IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
COURT-V

IB-54/ND/2022

IN THE MATTER OF:
Yes Bank Ltd. **....Applicant**
V/s.
Mahendra Kumar Jajoo **.....Respondent**

SECTION
U/s 95 IBC **Order delivered on 11.03.2022**

CORAM:
SHRI ABNI RANJAN KUMAR SINHA
HON'BLE MEMBER (JUDICIAL)

SHRI AVINASH K. SRIVASTAVA,
HON'BLE MEMBER (TECHNICAL)

PRESENT:
For the Applicant : Anand Shankar Jha, Girish Bhardwaj, Shubham Tripathi Adv for Yes Bank
For the Respondent : Mr. Rajiv K. Virmani, Mr. Karan Valecha and Mr. Shivankar Rao, Adv. for the Respondent

ORDER

In the order dated 11.03.2022, due to typographical error in place of "List the matter on 19.04.2022", it is typed as "List the matter on 09.04.2022". This typographical error is hereby corrected, the order dated 11.03.2022 shall be read as List the matter on 19.04.2022 in place of List the matter on 09.04.2022.

-Sd-

(AVINASH K. SRIVASTAVA)
MEMBER (T)

-Sd-

(ABNI RANJAN KUMAR SINHA)
MEMBER (J)

NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH-V

(IB) 54 (ND)/2022

IN THE MATTER OF:

YES BANK LIMITED
YES BANK HOUSE
OFF WESTERN EXPRESS HIGHWAY
SANTACRUZ (EAST) MUMBAI 400055

REGIONAL HEAD OFFICE
4TH FLOOR MAX TOWERS
SECTOR 16B NOIDA 201301 **....APPLICANT BANK/ CREDITOR**

VERSUS

MAHENDRA KUMAR JAJOO
W-10/14, WESTERN AVENUE
SAINIK FARMS, NEW DELHI-110062
.... RESPONDENT /PERSONAL GUARANTOR

SECTION: U/S 95 of IBC, 2016

Order delivered on: 11.03.2022

CORAM:
MR. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)
MR. AVINASH K. SRIVASTAVA, MEMBER (TECHNICAL)

Present-

For the Applicant: Adv. Anand Shankar Jha, Adv. Girish Bhardwaj, Adv. Shubham Tripathi

For the Respondent: Adv. Rajiv K. Virmani, Adv. Karan Valecha, Adv. Shivankar Rao

ORDER

AS PER MR. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)

The present petition has been filed under Section 95 of the Insolvency & Bankruptcy Code, 2016, (hereinafter referred to as the "Code"), by Yes Bank Ltd. praying for initiation of Insolvency Resolution Process against Mr. Mahendra Kumar Jajoo, who is the Director as well as the Personal Guarantor of the Corporate Debtor i.e. Emkay Automobiles Industries Limited.

2. The facts mentioned in the application in brief are as follows:

i. That, in October 2018, the Corporate Debtor approached the Applicant seeking various credit facilities. In terms of the request made by the Corporate Debtor, Applicant Bank sanctioned the following credit facilities, which were also renewed from time to time.

a) Cash Credit Facility of Rs. 24,00,00,000.00 vide Facility Letter dated 26.10.2018 (renewed vide Facility Letter dated 26.10.2018) and Master Facility Agreement dated 05.11.2018.

b) Term Loan Facility of Rs. 15,00,00,000/- vide Facility Letter dated 26.10.2018 (amended vide Facility Letter dated 31.10.2018) and Loan Agreement dated 05.11.2018;

c) FITL-TL and FITL-CC facilities of Rs 47,81,387.72/- and Rs. 63,23,911/- granted on 02.09.2020.

ii. That in order to secure the repayment of the said facilities, security was created as follows:

a) Personal Guarantee: Unconditional and Irrevocable Deeds of Guarantee dated 05.11.2018 was executed by the Personal Guarantor Shri. Mahendra Kumar Jajoo. The guarantees created for CC Facility & TL Facility stood extended as guarantees for repayment of FITL Facility.

b) Primary Security: First *pari passu* charge on the current assets of the company and movable fixed assets of Borrower having 1.25x cover (except assets exclusively hypothecated in favour of other banks) was created vide Deed of Hypothecation dated 05.11.2018.

