

IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD
COURT - 2

ITEM No.304
C.P.(IB)/93(AHM)2021

Order under Section 95 IBC

IN THE MATTER OF:

State Bank of India

.....Applicant

V/s

Babulal Sagarmal Sanghvi

.....Respondent

Order delivered on: 16/04/2024

Coram:

Mrs. Chitra Hankare, Hon'ble Member(J)

Dr. Velamur G Venkata Chalapathy, Hon'ble Member(T)

ORDER

The case is fixed for pronouncement of the order. The order is pronounced in the open court, vide separate sheet.

-Sd-

DR. V. G. VENKATA CHALAPATHY
MEMBER (TECHNICAL)

-Sd-

CHITRA HANKARE
MEMBER (JUDICIAL)

**BEFORE THE ADJUDICATING AUTHORITY
THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD (COURT - II)**

CP(IB) No. 93 / NCLT / AHM / 2021

(Filed under Section 95(1) of the Insolvency & Bankruptcy Code, 2016)

State Bank of India
Stressed Assets Management Branch,
2nd Floor, Paramsiddhi Complex,
Opp. V. S. Hospital, Ellisbridge,
Ahmedabad-380006, Gujarat

... Financial Creditor

Versus

Mr. Babulal Sagarmal Sanghvi
41, Shree Society, Near Khanderao Market,
Bakarwadi, Vadodara-390004, Gujarat

... Personal Guarantor

Order pronounced on 16.04.2024

Coram:

**MRS. CHITRA HANKARE
HON'BLE MEMBER (JUDICIAL)**

**DR. V. G. VENKATA CHALAPATHY
HON'BLE MEMBER (TECHNICAL)**

Present:

For the Applicant : Mr. Pratik Thakkar, Adv.
RP : Mr. S K Agarwal
For the Respondent : Ms. Prachi Bohra, Proxy Adv. for
A R Gupta & Associates.

JUDGEMENT

1. State Bank of India (Financial Creditor) has filed this Application 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 to initiate Insolvency Resolution Process against Mr. Babulal Sagarmal Sanghvi, the Personal Guarantor of the Corporate Debtor namely Sanghvi Forging & Engineering Limited for default of an amount of Rs. 137,64,76,599.15/-
2. On receipt of loan application from the Corporate Debtor, the Financial Creditor had sanctioned the credit facilities in the year of 2004. The limits sanctioned under the said credit facilities were renewed/enhanced from time to time by the financial creditor. Subsequently, a consortium of two banks was formed as Bank of Baroda also having granted the credit facilities to the Corporate Debtor.
3. At the request of the Corporate Debtor Sanction Letter was issued by the financial creditor on 15.02.2014 for restructuring of advances by sanctioning total indebtedness from 92.98 crore to 109.48 crore by the financial creditor and from 142.44 crore to 167.94 crore by the consortium. As security for the repayment of the said Facilities together with interest, costs, charges and other expenses, payable in respect of the above facilities Deed of Guarantee was executed between Financial Creditor and Personal Guarantor on 29.03.2014.
4. Working Capital Term Loan Consortium Agreement was executed on

