

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH, (Court – II)
KOLKATA**

IA(IBC)/449(KB)2024

C.P. (IB)/54(KB)2021

*An application under Section 95(1) of the Insolvency and Bankruptcy Code, 2016
and in accordance with Rule 11 of National Company Law Tribunal Rules, 2016.*

In the matter of:

(1) **Mr. Prashant Jain**, Regd. Add: A501, Shanti Heights, Plot No. 2,3,9B/10, Sector 11, Koparkharine, Thane, Navi Mumbai – 400709 and Correspondence Address: Office No. 610, B Wing, Plot No. 39/5A, BSEL Tech Park Sector 30A, Vashi, Navi Mumbai – 400703, Maharashtra.

... Resolution Professional

-And-

(2) **STATE BANK OF INDIA**

... Applicant

-Versus-

(3) **SUDIP BIJOY DUTTA**

... Personal Guarantor

Date of pronouncing of the order: 10/04/2024

Coram:

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

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

Appearances (via video conferencing/physically):

Mr. Vikram Wadhera, Adv. : **For the Resolution Professional**

Mr. Pathik Choudhary, Adv. :

ORDER

Per: Bidisha Banerjee, Member (Judicial)

1. The court convened through hybrid mode.

2. Ld. Counsels appearing for the parties were heard in extenso.
3. This application **IA(IBC)/449(KB)2024** has been preferred to seek the following reliefs, inter alia: -

(a) Terminating the Insolvency Resolution Process of Personal Guarantor and discharging the Applicant from his role as the Resolution Professional.

(b) Granting liberty to the Creditors of the Personal Guarantor to initiate Bankruptcy Process against the Personal Guarantor.

(c) Directing the Creditors of Personal Guarantor to contribute to the Insolvency Resolution Process cost.

4. **Factual matrix of the case are as under: -**

- i. The Creditor had granted loans and various credit facilities to ESS DEE Aluminium Limited. That ESS DEE Aluminium Limited failed to make payment of its dues and finally the account was declared as Non-Performing Asset by the Creditor on 29th March, 2016.
- ii. The SBI (Creditor/Applicant) filed an application **C.P. (IB)/1284(KB)2019** under Section 7 of the Insolvency and Bankruptcy Code, 2016 (Code) against the Corporate Debtor before this Tribunal. The application was admitted vide Order dated 14th February, 2020 and subsequent clarification dated 19th February, 2021. Accordingly, the Corporate Insolvency Resolution Process (hereinafter referred to as “CIRP”) was initiated against the Corporate Debtor.
- iii. The present **C.P. (IB)/54(KB)2021** under Section 95 of Code. The Tribunal *vide* its Order dated 3rd August, 2021 Mr. Prashant Jain was appointed as RP in the said matter and the Order received by the RP on 10th September, 2021. The RP in compliance of Section 99 of the Code, filed his Report before this Tribunal and recommending the initiation of

Insolvency Resolution Process of Personal Guarantor to the Corporate Debtor.

iv. This Tribunal *vide* its Order dated 16th June, 2022 initiated the Insolvency Resolution Process against Mr. Sudip Bijoy Dutta, the Personal Guarantor to Ess Dee Aluminium Ltd. and had appointed Mr. Prashant Jain as the RP.

- **Public notice for intimation of Insolvency Resolution for PGs to the Corporate Debtor.**

- i. The RP has published a Public Notice, as per Section 102 of Code on 21st June, 2022 which was circulated in the newspapers – **Financial Express** (in Maharashtra Edition) in **English** and **Navakal** (in Maharashtra Edition) in **Marathi** Language.

- **Intimation email sent to the Financial Creditors**

- i. After publication of Public Announcement, an email was sent to the Financial Creditors intimating them to the initiation of Insolvency of Resolution Process of the Personal Guarantor and requesting them to submit their claims in **Form B** on or before 12th July, 2022, i.e., within a period of twenty – one days of issuance of public notice.

- **Submission of Public Notice to the Registry of NCLT Kolkata Bench.**

- i. The RP sent the public notice to the Registry of NCLT Kolkata Bench *vide* Order dated 16th June, 2022 for placing the said notice on the website as well as the premises of this Tribunal through letter dated 22nd June, 2022.

