

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH - IV**

C.P. (IB) No. 72/MB/2023

Under Section **95(1)** of the Insolvency & Bankruptcy Code, 2016 *r/w* Rule **7(2)** of the Insolvency and Bankruptcy (Application to the Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors), Rules, 2019.

In the matter of

Bank of Maharashtra

...Financial Creditor

Versus

Mr. Ajith Govindan Menon

...Personal Guarantor

Order Pronounced On: 07.05.2024

Coram:

Ms. Anu Jagmohan Singh
Hon'ble Member (Technical)

Mr. Kishore Vemulapalli
Hon'ble Member (Judicial)

Appearances:

For the Financial Creditor

Mr. Subir Kumar *a/w*. Ms. Disha Shah *i/b*. SDS Advocates, Ld.
Counsel for the Petitioner.

For the Personal Guarantor

Ms. Sneha Mishra *i/b*. Mr. Jamshed Ansari, Ld. Counsel for the Respondent.

For the Resolution Professional

Mr. Manoj Mishra, Ld. Counsel for the RP.

ORDER

1. The captioned petition has been filed on 26.01.2023 u/s. 95 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to 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 **Bank of Maharashtra** ("Applicant / Financial Creditor") for the purpose of initiating insolvency resolution process against **Mr. Ajith Govindan Menon** ("Respondent / Personal Guarantor") for recovery of total debt amounting to INR 13,69,79,598/- (Indian Rupees Thirteen crores, sixty-nine lakhs, seventy-nine thousand, five hundred and ninety-eight only). The Date of Default, per Part-III of the present petition, is 12.11.2018.
2. The Financial Creditor herein submits that **M/s. Opal Asia (India) Private Limited** ("Corporate Debtor") was sanctioned a loan to the tune of INR 4.50 Crores vide Sanction Letter dated 27.06.2013. The said loan facility was thereafter enhanced by the Financial Creditor for INR 8.50 Crores vide Sanction Letter dated 27.06.2016. As against the said facility, the Corporate Debtor along-with its Guarantors (including the Respondent herein) executed a Deed of Guarantee dated 29.06.2016 along-with Demand Promissory Note thereby guaranteeing to "*..jointly and severally*" repay the dues upon demand pertaining to the same. The said loan-facility was further secured by hypothecation of tangible and intangible assets, as particularly laid out in Clause {7} of Deed of Hypothecation dated 29.06.2016.
3. Due to alleged irregularities in re-payment of monies in consonance with the afore-mentioned facility and subsequent failure in regularizing its account, the loan account of the Corporate Debtor was classified as 'NPA' on 12.11.2018. Subsequently, the Financial Creditor viz. Applicant herein issued a Demand Notice dated 27.06.2022 to the Personal Guarantor herein, in Form-B under

Rule 7(1) of the Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019, demanding forthwith payments of its dues within fourteen days. However, the Personal Guarantor, per the Financial Creditor herein, has failed to act thereupon. Hence, the present petition.

4. A perusal of the records in the matter-at-hand reveals that the Demand Notice *dated* 27.06.2022 could not be served to the Personal Guarantor *viz.* Respondent herein as the said service through speed-post returned with an endorsement of the postal authority mentioning that the addressee “LEFT” the address. The same was duly brought forth to the attention of this Bench, and the Ld. Counsel for the Financial Creditor was thereby permitted to carry out substituted service by paper publication *vide* Order *dated* 03.02.2023, which was duly effectuated *via* two-newspapers on 18.02.2023. Additionally, this Bench caused to issue notice to the Respondent herein *vide* Order *dated* 30.03.2023.
5. At the backdrop of the afore-stated chain of events, the Corporate Debtor herein was admitted into Corporate Insolvency Resolution Process by this Bench in the Company Petition bearing C.P. (IB) No. 3853/NCLT/MB-IV/2019 *vide* Order *dated* 24.08.2022, and was subsequently Liquidated *vide* Order *dated* 16.06.2023.
6. The Personal Guarantor *viz.* Respondent herein, *via* its Reply *dated* 02.05.2023, has sought to challenge the veracity of the factual matrix as spelt out in the captioned petition.
 - 6.1. The Respondent submits that after the enhancement of the loan facility (*as mentioned in para (2) hereto*) and upon not getting favorable terms pertaining to the same, it sought to approach HDFC Bank Limited for a loan amount of INR 12 Crores, which was sanctioned *vide* Sanction Letter *dated* 01.09.2017. From the said facility of 12 Crores, the Respondent submits that HDFC Bank paid a sum of INR 9.70 Crores towards outstanding loan amount to the Financial Creditor herein.

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- 6.2.** The Respondent submits that despite confirmation of receipt of the said amount, the Financial Creditor didn't hand over the title deeds in respect of the collateral securities until 30.12.2018 to HDFC Bank, which in-turn did neither disburse nor allow the Respondent herein to utilize the balance sum of INR 2.30 Crores out of the original facility of INR 12 Crores. The Respondent contends that on account of the same, it could not sustain its commercial existence. In light of the afore-mentioned averments, the Respondent contends that the alleged dues have been duly repaid by HDFC Bank Limited to the Financial Creditor herein, and that the Respondent is in-turn liable to be compensated for the totality of losses that have been incurred by it. The Respondent further disputes the veracity of Statement of Account and the Acknowledgement of Debt relied by the Financial Creditor herein.
- 7.** The contentions raised by the Respondent herein *via* its afore-mentioned Reply have been duly taken into account. In response to the same, the Financial Creditor was directed to file its Rejoinder *vide* Order *dated* 08.06.2023, and the same was duly effectuated with. The Financial Creditor, *via* its Rejoinder *dated* 19.07.2023, has sought to dispute the facts averred by the Respondent *via* its Reply.
- 7.1.** The Financial Creditor, in response to the facts averred by the Respondent in sub-para (5.1) hereto, submits that the amount of INR 9.70 Crores admittedly credited by HDFC Bank to it towards outstanding loan amount was subsequently withdrawn by the Corporate Debtor “*..beyond its account limit which led the said account to be overdraft*” and that Corporate Debtor's actions allegedly tantamount to double-financing.
- 7.2.** The Financial Creditor has further sought to rely on Bank Statements from 25.09.2017 to 15.01.2019, and has pressed upon the veracity of the Acknowledgment of Debt by the Personal Guarantors of the Corporate Debtor (including the Respondent herein) *dated* 29.01.2018.