- 29.03.2014 between a bank consortium and Corporate Debtor and Second Supplemental Working Capital Consortium Agreement was also executed between a bank consortium and corporate debtor on the same date. Further, on 29.03.2014 Second Supplemental Joint Deed of Hypothecation between a bank consortium and Corporate Debtor and Facility Agreement (Consortium Term Loan) was executed between a bank consortium and Corporate Debtor.
5. Agreement for pledging shares was executed on 28.06.2014 by the personal guarantor in favour of consortium banks including the applicant. Memorandum relating to deposit of Title Deeds for creation of further charge for securing the overall credit limit was executed by the CD in favour of consortium banks and was registered with the Sub Registrar Vaghodia (Book No.2002/2014). Further on 25.05.2016, revival letter was executed by the CD and personal guarantor in favour of the consortium banks.
 6. In the year of 2018, Bank of Baroda had filed an application for initiation of Corporate Insolvency Resolution Process against the Corporate Debtor being CP(IB) 197/7/AHM/2018 under section 7 of the Insolvency and Bankruptcy Code, 2016 before the Hon'ble Adjudicating Authority at NCLT Ahmedabad which came to be allowed vide an order dated 30.08.2019. A resolution Plan is stated to have been approved wherein M/s BF Industrial Solutions was assigned the debt of Rs 173.31 crore. From the records it is observed that the Resolution Plan progressed however, due to a court case the matter on which there was no update to the tribunal. However, successful RA has also filed certain IAs in the matter which are pending disposal.
 7. 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 13.04.2021 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 19.04.2021. This Tribunal approved the Resolution Plan proposed during CIRP on 26.04.2021. The respondent replied to the demand notice on 05.05.2021. However, the debt was not repaid by guarantor whose guarantee continued even after the CIRP was closed and the Resolution Plan was approved as only the claim of the financial creditor on the CD has been reduced. Hence, the Financial Creditor has filed application.

8. Vide order dated 21.06.2021 the Resolution Profession, as suggested by the Financial Creditors, Mr. Sunil Kumar Agarwal (bearing registration No. IBBI/IPA-001/IP-P01390/2018-2019/12178 appointed to carry out Insolvency Resolution Process of the Personal Guarantor as per section 97(3) of IBC, 2016.
9. Accordingly, the Resolution Professional has filed the report dated 06.07.2021 recommending the admission of the application filed under Section 95 of IBC, 2016. The Report of RP states that the RP had not received any evidence of repayment of the debt claimed in Sec.95 petition from Mr. Babulal Sagarmal Sanghvi. Further, Vide notice dated 25.06.2021 RP communicated to the personal guarantor for any evidence of proof of payment of the debt claimed as unpaid by the creditor, no reply or communication was received from

the personal guarantor with respect to this notice. RP had neither received any document whereby the Personal Guarantee agreement dated 29.03.2014 was cancelled by both the parties nor received any order of court or any other forum whereby the personal guarantee agreement dated 29.03.2014 was cancelled or set aside.

10. The Respondent/Personal Guarantor filed an affidavit in reply dated 25.11.2021 and raised the following objections:

- i. Application is barred by law of limitation as the last sanction for renewal of working capital limit was granted to the Corporate Debtor on 30.10.2015. Corporate Debtor defaulted in repayment of its credit facilities in November, 2016, its account was declared as NPA with effect from 18.02.2014.
- ii. Personal Guarantee given is not payable on demand. Further, liability of guarantor will arise as soon as default is committed by principal borrower as per clause 14 of Guarantee Deed dated 29.03.2014.
- iii. Application is without jurisdiction. It is submitted that Section 179 of IBC envisages DRT to be Adjudicating Authority for individual including personal guarantor. According to Section 60(1) & 60(2) only those individuals who are personal guarantors to corporate debtor and CIRP or Liquidation process is pending against the corporate debtor, the NCLT will be the Adjudicating Authority. If no such CIRP or liquidation is pending against the corporate debtor then by virtue of Section 179 the jurisdiction will lie before Debt Recovery Tribunal for applications against such individuals including personal guarantor. Further, at present no such Insolvency Resolution

Process or Liquidation is pending against the Corporate Debtor. The Hon'ble Tribunal approved the resolution plan of the CD on 26.04.2021 which is challenged and pending before NCLAT. Hence, as on date no insolvency proceedings or liquidation proceedings are pending before this Hon'ble Tribunal for exercising jurisdiction under section 60(1) & (2) against the respondent.

