

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH (Court-I)
KOLKATA**

C.P. (IB)/385(KB)2021

*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:

State Bank of India

...FINANCIAL CREDITOR

Versus

Sri Ramesh Kumar Agarwal

...RESPONDENT/PERSONAL GUARANTOR

Date of pronouncement: 22.07.2024

CORAM:

Smt. Bidisha Banerjee, Member (Judicial)

Shri Balraj Joshi, Member (Technical)

Appearance (via video conferencing/physically)

For the Financial Creditor

Mr. Debasish Chakraborti, Adv.

Mr. Snehasish Chakraborty, Adv.

For the Personal Guarantor

Mr. Saurav Jain, Adv.

For the RP

Mr. Ankan Rai, Adv.

O R D E R

Per: Bidisha Banerjee , Member (Judicial)

1. The Court Convened in a hybrid mode.
2. This C.P. (IB)/385(KB)2021 has been preferred by the Financial Creditor to seek initiation of Insolvency Regulation Process against the Respondent Personal Guarantor to Corporate Debtor Rule, 2019 (“Personal Guarantors Rules”) and Regulation 4(2) of IBBI (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Regulations, 2019 (‘Personal Guarantors Regulations’) in terms of Section 99 (1) of the Insolvency and Bankruptcy Code, 2016 read with applicable Regulation of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors), 2016.
3. The amount in default is Rs.144,39,21,465.27/- (Rupees One Hundred and Forty Four Crores Thirty Nine Lacs Twenty One Thousand Four Hundred and Sixty Five and paise Twenty Seven) Only.
4. The application is complete as required under Section 95 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.
5. It is to be noted that Hon’ble Supreme Court in the judgment of **Dilip B. Jiwrajka vs. Union of India & 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*

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- iii. *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;*
- iv. *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;*
- v. *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 CP/IB/337/AHM/2020 12 of 17 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;*
- vi. *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;*
- vii. *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;*
- viii. *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; CP/IB/337/AHM/2020 13 of 17*

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- ix. *The purpose of the interim moratorium under Section 96 is to protect the debtor from further legal proceedings; and*
- x. *The provisions of Section 95 to Section 100 of the IBC are not unconstitutional as they do not violate Article 14 and A.”*

6. The Applicant had proposed the name of the Insolvency Professional for appointment as Resolution Professional. In view of the above, **Mr. Neeraj Kumar Sureka**, IBBI Registration No. **IBBI/IPA-001/IP-P-01539/2019-2020/12517** email- ipneerajsurka@gmail.com was appointed as Resolution Professional, subject to his possessing a valid AFA, in exercise of the power conferred under Section 97 of the IBC, 2016 on this Authority.
7. The Resolution Professional was directed to file declaration within seven days to the effect that he fulfils all the requirements for being appointed as Resolution Professional in the matter which he has given, and to file his report in terms of Section 97 in two weeks.
8. The Resolution Professional **Mr. Neeraj Kumar Sureka** has vide his report dated 05/02/2024 has recommended admission of the personal guarantor in to the Insolvency resolution process. The relevant portion of his report has been extracted and appended below for the sake of convenience.

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III. RESOLUTION PROFESSIONAL'S RECOMMENDATION:

As stated above, the dues claimed by SBI on various occasions have been detailed below:

Date	Occasion	Amount claimed by SBI	Amount claimed up to
15.12.2013	NPA Date	75,99,74,564.80	15.12.2013
19.06.2014	Sec 13(2) notice	88,92,18,922.74	18.06.2014
19.12.2014	O.A. before DRT-I	89,81,69,053.00	06.12.2014
06.07.2021	Demand notice (Form B) to guarantor	144,39,21,465.27	06.01.2021
16.01.2021	Form D to liquidator of ROTL	144,39,21,465.27	06.01.2021
12.11.2021	Sec 95 application CP (IB) No. 385 (KB) 2021	144,39,21,465.27	06.01.2021

The amounts as claimed in Form B, Form D and Sec 95 application can be further classified as below:

Account	Principal	Interest up to 06.01.2021	Amount Outstanding as on 06.01.2021
37561915198	16,68,80,000.80	20,48,35,077.04	37,17,15,077.84
34801410696	52,71,52,560.00	41,93,25,600.87	94,64,78,160.87
37562054033	6,43,68,000.00	6,13,60,226.56	12,57,28,226.56
TOTAL			144,39,21,465.27

As evident from the above facts and information/explanation received by the RP, the RP understands that SBI had claimed an outstanding amount of Rs. 144,39,21,465.27/- up to 06.01.2021 in the demand notice dated 06.07.2021 served in Form B to the guarantor Mr. Ramesh Kumar Agarwal as well as in Form D submitted to the liquidator of ROTL. The claim was admitted in full by the liquidator. Vide email dated 02.04.2022, SBI confirmed



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to have not received any payment towards the outstanding dues from the guarantor Mr. Ramesh Kumar Agarwal and from the liquidation proceeds.

