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

ITEM No.301

CP/IB/221/NCLT/AHM/2021

Order under Section 95 of IBC, 2016

IN THE MATTER OF:

State Bank of India **.....Applicant**
V/s
Mr. Pankaj Narayanbhai Patel **.....Respondent**

Order delivered on: 07/02/2024

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/221/NCLT/AHM/2021

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

In the matter of ***Mr. Pankaj Narayanbhai Patel***

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

... Financial Creditor/Applicant

V/s

Mr. Pankaj Narayanbhai Patel
(Personal Guarantor)
At- 8, Rudravan Banglow, Near Someshwar Park,
Gulab Tower, Thaltej, Ahmedabad,
Gujarat-380054

.... Personal Guarantor/Respondent

Order pronounced on 07.02.2024

CORAM:

SHAMMI KHAN, MEMBER (JUDICIAL)
SAMEER KAKAR, MEMBER (TECHNICAL)

For Applicant/SBI : Mr. Mandeep Singh Saluja Adv for Mr. Rituraj Meena, Adv.
For the Respondent/ Personal Guarantor : Mr. Parth Shah, Ld. Adv.
For IRP/RP : Mr. Sunil Kabra in Person

O R D E R

***Per:* Bench**

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 State Bank of India (hereinafter referred to as "Financial Creditors") for the purpose of initiating insolvency process against Mr. Pankaj Narayanbhai Patel (hereinafter referred to as "Personal Guarantors") for a default amount of Rs. 37,15,26,865.29. 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 15.03.2016 in favour of Applicant.

2. It is stated that the Respondent entered into a Deed of Guarantee, Agreement of hypothecation of goods and

assets, Deed of Mortgage alongwith Working Capital Consortium Agreement was executed with the Financial Creditor on 15.03.2016.

3. By order dated 15.01.2019, the Corporate Debtor /Swastik Ceracon Limited was admitted and order of moratorium was passed by the Hon'ble Adjudicating Authority in CP IB No. 175/9/NCLT/AHM/2018.

4. 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 22.09.2021 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 22.09.2021.

5. On presentation of the application by the Applicant/Financial Creditor, this Tribunal vide order dated 01.12.2021 appointed Interim Resolution Profession (hereinafter referred to as "IRP") as suggested by the Financial Creditors viz. Mr. Sunil Kumar Kabra to carry out Insolvency Resolution Process of the Personal Guarantor as per section 97(3) of IBC, 2016. This Tribunal directed the IRP to file his report. “The Interim Resolution Professional has filed the report dated 14.12.2021 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:

   i. As per the documents provided by State Bank of India, Mr. Pankaj Narayanbhai Patel is standing as a personal guarantor for the credit facilities granted under consortium agreement to M/s Swastik Ceracon Limited.

ii. RP has sent intimation u/s 99 of IBC, 2016 and asked the Personal Guarantor Mr. Pankaj Narayanbhai Patel to provide proof of repayment of outstanding amount of credit facilities granted to the borrower M/s Swastik Ceracon Limited but the respondent has not provided any documentary evidence.

iii. Thus, Resolution Professional is of the view that application should be accepted and proceedings should be initiated with respect to the Individual Insolvency Resolution Process of Mr. Jigarkumar Kodarlal Patel (Personal Guarantor to M/s Swastik Ceracon Limited) in order to recover the outstanding debt payable as per the Personal Guarantee Agreement/ deed executed dated 15th March 2016 between the Consortium Lenders and Personal Guarantors.

iv. The Present application is filed against the personal guarantor is in the prescribed format and complete in all respects.

6. The Respondent/Personal Guarantor filed an affidavit in reply dated 31.05.2022 under diary no. D9205 and raised following objections to the Application as under:

a) The Petition is filed beyond the period of 3 years hence it is barred by law of limitation as the Guarantee was invoked on 17.10.2018 whereas the instant petition was filed in November, 2021.

b) The Respondent states that the Debtor is located at Mahesana and the Financial creditor is Located at Ahmedabad whereas the IRP is Surat based so they requested to change the IRP and appoint any IRP from Ahmedabad.

c) The Respondent states that the IRP recorded some immovable properties to be owned by the Debtor which is denied by the Respondent stating that the said property was already sold by the Debtor vide sale Deed dated 29th May, 2020 having no. 5212 of 2020, and an open land

which was in the name of the Respondent was also sold by the respondent on 11th February, 2019 vide sale Deed no. 434 of 2019 dated 11th February 2019.

d) The Respondent stated that the Respondent do not possess any assets other than a Swift Dezire car bearing registration No. GJ-09-AG-5205.

e) The Respondent stated that the IRP have not verified the records and undertaking due diligence stated facts in the report hence the reports is required to be rejected.

f) The Respondent states that the State Bank of India had already filed its claim for the dues before the Resolution Professional in the CIRP of the M/s. Swastik Ceracon Pvt. Ltd. CIRP is still pending before this Tribunal.

