

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

ITEM No.304 - C.P.(IB)/60(AHM)2021
With
ITEM No. 305 - IA/817(AHM)2021

Order under Section 95 IBC

IN THE MATTER OF:

State Bank of India

.....Applicant

V/s

Pravin Kumar Tayal
(Personal Guarantor)

.....Respondent

Order delivered on 07/03/2024

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
NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH-I
AHMEDABAD**

**CP/IB/60/AHM/2021
With
IA/817(AHM)2021**

*Filed under Section 95 of the Insolvency & Bankruptcy Code,
2016*

*In the matter of **Mr. Pravin Kumar Tayal***

State Bank of India

Stressed Assets Management Branch,
2nd Floor, Paramsiddhi Complex,
Opp. V.S. Hospital,
Ellisbridge, Ahmedabad,
Gujarat – 380 006

.... Applicant/Financial Creditor

VERSUS

Mr. Pravin Kumar Tayal

(Personal Guarantor)
C/O Krishna Knitwear Technology Ltd.,
Raghuvanshi Mills Compound, 11/12,
Senapati Bapat Marg, Lower Parel (West),
Mumbai- 400 013

.... Respondent/Personal Guarantor

Order pronounced on 07.03.2024

CORAM:

**SH. SHAMMI KHAN, MEMBER (JUDICIAL)
SH. SAMEER KAKAR, MEMBER (TECHNICAL)**

Appearance:

For the Applicant/FC : Mr. Pratik Thakkar, Advocate
For the Respondent/PG : Mr. Harmesh K Shah, Advocate

O R D E R

CP/IB/60/AHM/2021

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. Pravin Kumar Tayal (hereinafter referred to as "Personal Guarantors") for a default amount of Rs.206,34,01,750.03/-. The Respondent/Personal Guarantor stood as Guarantor in respect for repayment of interest, cost, charges and other expenses in respect of Deed of Guarantee dated 08-12-2009 and 04-05-2010 in favour of Applicant.

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 13.01.2020. 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. It is stated that the Respondent entered into a Deed of Guarantee, Agreement of hypothecation of goods and

assets executed with the Financial Creditor on 08.12.2009.

4. The Respondent entered into another Deed of Guarantee executed with the Financial Creditor on 04.05.2010.
5. It is stated that an affidavit dated 31.03.2010 was executed by the Personal Guarantor regarding the asset liability.
6. It is further stated that a Joint Fifth Supplemental deed of hypothecation and also of working capital consortium agreement was entered by the Corporate Debtor with the Financial Creditors and other Creditors on 26.03.2012. A Joint Sixth Supplemental deed of hypothecation was entered by the Corporate Debtor with the Financial Creditors and other Creditors on 20.04.2013.
7. By order dated 13.01.2020, the Corporate Debtor was admitted and order of moratorium was passed by this

Adjudicating Authority in CP (IB)
No.279/7/NCLT/AHM/2018.

8. 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 07.12.2020 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 on 12.12.2021.
9. On presentation of the application by the Applicant/Financial Creditor, this Tribunal vide order dated 26.07.2021 appointed the Interim Resolution Profession (hereinafter referred to as "IRP") as suggested by the Financial Creditors, Mr. Sunil Kumar Agarwal, 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.

10. The Interim Resolution Professional has filed the report dated 13.08.2021 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. It is stated that the IRP had examined the application CP (IB) No.60 of 2021 and the same is found to be satisfying all the ingredients of Sec.95 of IBC.
- ii. It is stated that the IRP had not received any evidence of repayment of the debt claimed in Sec.95 petition from Mr. Pravin Kumar Tayal.
- iii. It is stated that the IRP had not received any document whereby the Personal Guarantee agreement dated 08-12-2009 and 04-05-2010 was cancelled by both the parties.
- iv. It is stated that the IRP had not received any order of court or any other forum whereby the personal

guarantee agreement dated 08-12-2009 and 04-05-2010 was cancelled or set aside.