The RP, vide email dated 21.03.2022, 26.03.2022 and 28.03.2022 sent to Mr. Ramesh Kumar Agarwal, sought details of payment, if any, made by him subsequent to the demand notice issued by SBI. Mr. Ramesh Kumar Agarwal, vide his emails dated 26.03.2022 & 28.03.2022, sought 10 days' time to collect and bring together the information. However, the RP granted time only till 29.03.2022. Vide email dated 29.03.2022, Mr. Ramesh Kumar Agarwal informed the RP that State Bank of India had recovered an amount of Rs. 5,44,00,000/- out of the total outstanding amount of Rs. 144,39,21,465.27/- by selling the two mortgaged properties as under:

1. Property sold to Yashika Realty Private Limited for Rs.2,31,00,000/- on 10.11.2016
2. Property sold to Tiger Hill Hotels and Properties Ltd. for Rs. 3,13,00,000/- on 15.10.2018

A copy of emails exchanged with the Guarantor is annexed hereto and marked as ANNEXURE "F".

Thereafter, the RP sought details of adjustment of such recoveries from SBI. SBI informed that the recovery amount of Rs. 3,09,87,000/- (after TDS) from sale of property to Tiger Hill Hotels and Properties Ltd was duly adjusted on 31.10.2018 against the outstanding amount. However, SBI informed that the recovery amount of Rs. 2,31,00,000/- from sale of property to Yashika Realty Private Limited did not pertain to the Corporate Debtor account, instead the same belonged to R. Piyarelal International Pvt. Ltd.

On perusal of records, specifically the revised interest calculation sheet as provided by SBI, the RP observed that sum of Rs. 3,09,87,000/- and sum of Rs. 2,27,03,588/- was credited and debited respectively into two different accounts. The copies of interest calculation sheets as submitted with the section 95 application are annexed hereto and marked as ANNEXURE "G". The RP sought clarification from SBI for such entries. SBI, vide its email dated 22.04.2022, informed the RP that due to inadvertent typing mistake, there has been a wrong calculation of interest, and thereby claim amount. As per



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communication and documents received from the claim amount as on 06.01.2021 should be Rs. 1,45,06,51,498.58 instead of Rs. 1,44,39,21,465.27 (as claimed in Section 95 application). SBI further informed the RP that post write off of the balances, the balances were transferred into new AUCA accounts viz. 34801410696, 37561915198 & 37562054033.

After the correction in interest calculation sheet, the claim can now be classified as under:

Account	Principal	Interest up to 06.01.2021	Adjustment (net)*	Amount Outstanding as on 06.01.2021
37561915198	16,68,80,000.80	21,53,46,853.78	-	38,22,26,834.58
34801410696	52,71,52,560.00	41,55,43,877.44	-	94,26,96,437.44
37562054033	6,43,68,000.00	6,96,43,638.56	(82,83,412.00)	12,57,28,226.56
TOTAL				1,45,06,51,498.58

*Credit- 3,09,87,000.00; Debit-2,27,03,588.00

The copies of rectified interest calculation sheets as provided by SBI by email dated 22.04.2022 and 25.04.2022 are annexed hereto and marked as ANNEXURE "H".

As far as the requirements of section 95 of the Code are concerned, the RP would like to bring to the notice of the Hon'ble Tribunal that the demand notice in Form B dated 06.07.2021 was served upon the guarantor Mr. Ramesh Kumar Agarwal at the address available in the bank records i.e., 5 Gokhel Road, Kolkata - 700 020, West Bengal through speed post. However, the same was returned undelivered quoting "Door Locked / Addressee Absent". A copy of Speed Post Tracking Report is annexed hereto and marked as ANNEXURE "I". As already stated above, the application under section 95 of the Code was then served on to the guarantor Mr. Ramesh Kumar Agarwal electronically as well as physically at his address 5 Gokhel Road, Kolkata - 700 020, West Bengal through speed post. The proof of service has been annexed as ANNEXURE "E".

In the opinion of the RP, the application made by State Bank of India before the Hon'ble National Company Law Tribunal, Kolkata to initiate Insolvency Resolution Process against Mr. Ramesh Kumar Agarwal, the personal guarantor of M/s. Rythem Overseas Trade



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Limited u/s 95 of the Insolvency and Bankruptcy Code, 2016 is **admissible**. **This Hon'ble Tribunal may, upon perusing the facts stated above, pass an appropriate direction on the amount of claim to be admitted.**

The RP hereby mentions that the application satisfies the other requirements set out under section 95 of the Code.

Thus, the Hon'ble NCLT may kindly pass an appropriate order.

