

IN THE NATIONAL COMPANY LAW TRIBUNAL

AT MUMBAI BENCH, C-IV

CP (IB) NO. 293/MB/2022

An application under section 100 read with section 95 of the Insolvency & Bankruptcy Code, 2016 R/w. Rule 7 (2) of the Insolvency and Bankruptcy (Application to the Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors), Rules, 2019.

Mr. Surya Pratap Gupta

...Insolvency

Professional/Applicant

IN THE MATTER OF

State Bank of India.

...Financial Creditor

Versus

Mr. Sahil Paresh Shah

*...Personal Guarantor for
Corporate Debtor P&S
Jeweller Ltd.*

Order delivered on: 07.02.2024.

Coram:

Ms. Anu Jagmohan Singh

Mr. Kishore Vemulapalli

Hon'ble Member (Technical)

Hon'ble Member (Judicial)

Appearances:

For the Applicant/Resolution Professional : Adv. Priyank
Jadav a/w Mr.
Ayush Rajani i/b
AKR Legal, Ld.
Counsel (through
VC)

For the Respondent/PG present. : Mr. Bhanu
Chopra a/w Ms.
Meghna Gupta
and Mr. Darshan
Suvarna i/b Vigil
Jurs, Ld.
Counsel.

ORDER

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. Sahil Paresh Shah** (hereinafter referred to as "Personal Guarantor") for recovery of Rs.291,82,32,430/- including interest as on 31.07.2021. The date of default is stated to be 19.05.2015. The Corporate Debtor was brought under CIRP under Section 10 of the IBC vide order dated 29.05.2017.

2. Further an application was filed under Section 33 (1) of the Insolvency and Bankruptcy Code, 2016 (hereinafter called as "the Code"). The tribunal vide order dated 30.07.2018 initiated Liquidation process of the Corporate Debtor. The Corporate Debtor is currently undergoing Liquidation Process.
3. On the request of the Corporate Debtor certain Credit facilities like EPC limit under SBI Exporters Gold Card scheme under the consortium finance, term loan and LC (import/inland) buyers credit limit/BG/Metal gold loan sanctioned vide two letters of Arrangement dated 21.05.2012 and 12.11.2012 was issued for granting the various credit facilities to Corporate Debtor.
4. An agreement of Loan cum Hypothecation dated 21.05.2012 executed by and between Financial Creditor and Corporate Debtor for sanctioning the credit facilities of Rs. 50 Crores. Further, an Agreement of Loan cum Hypothecation dated

12.11.2012 executed by and between Financial Creditor and Corporate Debtor for sanctioning the credit facilities of Rs. 70 Crores. A purported Deed of Guarantee dated 22.03.2013 was executed by and between the Personal Guarantors and Consortium Banks.

5. The Financial Creditor issued a Notice dated 19.05.2015 under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 issued against Corporate Debtor and Personal Guarantors to recall the outstanding debt within 60days from 19.05.2015, i.e. on 18.07.2015. The extract of the same is reproduced below:

1) Please note that if you fail to remit the dues within 60 days and if Union Bank of India Consortium exercises all its rights under the said act and if the dues are not fully satisfied with the sale proceeds of the Secured assets we shall be constrained to take appropriate legal action against you in a court of law/ Debt Recovery Tribunal for recovery of the balance amount from you.

6. A Proposal for One Time Settlement dated 05.09.2018 was received from the Corporate Debtor.
7. Demand Notice dated 06.08.2021 in Form B was issued to the Respondent / Personal Guarantor and the same has been successfully delivered on 12.08.2021.
8. On presentation of the application by the Financial Creditor, under section 95(1) of the IBC,2016 for initiating Insolvency

Resolution Process against the Personal Guarantor, this tribunal vide order dated 08.12.2022 had appointed Mr. Surya Pratap Gupta bearing Registration No. IBBI/IPA-001/IP-P01060/2017-2018/11753 as Insolvency Resolution Professional and directed to exercise all the powers as enumerated u/s.99 of the Code, r/w. Rules made thereunder. Accordingly, he has filed a report on 16.07.2022 and have recommendations with reasons in writing for acceptance or rejection of the Company Petition.

