

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

ITEM No. 304
C.P.(IB)/116(AHM)2022

Order under Section 95 of IBC, 2016

In The Matter Of:

Bank of Baroda

Vs

Saurabh Kumar Tayal

.....Applicant

.....Respondent

Order delivered on: 28/06/2024

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 the 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/116/AHM/2022

[Application under Section 95 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 **Mr. Saurabh Kumar Tayal***

Bank of Baroda

Stressed Assets Management Branch,
Dena Building, No. 17/B, First Floor,
Horniman Circle, Fort, Mumbai-400023

... Applicant/Financial Creditor

VERSUS

Mr. Saurabh Kumar Tayal

(Personal Guarantor)

M/s. K. Lifestyle & Industries Ltd.,
101/102, Happy House, Old Sonapur Wala
Lane, Prabhadevi, Mumbai: 400025

... Respondent/Personal Guarantor

Order pronounced on 28.06.2024

CORAM:

SH. SHAMMI KHAN, MEMBER (JUDICIAL)

SH. SAMEER KAKAR, MEMBER (TECHNICAL)

APPEARANCE:

For the Applicant: Mr. Yahya Batatawala, Adv
For the Respondent: Mr. Harmish K. Shah, Adv

ORDER

1. The Present Application is filed under Section 95 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as IBC, 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 by Bank of Baroda (hereinafter referred to as "Financial Creditors") for the purpose of initiating insolvency process against Mr. Saurabh Kumar Tayal (hereinafter referred to as "Personal Guarantors") for a default amount of Rs.119,16,85,952.21/-. The Respondent/Personal Guarantor stood as Guarantor in respect for repayment of interest, cost, charges and other expenses in respect of Deed of Guarantee dated 06.10.2012 in favour of Applicant.

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. The Corporate Insolvency Resolution process in respect of the Corporate Debtor was ordered by this Adjudicating Authority on 05.02.2020. Hence, the present application in respect of the Insolvency and Bankruptcy proceedings of the Personal Guarantor of the Corporate Debtor is filed by the Creditor before this forum.

3. It is stated that the Corporate Debtor, K. Lifestyle & Industries Limited had availed loan of Rs. 30.00 Crore in the form of Cash Credit Facility Vide Sanction Letter dated 09.02.2010 from Dena Bank (now Bank of Baroda after amalgamation) which was later on enhanced to Rs.170.00 Crore. Against the said loan, three (3) individuals one of whom is a respondent, had provided their personal guarantee and executed Deed of Guarantee dated 06.10.2012 in favour of Applicant Bank/Financial Creditor. The Corporate Debtor defaulted in repayment of loan resulting in being declared as NPA as on 31.01.2013. In the mean time, CIPR process was initiated against the Corporate Debtor.

4. By order dated 05.02.2020, the Corporate Debtor was admitted and an order of moratorium was passed by this Adjudicating Authority in CP IB No.625/7/NCLT/AHM/2018.

5. Due to non-payment of the amount by the Corporate Debtor, the Financial Creditor has filed this application for initiation of Insolvency Resolution Process against the Guarantor under Section 95(1) of IBC, 2016. The Financial Creditor invoked the personal guarantee and issued demand notice to the Respondent on 17.05.2021 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.
6. On presentation of the application by the Applicant/Financial Creditor, this Tribunal vide order dated 10.06.2022 held that the name of Interim Resolution Profession (hereinafter referred to as "IRP") as suggested by the Financial Creditors, **Mr. Ashok Kumar Golechha** to be appointed as IRP 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. The Interim Resolution Professional has filed the report on 27.06.2022 under diary no. D3482

recommending the admission of the application filed under Section 95 of IBC, 2016. The grounds for admission of the application as per the Report are as follows:

- i. it is stated that the IRP had examined the application CP (IB) No.116 of 2022 and the same is found to be satisfying all the ingredients of Sec.95 of IBC.
 - ii. it is stated that the IRP had not received any evidence of repayment of the debt claimed in Sec.95 petition from Mr. Saurabh Kumar Tayal.
 - iii. it is stated that the IRP had not received any document whereby the Personal Guarantee agreement dated 06.10.2012 was cancelled by both the parties.
7. The Respondent/Personal Guarantor filed Written Submissions on 13.05.2024 under diary no. D4069 and raised following objections to the Application as under:
- a) The Petition is not filed within limitation period.

