

IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD
DIVISION BENCH
COURT - 1

ITEM No.309
CP(IB)/76(AHM)2021

Proceedings under Section 95 IBC

IN THE MATTER OF:

State Bank of India

.....Applicant

V/s

Amit Dinesh Patel

.....Respondent

(Personal Guarantor)

Order delivered on: 17/05/2024

Coram:

Mr. Shammi Khan, Hon'ble Member(J)

Mr. Sameer Kakar, Hon'ble Member(T)

PRESENT:

For the Applicant :

For the Respondent :

ORDER

The case is fixed for pronouncement of the order. The order is pronounced in the open court, vide separate sheet.

-Sd-

SAMEER KAKAR
MEMBER (TECHNICAL)

-Sd-

SHAMMI KHAN
MEMBER (JUDICIAL)

**BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH-I, AHMEDABAD**

CP/IB/76/NCLT/AHM/2021

[Application under Section 95(1) of the Insolvency & Bankruptcy Code, 2016 r.w. Rule 7(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantor to Corporate Debtor) Rules, 2019]

*In the matter of **Mr. Amit Dinesh Patel***

State Bank of India

Stressed Assets Management Branch,
2nd floor, Paramsiddhi Complex,
Opp. V.S. Hospital,
Ellisbridge, Ahmedabad,
Gujarat-380006

...Applicant/Financial Creditor

VERSUS

Mr. Amit Dinesh Patel

(Personal Guarantor to Shirpur Power Private Limited)
At- "Vrindavan" Nr. Manali Apartment,
Behind Apang Manav Mandal Work Shop,
Dr. V.S. Road, Vastrapur,
Ahmedabad, Gujarat-380054.

.... Respondent/Personal Guarantor

Order pronounced on 17.05.2024

CORAM:

SH. SHAMMI KHAN, MEMBER (JUDICIAL)

SH. SAMEER KAKAR, MEMBER (TECHNICAL)

APPEARANCE:

For Applicant/SBI : Mr. Devang Nanavati Sr. Adv a.w.
Ms. Nitu Chaturvedi, Adv.
For the Respondent/
Personal Guarantor : Mr. Arjun Seth, Ld. Adv. a.w.
Mr. Rajiv Chawla, Adv
For IRP/RP : Mr. Sunil Kabra in Person

ORDER

Per: Bench

1. The Present Application is filed on 29.04.2021 under Section 95(1) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred as "IBC, 2016") r/w Rule 7(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 by Applicant Bank (herein after referred to as "Financial Creditor") for the purpose of initiating of insolvency process against Mr. Amit Dinesh Patel (hereinafter referred to as "Personal Guarantor") for a default amount of Rs.287,46,42,870.42ps. as on 19.10.2020 in respect of Deed of Guarantee dated 09.02.2016 executed in favour of Applicant Bank/Financial Creditor.

2. In so far as the Personal Guarantor to Corporate Debtor is concerned, the Hon'ble Supreme Court of India in the matter of **Lalit Kumar Jain vs. Union of India & Ors.** in the Transferred Case (Civil) No.245/2020 has upheld the vires of the notification issued by the Central Government vide S.O. 4126(E) dated 15.11.2019, in so far as it relates to coming into force of Insolvency and Bankruptcy Process of Personal Guarantors to Corporate Debtor. Thus, when a Corporate Insolvency Resolution Process in relation to Corporate Debtor is pending before this Adjudicating Authority, then as per Section 60(2) of IBC, 2016 the NCLT would be competent forum to file an Application for Personal Guarantor in relation to such Corporate Debtor.

3. It is the case of the Applicant Bank/Financial Creditor that on 09.02.2016 Corporate Debtor- Shirpur Power Private Limited being principal borrower entered into COR Common Loan Agreement under consortium banking arrangements with Applicant Bank, Bank of

Baroda, & IDBI Bank for additional financing of its project under COR Facility Agreement.

4. The Respondent being personal Guarantor of the Corporate Debtor executed and signed Deed of Guarantee dated 09.02.2016 in favour of Security Trustee i.e. SBI Cap And Applicant Bank. In terms of Clause 2.1 of the Personal Guarantee, the Respondent irrevocably and unconditionally agreed to personally repay the outstanding amount on demand from the Applicant Bank, in the event of any default by the Corporate Debtor under the COR Facility Agreement.
5. However, after availing the Loan/Credit Facilities, the Corporate Debtor failed to maintain financial discipline as per terms and conditions of the loan agreement due to which loan account became irregular. Consequently, the said loan account of the Corporate Debtor was classified as NPA on 29.11.2017. Subsequently, on 10.05.2018 the Applicant Bank recalled the loan

amounts advanced under the Common Loan Agreement & COR Facility by way of Callup Notice.