9. The ground for admission of the application recorded in report are as follows:
 - a. The RP submits that the present report is being prepared in compliance with the requirements of section 99(1) of the Code.
 - b. The RP is of the considered view that the debt guaranteed by the personal guarantor has not repaid the debt claimed by the creditor. The RP submits that the requirements of 99(2) of the Code are complied with.
 - c. The debtor has not registered the debt for which this application has been filed with the information utility. The RP has complied with the requirements of section 99(3) of the Code.
 - d. In absence of any response from the guarantor/debtor, no further information or explanation in connection with the application is sought from the Creditor. The RP has

complied with the requirements of section 99(4) of the Code.

- e. The RP submits that the requirements of section 99(5) of the Code does not impact either admission or rejection of the present application.
- f. RP submits that the present application satisfies the requirements of provisions of section 95. The RP submits that the requirements of section 99(6) of the Code are complied with.
- g. RP submits that the present application satisfies the requirements of provisions of section 95 as is required to be examined under section 99(6) of the Code and the present application deserves to be admitted under section 100 of the Code.
- h. The present application is not filed under Section 94. The requirements in Section 99(8) are not applicable to this case.
- i. The RP hereby recommends for acceptance of the application which is the subject matter of the present report submitted under section 99(7) of the Code to this Tribunal for the reasons that the guaranteed debt is due and payable by the personal guarantor and despite letter under section 99(2) of the code to the debtor, no communication has been received from him regarding the payment of such dues by the Resolution Professional.
- j. The RP submits that the present application meets the

necessary requirements of the Code for its approval by this Tribunal and the reason for the same have been submitted in the preceding part(s) of this report and therefore, this Tribunal may kindly pass appropriate orders under section 100 of the Code, "Admitting" the present application filed by State Bank of India through the RP in C.P. (1B)-874(MB)/2021 and declare "Moratorium" under section 101 of the Code and issue "Public Notice" for inviting the claims under section 102 of the Code.

10. The Respondent/Personal Guarantor filed an affidavit in reply stating that the Petition is ex-facie barred by limitation; the petitioner has failed to provide appropriate documentary evidence as per Form C, in violation of the Insolvency and Bankruptcy Code and the Insolvency Rules; the purported guarantee is inadequately stamped; there is no privity of contract between the Petitioner and Respondent.
11. The proceedings in the present 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 CP/IB/243/AHM/2021 State Bank of India v/s Rohit S Sharma 12 of 22 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.*

Findings

13. We have heard the learned counsel for both the parties and perused the documents on record.
 - a. As per material on record, on 19.05.2015 demand notice was issued calling upon the respondent to pay the outstanding dues within 60 days from the date of notice. The date of default stated in petition is 19.05.2015 (the invocation notice provided a period of 60 days to the Respondent to repay the amounts on or before 18.07.2015). The limitation period in respect of said default will expire after a period of 3 years from the date of

default i.e. on 18.07.2018 as per section 137 of the Limitation Act. The One Time Settlement proposal was received from Corporate Debtor on 05.09.2018. This bench feels that, the OTS proposal has been issued after the expiry of the limitation period therefore it cannot give a fresh start under section 18(1) of the Limitation Act to the extent of Personal Guarantor. Since, the invocation of guarantee was on 19.05.2015 and the present company petition is filed on 31.08.2021 which is beyond limitation period. This bench is of the considered view that the present case is fit for dismissal on the ground of Limitation.

14. Accordingly, petition bearing C.P. (IB) No. 293/MB/C-IV/2022 filed by State Bank of India (herein after referred to as "Financial Creditors") for the purpose of initiating insolvency process in the matter of Mr. Sahil Paresh Shah, is **Rejected**.

Sd/-

ANU JAGMOHAN SINGH
MEMBER (TECHNICAL)
07.02.2024.

Sd/-

KISHORE VEMULAPALLI
MEMBER (JUDICIAL)