

IN THE NATIONAL COMPANY LAW TRIBUNAL, AHMEDABAD
SPECIAL BENCH
COURT - 1

ITEM No.7
C.P.(IB)/165(AHM)2021

Order under Section 95 IBC

IN THE MATTER OF:

State Bank of India
V/s
Bakul Jayantilal Karia

.....Applicant

.....Respondent

Order delivered on ..27/04/2022

Coram:

Madan B. Gosavi, Hon'ble Member(J)

PRESENT:

For the Applicant :
For the Respondent :

ORDER

The matters were heard almost in the month of March but orders could not be pronounced because Technical Member was not available. Technical Member will not be available for another couple of weeks, hence, matter cannot be kept pending for pronouncement because hearing was concluded almost a month ago. Hence orders are pronounced invoking Rules 151 of NCLT Rules,2016 with consent of other Member.

- Sd -

KAUSHALENDRA KUMAR SINGH
MEMBER (TECHNICAL)


MADAN B GOSAVI
MEMBER (JUDICIAL)

**BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
COURT-I**

CP (IB) No.165 of 2021

[An application for initiation of Insolvency Resolution Process under Section 95(1) of the Insolvency & Bankruptcy Code, 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]

In the matter of:

State Bank of India

Stressed Assets Management Branch,

CIN: 24AAACS8577K1ZK

Having registered address at:

2nd floor, Paramsiddhi,

Complex, opp. V.S. Hospital,

Ellisbridge, Ahmedabad, Gujarat, 380006

....Financial Creditor

Versus

Mr. Bakul Jayantilal Karia

14, Paradise Park Society,

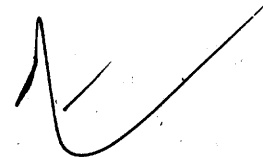
Opp. Shantinagar Bus Stand, Old Wadaj,

Ahmedabad, Gujarat, 380013

....Personal Guarantor

Order reserved on 29.03.2022

Order pronounced on 27.04.2022



Coram: Madan B. Gosavi (Member Judicial)
Kaushalendra Kumar Singh (Member Technical)

Appearance:

Ld. Counsel Mr. Pratik Thakkar appeared for Financial Creditor

Ld. Counsel Mr. Ravi Pahwa along with PCA Mr. Hiten Parikh appeared for Personal Guarantor

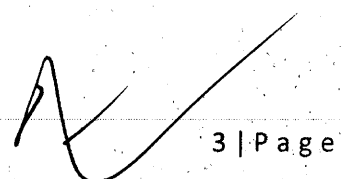
ORDER

[PER BENCH]

1. This Application has been 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. Bakul Jayantilal Karia** (hereinafter referred to as "**Personal Guarantors**") for a default amount of Rs. **176,45,58,095.31/-** in which the principal outstanding amount is of Rs. **66,77,94,405.90/-** and accrued interest and penal interest is of Rs. **109,67,63,689.41/-**. The Respondent/Personal Guarantor stood as Guarantor in respect for repayment of interest, cost, charges and other expenses in

respect of Deed of Guarantee in favour of SBI led Consortium banks. The Personal Guarantor also gave undertaking/indemnity in consideration of lenders having agreed to restructure the financial liabilities.

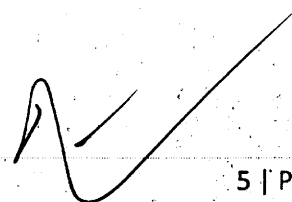
2. In so far as the Personal Guarantor to Corporate Debtor is concerned, the Hon'ble Supreme Court of India in the matter of **Lalit Kumar Jain vs. Union of India & Ors.** in the Transferred Case (Civil) No.245/2020 has upheld the vires of the notification issued by the Central Government vide S.O. 4126(E) dated 15.11.2019, in so far as it relates to coming into force of Insolvency and Bankruptcy Process of Personal Guarantors to Corporate Debtor. Thus, when a Corporate Insolvency Resolution Process in relation to Corporate Debtor is pending before this Adjudicating Authority, then as per Section 60(2) of IBC, 2016 the NCLT would be competent forum to file an Application for Personal Guarantor in relation to such Corporate Debtor. The Corporate Insolvency Resolution process in respect of the Corporate Debtor was ordered by this Adjudicating Authority on 09.11.2020. Hence, the present application in respect of the Insolvency and Bankruptcy proceedings of the Personal Guarantor of the Corporate Debtor is filed by the Creditor before this forum.