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8. We note that this Bench had appointed Mr. Anil Kashi Drolia, Insolvency Resolution Professional (“RP”) *vide* Order *dated* 30.08.2023 in the captioned petition and had thereby directed the Applicant to prepare and file a Report *u/s.* 99 of the IBC, 2016. The RP *via* his Report *dated* 06.10.2023, after due examination of the application, and the requirements as mandated under clauses (1) to (10) of Section 99 of the IBC, 2016, recommends that therefore “..Mr. Anil Kashi Drolia recommends *u/s* 99(7) and 99(9) that the Petition bearing C.P. (IB) – 72/2023 deserves to be admitted under Section 100 of the Code and Personal Insolvency Resolution Process against Mr. Ajith Govindan Menon be initiated in this regard.”
9. In response to the said Rejoinder filed by the Financial Creditor and Report filed by the RP, the Respondent herein sought to file its Sur-Rejoinder *dated* 22.07.2023 and its Reply *dated* 26.12.2023 respectively. At the outset, the Respondent contends that the said RP Report had been served to an invalid E-mail address *viz.* “rajagopalan@opalasia.com”. The Respondent has re-iterated its objection over the Statement of Account relied upon by the Petitioner, and further contends that its liability stood discharged upon payment of INR 8.50 Crores by HDFC Bank Limited to the Financial Creditor herein and the *alleged* closure of the loan account consequent to the same.
10. We have duly heard the averments of the parties hereto, and have perused the submissions from materials that form part of the record.
- 10.1. To contextualize the factual lacunae, the Financial Creditor sanctioned a loan of INR 8.50 Crores to the Corporate Debtor in 2016, *apropos* which the Personal Guarantor(s) (*including the Respondent herein*) stood in guarantee thereof. In a bid to seek more favorable terms, the loan account of the Corporate Debtor was transferred from the Financial Creditor Bank to HDFC Bank Limited, whereby the latter sanctioned a loan facility of INR 12 Crores to the Corporate Debtor. Out of the *afore-said* amount of INR 12 Crores, INR 9.70 Crores was admittedly credited

by HDFC Bank Limited to the Financial Creditor Bank *vide* Demand Draft *dated* 21.09.2017. Pursuant to the same, the title deeds in respect of the collateral securities were transferred by the Financial Creditor Bank to HDFC Bank Limited on 30.12.2018. We however are of the considered view that the same does not *ipso-facto* amount to discharge/ extinguishment of liability of the Corporate Debtor and/ or that of the Personal Guarantor(s) (*including the Respondent herein*). There is a valid Acknowledgement of Debt by the Respondent *dated* 29.01.2018, and in absence of any No Objection/ No Due Certificate from the Petitioner Bank to the contrary; The Respondent herein cannot deny its contractual commitment, more specifically so in light of Clause (7) of the Deed of Guarantee *dated* 29.06.2016.

- 10.2.** In so far as the dispute to the veracity of the Report by RP *dated* 06.10.2023 and its service to the Respondent herein is concerned, we find that the same had been duly served upon the Respondent. The proof-of-service apropos the same forms part of the records hereto, and the said contention is therefore devoid of any substance.
- 11.** The proceedings in the present matter were put on hold since the constitutional validity of the Sections 94 to 100 of IBC, 2016, relating to the insolvency of Personal Guarantor was pending before the Hon'ble Supreme Court in the matter of *Dilip B. Jiwrajka V/s Union of India & Ors. [WP (Civil) No. 1281 of 2021]*.
- 12.** We are of thus of the considered view that the captioned petition is complete is all aspects, and the present case is fit for admission. Ordered accordingly.

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ORDER

13. In terms of the above, the captioned petition bearing C.P. (IB) No. 72/MB/2023 filed under Section 95 of the IBC, 2016 is hereby **Admitted** and the Insolvency Resolution Process stands initiated against Mr. Ajith Govindan Menon *viz.* the Respondent herein.

We hereby direct as hereinafter:

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 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. Anil Kashi Drolia**, Insolvency Resolution Professional, having Registration No. IBBI/IPA-001/IP-P-02327/2020-2021/13482, having address at B-906, Park Side 1, Raheja Estate, Kulupwadi, Borivali-East, Near National

Park, Mumbai Suburban, Maharashtra-400066 [E-Mail: anildrolia.ip@gmail.com] 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 Mumbai 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 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, business or trade on his behalf or in his name:

or

b. realize the assets of the debtor; or

c. administers 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 thereof. 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 days 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 Applicant is directed to deposit **INR 2,00,000/-** (Indian Rupees Two lakhs) to the bank account of the Resolution Professional within one week, towards his fees. This shall be subjected to the rules and regulations under the provisions of the Insolvency and Bankruptcy Code, 2016.
- X.** 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.

Sd/-

ANU JAGMOHAN SINGH
MEMBER (TECHNICAL)

07.05.2024

Aditya Kalia

Sd/-

KISHORE VEMULAPALLI
MEMBER (JUDICIAL)