- v. It is stated that the IRP had already communicated the personal Guarantor through Email dated 30-07-2021 and speed post-dated 03-08-2021 giving him an opportunity to inform, if he has any objection for which IRP has not received any reply from personal guarantor. Hence, it is assumed that the personal guarantor has nothing to say in this matter.

11. The Respondent/Personal Guarantor filed an affidavit in reply dated 29.01.2024 under Diary No. D720 and raised following objections to the Application as under:

- a) The Respondent was not served with demand notice at the correct address.
- b) The Respondent was not served with petition at the correct address.
- c) No Evidence of any Guarantee given by the Respondent being invoked and the guarantee was not invoked within the period of limitation.

IA/817(AHM)2021

12. The Personal Guarantor/Pravin Kumar Tayal has also filed an IA/817(AHM)2021 on 26.11.2021 vide Inward Diary No. E1570 seeking dismissal of the application (Company Petition No. 60 of 2021) filed by the Financial Creditor/State Bank of India with following reliefs:-
1. That the Application under Section 95(1) of IBC, 2016 read with Rule 7(2) of the Respondent be rejected with exemplary cost upon the Respondent.
 2. That the hearing of C.P. No. 60/AHM/2021 be deferred until final adjudication of the present application.
 3. That any other relief may be granted as deemed fit and proper.
13. The above mentioned prayers were made on the following submissions:
- (a) The Personal Guarantor was not served with demand notice at the correct address.
 - (b) The Personal Guarantor was not served with petition at the correct address.

(c) No evidence of any guarantee given by the personal guarantor being invoked.

14. Thereafter, reply has been filed by the Respondent/State Bank of India on 08.02.2022 vide Inward Diary No. D654 and made following submissions:

(i) It is stated that the demand notice under Rule 7(1) is issued to the personal guarantor at its last known address and the applicant in his affidavit to the application at Page-17 admits to the residing at Mumbai while the demand notice is served at the Mumbai itself. Further, it is stated that it is not the case of the present applicant residing at any specific place in Mumbai.

(ii) It is also stated that the petition is also served to the applicant by Registered Post and on 26.03.2021 the same has been received by the Applicant. The personal guarantee is already invoked by demand notice which is forming part of the main matter.

(iii) It is stated that the above all the aspect of service are in complied and in absence of any contentions with regards to the merit of the main petition the present application should be dismissed and Company Petition (IB) No. 60 of 2021 deserves to be admitted by this Hon'ble Adjudicating Authority.

15. The Applicant/Personal Guarantor filed rejoinder on 09.05.2022 vide Inward Diary No. D2573 to the reply filed by the Respondent/Financial Creditor and made following submissions:

(i) It is stated that the respondent has deliberately and purportedly with malicious intent kept the applicant in dark about the proposed action of Insolvency Resolution under Section 95(1) of IBC, 2016 by not serving the Applicant the Demand Notice/Form-B and the Company Petition at the notified and proper/correct address of the Applicant which was on the record of the Respondent and not the Registered Office Address

of M/s. Krishna Knitwear Technology Limited i.e. Raghuvanshi Mills Compound, 11/12, Senapati, Bapat Marg, Lower Parel (West), Mumbai – 400013 (“the incorrect address”) of which the Applicant is neither an employee or manager or employer or director or authorized representative of the same is more elaborated in the IA of the Applicant.

- (ii) It is stated that the acknowledgment slip produced by the respondent once again reflects the incorrect address. The slip wrongly mentions the Pravin Kumar Tayal as the c/o of Krishna Knitwear Technology Limited with again the incorrect address. It has been explained in detail in the IA and reply to the company petition filed by the applicant and also in the above Rejoinder as to why the delivery to the incorrect address does not amount to delivery to the Applicant.
- (iii) It is stated that the company petition is bad in law as the respondent has not produced/adduced any credential evidence to show that the guarantee

given by the applicant was ever invoked. Thus, the applicant puts that respondent under strict proof.