- b) The applicant's reliance on guarantee agreement dated 06.10.2012 is unwarranted and legally untenable.
 - c) The applicant has wrongfully classified the account of CD as NPA.
 - d) The Petition is in non-compliance with the provisions of Insolvency & Bankruptcy Code, 2016.
8. It is stated that the applicant filed an additional affidavit on 03.06.2024 to place on record the recovery proceedings pending before DRT, Kolkata being Original Application No. 368 of 2015 filed on 13.07.2015.
9. 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.

10. 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.*

11. We have heard the learned counsel for both the parties and perused the documents on record. We have also gone through the report filed on 27.06.2022 filed by the IRP.

12. The Corporate Debtor, K. Lifestyle & Industries Limited initially availed loan of Rs. 30.00 Crore in the form of Cash Credit Facility Vide Sanction Letter dated 09.02.2010 from Dena Bank (now Bank of Baroda after amalgamation) which was later on enhanced to Rs.170.00 Crore. Against the said loan, three (3) individuals one of whom is a respondent, had provided their personal guarantee and executed Deed of Guarantee dated 06.10.2012 in favour of Applicant Bank/Financial Creditor. The Corporate Debtor

defaulted in repayment of loan resulting in being declared as NPA as on 31.01.2013.

13. By order dated 05.02.2020, the Corporate Debtor was admitted and an order of moratorium was passed by this Adjudicating Authority in CP IB No.625/7/NCLT/AHM/2018.
14. It is recorded in judgment 05.02.2020 passed in CP IB No.625/7/NCLT/AHM/2018 that the Corporate Debtor has acknowledged its debts to the Financial Creditor in its Balance Sheet filed with the ROC in the year 2016-2017 which ultimately extends the Limitation period upto 31.03.2020. Further, documents submitted by the Financial Creditor show that the detailed Resolution Plans have been submitted on 10.03.2018 and 29.03.2018 by the Corporate Debtor wherein they have mentioned that the Board of Directors of the Corporate Debtor have requested to the Financial Creditor to accept their OTS with interest at 4% simple from the date of NPA to the revised cut-off date i.e. 28.02.2018.

15. As in view of the COVID pandemic period, Hon'ble Supreme Court ***in Suo Moto WP (Civil) No. 3 of 2022 in Re: Cognizance for Extension of Limitation*** held that the period i.e. 15.03.2020 to 28.02.2022 is excluded for calculating the period of limitation.
16. In this case Applicant Bank/Financial Creditor invoked the personal guarantee and issued Demand Notice to the Respondent/Personal Guarantor on 17.05.2021 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 and filed the present Petition which is to be considered with in limitation.
17. Further, it is 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".

18. 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 filed on 27.07.2022.
- ii. The Guarantee Agreement was executed on 06.10.2012.
- iii. The Applicant has demanded the amount outstanding from the Respondent vide Demand Notice dated 17.05.2021.
- 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 of the date of order.

19. 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 Section 101 of IBC, 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. Ashok Kumar Golechha**, having Registration **No: IBBI/IPA-002/IP-N000932/2019-2020/12973**, (e-mail id akgolecha9@gmail.com] who was appointed when the Section 97 application was allowed vide Order dated 10.06.2022, 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.

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.

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.

V. 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.

VI. 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 sub- section (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.

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

IX. 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.

20. In terms of the above, **CP(IB)/116(AHM)/2022** filed under Section 95 (1) of the IBC, 2016 is admitted and the Insolvency Resolution Process stands initiated against the Applicant/Personal Guarantor.

-SD-
SAMEER KAKAR
MEMBER (TECHNICAL)
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-SD-
SHAMMI KHAN
MEMBER (JUDICIAL)