

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH (Court- I)  
KOLKATA**

CP (IB) No. 67/KB/2023

*A Petition under Section 95(1) of the Insolvency and Bankruptcy Code, 2016;*

***In the matter of:***

***Aditya Birla Finance Limited***

***...Financial Creditor/Applicant***

*Versus*

***Sarita Mishra***

***... Personal Guarantor/Respondent***

**Order pronounced on:19/01/2024.**

***Coram:***

**Shri Rohit Kapoor** : **Member (Judicial)**

**Shri Balraj Joshi** : **Member (Technical)**

***Appearances (through video conferencing):***

For the Financial Creditor/Applicant : Mr Rishav Banerjee, Adv.  
Ms.Sudeshna Mazumdar,Adv.

**ORDER**

**Per: Rohit Kapoor, Member (Judicial):**

1. The Court convened *via* video conference.
2. The present Petition **CP (IB) No. 67/KB/2023** is a Petition filed under section 95(1) of the Insolvency and Bankruptcy Code, 2016 (**'Code'**) read with rule 7(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for

Insolvency Resolution process for Personal Guarantors to Corporate Debtor) Rules, 2019 (*‘Personal Guarantors Rules’*) and regulation 4(2) of IBBI (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Regulations, 2019 (*‘Personal Guarantors Regulations’*) filed by *Aditya Birla Finance Limited (‘Petitioner’)* a Non Banking Finance Company registered with the Reserve Bank of India having its registered office at Indian Rayon Compound, Veraval, Gujarat-362266, for initiating the Insolvency Resolution Process (*‘IR Process’*) against *Sarita Mishra*, One of the directors of *Ariyant Logistics Private Limited (CIN: U60231WB2008PTC124527)* (hereinafter referred to as “ **Corporate Debtor** ”) for debt amounting to Rs.2,25,27,209.39/-

3. The factual matrix of the case is that the Applicant a Non-Banking Finance Company registered with the Reserved Bank of India and incorporated under the provisions of the Companies Act, 1956 and “**the Corporate Debtor** ” and guarantor had approached the applicant seeking grant of various financial facility. On the representations made by the “ **Corporate Debtor** ”, the Applicant extended various Credit facilities on 25<sup>th</sup> September,2018 and granted Cash Credit Facility. As per the Credit Facility, Corporate Debtor was obliged to repay the Principal sum of loan along with interest on in accordance with repayment schedule as set out in the agreement. The Deed CD of Guarantee was executed on 25<sup>th</sup> September,2018. The “ **Corporate Debtor** ” and the guarantor had failed and/or neglected to make payment as per terms of the said Facility Agreement. Thereafter, the applicant had classified the account of the (Corporate Debtor as a non-performing asset (NPA) on 15/12/2020.
4. The Applicant Bank, thereafter, proceeded to issue statutory Demand Notice under Section 13(2) of SARFAESI Act, 2002 on 07.06.2021

5. The personal guarantor viz Mr. **Sarita Mishra** has executed personal guarantee on 25.09.2018 in favour of the Applicant to secure the repayment of the principal amount of the Cash Credit Facilities together with all interest, additional interest, liquidated damages, premium on repayments, reimbursement of all costs, charges and expenses and all other obligations payable as per the Facility Agreement. The Applicant issued a Demand Notice in **Form B** on 07/06/2021 under Rule 7(1) of the IB Rules, 2019 but no response was received.
6. In this factual conspectus, the applicant prays for initiation of insolvency resolution process, against the respondent/guarantor. The application is complete as required under Section 95 read with rule 7 of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution process for Personal Guarantors to Corporate Debtor) Rules, 2019. **Form B** is at page 214-222 **Form C** is at page “5 to 15” of the application. Rule 7(3) of the IB (Application to Adjudicating Authority for Insolvency resolution Process for Personal Guarantors to Corporate Debtors) Rules 2019, requires a copy of the Petition/Application to be served on to the guarantor and the Corporate Debtor. An affidavit of service in this regard shall be filed by the Financial Creditor.
7. It is to be noted that 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 has upheld the Constitutional Validity of the Sections 94 to 100 and the Conclusion of the Judgments inter-alia 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 CP/IB/337/AHM/2020 12 of 17 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; CP/IB/337/AHM/2020 13 of 17*

*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.*

8. The Applicant has not proposed name of Insolvency Professional for appointment as Resolution Professional. In view of the above, **Mr.Rajesh Kumar Agrawal**, IBBI Registration No. IBBI/IPA-001/IP-P01023/2017-18/11722 email: [rajesh521@yahoo.com](mailto:rajesh521@yahoo.com), is hereby appointed as Resolution Professional in exercise of the power conferred under section 97 of the IBC, 2016 on this Authority. The Resolution Professional is directed to file declaration within seven days from the date of receiving this Order to the effect that he fulfils all the requirements for being appointed as Resolution Professional in the matter.
9. The Resolution Professional shall exercise all the powers as enumerated under section 99 of the IBC, 2016 read with the Rules made thereunder and as brought out in the judgment of Hon'ble Supreme Court (Supra) He is directed to make the recommendations for acceptance or rejection of this Application within the stipulated time as envisaged under section 99(1) of the IBC, 2016. The RP shall give a copy of the report under sub-section (7) of section 99 of IBC, 2016 to the Applicant, as soon as the same is filed before this Authority.
10. It is made known to everyone that on filing this Application by the Applicant/ Creditor the interim-moratorium commences in terms of section 96(1)(a) of IBC, 2016. The relevant section is reproduced below:

**96. Interim- moratorium. -**

*(1) When an application is filed under section 94 or section 95 –*

*(a) an interim-moratorium shall commence on the date of the application in relation to all the debts and shall cease to have effect on the date of admission of such application; and*

*(b) during the interim-moratorium period -*

*(i) any pending legal action or proceeding in respect of any debt shall be deemed to have been stayed; and*

*(ii) the creditors of the debtor shall not initiate any legal action or proceedings in respect of any debt.*

11. The Counsel on record for the Applicant is hereby directed to serve the copy of this order along with copy of the Application and documents on the Resolution Professional by all available modes for information and compliance. Proof of service shall be filed with this Bench for record.
12. List this matter on **.12-02-2024** for further consideration.
13. The Registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.
14. Certified Copy of this order be issued, if applied for, upon compliance of all requisite formalities.

**(Balraj Joshi)**  
**Member (Technical)**

**(Rohit Kapoor)**  
**Member (Judicial)**

**Signed on this, 19<sup>th</sup> day of January , 2024**

PJ