

IN THE NATIONAL COMPANY LAW TRIBUNAL: NEW DELHI
PRINCIPAL BENCH

ITEM No. 19
(IB)-709(PB)/2022

IN THE MATTER OF:

State Bank of India

.... Petitioner

v.

Sh. Brij Bhushan Singal

.... Respondent

Order U/s. 95 (1) of (IBC)

Order delivered on 08.04.2024

CORAM:

JUSTICE RAMALINGAM SUDHAKAR
HON'BLE PRESIDENT

SH. AVINASH K. SRIVASTAVA
HON'BLE MEMBER (TECHNICAL)

(HEARING THROUGH PHYSICAL MODE & VC)

PRESENT:

For the Applicant in : Mr. Sudhir Makkar, Sr. Counsel
IA-311/2024

For the Respondent :

ORDER

1. The Petitioner herein viz. State Bank of India has moved the present Application u/s 95(1) of IBC, 2016 read with Rule 7 of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 (Personal Guarantor Rules) against Applicant/ Personal Guarantor (PG) to Corporate Debtor with a prayer to initiate insolvency resolution process. According to the Ld. Counsel for the Applicant, the demand notice under Section 95(4) (b) read with Rule 7 of the Personal Guarantor Rules, demanding payment of amount of default (in form-B) is enclosed with the application and is placed on record. The Ld. Counsel has submitted the proof of service of the application upon the Personal Guarantor. In the meanwhile, IA-311/2024 has been filed on behalf of PG seeking following prayers:

- a. *Dismiss the present proceedings being non-maintainable bearing no. CP(IB) 709/PB/2022 titled as 'SBI & Anr. vs. Brij Bhushan Singal; and*
- b. *Recall the order dated 05.12.2023 passed by this Hon'ble Tribunal; and/or*
- c. *Pass any other order that this Hon'ble Tribunal may deem fit in the facts and circumstances of this case;*

2. Mr. Sudhir Makkar, Ld. Sr. Counsel appeared on behalf of the Applicant (PG) and stated that prayer “b” has become infructuous. While making prayer “a”, he referred to the decision of Hon'ble Supreme Court passed in Writ Petition (Civil) No. 1281 of 2021 titled **Dilip B Jiwrajka v. Union of India and Others** more particularly para nos. 68, 72 & 74 and submitted that in terms of para 86 (i), (ii) & (iii) no adjudication is involved at the stage of 95-99 (1) Sections. Para 68, 72 & 74 reads as follows:-

68. The submission which has been urged on behalf of the petitioners, however, is that Section 97(5) contemplates a role for the adjudicating authority in the appointment of a resolution professional anterior to the stage which is contemplated during the course of adjudication under Section 100. It has been urged that when the adjudicating authority appoints a resolution professional under Section 97(5), the adjudicating authority should be required to decide the jurisdictional questions on the basis of which the provisions of Part III are implicated. In other words, it is urged that, at that stage, it would be necessary for the adjudicating authority to apply its mind as to whether (i) a debt subsists; and (ii) the relationship of creditor and debtor subsists. This is similar to the UNCITRAL Guide which emphasises the need for the insolvency court to evaluate commencement criteria before admitting insolvency proceedings, ensuring a fair hearing for the parties involved.

....

72. We are of the view that the submission that an adjudicatory role should be interposed at the stage of Section 97(5) cannot be accepted. The power which is conferred on the adjudicating

authority at the stage of filing of an application is to appoint a resolution professional. The appointment of a resolution professional is for the purpose of a facilitative exercise which is contemplated by Section 99 which, as we have noted, eventually ends in a report either recommending the acceptance or rejection of the application. Bearing in mind the statutory scheme, it would be impermissible for this Court to allow for the adjudicatory intervention of the adjudicating authority in adjudicating what is described as a jurisdictional question at the stage of Section 97(5).

....

74. *The true adjudicatory function of the authority commences under Section 100 after the submission of the report. Another reason why we are not inclined to accept the submission is that what is described as a jurisdictional question by the petitioners may not be a simple matter to be decided as a question of law. The jurisdictional questions of the nature which have been suggested by the petitioners, namely, on whether there is a subsisting debt or whether the relationship of debtor and creditor subsists, would involve a decision on mixed questions of law and fact. The entire scheme of Sections 99 and 100 implicates time lines which have been laid down by Parliament. The entire process of implementing these time lines would be rendered nugatory if an adjudicatory role were to be read into the provisions of Section 97(5). The final reason which would militate against accepting the submission is that the provisions of Section 99 do not as such implicate any adverse civil consequences particularly if those provisions are read in the manner in which we now propose to elucidate.*

....