Neeraj Kumar Sureka

Neeraj Kumar Sureka

Resolution Professional

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[Corporate Debtor: Rythem Overseas Trade Limited

Reg. No.: IBBI/PA-001/IP-P01539/2019-2020/12517



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9. Vide order dated 2nd July, 2024, Ld. Counsel on both sides were directed to furnish written notes of arguments within three days.

10. The Personal Guarantor by way of Written notes of Arguments has refuted/contradicted the statements of the RP in the following manner:

- I. Ld. Counsel for the petitioner submitted that the Principal borrower had availed diverse loans from the financial creditor from time to time and the personal guarantor had furnished several personal guarantees securing the repayment of such loans availed, last of which was given on 30th March, 2013. The guarantee furnished by the personal guarantor was a continuing one, which was payable on “demand” as apparent from Clauses 1, 13 and 20 of the Deed of Supplemental Guarantee dated 30th March, 2013. By a notice dated 19th June, 2014 the Financial Creditor invoked the Supplemental Deed of Guarantee dated 30.03.2013. The Financial Creditor filed an Original Application being no. 486 of 2014 before the Hon’ble Debts Recovery Tribunal – I which is pending. It is submitted that despite having invoked the supplemental deed of guarantee against the personal guarantor in the 2014, application has been filed by the financial creditor in the year 2021, after a lapse of more than six years. The judgment rendered by the Hon’ble Supreme Court of India in the matter of **Syndicate Bank vs. Channaveerappa Beleri and Others. Reported in (2006) 11 SCC 506, Para-11 and 13** and upheld the judgment rendered by the Hon’ble National Company Law Appellate Tribunal, New Delhi in Company Appeal (AT) (Ins.) no. 329 of 2023, paras 12 to 26. Judgment passed by the Hon’ble National Company Law Tribunal, Ahmedabad Bench in C.P. (IB) No. 238 of 2022, paras 3, 8, 11 and 12. In the said judgment, NCLT , Ahmedabad, dismissed the petition under section 95 of IBC, for being time barred as it was filed after three years from the date of issuance of the first demand notice invoking the deed of guarantee. In so far as the purported acknowledgements of dues of financial creditor appearing in the Balance Sheet of the principal borrower for the financial years ended on 31st March 2015 and 2017 are concerned. It is stated that none of those purported acknowledgements have been made by the personal guarantors and are unilateral acknowledgements made by the principal borrower without obtaining consent from the guarantor.

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II. In **Asset Reconstruction Company (India) Limited Vs. Biswal Jaiswal and Anr.** Reported in (2021) 6 SCC 366 the Hon'ble Supreme Court of India in clear, precise and in unequivocal terms held that "it would depend on the fact of each case as to whether an entry made in a balance sheet qua any particular creditor is unequivocal or has been entered into with caveats, which then has to be examined on a case by case basis to establish whether an acknowledgement of liability has in fact, been made, thereby extending limitation under section 18 of the Limitation Act." Applying the aforesaid principle of law to the facts of the case, it is axiomatic from the records that the personal guarantor herein has not acknowledged any liability with regard to the dues of the Principal Borrower either in any balance sheets or contemporaneously. Thus, the question of any acknowledgement of liability having been made extending the period of limitation under Section 18 of the Limitation Act, 1963 does not and cannot arise in the present facts and circumstances of the instant case. In fact, in the present case there is no acknowledgement by the personal guarantor.

III. It is also relevant to note that as on date the principal borrower stands dissolved by virtue of an order passed by this Hon'ble Bench. In light of the aforesaid, it is most respectfully and humbly prayed that the present application under section 95 of the Insolvency and Bankruptcy Code, 2016 be dismissed for being time barred.

11. In regard to the plea of limitation taken, we find the following:

(i) That the JLF meetings with the Personal Guarantor and Promoters continued till September 2017, the account with the Applicant bank became NPA on 31st March, 2016. The demand notice was signed on 12.07.2019. In **Pooja Ramesh Singh** Hon'ble NCLAT has held as under:

"24. The scheme of I&B Code clearly indicate that both the Principal Borrower and the Guarantor become liable to pay the amount when the default is committed by the Principal Borrower the amount becomes due not only against the Principal Borrower but also against the Corporate Guarantor, which is the scheme of the I&B Code. When we read with as is delineated by Section

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*3(11) of the Code, debt becomes due both on Principal Borrower and the Guarantor, as noted above. The definition of default under Section 3(12) in addition to expression ‘due’ occurring in Section 3(11) uses two additional expression i.e. “payable” and “is not paid by the debtor or corporate debtor”. The expression ‘is not paid by the debtor’ has to be given some meaning. As laid down by the Hon’ble Supreme Court in **“Syndicate Bank vs. Channaveerappa Beleri & Ors.”** (supra), a guarantor’s liability depends on terms of his contract. There can be default by the Principal Borrower and the Guarantor on the same date or date of default for both may be different depending on the terms of contract of guarantee. It is well-settled that the loan agreement with the Principal Borrower and the Bank as well as Deed of Guarantee between the Bank and the Guarantor are two different transactions and the Guarantor’s liability has to be read from the Deed of Guarantee.”*

