

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

ITEM No. 303
C.P.(IB)/249(AHM)2022

Order under Section 94 IBC, 2016

In The Matter Of:

Asha Shah
(Personal Guarantor) of
RY Midas Alluminiums Private Limited
V/s
Canara Bank

.....Applicant

.....Respondent

Order delivered on: 12/03/2024

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 the 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/249/NCLT/AHM/2022

*Filed under Section 94 of the Insolvency & Bankruptcy Code,
2016*

*In the matter of **Mrs. Asha Shah***

Mrs. Asha Shah

30 Shahibaug Society,
Opposite Police Commissioner Officer,
Ahmedabad, Gujarat-380004

... Personal Guarantor/Applicant

V/s

Canara Bank,

Paldi branch, Shantivan Bus Stand,
Paldi, Gujarat-380007

.... Respondent

Order pronounced on 12.03.2024

CORAM:

SH. SHAMMI KHAN, MEMBER (JUDICIAL)

SH. SAMEER KAKAR, MEMBER (TECHNICAL)

For Applicant : Mr. Tirth Nayak, Advocate
For the Respondent/ : Mr. Sunil Kumar, Advocate
Canara Bank

ORDER

Per: Bench

1. The Present Application is filed under Section 94(1) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred as "IBC, 2016") r/w Rule 6 (1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for IRP for Personal Guarantors to Corporate Debtor) Rules, 2019. The prayer made is to initiate the Insolvency Resolution Process (hereinafter referred as "IR Process") against the Applicant/Debtor who is the Personal Guarantor of Canara Bank for an amount of Rs. 36,90,15,613.80 in relation to the credit facility extended by the Banks in favour of RY Midas Alluminiums pvt. Ltd. (hereinafter referred as the "Corporate Debtor").
2. **The facts of the Case are as follows: -**
 - i. The Applicant Personal Guarantor had given a personal guarantee from time to time in respect of total Credit Facilities amounting to Rs. 34.18

Crores granted in favour of Corporate Debtor RY Midas Aluminium Pvt. Ltd. by the Canara Bank for which various loan/security documents were executed.

- ii. The Corporate Debtor (CD) however defaulted in repayment of dues and accordingly the debt was classified as Non-Performing Asset by the Financial Creditor (FC) Canara Bank on 01.12.2020.
- iii. A Demand Notice dated 09.04.2021 was issued by the Financial Creditor w/s 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, calling upon the borrower RY Midas Alluminiums Pvt. Ltd. to repay the amount mentioned in the notice being Rs. 28,88,25,653.18 on 29.02.202 and Rs. 84,98,506.00 on 29.02.2020 with further interest on 01.03.2020 plus interest and other incidental charges.
- iv. The Applicant Personal Guarantor filed petition in prescribed FORM A on 30.08.2022 under Rule 6 of

the Insolvency and Bankruptcy (Application to Adjudicating Authority for Bankruptcy Process for Personal Guarantors to Corporate Debtors) Rules, 2019 before this Adjudicating Authority for initiation of IR Process. The Applicant had proposed Mr. Manish Santosh Buchasia having registration no. IBBI/IPA-002/IP-N00487/2017-2018/11449 to be appointed as the Interim Resolution Professional.

3. On presentation of the application by the Applicant/Debtor, this Authority vide order dated 09.09.2022 has appointed the Resolution Professional viz., Mr. Manish Santosh Buchasia having registration no. IBBI/IPA-002/IP-N00487/2017-2018/11449 & directed RP to file report under Section 99 of Insolvency and Bankruptcy Code, 2016, which has been filed through an Affidavit dated 30.11.2023 under Diary No. D4698 recommending the admission of the application filed under section 94 of IBC, 2016.

The grounds for admission of the application recorded in the Report are as follows: -

- i. I have examined the application CP (IB) No. 249 OF 2022 and the same is found to be satisfying all the ingredients of Section 94 of IBC.*
- ii. I have not received any evidence of repayment of the debt claimed in Section 94 petition from Mrs. Asha Shah.*
- iii. I have not received any document whereby the Personal Guarantee related agreement was cancelled by guarantor and any of the financial institution/bank.*
- iv. I have not received any order of court or any other forum whereby the personal guarantee agreements) entered between guarantor and any of the financial institution/bank was cancelled or set aside with financial institution/bank.*

4. It is further stated in the Report that all the documents required to be attached along with Form A under rule 6

of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 have been appended to the application with few of the information and documents attached to this report, which the IRP has called for from the personal guarantor:

- a) Copy of the summary of list of Assets, List of Creditors, ITR, etc are placed at Annexure A of the Application.
- b) Copies of the security documents executed by the corporate debtor in favour of the Financial Creditor is placed at Annexure E of the Report.
- c) Demand Notice Issued for recovery by the bank for repayment of loan is placed at Annexure H to M of the Petition.
- d) Copies of the certificate of registration of charges issued by the Registrar of Companies is placed at Annexure F of the Report.