6. Thereafter, on 02.06.2018 the Applicant bank invoked the Personal Guarantee and issued Demand Certificate for the payment of the amount due under the COR Facility Agreement within seven days. The Respondent replied to the said Callup Notice vide Letter dated 25.06.2018 raising moonshine defence for not honouring Personal Guarantee.
7. Thereafter, by order dated 04.03.2020, the Corporate Debtor- Shirpur Power Private Limited was admitted under CIRP and order of moratorium was passed by the Hon'ble Adjudicating Authority in CP (IB) No. 487/NCLT/AHM/2018.
8. Thereafter, Applicant Bank/Financial Creditor invoked the personal guarantee and issued Demand Notice to the Respondent/Personal Guarantor on 20.10.2020 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 which was delivered to the Respondent/Personal Guarantor on 22.10.2020 as per tracking report of Postal Authority.

9. Due to non-payment of the amount by the Corporate Debtor as well as Personal Guarantors, on 29.04.2021 the Applicant Bank/Financial Creditor has filed this application for initiation of Insolvency Resolution Process against the Respondent/Personal Guarantor in 'Form-C' under Section 95 of the IB 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
10. On presentation of the application by the Applicant/Financial Creditor, this Tribunal vide order dated 17.08.2021 appointed Interim Resolution Profession (hereinafter referred to as "IRP") as suggested by the Financial Creditors viz. **Mr. Sunil kumar Kabra**

to carry out Insolvency Resolution Process of the Personal Guarantor as per section 97(3) of IBC, 2016. This Tribunal directed the IRP to file his report.

11. The Interim Resolution Professional has filed the report dated 12.09.2021 recommending the admission of the application filed under Section 95 of IBC, 2016.” The summary of grounds for admission of the application as per the Report filed by the IRP are as follows:

- i. As per the documents provided by financial creditor State Bank of India, Mr. Amit Dinesh Patel is standing as a personal guarantor for the credit facilities granted under COR facility to M/s Shirpur Power Private Limited.
- ii. We have sent intimation u/s 99 of IBC, 2016 and asked the Personal Guarantor Mr. Amit Dinesh Patel to provide proof of repayment of outstanding amount of COR facility, to financial creditor State Bank of India, but the respondent has not provided any documentary evidence.
- iii. Thus, Resolution Professional is of the view that application should be accepted and proceedings

should be initiated with respect to the Individual Insolvency Resolution Process of Mr. Amit Dinesh Patel (Personal Guarantor to M/s Shirpur Power Private Limited) in order to recover the outstanding debt payable as per the Personal Guarantee Agreement/ deed executed dated 09th February 2016 between the SBI Consortium and Personal Guarantors.

- iv. The Present application is filed against the personal guarantor is in the prescribed format and complete in all respects.

12. The Respondent/Personal Guarantor filed an affidavit in reply dated 20.04.2022 under diary no. D2168 and raised following objections to the Application as under:

- a) The Respondent stated that the demand notice dated 20.10.2020 was issued without authorization as applicant seeks to place reliance upon purported letter of authority dated 15.04.2021 placed on record at page 20 of the application, which in any event has been executed much later on, after the issuance of the demand

notice dated 20.10.2020. No board of resolution has been placed on record.

- b) The respondent stated that application and demand notice under Section 95 of the IB Code is not maintainable since it is devoid of any basis of law.
- c) There is no document substantiates that the Deputy General Manager had the authority to file the application before the NCLT and no name of the Deputy General Manager is visible at page 20 of the application.
- d) The respondent stated that there is no contract of personal guarantee between the respondent herein and SBICAP Trustee Co. Ltd. Since it lacks the fundamental requirement of consideration for guarantee.
- e) The respondent stated that there is no request flowing from the guarantor for release of loan favour of the borrower.

- f) The respondent stated that the purported guarantor is also not a party to the common loan agreement dated 09.02.2016.
- g) The respondent stated that that the purported personal guarantee contract in question is not a tripartite agreement, between the borrower, lender and the guarantor and hence, application is not maintainable.
- h) The respondent stated that as per Section 3 (e) of the Personal Guarantor Rules, 2019, there is a requirement for invocation of guarantee for the purpose of falling within the definition of guarantor and not entitled to initiate insolvency proceedings since no invocation of personal guarantee.
- i) The respondent stated that there is no proof subject to delivery of the purported Demand Notice dated 02.06.2018.

