

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

IA(I.B.C)/838(KB)2023

In

C.P. (IB)/92(KB)2022

*An application under Section 60 (5) of the Insolvency and Bankruptcy
Code, 2016 read with Rule 11 of the National Company Law Tribunal
Rules, 2016*

In the matter of:

Bank of Baroda, having its head office at Baroda Bhawan, R.C. Dutt
Road, Alkapuri, Baroda- 390007, Gujarat and Stressed Assets
Management Branch at 1st Floor, Avani Heights, 59A, Chowringhee,
Kolkata- 700020.

... .. Applicant/Financial Creditor

Versus

Shankar Lall Ajitsaria, residing at CF, 366, Sector-I, Salt Lake City,
Kolkata- 700064.

... .. Respondent/Guarantor

And

In the matter of:

Shankar Lall Ajitsaria

... .. Applicant

Versus

Bank of Baroda

... .. Respondent

Date of pronouncement: 13th May, 2024

CORAM:

SMT. BIDISHA BANERJEE, HON'BLE MEMBER (JUDICIAL)

SHRI D. ARVIND, HON'BLE MEMBER (TECHNICAL)

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Appearance (via video conferencing/physically)

Ms. Alisha Kar, Adv.]	For the Financial Creditor
Ms. Smriti Das, Adv.]	
Mr. Arik Banerjee, Adv.]	For the Respondent
Mr. Sumit Biswas, Adv.]	
Ms. Rajshree Bhowmick, Adv.]	

O R D E R

Per: Bidisha Banerjee, Member (Judicial)

1. The Court Convened in a hybrid mode.
2. Heard the learned Counsel for the parties.

C.P. (IB)/92(KB)2022

3. This C.P. (IB)/92(KB)2022 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.
4. The amount in default is Rs.16,89,01,410.32/- (Rupees Sixteen crores eighty-nine lakhs one thousand four hundred ten and thirty-two paisa only).
5. 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.
6. 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.**

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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 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;*
- 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*

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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;
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- 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 A.”*

- 7.** The Applicant had proposed the name of the Insolvency Professional for appointment as Resolution Professional. In view of the above, Mr. Mahesh Chand Gupta, IBBI Registration No. IBBI/IPA-001/IP-P-01489/2018-2019/12304, email ID: mcgupta90@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.
- 8.** 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

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he has given, and to file his report in terms of Section 97 in two weeks.

- 9.** The Resolution Professional Mr. Mahesh Chand Gupta has vide his report dated 6th July, 2022 as extracted hereunder:

i.	Application filed by	Bank of Baroda
ii.	Amount claimed	Rs.16,89,01,410.32 as on 30 th November, 2021 plus unapplied interest and other costs and charges till date of payment.
iii.	Date of AA order for appointment of Resolution Professional and direction to submit report and recommendation	27 th June, 2022
iv.	Date of service of order on IP by way of e-mail by Hon'ble Bench and also by the Advocate of the Applicant	27 th June, 2022
v.	Due date of debt	30 th September, 2016
vi.	Documents in support of the demand	1. Statement of account and certificate under Banker's Book of Evidence Act, 1891. 2. Sanction letter in favour of Corporate Debtor dated 20 th August,

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		<p>2011, 16th September, 2011, 25th September, 2014, 12th December, 2024, 20th January, 2015 and 28th June, 2016.</p> <p>3. Agreement of Personal Guarantee dated 25th April, 2014.</p> <p>4. Notice of statutory demand notice dated 7th February, 2018 under Section 13 (2) of SARFAESI Act, 2002.</p> <p>5. Schedule containing securities.</p> <p>6. Demand notice in Form-B dated 19th October, 2020.</p> <p>7. NCLT order dated 3rd May, 2021 approving the resolution plan for Corporate Debtor.</p> <p>8. CIBIL report of the Guarantor.</p>
vii.	Date of issue of demand notice as per Clause (b) of sub-Section (4) of Section 95 on the	19 th October, 2020

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	Guarantor demanding payment of the amount of default, in prescribed Form-B under Rule 7 (1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019.	
viii.	Date of submission the application under sub-Section (1) of Section 95 in Form-C along with a fee of two thousand rupees as per Rule 7 (2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019	7 th December, 2021

Action taken by the Resolution Professional

By way of e-mail and via speed post dated 29th June, 2022, Resolution Professional requested the Personal Guarantor to

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prove the repayment of the debt claimed by the by the Creditor as per Section 99, sub-Section (2) of the Insolvency and Bankruptcy Code, 2016 and provide certain documents/informations. He has given 3 days' time to reply from the date of the e-mail and letter. Reply form Personal Guarantor was received on 2nd July, 2022.

Resolution Professional has received reply from Mr. Shankar Lall Ajitsaria on 2nd July, 2022 confirming that due to his acute personal financial crisis, he could not repay the debt demanded by the Applicant till date. He has also provided maximum informations as requested by the Resolution Professional.

Copy of e-mail, track report and speed post and reply e-mail received from Personal Guarantor are annexed herewith and collectively marked as "Annexure-B".