16. An additional affidavit has been filed by the Applicant/Financial Creditor and Respondent in IA/817(AHM)2021 on 19.12.2022 vide Inward Diary No. D6471 and made following submissions:

(i) It is stated that the respondent (in main CP) is the personal guarantor of the Krishna Knitwear Technology Limited and show cause notice to the Krishna Knitwear Technology Limited the respondent herein has issued a letter to the financial creditor dated 25.08.2021 which was inwards with the financial creditor on 14.09.2016. The communication of the personal guarantor states his address to be at Raghuvanshi Mill Compound, 11 12, Senapati Bapat Marg, Lower Parel(w), Mumbai-400013. Thus, the last known address with the financial creditor was the above referred address.

(ii) It is further stated that the financial creditor has initiated proceedings for inclusion of Krishna

Knitwear Technology Limited and its directors/guarantors in the list of wilful defaulters.

17. 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.

18. 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.*

19. We have heard the learned counsel for both the parties and perused the documents on record. We have also gone through the report dated 13.08.2021 filed by the IRP.

20. It is seen from the petition that the present application is filed within the period of limitation as the last payment made by the Corporate Debtor was on 25.09.2017 and the Section 7 application being CP (IB) No.279/7/NCLT/AHM/2018 was filed on 21.05.2018 against the Corporate Debtor in which the order of admission was passed on 13.01.2020.

21. Further, 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".

22. Further as per record furnished by the Applicant Bank, Demand Notice dated 07.12.2020 invoking Personal Guarantee within the period of limitation, was served upon the Respondent who is one of the Directors of the Corporate Debtor, through Registered Post against acknowledgment on the last recorded address.
23. The present Application was filed before this Tribunal on 26.11.2021. The date of default as stated to be on 25.09.2017 as the last payment made by the Corporate Debtor was on 25.09.2017 and the Section 7 application being CP (IB) No.279/7/NCLT/AHM/2018 was filed on 21.05.2018 against the Corporate Debtor in which the order of admission was passed on 13.01.2020. As noted above 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. The Personal Guarantee was invoked by the Applicant Bank vide Demand Notice dated 07.12.2020. Hon'ble Supreme Court ***in Suo Moto WP (Civil) No. 3 of 2022 in Re: Cognizance for Extension of Limitation*** held that the period i.e. 15.03.2020 to 28.02.2022 is excluded for calculating the period of limitation. Therefore, we find that the present Application is well within the limitation period.

24. Moreover, 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 13.08.2021.
 - ii. The Respondent has admitted to have executed the Guarantee Agreement.
 - iii. The Applicant has demanded the amount outstanding from the Respondent vide Demand

Notice dated 07.12.2020 which was served on the recorded address against the acknowledgment.

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

25. The objection taken by the Responded/Guarantor in IA/817(AHM)2021 regarding non-service of the notice under Rule 7(1) does not hold much substance. The Applicant/Financial Creditor has attached the acknowledgement of postal authority which is of the same address where the Financial Creditor has issued notice to the same Respondent/Guarantor being a show cause notice, the said notice was replied by the Respondent/Guarantor on 25.08.2016 (attached at Page-4 of affidavit of the Financial Creditor dated 06.12.2022) wherein the notice under Rule 7(1) was served. It was the duty of the Respondent/Guarantor

to inform the correct address to the Financial Creditor and in which he failed. Thus, one cannot take advantage of own mistakes/misdeeds.

26. In view of the foregoing discussions there is no force in the plea of the Respondent either taken in reply or through Separate I.A. Hence, 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 Section 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.

- II. 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 29.07.2021, 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; -

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.

27. In terms of the above, **CP(IB)/60(AHM)/2021** filed under Section 95(1) of the IBC, 2016 is admitted and the Insolvency Resolution Process stands initiated against the Respondent/Personal Guarantor.

28. Further, the **IA/817(AHM)2021** filed by respondent/Guarantor is dismissed for the reasons recorded hereinabove.

-Sd-

SAMEER KAKAR
MEMBER (TECHNICAL)

Swetambary/Steno

-Sd-

SHAMMI KHAN
MEMBER (JUDICIAL)