13. In response to the reply filed by the Respondent, the Applicant filed a Rejoinder dated 05.03.2024 under

diary no. D1962 stating the following facts with regards to the objection raised by the Respondent.

- i. It is submitted that demand notice dated 20.10.2020 was issued pursuant the gazette notification dated 02.05.1987 which is produced at page 28 of the petition wherein, Regulation 76(1) of the State Bank of India General Regulations, 1955 framed under Section 50 of the SBI Act, 1955 the executive committee of the Central Board hereby authorized the certain class of officers to exercise the signing power to the extent specified against the certain officers. Further, it is submitted that at the relevant point of time the Hon'ble Courts were insisting on filing of letter of authority for filing purpose and as per IB Code, 2016 provides for definition of financial creditor and does not specify categorically the list of person who can be referred as authorised person for signing the documents/petition on behalf of financial creditor.

- ii. There is no necessity of board of resolution considering the Provisions of State Bank of India Act, 1955 and Gazette Notification dated 02.05.1987. Further, IB Code also not specified any specific provision with regard to financial creditor.
- iii. The receipt of Demand Notice dated 20.10.2020 was placed at page 506 and tracking report was also placed at page 507. However, personal guarantor has not replied the said notice. Further, respondent has not raised any such issue with the RP at the time of meeting with the RP and such issues at this stage are not valid.
- iv. The application is in proper format as prescribed under the IB Code, 2016 and application preferred against the personal guarantors of the corporate debtor M/s. Shirpur Power Private Limited and not against any partnership.
- v. It is submitted that co-joint reading of the State Bank of India Act, 1955 and gazette notification

specified clearly that Mr. Nitin K. Chauhan being the officer in the grade of SMGS-V was authorized to sign all the documents.

- vi. It is submitted that *“in terms of Security Trustee Agreement dated 21/9/2015 the lenders have appointed SBICAP Trustee Company Limited as their security trustee for the purpose of holding and dealing with the security and including the guarantee contemplated under this guarantee for the benefit of the COR lenders and The COR Security Trustee has agreed to act as such. It is further stated that one of the condition of the COR Agreement is that Guarantor shall execute in favor of the COR security Trustee for the benefit of the COR Lenders an unconditional and irrevocable continuing guarantee for the repayment of all amounts as many be outstanding from time to time under or in respect of the COR facility. Further it is important to mention that the guarantor at the request of the Borrower and in consideration of the*

COR lenders having agreed to grant the COR facility to the borrower has agreed to execute this guarantee in favour of the COR security trustee acting for the benefit of the lenders for guaranteeing the outstanding sum and other dues payable in the accordance with the COR Finance Documents in the terms and in the manner hereafter appearing in this guarantee". That entire agreement is detailed with the responsibilities of the guarantor's and creditors and thus raising the issue that there is no consideration with regard to the present guarantee is a baseless contention in light of the entire personal guarantee agreement and many clauses refers to the same to name few clauses 10, 11, 15, 16, 17, 18 etc. Thus, in light of this the application filed is complete and within the four corners of IB code 2016.

- vii. It is stated that the Applicant herein is the Financial Creditor and a lender Bank, further the main COR Agreement dated 09.02.2016 is duly

signed by the Borrower, the SBI CAP as Security Trustee and all the lenders. Further the said agreement defines guarantees which means *"the guarantees to be issued or as the case may be confirmed by COR lenders on behalf of the Borrower or cause to be issued or confirmed by any banks on its behalf under the Non- Fund Based Facility as mentioned in Schedule-1 part B of this agreement issued or to be issued as sublimit to the respective loan granted or to be granted by the COR Lenders to the Borrower."*

- viii. It is submitted that pursuant to clause 26 of the personal guarantee agreement dated 9/2/2016 *"the demand certificate shall be conclusive evidence against the guarantor of the amount for the time being due to the COR security trustee/COR Lenders from the Borrowers/Guarantor in any action or proceeding brought on this guarantee against the guarantor during the subsistence of this guarantee and in accordance with the terms of this guarantee"*.

The clause further states that any demand under this guarantee shall be deemed to have been duly given to the guarantors by the COR security trustee/COR lenders by sending the same substantially in the form of the demand certificate annexed at annexure 1 of the agreement dated 9/2/2016.

