IN THE NATIONAL COMPANY LAW TRIBUNAL

SPECIAL BENCH, NEW DELHI

IA-876/2022

In

Company Petition (IB) No. 739(ND)/2021

Under 96, 97, 99 & 100 of IBC, 2016 r/w Rule 6 (1) of the IB (Application to Adjudicating Authority for IRP for Personal Guarantors to CD) Rules, 2019.

In the matter of:

Seimens Financial Services Pvt. Ltd.
Plot No. 2, Sector-2, Khargar Node,
Navi Mumbai-410210

.... Applicant/Financial Creditor

Vs.

Mr. Varun Jajoo

W-10/14, Western Avenue, Sainik Farms,

New Delhi-110062

.... Respondent/Personal Guarantor

AND

Mr. Babu Lal Gurjar
Residing at:
239, Mahadev Nagar, Ram Nagaria Road (SKIT Road),
Gali No. 1, Jaipur, Rajasthan-302017

..... Resolution Professional

ORDER DELIVERED ON: 22.08.2022

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CORAM:

SHRI P.S.N PRASAD, HON'BLE MEMBER (JUDICIAL)

SHRI RAHUL BHATNAGAR, HON'BLE MEMBER(TECHNICAL)

Present:

For the Applicant: Mr. Ashwini Kumar Singh, Advocate
For the IRP: Adv. SP Singh Chawla
For Respondent:

ORDER

Per: P.S.N. PRASAD, HON'BLE MEMBER (JUDICIAL)

1. Under consideration is application IA-876/2022, which is a report filed by the Resolution Professional namely Babu Lal Gurjar, in accordance with Section 99 of the Insolvency and Bankruptcy Code, 2016 ("IBC, 2016"). Originally, the Petitioner, namely, Siemens Financial Services (Financial Creditor), had filed a petition under Section 95 of the Insolvency and Bankruptcy Code, 2016 r/w Rule 7 (2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for IRP for Personal Guarantors to Corporate Debtor) Rules, 2019 (the Rules, 2019), against Mr. Varun Jajoo (Personal Guarantor), who is the Personal Guarantor of the Financial Creditor in relation to the credit facility availed by the company M/s. Emkay Automobile Industries Limited (Corporate Debtor) for an amount of Rs. 2,06,93,881/-.

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2. On presentation of the Petition CP (IB) No. 739(ND)/2021, by the Financial Creditor, this Adjudicating Authority vide order dated 31.01.2022, appointed the Resolution Professional viz., Babu Lal Gurjar, as proposed by the Financial Creditor and directed to examine the application referred in Section 95 of IBC and by duly following Section 99 (2) of IBC, 2016 file a report under Section 99 of IBC, 2016. The Report under Section 99 of IBC, 2016 has been filed by him through IA-876/2022 in CP (IB) -739/ND/2021, recommending the **admission of the application** filed under section 95 of IBC, 2016. The grounds for admission of the application recorded in the Report are as follows:

- The Insolvency Petition satisfies the requirement of Section 95 of IBC, 2016 and has been filed in the requisite form, in terms of Rule 7(2) of the Rules, 2019, supported by requisite fee and documents and Corporate Debtor namely, M/s Emkay Automobile Industries Limited (CIN: U34300DL2000PLC107525) is presently undergoing the CIRP process.
- The Application has been filed in compliance with the provisions of section 95(4) and 95 (7) of the Code with requisite documents.
- The Resolution Professional herein has asked the personal guarantor to prove repayment of the debt claimed as unpaid by creditor by furnishing the documents. However, no response has been received by RP till the filing of this report.
- That after prima facie examination of the disputed

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portion of the debt as raised by the personal guarantor in reply to the demand notice dated 28.06.2021, it is evident that the same does not affect the admissibility of the application in accordance with the provisions of section 78 and other provisions of IBC, 2016.

- The Personal Guarantor has committed default in repayment of his debts; therefore, the requirement as set out under Section 95(1) is satisfied.

3. The Respondent has filed its reply to the report filed by the Resolution Professional dated 07.03.2022 and submitted that:

a. The RP while acknowledging that Respondent/Personal Guarantor vide his reply dated 28.06.2021 to the Demand Notice sent by the Financial Creditor has disputed the purported debt, amounting to Rs. 2,06,93,881/- as claimed by the Financial Creditor in the present Application.

b. Since alleged debt as claimed by the Applicant/Financial Debtor is not registered with the information utility, the RP in accordance with the mandate of Section 99(3) of the IBC, 2016 ought to have considered the validity of the debt as purportedly claimed by the Applicant/ Financial Guarantor.

c. In Part III, Column 1 of the present Application, the Applicant/ Financial Creditor has claimed Future Outstanding Principal of Rs. 82,35,740/- and also wrongly claimed exorbitant cheque dishonour fees to the tune of Rs. 54,280/-, alleged Default interest of Rs.

