the Personal Guarantor to Financial Creditor.
9. RP has Referred to and examined the following: -
- a. The debt owned by the debtor to the creditor as on the date of the application i.e 29<sup>th</sup> July 2021.
  - b. Copy of demand Notice In form B dated 29<sup>th</sup> June 2021 received by Bina Choudhary on 1<sup>st</sup> July 2021.
  - c. The failure by the debtor to pay the debts within a period of 14 (fourteen) days of the service of the Notice of demand.

**10. Reasons for recommendation by RP:**

- a. The application CP (IB) No. 242/KB/2021 is found to be satisfying all the ingredients of section 95 of IBC, 2016.
- b. No evidence of repayment of debt claimed in section 95 application from Bina Choudhary has been received.

- c. No document whereby the personal guarantee agreement dated **19.02.2016, 18.05.2017 and 21.12.2018** was cancelled by both parties.
- d. No order of court or any other forum whereby the personal guarantee agreement dated **19.02.2016, 18.05.2017 and 21.12.2018** was cancelled or set aside.

**11. Approval of Resolution Plan Order:**

- 11.1 This Adjudicating Authority in **CP (IB) No. 986/KB/2020** vide order dated **11<sup>th</sup> January 2022** has approved Resolution plan of Corporate Debtor.

**12. Analysis and Finding**

- 12.1** We have heard the learned counsel and perused the record.
- 12.2 The Respondent/Personal Guarantor allegation is not supported by material evidence.
- 12.3** The personal guarantee was invoked on by applicant/Financial Creditor on 10.05.2020 and the application was filed on 21.08.2021. Hence, application is filed within the period of Limitation.

We rely on the judgement of **Hon'ble NCLAT in Pooja Ramesh Singh vs SBI Company Appeal (AT)(insolvency) No. 329 of 2023**, wherein Appellant Tribunal has held that the date of Notice to guarantor for repayment has to be treated as notice of default on receipt of such notice the date of default is established. In this case, considering the above judgement of Hon'ble NCLAT this application has been filed within the 3 years from date of the notice and hence not barred by limitation.

We also rely on the judgement of **Lalit Kumar Jain vs Union of India (2021 9 SCC 321)** of Hon'ble Supreme Court, wherein the Supreme Court has held that Personal/ Corporate

guarantor's liability remains unabated even after the Corporate Debtor's liability is extinguished upon the approval of Resolution plan.

**12.4** Accordingly, it is **admitted invoking power u/s. 100 of IBC.**

13. We have noted that Hon'ble Supreme Court in the judgment of Dilip B.Jiwrajka V/s Union of India & amp; Ors. In WP (civil) No. 1281 of 2021 dated 09.11.2023 has upheld the Constitutional Validity of the Sections 94 to 100 and the propositions that can be culled out from the Judgments inter-alia are as follows: -

- I. No judicial adjudication is involved at the stages envisaged in Sections 95 to Section 99 of the IBC;
- II. The Resolution Professional appointed under Section 97 serves a facilitative role of collating all the facts relevant to the examination of the application for the commencement of the insolvency resolution process which has been preferred under Section 94 or Section 95. The report to be submitted to the adjudicatory authority is recommendatory in nature on whether to accept or reject the application;
- III. No adjudicatory function of Adjudicating Authority is contemplated at the admission 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;
- IV. The resolution professional may exercise the powers vested under Section 99(4) of the IBC for the purpose of examining the application for insolvency resolution and to seek information on matters relevant to the application in order to facilitate the submission of the report recommending the acceptance or rejection of the application;

- V. There is no violation of natural justice under Section 95 to Section 100 of the IBC as the debtor is not deprived of an opportunity to participate in the process of the examination of the application by the resolution professional;
- VI. No judicial determination takes place until the adjudicating authority decides under Section 100 whether to accept or reject the application. The report of the resolution professional is only recommendatory in nature and hence does not bind the adjudicatory authority when it exercises its jurisdiction under Section 100;
- VII. The adjudicatory authority must observe the principles of natural justice when it exercises jurisdiction under Section 100 to determine whether to accept or reject the application;
- VIII. The purpose of the interim moratorium under Section 96 is to protect the debtor from further legal proceedings; and
- IX. The provisions of Section 95 to Section 100 of the IBC are not unconstitutional as they do not violate Article 14 and Article 21 of the Constitution.

14. Accordingly, the provisions of Section 100 will come into play.

- I. When the application is admitted under Section 100, a moratorium shall commence in relation to all the debts and shall cease to have effect at the end of the period of one hundred and eighty days beginning with the date of admission of the application or on the date the Adjudicating Authority passes an order on the repayment plan under Section 114, whichever is earlier.
- II. During the moratorium period: -
  - a. Any pending legal action or proceeding in respect of any debt shall be deemed to have been stayed;

- b. The creditors shall not transfer, alienate, encumber or dispose of any of his assets or his legal rights or beneficial interest therein;
- III. Where an order admitting the application under Section 96 has been made in relation to a firm, the moratorium under Sub-Section (1) shall operate against all the partners of the firm.
- IV. The provisions of this Section shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- 15.** List the main **CP (IB) No. 242/KB/2021** for progress report on **1.07.2024**.
16. The Registry is directed to send e-mail copies of the order forthwith to the Board and all the parties and their Ld. Counsel for information and for taking necessary steps.
17. Certified copy of this order may be issued, if applied for, upon compliance of all requisite formalities.

**D. Arvind**  
**Member (Technical)**

**Bidisha Banerjee**  
**Member (Judicial)**

**Signed this, on the 14<sup>th</sup> day of May 2024**

NKS(LRA)