Pari passu charge on entire current assets and movable fixed assets of Borrower having 1.25x cover (except assets exclusively hypothecated in favour of other banks), (both present and future), created vide Deed of Hypothecation dated 05.11.2018.

c) Collateral Security: First *pari passu* charge on Immovable Fixed Assets and movable fixed assets of Borrower having 1.25x cover (both present and future), created vide Mortgage Register Entry dated 09.05.2019 with SBI for Extension of Mortgage by deposit of title deeds covering enhanced limits and creation of equitable mortgage.

First pari passu charge on Immovable Fixed Assets and movable fixed assets of Borrower having 1.25x cover (both present and future) created vide Letter of Confirmation dated 28.05.2020 issued by SBI for Extension of Mortgage by deposit of title deeds covering enhanced limits and creation of equitable mortgage.

i. E-203A, Focal Point Phase 1 Ludhiana
ii. E-217, Focal Point Phase 1, Ludhiana
iii. E-203, Focal Point Phase 1, Ludhiana
iv. E-40, Focal Point Phase 1, Ludhiana
v. E-41, Focal Point Phase 1, Ludhiana
vi. 73,74,75,76 IIE Pantnagar, Udham, Singh Nagar
vii. 39/7, National Highway-8, Begumpur, Khatola, Haryana.

iii. That the Corporate Debtor and the Respondent defaulted in making regular payments to the Applicant Bank. The

account of the Corporate Debtor was classified as Non-Performing Asset ("NPA") on 29.12.2020.

iv. That a Demand cum Guarantee Invocation Notice dated 06.01.2021 was issued to the Corporate Debtor as well as the Guarantor regarding payment of default amount of Rs 1,60,63,305.06 as on 04.01.2021 within 7 business days. Further, on 27.05.2021, the Applicant Bank issued a Loan Recall cum Guarantee Invocation Notice regarding payment of Rs 20,89,97,327.30/- as on 19.05.2021.

v. That due to failure in payment, a notice under Section 13(2) of the SARFAESI Act, 2002 was issued on 09.06.2021 by the Applicant Bank for an amount of Rs 21,09,77,341.01/- together with interest and charges, as on 07.06.2021. On 28.06.2021, the Corporate Debtor issued a reply admitting the default and raising a sham defence.

vi. That the NCLT New Delhi Bench vide its order dated 12.10.2021 admitted an application filed by M/s Swastik Pipes Ltd u/s 9 of the Code against the Corporate Debtor.

vii. That a Demand Notice dated 18.11.2021 in Form B under Rule 7(1) of Insolvency & Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process of Personal Guarantors to Corporate Debtors) Rules, 2019 was sent to the Personal Guarantor for payment of total outstanding amount of Rs. 22,25,62,762.22/-, due as on 12.10.2021. Neither any reply nor any payment has been issued till date by the Personal Guarantor

3. The Respondent has filed written submissions and submitted the following:

i. That the Applicant has failed to disclose that as per the terms of the Sanction Letter dated 26.10.2018, it was agreed between the Applicant and the Corporate Debtor that the personal guarantee of the Mrs. Brinda Jajoo shall be

released post change in the shareholding of the Corporate Debtor with the Respondent and on 03.01.2019, the shareholding of the Respondent and Mrs. Brinda Jajoo in the Corporate Debtor stood altered which was communicated to Applicant.

ii. That, in order to repay the loan availed, the Corporate Debtor had sent several e-mails to the Applicant to grant a No-Objection Certificate. However, the Applicant Bank has withheld the NOC.

iii. That as per Section 240A r/w Section 29A (h) of the Code, the personal guarantor of an MSME Corporate Debtor has been given a right to become a resolution applicant and propose a resolution plan for the insolvency resolution of the Corporate Debtor. Therefore, the present application is not maintainable.

iv. That a Writ Petition bearing No. W.P. (C) 981 of 2022 was filed before the Hon'ble Delhi High Court by the Respondent along with other Personal Guarantors of the Corporate Debtor, seeking to declare Section 95 of the Code as unconstitutional. In light of the contradiction between Section 240 A and Section 95 read with Section 101 of the Code, the Hon'ble Delhi High Court issued notice to the Union of India and the IBBI, including the Applicant herein. Further, liberty was granted to the Personal Guarantors to file the Resolution Plan for the insolvency resolution of the Corporate Debtor, which shall be considered by the CoC without the embargo of Section 95 r/w Section 101 of the Code.