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28,66,548/-, alleged Prepayment Fees of Rs. 3,29,340/- as also GST @ 18% on such alleged prepayment fees to the tune of Rs. 59,297/-, Other Legal Charges of Rs.2,14,899/- without any explanation or justification towards the same.

d. An amount of Rs.3,29,430/- including GST of Rs.59,297/- has been claimed by the Applicant/Financial Creditor as prepayment charges. Without prejudice, it is submitted even if assuming though not admitting, that the Applicant/Financial Creditor had rightly declared the loan account of the corporate debtor, Emkay Automobiles Industries Limited as Non- Performing Asset (hereinafter referred to as `NPA'), the RP has failed to acknowledge that levy of prepayment charges on an NPA, as also the GST on the said charges is totally illegal, unjustified and simply preposterous.

e. The said report dated 10.02.2022 prepared by the RP has been submitted without even considering the detailed response given by the Respondent/ Personal Guarantor. Pertinently, the RP was informed by the Respondent/ Personal Guarantor vide his email dated 09.02.2022 that he shall provide the information, however due to some unforeseen circumstances the Respondent/ Personal Guarantor could only provide his detailed response by 11.02.2022. It is submitted that the RP ought to have considered the response given by the Respondent/Personal Guarantor before submitting

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his report under Section 99 of the IBC, 2016. It is further submitted that the failure to do so renders the present report dated 10.02.2022 non-est in the eyes of law.

f. While preferring the present Application, the Applicant/ Financial Creditor has alleged that the loan account of the corporate debtor, Emkay Automobile Industries Ltd, was declared by the Applicant/ Financial Creditor as NPA on 27.02.2020, however as per CIBIL reporting by the Applicant/Financial Creditor themselves, the loan account of the corporate debtor on 28.02.2020 had been declared as 'Standard.

g. Applicant/ Financial Creditor had no reason or cause of action accruing in its favour to declare the loan arrangement as NPA during the COVID-19 pandemic, especially in view of the moratorium imposed by the Reserve Bank of India vide its Statement of Development Regulatory Policy dated 27.03.2020.

h. The Hon'ble Supreme Court of India vide its order dated 03.09.2020 and 10.09.2020 passed in *Gajendra Sharma v/s Union of India & Anr.* reported as Writ Petition (Civil) No. 825 of 2020 had extended the moratorium on declaring the bank accounts of the borrowers as NPA, which subsequently came to an end on 23.03.2021 vide judgment dated 23.03.2021 passed by the Hon'ble Supreme Court of India in *'Small Scale Industrial Manufactures Association (Regd.) V/s Union of India and Others'* reported as Writ Petition (C) No. 476

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of 2020.

i. The right of the Respondent/Personal Guarantor under section 240A of the IBC, 2016 would get effected.

j. The Hon'ble High Court of Delhi vide its order dated 02.02.2022 passed in Writ Petition (C) No. 981 of 2022 while dealing with a Petition filed by the Respondent herein, along with other Personal Guarantors of the corporate debtor challenging the constitutionality of the Section 95 of the IBC,2016 in view of the right created in favour of the Respondent/Personal Guarantor under Section 240A of the IBC, 2016,was pleased to grant liberty to the Personal Guarantors of the corporate debtor to file the Resolution Plan for the insolvency resolution of the corporate debtor, including the Respondent herein, which shall be considered by the Committee of Creditors of the corporate debtor without the embargo of Section 95 read with Section 101 of the IBC, 2016. It is submitted that by virtue of the liberty by the Hon'ble High Court of Delhi vide its order dated 02.02.2022, the Respondent herein would be able to propose a Resolution Plan for the revival of the corporate debtor wherein interest of all the creditors of CD including Applicant/Financial Creditor will be taken care of.

k. The present Application under Section 95 of the IBC, 2016 cannot be filed by the Applicant/ Financial Creditor based on a defective Board Resolution dated 16.05.2018, when in fact the provisions of Part II1 of

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the IBC, 2016 itself were enforced by the Central Government on 15.11.2019 vide notification bearing S. O. 4126 (E) issued by the Ministry of Corporation Affairs.

4. We have gone through the documents placed on record and the averments made and heard the Learned Counsels. With respect to averment regarding dispute of debt in the reply to the Demand Notice dated 28.06.2021, it is observed that from the main petition, the applicant has made available sufficient proof / evidence for existence of debt amounting to Rs. 2,06,93,881/- as on 02.06.2021 and in accordance with the provisions of Section 78, threshold default limit for filing application under Section 95 is Rs. 1,000/- only against which the applicant has submitted proofs for dues of Rs.2,06,93,881/- in the application itself. Therefore, the dispute raised by the Respondent does not affect the admissibility of application as per provisions of IB Code, 2016. It is further observed that CIRP has been admitted by NCLT, New Delhi against the Corporate Debtor vide order dated 12.10.2021 in CP No. IB-3173 / 2019. The RP of the Corporate Debtor in the main CP would have already examined and finalized the claim of the Applicant as per provisions of Regulations 13 and 14 of CIRP Regulations, 2016.