- iv. Respondent submits that applicant has violated Section 97 & 99 of IBC, 2016. Further stated that as per section 97 of IBC when an application is filed through RP, the Board has to confirm within 7 days whether any disciplinary proceeding pending against the RP or not. It is submitted that RP has submitted his report before confirmation of his appointment by the Board.
 - v. Respondent submit that applicant failed to serve a copy of the application upon IBBI. Further states demand notice was issued without any authorization.
11. In Response to the reply filed by the respondent, the Applicant filed a Rejoinder dated 08.12.2021 stating the following facts with regard to the objections raised by the Respondent:
- I. Present application is well within the limitation period as numerous communications made between financial Creditor and personal guarantor which would extend the period of limitation. Personal Guarantor has provided affidavit of personal assets and liabilities dated 03.01.2018 for the grant of loan facility to the corporate debtor against the personal guarantee of the personal guarantor herein. Settlement proposal accepted by the financial creditor by letter dated

03.10.2019 which was acknowledged by the personal guarantor. Thus, the present application is within the limitation.

- II. The application filed is well within the jurisdiction of this Adjudicating Authority as the CIRP initiated against the CD and the appeal to the approval of resolution plan is pending before Hon'ble NCLAT. Further, demand notice under Rule 7(2) was issued before the approval of Resolution Plan. Thus, the process under section 95 r.w Rule 7 was triggered before the approval of resolution plan. Even if the Resolution Plan was approved/pending, the financial creditor can proceed against the personal guarantor under Section 95 as the liability of the guarantor is not honoured.
 - III. As per the current practice, the IBBI issues the negative list of RP to the Registrar of the NCLT to check and confirm whether any disciplinary proceeding pending against the RP or not. In the present case there are no disciplinary proceedings pending against the Resolution Professional. Further, the copy of the present petition is already served upon IBBI on 28.09.2021.
 - IV. The Demand Notice was issued by Mr. R.K Anand, Assistant General Manager who is authorized by the gazette notification dated 27.03.1987 being numbered ORG/17405 by his post.
12. The Respondent on 05.09.2022 filed affidavit in additional reply stating the following averments to the rejoinder filed by the applicant:
- I. It is stated that the Corporate Debtor has submitted OTS Offer to applicant which was accepted by it vide its letter dated 03.10.2019. The terms of the offer were accepted by the

personal guarantors including the respondent herein. Hence earlier contract was discharged and parties therein were governed by terms and conditions of OTS. Thus liability of respondent reduced to 75 crores towards the consortium and qua the Applicant, it stood reduced to 47.38 crores.

- II. The entire outstanding debt has been paid in terms of the approved resolution plan. As per the plan, the entire outstanding debt of all secured financial creditor including applicant has been acquired by a Special Purpose Vehicle. Therefore, once the entire debt is acquired by SPV no amount remains payable to the Applicant. Hence, guarantee cannot be invoked. Guarantee given by promoter has not been assigned to SPV but once the entire debt is acquired, no debt remains payable to the applicant.
 - III. As per the terms of Resolution Plan, assignment agreement was executed on 28.06.2021 by the applicant in favour of SPV being resolution applicant. As per the terms of assignment agreement, the applicant has assigned the entire debt to M/s. BF Industrial Solutions Limited and therefore no amount remains payable.
 - IV. The Application under section 95 of IBC is filed on the basis of original claim and not on the basis of OTS offer. Hence the respondent cannot reply upon the OTS offer to extend the period of limitation.
13. On perusal of the application and documents annexed with it, it is found that the Resolution Plan of the CD was approved on 26.04.2021. As per the plan the entire debt of the CD was acquired by SRA but how much amount received by the applicant pursuant to

approval of the resolution Plan was not mentioned in the application. Therefore, this Tribunal listed this matter for clarification on 03.04.2024. Pursuant to the order of this Tribunal applicant filed pursphish clarifying the above points on 04.04.2024. It is stated in the purshish that Total Amount of Rs. 46,71,99,997/-has been received by the present applicant pursuant to approval of resolution plan. Therefore, amount claimed to be in default will be reduced by Rs. 46,71,99,997/-.