3. SBI led Consortium issued sanction letter dated 11.05.2012 for restructuring of Funds Based Working Capital Credit (hereinafter referred to as **"FBWC"**) and Non Fund based Working Capital (hereinafter referred to as **"NFBWC"**) at the request of Corporate Debtor M/s Pradip Overseas Limited. At the request of the lenders of the Corporate Debtor PNB Investment Services Limited agreed to act as Scrutiny Trustee through Security Trustee Agreement dated 22.03.2014. The SBI led consortium also agreed to restructure the Corporate Debt under the Corporate Debt Restructuring Forum and entered into the Master Restructuring Agreement dated 22.03.2014.
4. The Corporate Debtor availed further credit facilities and its Directors entered into Mortgage Deed dated 05.04.2014. PNB Investment Services Limited acted as Security Trustee as per the Security Trustee Agreement dated 22.03.2014.
5. Deed of Guarantee dated 25.04.2014 was executed by the Personal Guarantee in favour of SBI led Consortium banks. The Personal Guarantor also agreed and provided indemnity to restructure the financial liabilities to the extent of Rs. 1286.39 crores. The Personal Guarantor executed a Trust and Retention

Account Agreement dated 27.06.2014 as per the terms of the Deed of Guarantee.

6. The Corporate Debtor and the Personal Guarantor executed Revival Letter dated 13.10.2016 in reference to loan amount of Rs.50,92,61,047.92/- plus interest in favour of the Financial Creditor.
7. A legal notice dated 16.03.2017 was issued by one of the SBI led consortium members invoking the Personal Guarantee of the Respondent on default in repayment of dues by the Corporate Debtor to repay the debt. The Corporate Debtor submitted One Time Settlement proposal of Rs. 23 crore dated 29.08.2019 which was accepted by the Financial Creditor on 28.11.2019 but the Financial Creditor cancelled the compromise settlement by letter dated 21.10.2020 on the ground of breach of terms and conditions.
8. The Personal Guarantor proposed and offered to pay Rs. 8 crore for release of personal guarantees by letter dated 20.07.2021 which was later revised to Rs. 10.15 crore by letter dated 30.07.2021. The same offer was rejected by letter dated 31.08.2021 on the ground that the offer proposed was very low.



9. 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 02.08.2021 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 05.08.2021, to which he has replied vide letter dated 19.08.2021, denying the averments of the demand notice.

10. On presentation of the application by the Applicant/Financial Creditor, this Tribunal vide order dated 05.10.2021 held that the name of Interim Resolution Profession (hereinafter referred to as **"IRP"**) as suggested by the Financial Creditor i.e. Sunil Kumar Agarwal be forwarded to IBBI for nomination of the same to carry out Corporate Insolvency Resolution Process of the Personal Guarantor as per section 97(3) of IBC, 2016. This Tribunal also directed the IRP to file his report upon confirmation by IBBI within 10 days from date of his appointment as IRP of the Personal Guarantor. The IBBI confirmed the appointment of IRP

for carrying out the process of CIRP against the Personal Guarantor via mail dated 15.11.2021. The Resolution Professional has filed the report dated 13.11.2021 recommending the admission of the application filed under Section 95 of IBC, 2016. The grounds for admission of the application as per the Report are as follows:

- (i) The IRP vide email and letter dated 01.11.2021 intimated Mr. Bakul Jayantilal Karia regarding order dated 05.10.2021 and confirmation from IBBI for appointment as IRP but no reply was received from the Personal Guarantor.
- (ii) The total amount of debt as on 31.07.2021 is Rs. 1,76,45,58,095.31/- includes the cash credit, term loans, working capital term loan, funded interest term loan and the interest overdue. As per section 78 of IBC, 2016, where the amount of default is not less than Rs.1000, Part III, i.e. provisions relating to fresh start, insolvency and bankruptcy of individuals and partnership firms shall apply. The IRP concluded that there is a default amount of more than Rs. 1000 after reviewing the documents attached with the application.

- (iii) The RP has submitted that as per Rule 3(e) of the Personal Guarantor Insolvency Rules, the Guarantor means a debtor who is personal guarantor to a Corporate Debtor and in whose respect guarantee has been invoked by the Creditor which remains unpaid in full or part.
- (iv) The RP has also submitted that as per section 128 of the Indian Contract Act, 1872, a co-extensive liability will be created between the surety and the Debtor.
- (v) The application was presented in Form C along with a fee of Two Thousand rupees as prescribed under Rule 7(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process of Personal Guarantors to Corporate Debtors) Rules 2019.

Submission by the Respondent/ Personal Guarantor

11. The Respondent/Personal Guarantor filed an affidavit in reply dated 29.11.2021 and stated that deed of guarantee was executed in favour of Financial Creditor and other lenders towards various credit facilities in form of term loans, working capital facilities, working capital term loans. It is also stated that the Respondent/Personal Guarantor funded interest term loans from the lenders.