Methods followed/Documents relied upon

On receipt of the NCLT order and as directed, Resolution Professional scrutinized application filed by Bank of Baroda for initiation of Insolvency Resolution Process along with all the documents in support of demand. He also studied NCLT orders initiating CIRP and final order approving resolution plan for the Corporate Debtor. Resolution Professional also requested to Personal Guarantor to cooperate and provide the necessary documents which was complied with. Resolution Professional relied upon the application copy filed by the Applicant for initiation of IRP as received from Advocates of the Applicant, MCA data and discussions with the Personal Guarantor and the Applicant.

Conclusion with recommendation

We conclude and recommend as below:

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- i.** The Personal Guarantor has committed default in payment of the debts to the Bank as agreed upon and has confirmed that he has not repaid any amount till date.
- ii.** The debts mentioned in the application are qualifying debt and not excluded debts.
- iii.** The application is accompanied with details and documents as mentioned in Section 95 (4) and has been duly filed in the prescribed Form-C with the requisite fees, satisfied the requirement under Section 95 (6).
- iv.** The Applicant Bank has provided copy of the application to the Personal Guarantor.
- v.** Demand notice issued as per prescribed format.
- vi.** No amount received within a period of 14 days of issue of demand notice nor even till date.
- vii.** The Applicant has provided information and given explanation sought by me.
- viii.** The Personal Guarantor is not eligible under Section 80 for a Fresh Start Process as provided under Part-III Chapter II.

Recommendation

After examination of the application under sub-Section (6) of Section 99, I hereby recommend, in terms of Section 99 (7) of IBC, 2016 for acceptance of the application filed under Section 95 of IBC, 2016 for commencement of Insolvency Resolution Process against Mr. Shankar Lall Ajitsaria, Personal Guarantor to the Personal Guarantor.

- 10.** The Personal Guarantor has neither entered appearance despite repeated opportunities has nor refuted the statements in the report of Resolution Professional.
- 11.** We have considered the report and perused the details of claim indicated therein.

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- 12.** We are satisfied with the recommendation of the Resolution professional to admit the application.
- 13.** In absence of any dispute or controversion by the Personal Guarantor, this application is admitted with the following directions:
- (i)** Since 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.
- 14.** Accordingly, C.P. (IB)/92(KB)2022 is, thus, admitted.
- 15.** List this matter for consideration on **11th July, 2024.**
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- 16.** The Personal Guarantor, namely, Shankar Lall Ajitsaria to the Corporate Debtor Prithvi Ferro Alloys Private Limited, the

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Principal Borrower, has preferred this IA(I.B.C)/838(KB)2023 on the ground that the application under Section 95 (1) preferred by the Resolution professional is not maintainable as it is barred by limitation.

- 17.** The Applicant has pleaded that the loan account became NPA on 1st December, 2016. The Bank admitted the debt was due on 30th September, 2016, yet a demand notice was issued on 7th December, 2021 which is admittedly three years after the date of default.
- 18.** We have perused the application preferred under Section 95 (1). It is evident from the pleadings that the loan account of the Corporate Debtor was classified as NPA on 1st December, 2016. The notice under Section 13 (2) of the SARFAESI Act, 2002 was sent to the Principal Borrower as well as Guarantors demanding a sum of Rs.52,72,07,849.62 (Rupees Fifty two crores seventy two lakhs seven thousand eight hundred forty nine and sixty two paise) due as on 31st January, 2018.
- 19.** DRT was moved for recovery of the sum on 31st August, 2018 and the application being O.A. No.381 of 2018 is pending.
- 20.** There was no impediment on the part of the Financial Creditor to move against the Personal Guarantor before the National Company Law Tribunal. However, the CIRP commenced against the Corporate Debtor on 8th August, 2019 in which an order for liquidation was passed on 3rd May, 2021.
- 21.** A demand notice under Rule 7 (1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process of Personal Guarantor to Corporate Debtor) Rules, 2019 dated 19th October, 2020 in Form B was sent to the Personal Guarantor showing the default as on 30th November, 2021.

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- 22.** Since the demand notice dated 19th October, 2020 is beyond for three years from the date of NPA which is on 1st December, 2016 and the Company Petition was preferred in the year 2022, the Applicant claims that it is barred by limitation.
- 23.** We rely on the judgment of **Hon'ble NCLAT in Pooja Ramesh Singh vs. SBI in 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 judgment of Hon'ble NCLAT, this application has been filed within the 3 years from the date of the notice and hence not barred by limitation.*
- 24.** We also rely in the judgment of **Lalit Kumar Jain vs. Inion of India (2021) 9 SCC 321** 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.*"
- 25.** The C.P. (IB)/92(KB)2022 filed within three year of demand notice is squarely within the limitation applicable. Therefore, this application under Section 95 (1) is maintainable.
- 26.** Accordingly, IA(I.B.C)/838(KB)2023 is dismissed.

**D. Arvind
Member (Technical)**

**Bidisha Banerjee
Member (Judicial)**

This Order signed on this, the 16th day of May, 2024.

Sayon (Steno)