- **Verification of claims of creditors received under Section 104 of IBC.**
 - i. On the last date for submission of Claims, i.e., 12th July, 2022, the RP has received claims from 6 Creditors of Respondent/Personal Guarantor amounting to Rs. 8,16,82,26,550/-. In accordance with Section 104 of Insolvency and Bankruptcy Code, 2016 r/w Regulation 9 of IBBI (Insolvency Resolution Process of Personal Guarantors to Corporate Debtors) Regulation, 2019, the RP has prepared the list of Creditors was also shared with the Respondent/Personal Guarantor through its email dated 22nd July, 2022.

- **Status of the appeal preferred by the Respondent/Personal Guarantor before the Hon’ble NCLAT:**
 - i. The Respondent/Personal Guarantor had preferred an appeal before the Hon’ble National Company Law Appellate Tribunal, Delhi against the Order passed by this Tribunal dated 03rd August, 2021 (Order u/s. 95 of Code) in Company Appeal (AT) (Insolvency) No. 807 of 2021 and Order dated 16th June, 2022 (Order u/s. 100 of Code) in Company Appeal (AT) (Insolvency) No. 740 of 2022.
 - ii. Both the appeals were listed and heard by the Hon’ble NCLAT on 14th July, 2022 and reserved for Orders. The RP appeared along with his advocate. The final Order was passed on 29th July, 2022 dismissing both the appeals.

- **Request to submit the repayment plan to Mr. Sudip Bijoy Dutta.**

- i. In accordance with 105 of the Code, the Personal Guarantor has to make a repayment plan in consultation with the Resolution Professional. The RP through its email dated 21st June, 2022 circulated the Public Notice to the Respondent. Thereafter, on 7th July, 2022 the RP once again sent an email requesting for providing a feasible time at the earliest to have a virtual meeting for providing consultation on the preparation of the Repayment Plan. The RP also requested to submit the Repayment Plan on or before 27th July, 2022.
- ii. The RP also sought information from the Respondent which is required as per Regulation 10 of IBBI (Insolvency Resolution Process of Personal Guarantors to Corporate Debtors) Regulations, 2019 so as to enable the RP to prepare the statement of affair of the guarantor such as: -

 - Assets and liabilities for the preceding three financial years and the current financial year;
 - Details of the excluded assets and excluded debts;
 - Income statement for the preceding three financial years and the current financial year;
 - Income-tax returns filed by the guarantor, if any, for the preceding three financial years;
 - Creditor wise amount due, broken up into secured and unsecured debts for the preceding three financial years; Details of debt owed by guarantor to his associates for the preceding three financial years;
 - Guarantees given in relation to any of his debts, and whether any of the guarantors is an associate of the guarantor; and

- Details of the financial statements for the business owned by the guarantor, or of the firm in which he is a partner, as the case may be, for the preceding three financial years, if applicable.
 - iii. The RP also sent letters to the Respondent / Personal Guarantor and follow – up emails. However, no reply has been received by the Resolution Professional.
 - iv. The RP has further sent a letter to the personal guarantor with regard to consultation of repayment plan and seeking documents.
 - v. The timeline to submit the repayment plan along with the RPs’ Report on this plan to this Tribunal was within a period of twenty-one days from the last date of submission of claims i.e., 3rd August, 2022. However, the Resolution Plan did not receive the Repayment plan from the Respondent / Personal Guarantor.
- **Filing Progress Report and Statement on Non-Cooperation by Personal Guarantor in accordance of Regulation 22 of IBBI (Insolvency Resolution Process of Personal Guarantors to Corporate Debtors) Regulation, 2019**
 - i. The Personal Guarantor i.e., Mr. Sudip Bijoy Dutta failed to cooperate with the RP during the insolvency resolution process sending him multiple mails on his email IDs’ available with the RP i.e., on cs@essdee.in and essdee.india1@gmail.com on 18th June, 2022, 21st June, 2022, 23rd June, 2022, 7th July, 2022 and 22nd July 2022.
 - ii. The Order passed by this Tribunal by Order dated 16th June, 2022, a copy of public announcement was shared with Personal Guarantor on his mobile no. +6590250981 through WhatsApp on 21st June, 2022 but still there was

no reply from his side. The RP further sent letters to his registered address. The Guarantor had received one Letter and two other Letters have not been delivered to the respondent.

