

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

ITEM No.306- C.P.(IB)/179(AHM)2022
With
ITEM No. 307- IA/71(AHM) 2024

Order under Section 95 IBC

IN THE MATTER OF:

State Bank of India

.....Applicant

V/s

Harjibhai Popatbhai Ghanva

.....Respondent

Order delivered on 20/03/2024

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.

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SAMEER KAKAR
MEMBER (TECHNICAL)

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SHAMMI KHAN
MEMBER (JUDICIAL)

**BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH-I, AHMEDABAD**

**CP (IB) No.179/NCLT/AHM/2022
With
I.A. No.71/NCLT/AHM/2024**

*[Application under Section 7 (2) of the Insolvency and Bankruptcy
(Application to Adjudicating Authority for Insolvency Resolution Process
for Personal Guarantor to Corporate Debtor) Rules, 2019]*

*In the matter of **Mr. Harjibhai Popatbhai Ghanva***

State Bank of India

Stressed Asset Management Branch,
2nd Floor, Paramsiddhi Complex,
Opp. V.S. Hospital, Ellisbridge,
Ashram Road, Ahmedabad-380006

.....Financial Creditor

VERSUS

Mr. Harjibhai Popatbhai Ghanva

Village Moviya,
Taluka Gondal,
District Rajkot – 360330

.... Personal Guarantor

Order pronounced on 20.03.2024

CORAM:

**SH. SHAMMI KHAN, MEMBER (JUDICIAL)
SH. SAMEER KAKAR, MEMBER (TECHNICAL)**

For Applicant/RP : Mr. Saurabh Rachchh, Advocate

For SBI : Ms. M.A. Gogia, Advocate

For the Respondent : None

ORDER
Per: Bench

1. The Present Application is filed on 07.06.2022 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 State Bank of India (hereinafter referred to as "Financial Creditors") for the purpose of initiating insolvency process against Mr. Harjibhai Popatbhai Ghanva (hereinafter referred to as "Personal Guarantors") for a default amount of Rs.30,44,45,906.43/-. 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 26.07.2013 in favour of Applicant. The date of default is stated to be 10.03.2020.

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.

3. It is stated that M/s. Yogiraj Spinning Limited being principal borrower applied for a loan for its operations from the Applicant Bank which was approved vide letter dated 26.07.2013. The Respondent was Director and personal Guarantor of the Corporate Debtor who executed and signed various standard loan documents in favour of Applicant Bank which was time to time enhanced and lastly renewed 06.06.2018.

4. However, after availing the Loan/Credit Facilities, the Corporate Debtor failed to maintain financial discipline as per terms and conditions of the loan agreement due to which loan account became irregular. Consequently, the said loan account of the Corporate Debtor was classified as NPA on 28.12.2018 and recalled by Applicant Bank. Thereafter, Applicant Bank served Legal Notice dated 06.04.2019 to the Borrower and Guarantors to repay the outstanding dues. Further, due to non-payment of the amount by the Corporate Debtor, in compliance with Rule 7(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process of Personal Guarantors to Corporate Debtor) Rule, 2019, the State Bank of India served From B (Demand Notice) to the Respondent/Personal Guarantor and requested to pay the unpaid debt in default in full within 14 (fourteen) days from the receipt of this notice dated 09.03.2022.
5. Thereafter, in pursuant to non-receipt of any response, the State Bank of India accordingly filed the petition in

'Form-C' under Section 95 of the Code 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, against the Personal Guarantors before the Hon'ble National Company Law Tribunal, Ahmedabad Bench, on 07.06.2022 with respect to the initiation of Individual Insolvency Resolution Process of Personal Guarantors to the Borrower.

6. On presentation of the application by the Applicant/Financial Creditor, this Tribunal vide order dated 19.12.2023, appointed Interim Resolution Profession (hereinafter referred to as "IRP") as suggested by the Financial Creditors viz. Mr. Vinod Tarachand Agarwal to carry out Insolvency Resolution Process of the Personal Guarantor as per section 97(3) of IBC, 2016, with a direction to submit the report under Section 99 of the IB Code, 2016, within ten days. The IRP is also directed to file its report through separate IA.

7. The Interim Resolution Professional has filed the report through IA No. 71 of 2024, vide inward diary No. E-92, dated 10.01.2024 recommending the admission of the application filed under Section 95 of IBC, 2016. The summary of grounds for admission of the application as per the Report are as follows:-

1. I have examined the application C.P.(IB/179(AHM)2022 and the same is found to be satisfying all the requirements of Section 95 of IBC 2016.
2. Debt owed by M/s Yogira Spinning Limited to the State Bank of India of **INR 46,61,35,473.96/-** along with interest rate till **28.02.2022** (Debt amount as per application filed by State Bank of India under Section 7 of the IBC, 2016 against Corporate Debtor **M/s Yogiraj Spinning Limited**) as evidenced by the various documents submitted along with the application;
3. **Mr. Harjibhai Popatbhai Ghana** had extended Personal Guarantee as evidenced by the Deed of Guarantee submitted along with the application;
4. The State Bank of India on 08.01.2020 invoked the personal guarantee against Mr. Haribhai Popatbhai Ghanva by issuing notice to the Borrower and Guarantors u/ s 13(2) of Securitization and Reconstruction of financial assets and