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5. It is further observed from the records that the Respondent was given sufficient time and opportunity to provide relevant information as per provisions of Section 99 (5) of IB Code, 2016 within 7 days vide letter through email dated 02.02.2022 i.e. upto 09.02.2022. A reminder was also issued in this regard on 07.02.2022 to provide information by 09.02.2022. The Respondent, himself had confirmed through email that the information shall be provided by 09.02.2022. In response to email of the RP dated 09.02.2022, he had promised through E-mail that the information shall be provided by the end of the day. But the requisite information / response could not be received by the Resolution Professional from Respondent. Also, as per order dated 31.01.2022 of the NCLT, the RP was directed to file the report u/s 99 of IBC, 2016 upto 10.02.2022 i.e. within 10 days of the date of order. The RP has filed the report on 10.02.2022, till then, there was no response from the Respondent and as stated by the Respondent the said letter through E-mail was received on 11.02.2022. It is further observed that all the facts mentioned in the letter dated 11.02.2022 were also mentioned by the respondent in his reply to demand notice of Applicant vide letter dated 28.06.2021 which forms part of Application filed by the Financial Creditor u/s 95 of IBC. It is observed that the RP has already considered the letter dated 28.06.2021 while submitting report under section 99 of IBC.

6. The contention raised by the respondent that the Board Resolution filed by the Financial Creditor in the main petition

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is defective due to the fact that the same was created on 16.05.2018 and at that time, the provision related to Insolvency resolution process was not in force is unsustainable. It is further observed that the Board Resolution clearly give authorization to initiate appropriate legal proceedings for or on behalf of the Financial Creditor. The said Board Resolution was duly signed and stamped by the Company Secretary of the Financial Creditor, hence there is no defect in the said Board Resolution.

7. Based on the reasons recorded in the report submitted by the Resolution Professional, the Petition i.e., IB - 739(ND)/2021, filed under the provisions of Section 95 of IBC, 2016, is hereby ***admitted*** under section 100 of the IBC, 2016. The Insolvency Resolution Process is initiated against the Personal Guarantor and the moratorium is declared, which begins with the date of admission of the Petition, i.e. the date of this order and shall cease to have effect at the end of the period of 180 days, 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

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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.

8. The Resolution Professional, Babu Lal Gurjar, who has been appointed under Section 95 vide Order dated 31.01.2022, is directed to cause a public notice to be published on behalf of the Adjudicating Authority within 7 days of uploading of this Order on the website of the NCLT Delhi, inviting claims from all Creditors, who shall register their claims as provided under Section 103 within 21 days of such issuance. The notice shall contain the necessary information as provided under Section 102 (2) of IBC, 2016. The publication of notice shall be made in newspapers, one in English and other in Vernacular which have wide circulation in the State where the Personal Guarantor resides. The Resolution Professional shall furnish two spare copies of the notice to the Registry. One shall be placed by the Registry on this Authority's website and the other shall be affixed in the premises of this Authority.

9. The Resolution Professional in exercise of the powers conferred under Section 104 of IBC, 2016, shall prepare a list of creditors within 30 days from the date of the notice. The debtor shall prepare a Repayment Plan in consultation with

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the Resolution Professional as provided under Section 105, which shall include the provisions for payment of fee to the Resolution Professional. The Resolution Professional shall submit the repayment plan along with his report on the plan to this Adjudicating Authority within a period of 21 days from the last date of submission of claims, as provided under Section 106 of IBC, 2016.

10. In case the Resolution Professional recommends that a meeting of the creditors is not required to be summoned, he shall record the reasons thereof. If the Resolution Professional is of the opinion that the meeting of the creditors should be summoned, he shall specify the details as provided under Section 106(3). 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 Section 106 (1) of the 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 the IBC, 2016.

11. The meeting of the creditors shall be conducted in accordance with Sections 108, 109, 110 & 111 of the IBC, 2016. The Resolution Professional shall prepare a report of the meeting of the creditors on the Repayment Plan with all details as provided under Section 112 of the IBC, 2016 and submit the same to this Adjudicating Authority, copies of which shall be provided to the Debtor and the Creditors. It is

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made clear that the Resolution Professional shall perform his functions and duties in compliance with the Code of Conduct provided under Section 208 of the IBC, 2016.

12. In terms of the above, **CP (IB) - 739(ND)/2021**, filed under Section 95 (1) of the IBC, 2016 is **admitted** and the Insolvency Resolution Process stands initiated against the Personal Guarantor, Mr. Varun Jajoo.

13. Let a copy of this order be served on all concerned.

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RAHUL BHATNAGAR
(Member Technical)

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P.S.N PRASAD
(Member Judicial)