

IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD
DIVISION BENCH
COURT – I

ITEM No. 307 & 308 - I.A. No. 160/NCLT/AHM/2024
With
CP(IB) No. 73/AHM/2021

Proceedings under Section 95 IBC

IN THE MATTER OF:

State Bank of India

.....Applicant

V/s

Rishi Kamlesh Agarwal

.....Respondent

Order delivered on 28/02/2024

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 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
THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH – I,
AHMEDABAD**

**I.A. No.160/NCLT/AHM/2024
With
CP (IB) No.73/AHM/2021**

I.A. No.160/NCLT/AHM/2024

[Application under Rule 11 of the NCLT Rules, 2016]

Mr. Shailesh Desai

Resolution Professional of
Rishi Kamlesh Agarwal
Having address at:
708, Raheja Centre, 7th Floor,
Nariman Point, Mumbai – 400 021
Email id: finvishal@yahoo.com

.....Applicant/RP

In the matter of:

State Bank of India

Through its Resolution Professional
of Mr. Shailesh Desai

.....Petitioner

Versus

Rishi Kamlesh Aggarwal

4C, Somerset Place, 61D, Bhulbhai Desai Road,
Mumbai – 400026, Maharashtra

....Respondent/Personal Guarantor

With

CP (IB) No.73/AHM/2021

[Application under Section 95 of the IB Code, 2016]

In the matter of:

State Bank of India

(Through Shailesh Bhalchandra Desai
1006, Raheja Centre, 7th Floor,
Nariman Point, Mumbai-400 021

...Petitioner

Versus

Rishi Kamlesh Agarwal

4 C, Somerset Place, 61 D,
Bhulabhai Desai Road, Mumbai,
Maharashtra – 400 026

...Respondent/Personal Guarantor

Order Pronounced on 28.02.2024

CORAM:

SH. SHAMMI KHAN, MEMBER (JUDICIAL)

SH. SAMEER KAKAR, MEMBER (TECHNICAL)

Appearance:

For the Applicant : Mr. Tanmay Kelkar, Proxy Advocate i/b.
: Mr. Aniruth Purusothaman, Advocate
For the Respondent : Mr. Aditya Mehta, Advocate

ORDER

[Per: Bench]

1. The present Application IA/160(AHM)2024 has been filed by the Resolution Professional with the following prayers:-

A. To take on record the report of the Resolution Professional dated 10.08.2021 under Section 99 of the

IBC, 2016.

B. Any order/directions this Hon'ble Tribunal may deem fit.

2. It is stated that vide an order dated 19.07.2021 the Applicant herein was appointed as the Resolution Professional in the captioned matter and the Applicant examined the petition and filed report in accordance with Section 99 of the IBC, 2016. The Applicant has filed report which is dated 10.08.2021 on Page No.25 of the present IA. The RP in his report has stated and recommended for admission of the CP (IB) 73 of 2021, the said para is reproduced below:

“It is humbly submitted by the RP that the present application meets the requisite requirements of the Code as is provided in this report and this Hon'ble NCLT may kindly pass appropriate orders under Section 100 of the Code, “Admitting” the present application filed by SBI through the RP in CP(IB)/73(AHM)2021 and declare “Moratorium” under Section 101 of the Code and issue “Public Notice” for inviting the claims under Section 102 of the Code and may pass such orders as this Hon'ble NCLT deem necessary.”

3. It is seen that this IA was filed pursuant to order dated 12.12.2023 through which the IRP was directed to file a physical copy of the IRP report through an IA. The same order records as under:-

“Further, in the order dated 12.07.2022, it is recorded that the learned counsel for the respondent already submitted that he does not wish to file a reply and the matter was further proceeded for hearing.”

4. Affidavit of service has been filed under Inward Diary No. D 1135 dated 12.02.2024. It is stated that a copy of the IA/160(AHM)2024 was served on the Respondent Guarantor on 25.01.2024 and again a mail was sent on 07.02.2024 informing regarding the proposed hearing and attaching therewith a copy of the order dated 25.01.2024 of this Tribunal. No reply was filed by the Respondent in the matter. However, the issue of limitation was orally raised by the learned counsel for the Respondent Guarantor during hearing and opportunity was given to the Applicant to file Additional Affidavit which was since filed under Inward Diary No. D 1368 dated 17.02.2024.
5. It is seen that the Corporate Debtor i.e. Vadraj Energy Limited which was admitted under CIRP by an order dated 08.01.2020 in CP (IB) No. 497 of 2019 by this Tribunal. M/s. Vadraj Energy Limited was earlier known as M/s. ABG Energy (Gujarat) Limited.
6. It is stated that Common Loan Agreement dated 28.06.2010 was executed between the Corporate Debtor and several other Banks where State Bank of India (formerly as State Bank of Indore and State Bank of Bikaner