12. The Respondent/Personal Guarantor has stated that an order dated 14.10.2021 for approval of resolution plan has been passed in IA No. 549 of 2021 in CP (IB) No.221 of 2019 by this Adjudicating Authority. It is further submitted that the liability towards the personal guarantee will be reduced from the receivables on account of approval of resolution plan.

13. We have heard the learned counsel for both the parties and perused the documents on record. We have also gone through the report dated 13.11.2021 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 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”.

The Hon'ble National Company Law Appellate Tribunal in the matter of **State Bank of India vs. Athena Energy Venture Private Limited** in Company Appeal (AT) (Ins) No.633 of 2020 observed as under:-



“19. It is clear that in the matter of guarantee, CIRP can proceed against Principal Borrower as well as Guarantor.”

In this application filed by the Financial Creditor, a Deed of Guarantee dated 25.04.2014 is executed between the SBI led Consortium and the Personal Guarantor. Clause 24 of the Deed of Guarantee states that this Guarantee shall be irrevocable and the obligations of the Guarantors hereunder shall be discharged except by performance and then only to the extent of such performance, such obligation shall not be conditional on the receipt of any prior notice by the Guarantors or by the Borrower and the demand notice by the Lenders shall be sufficient notice to or demand on the Guarantors. Therefore, based on the above mentioned case law, CIRP can be proceeded against the Personal Guarantor as an irrevocable Deed of Guarantee has been signed between the SBI led Consortium and the Personal Guarantor.

14. Further, the Hon'ble Supreme Court in the matter of **Lalit Kumar Jain vs. Union of India & Ors.** in the Transferred Case (Civil) No.245/2020 has observed as under:-

“108. It is therefore, clear that the sanction of a resolution plan and finality imparted to it by Section 31 does not per se operate as a discharge of the guarantor's liability. As to the nature and extent

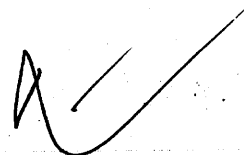
of the liability, much would depend on the terms of the guarantee itself. However, this court has indicated, time and again, that an involuntary act of the principal debtor leading to loss of security, would not absolve a guarantor of its liability. In Maharashtra State Electricity Board (supra) the liability of the guarantor (in a case where liability of the principal debtor was discharged under the insolvency law or the company law), was considered. It was held that in view of the unequivocal guarantee, such liability of the guarantor continues and the creditor can realize the same from the guarantor in view of the language of Section 128 of the Contract Act as there is no discharge under Section 134 of that Act.”

“111. In view of the above discussion, it is held that approval of a resolution plan does not ipso facto discharge a personal guarantor (of a corporate debtor) of her or his liabilities under the contract of guarantee. As held by this court, the release or discharge of a principal borrower from the debt owed by it to its creditor, by an involuntary process, i.e. by operation of law, or due to

liquidation or insolvency proceeding, does not absolve the surety/guarantor of his or her liability, which arises out of an independent contract.”

Based on the above mentioned judgment of Hon'ble Supreme Court, the Personal Guarantor cannot be discharged from his liability upon the approval of Resolution Plan under section 31 of IBC, 2016. Therefore, the liability of the Personal Guarantor continues and the Financial Creditor is in condition to realize the default amount from the Personal Guarantor.

On-going through the averments in the IBA, the reply of Respondents after the report of the Resolution Professional as also the report of Resolution Professional narrated above, we are of the considered opinion that this is a fit case for admission and proceed against the Personal Guarantor/ Respondent and initiate Corporate Insolvency Resolution Process. It is also seen from the report of Resolution Professional that he has not recommended for a negotiation between the parties for arriving at an amicable settlement for repayment. Hence, we admit CP (IB) No.165 of 2021 filed under the provisions of Section 95 of IBC, 2016 under section 100 of the IBC, 2016 by following order:



ORDER

1. 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 IBC, 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.

2. The Resolution Professional viz., Mr. Sunil Kumar Agarwal, having Registration No: IBBI/IPA-001/IP-P01390/2018-2019/12178, office at 603/6, Devnandan Heights, near

Poddar School, New C.G. Road, Chandkheda, Ahmedabad-382424, Gujarat [e-mail id – anil91111@hotmail.com] who was appointed when the Section 97 application was allowed vide Order dated 05.10.2021, 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.
- 3.** 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.
- 4.** 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 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; -


- 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;
- c) such other matters as may be specified.

5. 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.

6. 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 days 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.

7. 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.



8. The Resolution Professional shall submit his periodic reports before this Tribunal, as per rules.

- Sd-

KAUSHALENDRA KUMAR SINGH
MEMBER (TECHNICAL)


MADAN B. GOSAVI
MEMBER (JUDICIAL)

Shweta Desai