

IN THE NATIONAL COMPANY LAW TRIBUNAL

KOLKATA BENCH, COURT-II

I.A (I.B.C) 751/KB/2022

And

Company Petition (IB) No.648/KB/2020

An application 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 Process for Personal Guarantors to Corporate Debtors) Rules, 2019]

In the matter of:

Punjab National Bank

...FINANCIAL CREDITOR

Versus

Vivek Dugar

...RESPONDENT/PERSONAL GUARANTOR

Coram

Smt. Bidisha Banerjee, Member (Judicial)

Shri. D. Arvind, Member (Technical)

Date of Pronouncement: 8/05/2024

Appearance (via Hybrid Mode)

S. K Dokanai

] For the RP

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 Punjab National Bank 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 rule7(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 **Kohinoor Steel Pvt ltd., Vivek Dugar.**

4. The CP (IB) No. 648/KB/2020 has been filed under section 95 of the IBC, 2016 by Punjab national Bank for Initiating Insolvency Resolution Process of **Vivek Dugar**, the Personal Guarantor to Corporate Debtor.
5. **Facts in a Nutshell:-**

5.1 The Corporate Debtor is **Kohinoor Steel Pvt ltd.** in **CP (IB) No. 82/KB/2019** under section 9 of the IBC filed by **Rahul Carbon Commercials Private Limited** against Kohinoor Steel Pvt ltd. The CIRP was initiated in **CP (IB) No. 82/KB/2019** on **20th November 2019.** **Vivek Dugar** is the Personal Guarantor of **Kohinoor Steel Pvt ltd.**

5.2 Company in which **Vivek Dugar was acting as director as on the date of filing of report is given herein:**

Sl.No	Name of the company	CIN Number
1.	Kahinoor Steel Private Limited	U27109WB2005PTC11723
2.	Kahinoor paper and newsprint private limited	U21019WB2006PTC112244
3.	Kahinoor Power Private limited	U40106WB2008PTC125570

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4.	Kahinoor Pulp and paper private limited	U74999WB2008PTC126964
5.	Transtel Infrastructure limited	U19201WB2005PLC101090

5.3 This Adjudicating Authority was pleased to pass interim order moratorium against **Vivek Dugar** in CP (IB) No. 648/KB/2020 on 02/03/2022.

5.4 **Mr. Sajjan Kumar Dokania** 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, an extract whereof is as under:-

PARTICULARS OF DEBT		
1.	Total debt (including any interest or penalties)	Rs 32,97,81,857.86 Rs. thirty two crore, Ninety seven lakh eighty one thousand eight hundred fifty seven and eighty six paisa) plus interest cost and other charges w.e.f 01.01.2020
2.	Date on which debt was due	30.05.2017
3.	Date on which default occurred	The account was declared NPA with effect from 30 th may 2017.

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4.	Nature of debt	Cash credit hypothecation and term loan Mr. Vivek Dugar is the Personal Guarantor of the loan account of Kohinoor steel private limited for the above loan.
5.	Secured debt including particulars of security held, the date of its creation, its estimated value as Per the creditor (as applicable)	NIL securities of guarantor
6.	Unsecured debt (as applicable)	Rs 32,97,81,857.86 Rs. thirty two crore, Ninety seven lakh eighty one thousand eight hundred fifty seven and eighty six paisa)
7.	Details of retention of title arrangements (if any) in respects of goods to which the debt refers (attach a copy)	Not applicable
8.	Details of any Mutual Credit, Mutual debts or other mutual dealing between the guarantor and the creditor, which may be set-off against the claim (attach proof)	NIL

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9.	Particular of an order of a court, Tribunal, arbitral panel adjudicating on the default , if any (attach a copy of order)	Order dated 20.11.2019 passed in CP (IB) No. 82/KB/2019 by the Hon'ble Tribunal, Kolkata, in the matter of Rahul carbon Commercials Pvt ltd v Kohinoor steels Pvt ltd. True copy of the said order is annexed herewith as Annexure A.
10.	Record of default with the information utility if any (attach a copy)	Not applicable
11.	Provision of law, contract or other document under which the debt has become due	The contract act 1872, Particularly the law relating to guarantee under this act. Copy of agreement of guarantee dated 29.06.2015 executed by Mr Vivek Dugar in Favor of PNB for repayment of the loan interest and cost thereto of the

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		principal borrower namely Kohinoor steel Pvt ltd is attached herewith and marked as Annexure B
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8. The RP has sent a Notice/letter dated 22.12.2021 and email dated 23.12.2021 enquiring under section 99(2) of IBC , with regard to payment if any made to Financial Creditor. (**Annexure “C” of the report**). The RP did not received reply from the Personal Guarantor i.e Vivek Dugar. Despite of giving several opportunities to Personal Guarantor by this Adjudicating Authority vide order dated 16th May 2023 and 26 July 2023, the Personal Guarantor did not appeared.
9. RP has Referred to and examined the following: -
- a. Copy of agreement of guarantee dated 29.06.2015.
 - b. Copy of all loan document of the Corporate Debtor dated 09.06.2015
 - c. Copy of application Notice under section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 dated 11.01.2018.
 - d. Copy of reply Notice under section 13(2) of the SARFAESI, Act 2002 by the Corporate Debtor dated 09.02.2018.
 - e. Copy of Legal Notice through the learned Advocate to the guarantor/ Respondent by invoking the Personal Guarantee dated 25.02.2018.
 - f. Copy of the section 19 application filed before the DRT-1, Kolkata.
 - g. Copy of the Form-B (Demand Notice) dated 27.01.2020.

- h. Audited Balance Sheet of the Corporate Debtor for 31.03.2017.
- i. Audited Balance Sheet of the Corporate Debtor for 31.03.2018.
- j. Copy of the order dated 20.11.2019 for admission in CP (IB) No. 82/KB/2019 before the Hon'ble Tribunal, Kolkata Bench.
- k. Copy of Statement of Account and interest calculations under the Bankers Books of Accounts Evidence Act.

10. Reasons for recommendation by RP:

- a. The application CP (IB) No. 648/KB/2020 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 Vivek Dugar has been received.
- c. No document whereby the personal guarantee agreement dated 29.06.2015 was cancelled by both parties.
- d. No order of court or any other forum whereby the personal guarantee agreement dated 29.06.2015 was cancelled or set aside.

11. Approval of CIRP Order:

- 11.1 This Adjudicating Authority in CP (IB) No. 82/KB/2019 admitted Corporate Debtor into CIRP process 20 November 2019.

12. Analysis and Finding

12.1 We have heard the learned counsel and perused the record.

12.2 The personal guarantee was invoked on by applicant/Financial Creditor on 27.01.2020 and the application was filed on 27.02.2020. 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.

12.3 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;

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- 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. 648/KB/2020** for progress report on **21.06.2024 and I.A (I.B.C) 751/KB/2022** was for taking into consideration report of RP. Hence, **I.A (I.B.C) 751/KB/2022** was **disposed of**.
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 8th day of May 2024

NKS(LRA)