7. In response to the reply filed by the Respondent, the Applicant filed a Rejoinder dated 17.06.2022 under diary no. D3296 stating the following facts with regards to the objection raised by the Respondent.

i. It is submitted that what so ever is stated in the Main Petition/ Form- C are true and same is not reiterated.

ii. It is submitted that the Applicant denied that the captioned application is barred by the law of Limitation. It is submitted that on 16.12.2018, the default occurred in the account of the corporate debtor company i.e. Swastik Ceracon Ltd. It is submitted that the captioned application is filed on 17.11.2021 i.e prior to completion of 3 years and therefore the captioned application is under the limitation period. For sake of argument if NPA i.e 31.3.2018 is considered in that case also the present application is under a limitation period. It is submitted that the Limitation period for the claim would have ordinarily expired on 31.3.2021 (if counted from31.3.2018). However, in view of the order dated 23.9.2021 passed by the Hon'ble Supreme Court in MA no. 665/2021

in SMC(C) No. 3 of 2020 (IN RE: Cognizance for Extension of Limitation) the relevant portion of which is reproduced below, it is stated that the claim is within the period of Limitation:

> *"8. II. In case where the where the limitation would have expired during the period between 15.3.2020 till 2.10.201, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 3.10.2021. In the event the actual balance period remaining with effect from 3.10.2021, is greater than 90 days, that longer period shall apply"*

iii. It is submitted that the Applicant denied all the averments made in the para 3,4,5 and 6 of the reply, It is submitted that letter dated 3.12.2021 by RP addressed to the personal guarantor on page 11 of the RP report wherein the RP has intimated the personal guarantor regarding the order passed by this Hon'ble Tribunal and thereafter asked the personal guarantor to

provide the details for preparing the report. It is noteworthy that on columns no. 5 and 6 on page 12 of the report, the RP had categorically mentioned the required documents that are :

> *"5. Details of all the moveable assets as on date like vehicle, furniture Fixture, equipment" and "5 Details of any sale/ dispose-off of immovable or movable assets sold in past 5 years (provide information in tabular format and include the complete address of the property, area, details of joint owner (if any), date of sale, transaction amount and copy of bank account statement where the proceeds have been credited- As on date"*

iv. It is submitted that the RP before filing the report before the this Tribunal has asked the personal guarantor to provide the requisite documents however the personal guarantor had chosen not to give a response and also failed to provide documents to the RP. It is further submitted that the respondent herein raises technical and baseless contention before this

Tribunal for objecting to the captioned petition. It is submitted that the personal guarantor had not raised any objection with respect to the availing of the loan facility from the applicant, the fact of default occurred in the loan facility and the existence of a personal guarantor agreement. It is submitted the respondent had executed a personal guarantee agreement against the loan taken by the corporate debtor company and therefore the applicant has the statutory right to prefer the application under Section 95(4) of Insolvency and Bankruptcy Code, 2016.

v. It is submitted that the annexure attached with the reply at Annexure A may not be considered by this Tribunal as it is filed in vernacular language. It is submitted that as per NCLT and IBC rules, *"...every pleading presented to the Hon'ble Tribunal shall be in English and in case it*

is in some other Indian Language, it shall be accompanied by a copy of translated in English and shall be fairly and legibly type written...". As the attached annexure are not in the English language and hence the applicant herein is reserve its right to file a reply as and when the respondent will serve the translated copy of the documents.

vi. It is submitted that the herein denies all the averments made in the para 7 and 8, which are contrary to the facts and records herein. It is denied that the outcome of the pending proceeding against the corporate debtor company may interfere with the rights and liabilities of all concerned in the present proceeding. It denied that report and present petition are not maintainable as the nature of the debt is uncertain.

8. 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.

9. 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.*

10. We have heard the learned counsel for both the parties and perused the documents on record. We have also gone through the report dated 11.12.2021 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 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."*

11. 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 11.12.2021.

    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 22.09.2021.

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.

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

12. 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. Sunil Kumar Kabra, having Registration No: IBBI/IPA-001/IP-P01011/2017-2018/11662, office at Office No. 303, 3rd Floor, Reegus Business Centre, Above Mercedes Benz Showroom, New Citylight Road, Bharthana-Vesu, Surat, 395007, Gujarat (e-mail id

jlnusco@gmail.com] who was appointed when the Section 97 application was allowed vide Order dated 01.12.2021, 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 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 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.

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.

13. In terms of the above, **CP (IB)/221(AHM)/2021** filed under Section 95 (1) of the IBC, 2016 is admitted and the Insolvency Resolution Process stands initiated against the Respondent/Personal Guarantor.

SAMEER KAKAR
MEMBER (TECHNICAL)

SHAMMI KHAN
MEMBER (JUDICIAL)

Sandeep Pandey/LRA