

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

ITEM No.306
C.P.(IB)/57(AHM)2022

Order under Section 95 IBC

IN THE MATTER OF:

Tata Capital Financial Services Ltd
V/s
Jagdish Prasad Saboo

.....Applicant

.....Respondent

Order delivered on: 04/01/2024

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/57/AHM/2022

*Filed under Section 95 of the Insolvency & Bankruptcy Code,
2016*

*In the matter of **Mr. Jagdish Prasad Saboo***

Tata Capital Financial Services Limited

Registered office at
11th Floor, Tower A,
Penninsula Business Park,
G.K. Marg, Lower Parel.
Mumbai-400 013

... Financial Creditor

V/s

Mr. Jagdish Prasad Saboo

(Personal Guarantor)
3-A, Nidhivan Apartment, B/H,
Gokul Row House, Umara,
Surat-395007, Gujarat

... Personal Guarantor

Order pronounced on 04.01.2024

CORAM:

SHAMMI KHAN, MEMBER (JUDICIAL)

SAMEER KAKAR, MEMBER (TECHNICAL)

APPEARANCE:

For the Applicant : Mr. Dev Shah, Ld. Adv. for Mr.
Arjun Sheth, Ld. Adv.

For the Respondent : Ms. Rajshree Bohra, Ld. 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 Tata Capital Financial Services Limited (hereinafter referred to as "Financial Creditors") for the purpose of initiating insolvency process against Mr. Jagdish Prasad Sood (hereinafter referred to as "Personal Guarantors") for a default amount of Rs.4,62,75,433.70/- including interest or penalties. The date of default is stated to be 01.02.2021. The Respondent/Personal Guarantor had provided unconditional and irrevocable Guarantee towards Channel Finance Facility granted to the Corporate Debtor.

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 M/s. Surya Exim Ltd. (herein after referred to as "**Corporate Debtor**") was ordered by this Adjudicating Authority on 03.02.2021. 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. The Financial Creditor upon the request of the Corporate Debtor had sanctioned Channel Finance Facility of Rs.10,00,00,000/- and Rs. 5,00,00,000/- vide sanction letter dated 12.05.2016 and 27.07.2018 respectively.

4. The said Channel Finance Facility provided to Corporate Debtor was secured by unconditional and irrevocable Guarantee of Mr. Jagdish Prasad Saboo and Mrs. Archana Jagdish Saboo by executing Letter of Guarantee dated 13.05.2016 and 28.07.2018.

5. Thereafter, the Corporate Debtor executed following documents for all the renewals and change in terms and conditions:

i. Revised Sanction letter dated 25th March, 2019.

- ii. Loan Cum Guarantee Agreement dated 28th March, 2019.
- iii. Revised Sanction Letter dated 17th April, 2019.
- iv. Change of terms letter dated 2nd May, 2019.
- v. Request letter for renewal dated 2nd August, 2019.
- vi. Extension Letter dated 5th August, 2019.
- vii. Revival Letter dated 6th August, 2019.
- viii. Loan Cum Agreement dated 6th August, 2019.
- ix. Revised Sanction Letter dated 30th August, 2019.
- x. Loan Cum Guarantee Agreement dated 31st August, 2019.
- xi. Request for renewal letter dated 16th September, 2019.
- xii. Extension Letter dated 16th September, 2019.
- xiii. Renewal Letter dated 16th September, 2019.
- xiv. Loan Cum Guarantee Agreement dated 16th September, 2019.

6. Further, upon request of Corporate Debtor the Financial Creditor sanctioned another Channel Finance Facility of Rs.4,15,00,000/- vide sanction letter dated 31.10.2019 . The said facility was secured by Loan Cum Guarantee Agreement dated 22nd November, 2019.

7. Thereafter, a section 7 petition bearing CP (IB) No. 247 of 2020 was filed by State Bank of India against the Corporate Debtor. The said petition was admitted into Corporate Insolvency Resolution Process vide order dated 03.02.2021.

8. 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 23.07.2021 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. The demand notice was delivered to the Respondent on 28.07.2021.

9. On presentation of the application by the Applicant/Financial Creditor, this Tribunal vide order dated 07.03.2022 appointed Mr. Kabra Rajendrakumar Radhakishan having Registration No. IBBI/IPA-001/IP-P02385/2021-2022 as Interim Resolution Profession (hereinafter referred to as "IRP"). This Tribunal also directed the IRP to file his report within 10 days from date of his appointment as IRP of the Personal Guarantor. The Interim Resolution Professional has filed the report dated 05.04.2022 before this Tribunal on 04.05.2022 vide Inward No. D2421 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. The application CP (IB) No.57 of 2022 is found to be satisfying all the ingredients of Sec.95 of IBC.
- ii. No evidence is received of any repayment of the debt claimed in Sec.95 petition from Mr. Jagdish Prasad Saboo.
- iii. No document is received whereby the Personal Guarantee agreement was cancelled by both the parties.
- iv. No order of any court or any other forum is received whereby the personal guarantee agreement was cancelled or set aside.

10. The Respondent/Personal Guarantor filed an affidavit in reply dated 06.06.2022 before this Tribunal on 07.07.2022 under diary no. D3798 wherein it is stated that the Respondent does not oppose to the admission of the present application under section 95 of the Insolvency & Bankruptcy Code, 2016.

11. The proceedings in the present 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.

12. 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.*

13. We have heard the learned counsel for both the parties and perused the documents on record. We have also gone through the report dated 05.04.2022 filed by the IRP. 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 Indian 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.”

14. 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 05.04.2022.
- ii. The Respondent has admitted to have executed the Guarantee Agreement.
- iii. The Applicant has demanded the amount outstanding from the Respondent vide Demand Notice dated 23.07.2021.
- 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 on the date of order.

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 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., Kabra Rajendrakumar Radhakishan having Registration No. IBBI/IPA-001/IP-P02385/2021-2022, office at C-107, Cosy Corner Society, Thaltej, Ahmedabad-380054 (e-mail id: rajendrakumar_kabra@rediffmail.com] who was appointed when the Section 97 application was allowed vide Order dated 07.03.2022, 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 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 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 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.

15. In terms of the above, **CP(IB)/57(AHM)/2020** filed under Section 95 of the IBC, 2016 is admitted and the Insolvency Resolution Process stands initiated against the Applicant/Personal Guarantor.

-Sd-
SAMEER KAKAR
MEMBER (TECHNICAL)

-Sd-
SHAMMI KHAN
MEMBER (JUDICIAL)

Arati-LRA