

**IN THE NATIONAL COMPANY LAW TRIBUNAL**

**KOLKATA BENCH, COURT-II**

**Company Petition (IB) No.96/KB/2022**

**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:**

**Bank of Baroda**

**...FINANCIAL CREDITOR**

**Versus**

**Ramesh Kumar Sarawagi**

**...RESPONDENT/PERSONAL GUARANTOR**

**Coram**

**Smt. Bidisha Banerjee, Member (Judicial)**

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

**Date of Pronouncement: 8/05/2024**

**Appearance (via Hybrid Mode)**

**Ramesh Chandra Prusti**

**] For the Financial Creditor**

**Alisha Kar**

**Mahuya Ghosh**

**Swapna Choubey**

**] For the personal Guarantor**

**Mohan Ram Goenka**

**Sneha Khaitan**

**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 Bank of Baroda 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 **Prithvi Ferro Alloys Private Limited, Ramesh Kumar Sarawagi**.
4. The CP (IB) No. 96/KB/2022 has been filed under section 95 of the IBC, 2016 by Bank of Baroda for Initiating Insolvency Resolution Process of **Ramesh Kumar Sarawagi**, the Personal Guarantor to Corporate Debtor.
5. **Facts in a Nutshell:-**
  - 5.1 The Corporate Debtor is **Prithvi Ferro Alloys Private Limited** in CP (IB) No. 140/KB/2018 under section 9 of the IBC filed by **Punjab National Bank** against **Prithvi Ferro Alloys Private Limited**. The CIRP was initiated in CP (IB) No. 140/KB/2018 on 8<sup>th</sup> August 2019 . **Ramesh Kumar Sarawagi** is the Personal Guarantor of **Prithvi Ferro Alloys Private Limited**.

- 5.2 This Adjudicating Authority was pleased to pass interim order moratorium against **Ramesh Kumar Sarawagi** in **CP (IB) No. 96/KB/2022 on 27/06/2022**.
- 5.3 **Mr. Mahesh Chand Gupta** 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:-

1.	Application filed by	Bank of Baroda
2.	Amount claimed	Rs. 16,89,01,410.32 as on 30/11/2021 plus unapplied interest and other costs & charges till the date of payment.
3.	Date of AA order for Appointment of Resolution Professional and direction to submit report & recommendation.	27-06-2022
4.	Date of service of order on IP by way of E Mail by Hon'ble bench and also by the advocate of the applicant	27-06-2020
5.	Date of debt	30-09-2016

6.	Documents in support of the demand	<ol style="list-style-type: none"> <li>1) Statement of Account and certificate under bankers books evidence act 1891.</li> <li>2) Sanction letter in favour of Corporate Debtor dated 20.08.2011, 16.09.2011, 25.09.2014, 12.12.2014, 20.01.2015 &amp; 28.06.2016.</li> <li>3) Agreement of Personal Guarantor dated 25.04.2014.</li> <li>4) Notice of statutory Demand Notice dated 07.02.2018 under section 13(2) of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002.</li> <li>5) Schedule containing securities</li> <li>6) Demand Notice in form B dated 19.10.2020</li> <li>7) NCLT Order dated 03.05.2021 approving the Resolution plan for Corporate Debtor.</li> <li>8) CIBIL Report of the guarantor.</li> </ol>
7.	Date of issue of Demand Notice as per clause (b) of sub section (4) of section 95 on the guarantor demanding payment of the	19.10.2020

	<p>amount of default, in prescribed form B Under Rule 7(1) of insolvency and Bankruptcy ( Application to Adjudicating Authority for insolvency Resolution process for Personal Guarantor to Corporate Debtor) Rules 2019.</p>	
8.	<p>Dates of submission application under sub section (1) of the section 95 In Form C along with fee of two thousand Rupees as per rule 7(2) of the insolvency and Bankruptcy (application to</p>	07.12.2021

	Adjudicating Authority for insolvency Resolution process for Personal Guarantor to Corporate Debtor ) Rules 2019	
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8. The RP has examined the following:-
- a. NCLT order initiating CIRP of Corporate Debtor.
  - b. Final Order approving Resolution Plan
  - c. Documents Received from the advocates of the applicant, MCA data and discussion with PG and the applicant.
9. The RP has sent a Notice/letter dated 29.06.2022 and email dated 29.06.2022 enquiring under section 99(2) of IBC , with regard to payment if any made to Financial Creditor. (**Annexure “B” of the report**). The RP did not received reply from the Personal Guarantor i.e Ramesh Kumar Sarawagi.
10. Reasons for recommendation by RP:
- a. The Personal Guarantor has committed default in payment of the debts to the banks as agreed upon and has confirmed that he has not repaid any amount till date.
  - b. The debts mentioned in the application are qualifying debt and not excluded.
  - c. 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).

- d. The applicant bank has provided copy of the application to the Personal Guarantor.
- e. Demand Notice issued as per prescribed format.
- f. No amount received within a period of 14 days of issue of Demand Notice nor even till date.
- g. The applicant has provided information and give explanation sought by me.
- h. The Personal Guarantor is not eligible under section 80 for a fresh start process as provided under Part- III chapter-II.

11. Resolution Plan has already been approved with respect to the Corporate Debtor:

11.1 This Adjudicating Authority vide order dated 03.05.2021 in CP (IB) No. 140/KB/2018 has Resolution Plan of Corporate Debtor.

## **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 19.10.2020 and the application was filed on 12.12.2021. 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.

**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 & 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 ; **CP/IB/96/KB/2022** 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; **CP/IB/96/KB/2022**.
- 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. 96/KB/2022** 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 8<sup>th</sup> day of May 2024**

**NKS(LRA)**