- ix. It is further submitted that demand notice is in proper format as per the agreement and is duly signed by Lender's agent thus to raise a contention that there is no invocation of personal guarantee is false and baseless when there is supporting document and entire agreement to prove that personal guarantee is invoked. That the demand notice were sent through Registered post and the same is attached as Exhibit T with the petition.
- x. The clause F of personal guarantee agreement which states that *"The Guarantor at the request of the Borrower and in consideration of the COR Lenders having agreed to grant the COR Facility to*

the Borrower has agreed to execute this Guarantee in favour of the COR Security Trustee, acting for the benefit of the COR Lenders for guaranteeing the Outstanding sum (as defined below) and any documents in terms and in the manner hereinafter appearing in this guarantee." Hence, this is a valid contract and no need for any tripartite agreement.

14. The proceedings in the matter was put on hold since the Constitutional Validity of the Sections 94 to 100 relating to the insolvency of personnel Guarantor was pending before the Hon'ble Supreme Court in the matter of **Dilip B. Jiwrajka V/s Union of India & Ors.** in WP(civil)No. 1281 of 2021.
15. The Hon'ble Supreme Court in the judgement of **Dilip B. Jiwrajka V/s Union of India & Ors.** in **WP(civil)No. 1281 of 2021** dated **09.11.2023** upheld the Constitutional Validity of the Sections 94 to 100 and the Conclusion of the Judgments 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. *The submission that a hearing should be conducted by the adjudicatory authority for the purpose of determining 'jurisdictional facts' at the stage when it appoints a resolution professional under Section 97(5) of the IBC is rejected. No such adjudicatory function is contemplated at that 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.*
16. The Applicant bank as well as the Respondent filed written submissions. The Applicant Bank also filed letter dated 25.06.2018, by way of additional affidavit dated 01.05.2024, issued by Respondent/Personal Guarantor addressed to the Applicant Bank/Financial Creditor in which reference is given specifically to Demand Certificate dated 02.06.2018 which is a notice of invocation guarantee shown to have been delivered to the Respondent/ Personal Guarantor.

17. We have heard the learned counsel for both the parties and perused the documents on record. We have also gone through the report dated 12.09.2021 filed by the IRP.
18. It is seen from the record that the present application is filed on 29.04.2021. Personal Guarantee dated 09.02.2016 was executed in favour of in favour of Security Trustee i.e. SBI Cap and Applicant Bank.
19. In terms of Clause 2.1 of the Personal Guarantee, the Respondent irrevocably and unconditionally agreed to personally repay the outstanding amount on demand from the Applicant Bank, in the event of any default by the Corporate Debtor under the COR Facility Agreement.
20. Loan account of the Corporate Debtor was classified as NPA on 29.11.2017. Subsequently, on 10.05.2018 the Applicant Bank recalled the loan amounts advanced under the Common Loan Agreement & COR Facility by way of Callup Notice.

21. Thereafter, on 02.06.2018 the Applicant bank invoked the Personal Guarantee and issued Demand Certificate for the payment of the amount due under the COR Facility Agreement within seven days. The Respondent replied to the said Callup Notice vide Letter dated 25.06.2018 raising moonshine defence for not honouring Personal Guarantee.
22. Demand Notice dated 20.10.2020 issued 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 invoking Personal Guarantee within the period of limitation, was served upon the Respondent/Personal Guarantor on 22.10.2020 as per tracking report of Postal Authority.
23. It is also noted under section 128 of Indian Contract Act, 1872 that when a default is committed the Principal Borrower and Surety are jointly and severally liable to Creditor and Creditor has the right to recover its dues

from either of them or from both of them simultaneously. For benevolent reference, the said section of the Contract Act, 1872 is reproduced below:

"The liability of the surety is co- extensive with that of the principal debtor, unless it is otherwise provided by the contract."

24. Moreover, from the report of IRP, it is clear to us that:
- i. IRP has recommended to accept the application for the reason as stated in the report dated 13.09.2021.
 - ii. The Respondent has admitted to have executed the Guarantee Agreement on 09.02.2016 in favour of Applicant Bank/Financial Creditor. Hence, the Petition is very much maintainable.
 - iii. The Applicant has demanded the amount outstanding from the Respondent initially vide Demand Notice dated 10.05.2018, 02.06.2018 and 20.10.2020.
 - iv. Resolution Professional report states that no evidence was placed before him by the Respondent

having paid the amount demanded by the Applicant and as such in over view entire amount demanded is unserviced as on the date of order.

v. In our view the application is not hit by Limitation.