- (ii) A Notice was issued on 06.04.2021, whereafter the Financial Creditor invoked contract of guarantee by serving demand notice on Personal Guarantor in form B on 06.07.2021.
- (iii) The Personal Guarantor vide email dated 20th March, 2022 admitted that the company along with group of companies and other Personal Guarantor submitted one time settlement (OTS) of Rs. 15 Crore with State Bank of India for settling and clearing its dues and thereby acknowledged its liability.
- (iv) The OTS proposal was made by the company along with group of companies and other Personal Guarantor and the same was admitted by the Personal Guarantor vide email dated 20th March, 2022. While in a normal action against a debtor, liability of a Personal Guarantor presumably

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would start from the service of notice in Form B under Rule 7(1) of IB Guarantor to Corporate Debtor Rules, 2019, the acknowledgment of liability from time to time would extend the limitation under Section 18 of the Limitation Act, 1963.

12. Hence, we pass the following order:

- (1) This application is **admitted under Section 100**;
- (2) **In terms of Section 101** :

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 this Adjudicating Authority passes an order on the repayment plan under section 114, whichever is earlier.

(3) 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 initiate any legal action or legal proceedings in respect of any debt; and
 - (c) the debtor shall not transfer, alienate, encumber or dispose of any of his assets or his legal rights or beneficial interest therein;
- (4) In relation to a firm, the moratorium under sub-section (1) shall operate against all the partners of the firm.
 - (5) 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.
 - (6) In absence of any prayers from any quarters against the nominated Resolution Professional, the IRP will act as the Resolution Professional (RP in short).
 - (7) The said RP shall act in terms of Section 102, 103, 104 of the Code, to cause public notice, invite claims from creditors,

prepare list of creditors, and hold regular meeting as directed hereunder:

(i) In terms of Section 102:

The Resolution Professional shall cause a public notice within seven days of passing the order under section 100 inviting claims from all creditors within twenty-one days of such issue.

(ii) The notice under sub-section (1) shall include—

- (a) details of the order admitting the application;
- (b) particulars of the resolution professional with whom the claims are to be registered; and
- (c) the last date for submission of claims.

(3) The notice shall be—

- (a) published in at least one English and one vernacular newspaper which is in circulation in the state where the debtor resides;
- (b) placed on the website of the Adjudicating Authority.

(iii) In terms of Section 103:

- (1) The creditors shall register claims with the resolution professional by sending details of the claims by way of electronic communications or through courier, speed post or registered letter.
- (2) In addition to the claims referred to in sub-section (1), the creditor shall provide to the resolution professional, personal information and such particulars as may be prescribed.

(iv) In terms of Section 104:

The resolution professional shall, within 30 days from the date of notice prepare a list of creditors on the basis of—

- (a) the information disclosed in the application filed by the debtor under section 94 or 95, as the case may be; and,

(b) claims received by the resolution professional under section 102.

(v) **In terms of Section 105:**

The Resolution Professional shall assist the debtor in preparing repayment plan containing a proposal to the creditors for restricting of his debts or affairs.

(vi) **In terms of Section 106:**

The Resolution Professional shall submit the repayment plan under Section 105 along with his report, within 21 days from the last date of submission of claims under Section 102 specifying.

(a) That the repayment plan is in compliance with the provisions of any law for the time being in force;

(b) That the repayment plan has a reasonable prospect of being approved and implemented; and

(c) Whether there is a necessity of summoning a meeting of the creditors, if required, to consider the repayment plan:

(vii) Meeting of creditors shall be held if necessary, specifying the

(a) Date, Time and Place of meeting after consulting the creditors;

(b) Within 14 to 28 days from submission of its report;

(c) After issuance notice for meeting at least 14 days in advance, to all the creditors mentioned in the list of creditors.

(viii) The Resolution Professional will act in accordance with Sections 107, 108, 109 and 110 to summon creditors, conduct meeting of creditors, allow them voting rights

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in accordance with voting share assigned to each, and seek approval of repayment plan if any.

- (ix) The Resolution Professional shall prepare a report of the meeting in accordance with Section 112 and furnish a report to this Adjudicating Authority.

13. As Company Petition No. 385 of 2021 stands admitted.

14. Next date for consideration on 06.09.2024.

**Balraj Joshi
Member (Technical)**

**Bidisha Banerjee
Member (Judicial)**

Order signed on this, 22nd day of July, 2024

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