- iii. The RP neither received any information as sought from the Personal Guarantor nor any repayment plan as on the date of submission of the Report. Therefore, the RP sought directions of this Tribunal to the Respondent/Personal Guarantor to cooperate with the RP during the Insolvency resolution Process and submit a Repayment Plan in accordance with Section 105 of the Code r/w. Regulation 17 of IBBI (Insolvency Resolution Process of Personal Guarantors to Corporate Debtors) Regulation, 2019.
- iv. On 3rd August, 2022 the aforesaid Progress Report was filed before this Tribunal via Interlocutory Application bearing **IA(IBC)/870(KB)2022**.
- v. The aforesaid IAs were on various dates but due to pendency of the matter relating to Section 95(1) before the Hon'ble Supreme Court of India the IAs could not be taken up. When the matter came up on board on 07th December, 2023; this Tribunal passed an Order to take on record the Progress Report. The copy of the Progress Report dated 3rd August, 2021 along with Order dated 07th December, 2023.
- vi. Further, even though no Repayment Plan was received in this matter, the RP had called for a meeting of the Creditors of Personal Guarantor to discuss on cost incurred and the mechanisms of contribution towards the same. In the meeting of Creditors held, the RP had placed the cost incurred by him and requested all the Creditors to contribute to the cost. The RP circulated the cost amounting to Rs. 11,30,400 /- in the meeting of Creditors and Debit notes towards contribution of cost. However, only two Creditors being State Bank of India and Pegasus Assets

Reconstruction Private Limited deposited the cost incurred. The RP seeks direction of this Tribunal to the Creditors being IDBI Bank, Asset's Care & Reconstruction Enterprise Limited and IFCI Limited to contribute to the cost as decided.

vii. There is no repayment plan from the Personal Guarantor. The applicant submits that the Code does not contemplate a situation as a consequence of non-submission of a repayment plan by an insolvent individual during the IRP under Chapter III of Part III.

5. The contentions are noted.

6. Section 114, Section 115 and Section 121 of IB, Code reads as under: -

Section 114

“Order of Adjudicating Authority on repayment plan.

(1) The Adjudicating Authority shall by an order approve or reject the repayment plan on the basis of the report of the meeting of the creditors submitted by the resolution professional under Section 112:

Provided that where a meeting of creditors is not summoned, the Adjudicating Authority shall pass an order on the basis of the report prepared by the resolution professional under section 106.”

Section 115

“Effect of order of Adjudicating Authority on repayment plan.

(2) Where the Adjudicating Authority rejects the repayment plan under Section 114, the debtor and the creditors shall be entitled to file an application for bankruptcy under Chapter IV.”

Section 121

“Application for bankruptcy.

(3) An Application for bankruptcy of a debtor may be made, by a creditor individually or jointly with other creditors or by a debtor, to the Adjudicating Authority in the following circumstances, namely: -

(a) where an order has been passed by an Adjudicating Authority under sub-section 4 of section 100; or

(b) where an order has been passed by an Adjudicating Authority under sub-section 2 of section 115; or

(c) where an order has been passed by an Adjudicating Authority under sub-section 3 of section 118.

(4) An application for bankruptcy shall be filed within a period of three months of the date of the order passed by the Adjudicating Authority under the sections referred to in sub-section (1).

(5) Where the debtor is a firm, the application under sub-section (1) may be filed by any of its partners.”

7. Since, we have failed to decipher any specific provision contemplating a situation where no repayment plan is proposed, we consider it fit to apply provisions under Section 114 and Section 115 that envisages a situation when an Adjudicating Authority rejects a repayment plan under Section 114(1) and Section 115(2), the creditors are entitled to file an application for bankruptcy under Chapter IV. We thus pass the following Orders: -

- i. We thus allow the prayer(s).
- ii. With the above directions, **IA(IBC)/449(KB)2024** is **allowed** and **disposed of**.
- iii. 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.

8. 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)

Order signed on: 10th of April, 2024.

Ar.