14. It is admitted fact that the Resolution Plan of CD was approved and the entire debt of the Corporate Debtor has been taken over by Successful Resolution Applicant but the guarantee given by the promoters has not been assigned to SRA. The personal guarantor thereby has not been freed of his guarantee for the debt payable. 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.
15. On the basis of above facts and submissions it appears that the present application is filed within the period of limitation. Date of Default as mentioned in the petition is 23.01.2019 and the present petition filed before this Tribunal on 22.05.2021.
16. The RP has recommended to initiate the Insolvency Resolution Process against the Personal Guarantor. The RP has submitted the copies of documents and also details of assets of respondent. It is observed from the record that the respondent had not brought on record any document denying or disputing the invocation of his Personal Guarantee. There is no any evidence given by the respondent to show that he has paid the debt or his Personal

Guarantee agreement is cancelled.

17. The Hon'ble Supreme Court in its judgment in Lalit Kumar Jain V Union of India & Ors held that the release or discharge of a principal borrower from the debt owned by it to creditor by an involuntary process, i.e. by operation of law, or due to liquidation or insolvency proceedings, does not absolve the surety/guarantor of his or her liability, which arises out of an independent contract.
18. Accordingly, based on the report of Resolution Professional submitted under Section 99 that the applicant satisfies the provisions of Section 95 of IBC 2016 and after hearing of the submissions of the applicant and the respondent, pass the following order in terms of Section 100 of IBC, 2016.

ORDER

- (i) Application is allowed.
- (ii) The insolvency process is initiated against the respondent personal guarantor. The moratorium begun on the date of admission of the application shall cease to have effect at the end of the period of 180 days from the date of this order. During the moratorium period, the following provisions shall be in effect:
 - a. Any pending legal action or proceeding in respect of any debt 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
- (iii) The Resolution Professional viz., Mr. Sunil Kumar Agarwal, who has been appointed under Section 97 vide order dated 21.06.2021, is directed to cause a public notice to be published on behalf of the Adjudicating Authority within 7 days of uploading of this order on the website of NCLT, inviting claims from all Creditors who shall register their claims as provided under Section 103 within 21 days of such issuance. The notice shall contain the necessary information as provided under section 102(2) of IBC. The publication of the notice shall be made in newspapers, one in English and the other in Vernacular which have wide circulation in the state where the debtor resides. The Resolution Professional shall furnish two spare copies of the notice to the Registry. One shall be placed by the Registry on our website and the other shall be affixed in the premises of this Authority.
- (iv) The Resolution Professional in exercise of the powers conferred under Section 104 shall prepare a list of creditors within 30 days from the date of the notice. The debtor shall prepare a repayment plan in consultation with the Resolution Professional as provided under section 105 which shall include the provisions for payment of fee to the Resolution

Professional. 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.

- (v) In case the Resolution Professional recommends that a meeting of the creditors is not required to be summoned, he shall record the reasons thereof. If the resolution professional is of the opinion that the meeting of the creditors should be summoned, he shall specify the details as provided under Section 106(3). 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, for which at least 14 days' notice to the creditors (as per the list prepared) shall be issued by all relevant/feasible modes. Such notice must contain the details as provided under the provisions of Section 107.
- (vi) The meeting of the creditors shall be conducted in accordance with section 108,109,110 & 111. The Resolution Professional shall prepare a report of the meeting of the creditors on repayment plan with all details as provided under Section 112 and submit the same to this Authority, copies of which shall be provided to the debtor and the creditors. It is made clear that the resolution professional shall perform his function and duties in compliance with the code of Conduct provided under section 208 of the IBC,2016.
- (vii) The applicant is directed to deposit Rs.2 lakhs to the bank account of RP within one week, towards his fees. This shall be

subjected to the Rules and Regulations under the provisions
of IBC,2016

(viii) Accordingly, CP(IB) 93 of 2021 is disposed off.

-Sd-

DR.V. G. VENKATA CHALAPATHY
MEMBER (TECHNICAL)

-Sd-

CHITRA HANKARE
MEMBER (JUDICIAL)