& Jaipur) were the parties. Thereafter, several other documents and loans were sanctioned by the Consortium Banks and Deed of Guarantee was executed on 31.12.2012 by the Respondent/Guarantor herein, in favour of the Bank. The loans were, thereafter, restructured from time to time. The Corporate Debtor has acknowledged the debt by way of Balance Confirmation dated 19.06.2017, the balance outstanding to State Bank of India and in support thereof the Balance Confirmation Certificate is placed on Page No. 81 of the Additional Affidavit filed by the Applicant herein.

7. Subsequent to the Balance Confirmation Certificate the Bank has issued a recall notice on 16.11.2017 and invoked the guarantee. Thereafter, the present petition was filed in 2021, after giving due notice under the IBC.
8. It is stated that the application is not suffering from any limitation. Since Balance Confirmation dated 27.08.2014, 21.04.2016, 30.08.2016 and 19.06.2017 are all available with the Bank which are forming part of the Additional Affidavit.
9. It is stated that because of the Balance Confirmation Certificate and Hon'ble Supreme Court ***in Suo Moto WP (Civil) No. 3 of 2022 in Re: Cognizance for Extension of Limitation*** vide order dated 10.01.2022, held that:-

“In cases where the limitation would have expired during the period between 15.03.2020 till 28.02.2022, notwith-

standing the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 01.03.2022. In the event the actual balance period of limitation remaining, with effect from 01.03.2022 is greater than 90 days, that longer period shall apply.”

Hence, the limitation got extended and present application is within limitation period.

10. We have heard the various counsels and perused the documents. The Respondent/Guarantor has given the Guarantee with respect to the Corporate Debtor i.e. M/s. Vadraj Energy Limited on 31.12.2012 due to the reasons explained in Para No. 9 we hold that the present application does not suffer from any limitation and the Corporate Debtor has duly acknowledged and has given Balance Confirmation from time to time to State Bank of India, such Balance Confirmation has extended the limitation for the Guarantee.
11. Due to non-payment of the amount by the Corporate Debtor, the Financial Creditor has filed this application for initiation of the Insolvency Resolution Process against the Guarantor under Section 95(1) of IBC, 2016. The Financial Creditor invoked the personal guarantee and issued a demand notice to the Respondent/Personal Guarantor on 17.11.2020 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/Personal Guarantor.

12. On presentation of the application by the Applicant/Financial Creditor, this Tribunal vide order dated 19.07.2021 held that the Interim Resolution Professional (hereinafter referred to as "IRP") as suggested by the Financial Creditors, Mr. Shailesh Bhalchandra Desai to be appointed as IRP 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 10.08.2021 recommending the admission of the application filed under Section 95 of IBC, 2016 recommending order under Section 100 of the IBC, 2016.
13. 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.
14. 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.
15. We have also gone through the report dated 10.08.2021 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".

16. 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 10.08.2021.
- ii. The Respondent has admitted to having executed the Deed of Guarantee.
- iii. The Applicant has demanded the amount outstanding from the Respondent vide Demand Notice dated 17.11.2020.
- iv. Respondent has not filed any reply to raise any objection against admission of the present Application.

17. 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. Shailesh Desai, having Registration No: IBBI/IPA-001/IP-P00183/2017-2018/10362, having address at 708, Raheja Centre, 7th Floor, Nariman Point, Mumbai - 400021 (E-mail Id: ip10362desai@gmail.com] who was appointed when the Section 95 application was allowed vide Order dated

19.07.2021, 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.

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;

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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.
- (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.

18. In terms of the above, **CP(IB)/73(AHM)/2021** filed under Section 95 (1) of the IBC, 2016 is admitted and the Insolvency Resolution Process stands initiated against the Applicant/Personal Guarantor. Accordingly, **IA/160(AHM)2024** stands disposed of.

-Sd-

SAMEER KAKAR
MEMBER (TECHNICAL)

Swetambary-Steno

-Sd-

SHAMMI KHAN
MEMBER (JUDICIAL)