Enforcement of Security Interest Act, 2002 (SARFAESI and directed to pay the debt. However, the Personal Guarantor failed to pay the debt;

5. In pursuant to non-receipt of any response of the demand notice (Form-B) served to the personal guarantor, the State Bank of India filed the petition in Form-C under Section-95 of the Code read with rule 7(2) of the Insolvency and Bankruptcy Rules, 2019 against the personal guarantor before the Hon'ble National Company Law Tribunal, Ahmedabad, Bench, on 03.06.2022 with respect to the Initiation of Individual Insolvency Resolution Process of the Personal Guarantors to the Borrower,
6. As per Section 96 (1) (a) an interim-moratorium shall commence on the date of the application in relation to all the debts and shall cease to have effect on the date of admission of such application. In view of the same, the interim moratorium under section 96 of the code is effective from 03.06.2022.
7. The Hon'ble National Company Law Tribunal, Ahmedabad Bench vide order dated 19.12.2023 directed for the RP Report as per section 99 of the code on admission or rejection of the application made by the State Bank of India under section 95 of the code;
8. I have sent Intimation letter through speed post-delivery to State Bank of India and Mr. Sunil

Kumar Agarwal (Resolution Professional of M/s Yogiraj Spinning Limited) dated 27.12.2023 along with the order of Hon'ble Adjudicating Authority and through e-mail dated 26.12.2023, to provide us any records and evidence with regard to personal guarantee provide by Mr. Harjibhai Popatbhai Ghanva to State Bank of India on behalf of M/s. Yogiraj Spinning Limited.

9. I have sent hard copy of letter through speed post-delivery to business and personal address along with the copy of order of Hon'ble Adjudicating Authorities dated 27. 12.2023 to Mr. Harjibhai Popatbhai Ghana and vide our e-mail dated 26. 12.2023, wherein he was requested to submit the reply within 5 days of receipt of the letter, But I did not receive either any acknowledgement or any evidence from Mr. Harjibhai Popatbhai Ghana to proving the repayment of the debt claimed as unpaid by State Bank of India.
10. I did not receive any evidence/ records of repayment of debt claimed in section 95 petition from Mr. Harjibhai Popatbhai Ghanva.
11. I have not received any document whereby the Personal Guarantee agreement dated 26.07.2013 was cancelled by both the parties.
12. I have not received any order of court or any other forum whereby the personal guarantee agreement dated 26.07.2013 was cancelled or set aside.

8. Vide order dated 16.01.2024, this Tribunal issued a notice to the Respondent / Personal Guarantor and directed the respondent as well as to the Corporate Debtor to file its reply, if any, within two weeks from the date of receipt of notice. Thereafter, rejoinder, if any, be filed within seven days.
9. Vide order dated 19.02.2024 this Tribunal records that “despite due service, neither respondent / personal guarantor has appeared, nor filed any objection / reply to the report filed by the RP under Section 99 of the IBC, 2016. Last chance is given to the respondent / personal guarantor for appearance and for filing objections / reply, if any, within seven days.
10. Vide order dated 26.02.2024, records that “Despite extended opportunity given again no reply has been filed by the Respondent/Personal Guarantor. Therefore, right to file reply is hereby closed. Further, Respondent/Personal Guarantor is hereby proceeded **ex-parte**”.

11. 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.

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 10.01.2024 filed by the IRP.

14. It is seen from the petition that the present application is filed on 07.06.2022 within the period of limitation as the said loan account of the Corporate Debtor was classified as NPA on 28.12.2018. Thereafter, Applicant Bank served Legal Notice dated 06.04.2019 to the Borrower and Guarantors to repay the outstanding dues. Ultimately, Demand Notice dated 09.03.2022 invoking Personal Guarantee within the period of limitation, was served

upon the Respondent who is one of the Directors of the Cooperate debtor which is not denied by the Respondent. 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.

15. 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."

16. Moreover, 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 10.01.2024.

- 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 09.03.2022.
- 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.
- v. In our view the application is not hit by Limitation.

17. 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 1BC, 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. Vinod Tarachand Agrawal, having Registration No: IBBI/IPA-001/IPA-001/IP-P00641/2017-18/11090, office at 204, Wall Street -1, Opp. Orient Club, Near

Gujarat College, Ellisbridge, Ahmedabad - 380006 who was appointed when the Section 97 application was allowed vide Order dated 19.12.2023, is directed to cause a public notice published on behalf of the Adjudicating Authority within 10 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.

- V. 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.

VI. 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.

VII. 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 subsection (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.

VIII. 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.

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

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.

18. In terms of the above, **CP (IB)/179(AHM)/2022** filed under Section 95 (1) of the IBC, 2016 is admitted and the Insolvency Resolution Process stands initiated against the Respondent/Personal Guarantor.

19. Accordingly, **IA/71(AHM) 2024** is stands disposed of.

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**SAMEER KAKAR
MEMBER (TECHNICAL)**

Vinit Patel / Steno

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**SHAMMI KHAN
MEMBER (JUDICIAL)**