3. Nevertheless, while considering the issue on whether there is a subsisting debt or whether the relationship of debtor and creditor subsists, only those issues which are mixed questions of law and fact are barred, while question of law can be raised at any point of time making it clear that if there is an issue on the very maintainability of the case it can be agitated prior to the issuance of notice.

4. To support this plea, Ld. Sr. Counsel relied upon three crucial facts:- (i) by a plan approved by the Adjudicating Authority on 15.05.2018 in the case of Bhushan Steels, the liabilities stand extinguished (para “D” page 19 of the IA-311/2024), (ii) in the books of accounts of the creditors post approval of the plan, the liability shown as nil and therefore, there is no debt as on date, hence, the initiation of this proceeding is barred by law (page 17 of the IA-311/2024) and (iii) post approval of the plan, the subsisting debts have been assigned to a new company which in turn has been amalgamated with the SRA, therefore, the liability stood extinguished (para “B” page 14 of the IA-311/2024).
5. As a result, there is no debt as on date and therefore, there is no cause for the bank to initiate the present proceeding. Mr. V. Ganda, Ld. Sr. Counsel for the Bank relied upon para 72, 74 & 86 of the judgment passed by Hon’ble Supreme Court in Writ Petition (Civil) No. 1281 of 2021 titled **Dilip B Jiwrajka v. Union of India and Others** to emphasize the fact that at this stage, there is no role for the Adjudicating Authority to enter into either issue of fact and law and it has to simply follow the procedure prescribed in law. The three issues urged by the Ld. Sr. Counsel are the issues on question of fact and law. One other example which was suggested by the Ld. Sr. Counsel Mr. Sudhir Makkar is that if there is a Section 95 application against same PG filed prior in time, any application filed thereafter should not be pursued.
6. As far as the three contentious issues raised that there is no debt subsisting to initiate proceedings under Part-III Chapter-III, it may be true that the plan has its own method of working out liabilities of the respective parties. The parties have acted upon the plan in a particular manner and there could be an assignment of debt.
7. In any event, if such event had happened that could be captured by the RP at the time of inquiry and reported to us and it will be duly considered for the purpose of initiating further proceedings by way of an adjudication process which is envisaged under Section 100 and clearly defined by the Hon’ble Supreme Court in paragraph 73.
8. The three issues raised are question of fact and law which are clearly delineated by the Hon’ble Supreme Court in para 74 as extracted above.

Hence, we are not inclined to accept such a plea. As far as the example cited by Mr. Sudhir Makkar, Ld. Sr. Counsel that the prior petition could bar the subsisting petition is concerned, it is governed by the provisions of the Code and there is no need to assail that any further.

9. Hence, we find no merit in this application to dismiss the proceedings filed by the Bank initiated under Part-III Chapter-III. The IA-311/2024 stands dismissed in above terms. Since petitioner / FC has not proposed the name of RP, therefore this Bench Appoints **Mr. Amit Jain** from the panel of Resolution Professionals maintained by IBBI whose details are given below:

Sh Amit Jain,
IBBI/IPA-001/IP-P-02836/2023-2024/14369
amitjain32@gmail.com
Mob. No.9818582552

10. The Resolution Professional so appointed shall perform all the functions as stipulated under Section 99 of IBC, 2016 read with Rules made thereunder. He shall also examine the application and make recommendations with reasons in writing for acceptance or rejection of the present application within the time stipulated under Section 99 of IBC, 2016.
11. The Resolution Professional shall give a copy of its Report to the Applicant, Creditors of the applicant as well as to Personal Guarantor as soon as the same is filed before this Authority.
12. The Applicant and his counsel are directed to make available the copy of this order along with copy of the application and documents immediately to **Mr. Amit Jain** Resolution Professional by all modes for information and necessary compliance.
13. List the matter on **30.04.2024** for the perusal of the Report of the RP and further proceedings.

-Sd/-
(RAMALINGAM SUDHAKAR)
PRESIDENT

-Sd/-
(AVINASH K. SRIVASTAVA)
MEMBER (TECHNICAL)