- e) Income Tax Return for previous three years is placed at Annexure G of the Report.
- f) Business and operations in which personal guarantor is the proprietor is placed at Annexure H of the Report.
- g) Net worth Statement as on 31/03/2022 and 30/11/2022 is placed at Annexure C of the Report.
- h) The Properties details held by the Personal guarantor in his own name is placed at Annexure D of the Report.
- i) The Bank statement as of 31/11/2022 is placed at Annexure I of the Report.

5. Submission by the Respondent:

- i. It is stated that on perusing the Insolvency Application, it is an admitted fact that the Canara Bank/Respondent is a Financial Creditor to the Corporate Debtor i.e. RY Midas Alluminiums Pvt. Ltd., wherein the present Applicant is a personnel guarantor. It is stated

that in the report filed by the IRP has incorporated the defaults and/or claims of the Personnel Guarantor to the extent of Rs. 36,90,15,613.80 as on 30.07.2021 in case of the CD.

- ii. It is submitted that the Respondent has initiated SARFAESI Proceedings against the borrower and the present applicant and Respondent Bank issued Demand Notice upon the Borrowers u/s. 13 (2) of the Act dated 31.07.2021 sent through Registered Post AD calling upon the Borrowers to make payment of sum of Rs. 36,90,15,613.80ps along with interest within 60 days. That the said Demand Notice were duly served upon all the Borrowers but the borrowers did not comply with the said statutory notice and failed to make payment within stipulated time as demanded and as such the present respondent initiated further measures under SARFAESI Act,2022. The respondent bank issued Possession Notice

upon the Borrowers u/s. 13 (4) of the Act dated 14.12.2021.

- iii. It is further submitted that the respondent bank filed applications under section 14 of the SARFAESI Act for Physical Possession of the secured asset of the borrower/guarantors Before the Hon'ble Chief Judicial Magistrate, Ahmedabad (Rural), Mirzapur. The respective Hon'ble Court passed order on 04.02.2022 to take physical possession of the schedule property. The respondent bank issued auction notice on 28.07.2022 and wherein auction was scheduled on 08.09.2022.
- iv. It is submitted that a with a view to avoid proceedings before the Debts Recovery Tribunal in OA no.647/2021 and to derail the recovery of public money under the SARFAESI Act, 2002 and with an ill intention of securing moratorium by way of the present petition under the provisions of the Insolvency and Bankruptcy

Code, 2016, Petitioner has approached this Hon'ble Tribunal despite being fully aware that present Petition is not maintainable in law.

- v. It is submitted that according to Sub Section (2) read with Sub-Section (4) of the Section 60 of Insolvency and Bankruptcy Code, 2016 a Petition for an insolvency proceedings with respect to personal guarantor is maintainable before the National Company Tribunal only when Corporate Insolvency Resolution Process or Liquidation Process of Corporate Debtor is pending before this Hon'ble tribunal.
- vi. It is submitted that according to sub section (12) of Section 5 of Insolvency and Bankruptcy Code, 2016, Insolvency commencement date is defined to mean the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under section 7,9 or section 10, as the case may be. It is submitted that in the present case, Corporate

Insolvency resolution Process qua the Corporate Debtor is not commenced as provided in Sub-Section (12) of Section 5 of Insolvency and Bankruptcy Code, 2016. Under the circumstances, petitioners could not have filed the present Petition before this Hon'ble Tribunal.

vii. Thus, the Respondent has objected to the Application and pleaded to dismiss the present Application.

6. We have heard the learned Counsel for both the parties and perused the documents on record. We have also gone through the report dated 14.02.2023 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 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.”

7. The proceedings in the matter were 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.

8. 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.*

9. 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 14.02.2023.

ii. The Respondent has admitted to have executed the Guarantee Agreement.

iii. The Respondent has demanded the amount outstanding from the Applicant vide Demand Notice dated 09.04.2021.

iv. Resolution Professional report states that Applicant/Personal Guarantor is not an undischarged bankrupt, not undergoing a fresh start process, not undergoing an insolvency

resolution process or bankruptcy process, therefore satisfies the requirement set out u/s 94(4).

10. In view of the foregoing we are left with no other choice but to order as under: -

I. Initiate Insolvency Resolution Process against the Applicant/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 of 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. Manish Santosh Buchasia having registration no. IBBI/IPA-002/IP-N00487/2017-2018/11449, office at 306, 3rd Floor, (Part-A) " Gala Mart" Nr Sobo Centre, Before Safal Parisar, Above SBI/Union Bank/ Hindmart, South Bopal, Ahmadabad, Gujarat, 380058 who was appointed when the Section 97 application was allowed vide Order dated 09.09.2022, 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 situated/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 on the basis of which the creditors may agree upon the plan;
 - b) provision for payment of fee to the Resolution Professional.
- 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 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 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.

11. In terms of the above, **CP(IB)/249(AHM)/2022** filed under Section 94 (1) 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)

Sandeep/LRA