4. We have heard the Ld. Counsel appearing for the applicant as well as the respondent and perused the averments made in the application and the written submissions filed on behalf of the respondent. The Ld. Counsel appearing for the respondent raised an objection that in terms of Section 240A read with Section 29Ah of the IBC, the Personal

Guarantor of an MSME Corporate Debtor has been given a right to become a Resolution Applicant and propose a Resolution Plan for the Insolvency Resolution of the Corporate Debtor. Therefore, the present application is not maintainable. He also placed reliance upon the order of the Hon'ble Delhi High Court and passed in WPC No. 981/2022 and by placing reliance upon the order, ld. Counsel for the applicant submits that the Constitutional validity of Section 95 of the Code is under challenged. Whereas the Ld. Counsel appearing for the applicant submitted that the matter is pending only for the appointment of Resolution Professional Under Section 97 of the IBC and it is only after the submission of report by the Resolution Profession under Section 99 of the IBC, the grounds of admission or rejection of the application filed under Section 95 of the Code shall be considered under Section 100 of the IBC. Therefore, the submission of the applicant at this stage is not maintainable.

5. Before considering the submissions, we would like to refer to Sections 97, 99 and 100 of IBC and the same are reproduced below:-

IBC Section 97-Appointment of resolution professional

(1) If the application under section 94 or 95 is filed through a resolution professional, the Adjudicating Authority shall direct the Board within seven days of the date of the application to confirm that there are no disciplinary proceedings pending against resolution professional.

(2) The Board shall within seven days of receipt of directions under sub-section (1) communicate to the Adjudicating Authority in writing either—

(a) confirming the appointment of the resolution professional; or

(b) rejecting the appointment of the resolution professional and nominating another resolution professional for the insolvency resolution process.

(3) Where an application under section 94 or 95 is filed by the debtor or the creditor himself, as the case may be, and not

through the resolution professional, the Adjudicating Authority shall direct the Board, within seven days of the filing of such application, to nominate a resolution professional for the insolvency resolution process.

(4) The Board shall nominate a resolution professional within ten days of receiving the direction issued by the Adjudicating Authority under sub-section (3).

(5) The Adjudicating Authority shall by order appoint the resolution professional recommended under sub-section (2) or as nominated by the Board under sub-section (4).

6) A resolution professional appointed by the Adjudicating Authority under sub-section (5) shall be provided a copy of the application for insolvency resolution process.

IBC Section 99- Submission of report by resolution professional

1) The resolution professional shall examine the application referred to in section 94 or section 95, as the case may be, within ten days of his appointment, and submit a report to the Adjudicating Authority recommending for approval or rejection of the application.

(2) Where the application has been filed under section 95, the resolution professional may require the debtor to prove repayment of the debt claimed as unpaid by the creditor by furnishing—

(a) evidence of electronic transfer of the unpaid amount from the bank account of the debtor;

(b) evidence of encashment of a cheque issued by the debtor; or

(c) a signed acknowledgment by the creditor accepting receipt of dues.

(3) Where the debt for which an application has been filed by a creditor is registered with the information utility, the debtor shall not be entitled to dispute the validity of such debt.

(4) For the purposes of examining an application, the resolution professional may seek such further information or explanation in connection with the application as may be required from the debtor or the creditor or any other person who, in the opinion of the resolution professional, may provide such information.

(5) The person from whom information or explanation is sought under sub-section (4) shall furnish such information or explanation within seven days of receipt of the request.