25. In view of the foregoing we are left with no other choice but to order as under: -

- I. Initiate Insolvency Resolution Process against the Respondent/Personal Guarantor and moratorium in relation to all the debts is declared, from today i.e. date of admission of the application and shall cease to have effect at the end of the period of 180 days, or this Tribunal passes order on the repayment plan under Section 114 whichever is earlier as provided under Sec 101 of 1BC, 2016. During the moratorium period,
 - a) Any pending legal action or proceeding in respect of any debt shall be deemed to have been stayed, and

b) The creditors of the debtor shall not initiate any legal action or 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:

d) 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.

II. The Resolution Professional viz., **Mr. Sunil Kumar Kabra**, having Registration No: IBBI/IPA-001/IP-P01011/2017-2018/11662, office at Office No. 303, 3rd Floor, Reegus Business Centre, Above Mercedes Benz Showroom, New Citylight Road, Bharthana-Vesu, Surat, 395007, Gujarat (e-mail id jlnusco@gmail.com] who was appointed when the Section 97 application was allowed vide Order dated 17.08.2021, is directed to cause a public notice published on behalf of the Adjudicating

Authority within 7 days of passing this Order on the website of the NCLT Ahmedabad Bench, inviting claims from all Creditors, within 21 days of such issue The notice under Sub Section (1) of Section 102(2) 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.

III. The publication of notice shall be made in two newspapers, one in English and other in Vernacular which have wide circulation in the State where the Corporate Debtor and Personal Guarantor resides. The Resolution Professional shall furnish two spare copies of the notice to the Registry for the record.

- IV. The Resolution Professional in the exercise of the powers conferred under Section 104 shall prepare a list of creditors on the basis of
- a) the information disclosed in the application filed by the debtor under Sections 94 or 95. as the case may be, and
 - b) Claims received by the Resolution Professional under Section 102 within 30 days from the date of the notice.
- V. The debtor shall prepare a repayment plan under Section 105, in consultation with the Resolution Professional, containing a proposal to the Creditors for restructuring of his debts or affairs.
- VI. The repayment plan may authorize or require the Resolution Professional to:
- a) Carry on the debtor's business or trade on his behalf or in his name: or
 - b) Realise the assets of the debtor; or
 - c) Administer or dispose of any funds of the debtor.

The repayment plan shall include the following, namely; -

- a) Justification for preparation of such repayment plan and reasons based on which the creditors may agree upon the plan;
- b) Provision for payment of fee to the Resolution Professional;
- c) Such other matters as may be specified.

VII. The Resolution Professional shall submit the repayment plan along with his report on the plan to this Authority within a period of 21 days from the last date of submission of claims, as provided under Section 106.

VIII. In case the Resolution Professional recommends that a meeting of the creditors is not required to be called, he shall record the reasons therefor. If the Resolution Professional is of the opinion that a meeting of the creditors should be summoned, he shall specify the details as provided under Section

106(3) of IBC, 2016. The date of meeting should not be less than 14 day or more than 28 days from the date of submission of the Report under subsection (1) of Section 106 of IBC, 2016, for which at least 14 days' notice to the creditors (as per the list prepared shall be issued by all modes. Such notice must contain the details as provided under the provisions of Section 107 of IBC, 2016.

IX. The meeting of the creditors shall be conducted in accordance with Sections 108, 109, 110 & 111 of IBC, 2016. The Resolution Professional shall prepare a report of the meeting of the creditors on repayment plan with all details as provided under Section 112 of IBC, 2016 and submit the same to this Tribunal, copies of which shall be provided to the Debtor and the Creditors. It is made clear that the Resolution Professional shall perform his functions and duties in compliance with the Code of Conduct provided under Section 208 of IBC, 2016.

X. The Resolution Professional shall submit his periodic reports before this Tribunal, every 30 days.

XI. The Registry is directed to communicate a copy of order, report and application within seven working days and upload the same on the website immediately after the pronouncement of order.

26. In terms of the above, **CP (IB)/76/(AHM)/2021** filed under Section 95 (1) of the IBC, 2016 is admitted and the Insolvency Resolution Process stands initiated against the Respondent/Personal Guarantor.

-Sd-

**SAMEER KAKAR
MEMBER (TECHNICAL)**

-Sd-

**SHAMMI KHAN
MEMBER (JUDICIAL)**

SP, MD