

IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD
COURT – 2

ITEM No.303- CP(IB)/300(AHM)2022

With

ITEM No.304 - IA/85(AHM)2024

Order under Section 94 IBC

IN THE MATTER OF:

Ashish Alex Personal Guarantor of Sealand Infrastructure
Private Limited

.....Applicant

V/s

.....Respondent

Daimler Financial Services India Pvt Ltd

Order delivered on: 26/04/2024

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 common order is pronounced in the open court, vide separate sheet.

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

CHITRA HANKARE
MEMBER (JUDICIAL)

IN THE NATIONAL COMPANY LAW TRIBUNAL

AHMEDABAD (COURT - II)

CP(IB) No. 300 / NCLT / AHM / 2022

With

IA No. 85/ NCLT / AHM / 2024

[Under Section 94 of the Insolvency and Bankruptcy Code, 2016 read with rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019]

IN THE MATTER OF:

Mr. Ashish Alex,
Personal Guarantor of
M/s. Sealand Infrastructure Pvt. Ltd.

...Applicant

Versus

M/s. Daimler Financial Services India Pvt. Ltd.

...Respondent

Order pronounced on 26.04.2024

Coram:

MRS. CHITRA HANKARE
HON'BLE MEMBER (JUDICIAL)

MR. VELAMUR G VENKATA CHALAPATHY
HON'BLE MEMBER (TECHNICAL)

MEMO OF PARTIES

Mr. Ashish Alex,
“Dia”, 1 –Tapovan Society,
Axar Marg, Rajkot – 360001.

...Applicant

Versus

M/s. Daimler Financial Services India Pvt. Ltd.

Having its office at-
C-5th Floor, Plot 8, Baashyam Willow Square,
9 & 10 First Street, Thiru Vika Industrial Estate,
Guindy, Chennai, Tamil Nadu 600032

...Respondent

Present:

For the Applicant : Mr. Tirth Nayak, Adv.

For the Respondent : Mr. Arjun Sheth, Adv. a/w Mr. Rajiv Chawla,
Adv.

For the RP : Mr. Neel Vasant

RP : Mr. Ashish Shah

JUDGEMENT

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.
2. M/s. Sealand Infrastructure Pvt. Ltd. has obtained various fundings like Inventory funding, working capital funding and

real estate funding from M/s. Daimler Financial Services India Pvt. Ltd. now known as M/s. Mercedes Benz Financial Services Pvt. Ltd. Financial Creditor has issued demand notice u/s. 13(2) of SARFAESI Act against the Corporate Debtor as well as Applicant on 16.11.2021.

3. On presentation of the application by the Applicant/ Personal Guarantor, this Authority vide order dated 04.11.2022 has appointed the Resolution Professional viz., Mr. Ashish Shah, having Registration No. IBBI/IPA-002/N00214/2017-2018/10666 & directed RP to file report under Section 99 of Insolvency and Bankruptcy Code, 2016, which has been filed by him recommending the admission of the application filed under section 94 of IBC, 2016.
4. Respondent-M/s. Daimler Financial Services India Pvt. Ltd. filed its reply and written submissions. It is stated that applicant has not disclosed to this Tribunal regarding initiation of Arbitration proceedings and action taken under the provisions of the SARFAESI Act against it by the respondent. It is further stated that a petition has been filed before the Hon'ble Arbitral Tribunal claiming an amount of

Rs.33,44,57,682.25/- as on 17.09.2021 together with interest @24% per annum against M/s. Sealand Infrastructure Private Limited and its personal guarantors. During the pendency of the petition before the Ld. Arbitral Tribunal, applicant filed the present insolvency petition to wriggle off from its liabilities.

5. It is stated that the Demand Notice dated 16.11.2021 under Section 13(2) of the SARFAESI Act was issued to Sealand Infrastructure Private Limited (Corporate Debtor) and its personal guarantors and to the applicant. The corporate debtor had replied to the aforesaid notice but reply was not received by the respondent. However, on perusal of the SCA No.14522 of 2023, filed by the applicant, before the Hon'ble Gujarat High Court, respondent came to know about the said reply. The corporate debtor in the aforesaid reply denied its liability of Rs.33,44,57,682.23 as on 21.01.2022. However, in the present petition, the default amount mentioned by the applicant is Rs.31,49,78,942.65 as on 17.02.2021. Respondent further submitted that the conduct of the applicant shows that it has filed the present insolvency petition with ulterior motive as, on one side it is saying that

there is no default and on other side the applicant itself is filing insolvency petition for defaulting in payment of debt.

6. Respondent submitted that it had issued possession notice under Rule 8(1) of the Security Interest (Enforcement) Rules, 2002 on 17.11.2022 and the same was published in newspaper on 22.11.2022. It had also filed an application under section 14 of the SARFAESI Act, 2002 on 13.06.2023 before Ld. Additional Chief Judicial Magistrate, Mirzapur, Ahmedabad in which an order dated 17.06.2023 has been passed and notice dated 28.07.2023 in respect of the property of the Petitioner issued. The said order was challenged by the Applicant before Hon'ble High Court of Gujarat in SCA No. 14522 of 2023 in which vide order dated 27.08.2023 Hon'ble High Court stayed the further proceedings in respect of the order 17.06.2023 passed by the Ld. 3rd Addl. Chief Judicial Magistrate, Ahmedabad (Rural) in Criminal Misc. Application No. 1334 of 2023, in view of the order of interim moratorium passed by this Hon'ble Adjudicating Authority under section 96 of the IB Code, 2016.
7. The Respondent also filed an IA 83 of 2024 in this main petition under Section 65 of IBC, 2016 in which it again reiterated the

same contentions verbatim as filed in above mentioned reply, praying for dismissal of the main petition. The present applicant filed reply to the IA and submitted that the present application is not filed with any malicious intent.

8. We have heard the learned Counsel for both the parties and perused the documents on record. We have also gone through the report dated 06.02.2023 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.”

9. 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.

10. 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.

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 06.02.2023.
- 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 16.11.2021.
- iv. Resolution Professional report states that no evidence was placed before him by the Applicant having paid the amount demanded by the Respondent and as such in over view entire amount demanded is unserviced as on the date of order.

12. From the report there does not appear any request of the

Resolution Professional for issuance of the instructions for the purpose of conducting negotiations between the debtor and creditors for arriving at a repayment plan. Therefore Insolvency Resolution Process is to be initiated against Personal Guarantor.

13. Hence, we pass the following order:

ORDER

- I. The present application i.e., CP(IB) No.300 of 2022 is allowed.
- II. 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.

III. The Resolution Professional 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.

IV. 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.

V. 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, 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.

- 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 provides 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.

- XI. IA/85(AHM)/2024 in CP(IB)/300(AHM)/2022 filed under Section 65 of the IBC, 2016 is rejected.

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DR.V. G. VENKATA CHALAPATHY

CHITRA HANKARE

MEMBER (TECHNICAL)

MEMBER (JUDICIAL)

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