(6) The resolution professional shall examine the application and ascertain that—

(a) the application satisfies the requirements set out in section 94 or 95;

(b) the applicant has provided information and given explanation sought by the resolution professional under sub-section (4).

(7) After examination of the application under sub-section (6), he may recommend acceptance or rejection of the application in his report.

(8) Where the resolution professional finds that the debtor is eligible for a fresh start under Chapter II, the resolution professional shall submit a report recommending that the application by the debtor under section 94 be treated as an application under section 81 by the Adjudicating Authority.

(9) The resolution professional shall record the reasons for recommending the acceptance or rejection of the application in the report under sub-section (7).

(10) The resolution professional shall give a copy of the report under sub-section (7) to the debtor or the creditor, as the case may be.

Section 100: Admission or rejection of application

(1) The Adjudicating Authority shall, within fourteen days from the date of submission of the report under section 99 pass an order either admitting or rejecting the application referred to in section 94 or 95, as the case may be.

(2) Where the Adjudicating Authority admits an application under sub-section (1), it may, on the request of the resolution professional, issue instructions for the purpose of conducting negotiations between the debtor and creditors and for arriving at a repayment plan.

(3) The Adjudicating Authority shall provide a copy of the order passed under sub-section (1) along with the report of the resolution professional and the application referred to in section 94 or 95, as the case may be, to the creditors within seven days from the date of the said order.

(4) If the application referred to in section 94 or 95, as the case may be, is rejected by the Adjudicating Authority on the basis of report submitted by the resolution professional that the application was made with the intention to defraud his creditors or the resolution professional, the order under sub-section (1) shall record that the creditor is entitled to file for a bankruptcy order under Chapter IV.

6. The conjoint reading of the provisions shows that whenever an application under Section 94 or 95 is filed, the first stage is to appoint a Resolution Professional, who after enquiry is required to submit a report under Section 99 of IBC. It is further seen that the question of admission or rejection of the application can only arise, when the report is submitted by the Resolution Professional under Section 99 of IBC. And after submission of the report, the matter will be taken up under Section 100 of the IBC.

7. Here admittedly the matter is pending for appointment of Resolution Professional under Section 97 of the Code and not on the point of the hearing under Section 100 of the IBC.

8. For the purpose of appointment of Resolution Professional, the Adjudicating Authority is required to examine the details and the documents accompanied with the application, as required under Section 95(4) of the IBC. In terms of the provisions contained in Section 95(4) of the IBC, we considered the averments made in the application, and we observe that the CIRP against principal borrower has already been initiated vide order dated 12.10.2021 in an application filed by one M/s Swastik Pipe Limited under Section 9 of the IBC, therefore, default in payment is admitted. We further observed that a demand notice has already been sent and the respondent had appeared, therefore, there was no occasion for issuance of notice. We further notice that the applicant has also proposed the name of Resolution Professional at Page 41 Part-IV of the application; therefore, in our considered view that the applicant has fulfilled all the criteria ,as laid down Under Section 95(4), hence, we are inclined to proceed in the matter in accordance with law.

9. Since the applicant has proposed the name of the Resolution Professional, therefore, we hereby appoint Mr Gautam Mittal, Email:- mittalgautam@yahoo.com as Resolution Professional. The Resolution Professional shall exercise all the powers enumerated under Section 99 of IBC, 2016 read with relevant rules made thereunder. He is further directed to examine the application and make recommendations along with the reasons in writing for acceptance or rejection of this application within the stipulated period as mentioned in the provision of Section 99 of IBC and submit a report in terms of Section 99(7) of the IBC.

10. In terms of Section 96(1), the interim moratorium commences on the date of the application in relation to all the debts of the personal guarantor and shall cease to have effect on the date of admission of such application

11. The applicant and the Registry are directed to serve a copy of this order alongwith copy of documents immediately on the Resolution

Professional for information and compliance. List the matter on 09.04.2022

19

Sd/-

AVINASH K. SRIVASTAVA
Member (T)

Sd/-

3.2022

ABNI RANJAN KUMAR SINHA
Member (J)