

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH - IV**

C.P. (IB) NO. 120/MB/2022

Under Section **100** *r/w* Section **95** of the
Insolvency & Bankruptcy Code, 2016 *r/w* Rule
7(2) of the Insolvency and Bankruptcy
(Application to the Adjudicating Authority for
Insolvency Resolution Process for Personal
Guarantors to Corporate Debtors), Rules,
2019.

Mr. Birendra Kumar Agrawal

Resolution Professional for Personal Guarantor

...Applicant

In the matter of

State Bank of India

...Financial Creditor

Versus

Mr. Harish Agarwal

...Personal Guarantor

Order delivered on: 22.02.2024

Coram:

Ms. Anu Jagmohan Singh

Hon'ble Member (Technical)

Mr. Kishore Vemulapalli

Hon'ble Member (Judicial)

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Appearances:

For the Financial Creditor/ Applicant	Mr. Kunal Kanungo, Ld. Counsel for the Petitioner.
For the Personal Guarantor	Mr. Manaswi Agarwal, Ld. Counsel for the Respondent.
For the Resolution Professional	Mr. Suraj Chaudhary, Ld. Counsel for the RP.

ORDER

1. The present petition is filed on 21.01.2022 u/s. 95 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "IBC, 2016") r/w. 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** ("Financial Creditor") through its Resolution Professional for the purpose of initiating insolvency resolution process against **Mr. Harish Agarwal** ("Personal Guarantor") for recovery of Principal Amount of INR 185,19,35,213/-, Interest of INR 157,25,37,909/- and Other Expenses of INR 6,95,80,332/-, amounting to INR 349,40,53,455/- (Indian Rupees Three hundred and forty-nine crores, forty lakhs, fifty-three thousand, four hundred and fifty-five only) as on 30.11.2021. The Date of Default, as specified in Part-III of the present petition, is 08.02.2017.
2. The Financial Creditor herein submits that Shree Vaishnav Casting Private Limited ("**Corporate Debtor**") approached the erstwhile State Bank of Travancore and Andhra Bank ("**Original Lenders**") for the purpose of availing financial facilities amounting to INR 38,65,00,000/- and, the same was granted *vide* Sanction Letters *dated* 16.01.2014 and 13.02.2014 on the terms and conditions mentioned thereunder. Pursuant to which, the Personal Guarantor *viz.* Respondent herein rendered a Personal Guarantee *dated* 03.03.2014 and executed the requisite security documents in favour of the Original Lenders for securing the said financial facilities availed by the Corporate Debtor.

3. The Financial Creditor submits that on account of non-payment of the outstanding debt, the accounts of the Corporate Debtor were classified as 'NPA' *w.e.f.* 28.08.2015. Subsequently, a Demand Notice *dated* 01.02.2017 was issued to the Corporate Debtor and its Personal Guarantors demanding payments of its dues. On account of inaction with consonance to the said Demand Notice and the terms and conditions subsequent thereto; The Original Lenders filed an Original Application bearing O.A. (L) No. 151 of 2017 *u/s.* 19 of the Recovery of Debts Due to Bank and Financial Institution Act, 2013, against the Corporate Debtor and its Personal Guarantors for recovery of outstanding dues as well as for invoking the said personal guarantee(s). The said O.A. however, has been dismissed for non-compliance with office objections *vide* Order *dated* 17.10.2019, as duly brought out by the Respondent herein.
4. The Financial Creditor submits that in light of the afore-stated, a Company Petition bearing C.P. (IB) No. 2298 of 2018 was filed *u/s.* 9 of the IBC, 2016, and this Bench was thereby pleased to initiate Corporate Insolvency Resolution Process ("CIRP") against the Corporate Debtor herein *vide* Order *dated* 11.03.2019. Pursuant thereto, this Tribunal was pleased to approve the Resolution Plan filed *u/s.* 30(6) of the IBC, 2016, in I.A. No. 3960 of 2019 in C.P. (IB) No. 2298 of 2018, *vide* Order *dated* 31.07.2023, as against the Corporate Debtor herein.
5. The Financial Creditor further submits that on account of continued default by the Personal Guarantor *viz.* Respondent in repayment of the outstanding dues, it served a Demand Notice *dated* 03.09.2021 in Form-B, under Rule 7(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process of Personal Guarantors to Corporate Debtors) Rules, 2019. However, the Personal Guarantor, per the Financial Creditor herein, has failed to act thereupon. Hence, the present petition.
6. The Personal Guarantor *viz.* Respondent herein, *via* his Reply *dated* 08.01.2024, has disputed the contentions of the Financial Creditor with regards to the claim amount,

maintainability of the petition on grounds of limitation and has disputed the veracity of the said Personal Guarantee *dated* 03.03.2014. However, we are of the considered view that the Respondents' contention(s) are devoid of any merits whatsoever on account of valid invocation of the Personal Guarantee *vide* Demand Notice *dated* 03.09.2021 and the subsequent default in relation thereto.

7. We note that this Bench had appointed the Applicant herein *viz.* **Mr. Birendra Kumar Agrawal**, Insolvency Resolution Professional ("RP") *vide* Order *dated* 06.12.2022 in the captioned petition, and had thereby directed the Applicant to prepare and file a Report *u/s.* 99 of the IBC, 2016. The RP *via* his Report *dated* 03.02.2023, after due examination of the application, documents filed along with the application, in addition to the requirements as mandated under clauses (1) to (10) of Section 99 of the IBC, 2016, has recommended that "*..this is the fit case to commence the personal insolvency of Mr. Madhusudan Agrawal.*"
8. It is trite in law, that the liability of surety is co-extensive with that of the principal debtor. Further, the law on extinguishment of claim against personal guarantor and/or third party on approval of Resolution Plan has been well-settled by Hon'ble Supreme Court in ***Lalit Kumar Jain vs. Union of India and Ors.*** [(2021) 9 SCC 321], wherein the Hon'ble Supreme Court has held that approval of resolution plan does not *ipso facto* discharge a Personal Guarantor (of a Corporate Debtor) of her/ his liability under the contract of guarantee. In paragraph (126) of the said judgement, the Hon'ble Supreme Court held as hereunder:

"126. For the foregoing reasons, it is held that the impugned notification is legal and valid. It is also held that approval of a resolution plan relating to a corporate debtor does not operate so as to discharge the liabilities of personal guarantors (to corporate debtors). The writ petitions, transferred cases and transfer petitions are accordingly dismissed in the above terms, without order on costs."

Furthermore, the Hon'ble NCLAT in ***UV Asset Reconstruction Company Ltd. v. Electrosteel Castings Ltd.*** [Company Appeal (AT)(Ins) 975/2022] has held that

extinguishment and effacement of entire debt on account of approval of the resolution plan “..has to confine to the finding qua Corporate Debtor only and the finding cannot be read to mean that approval of Resolution Plan has led to extinguishment and effacement of entire debt against third party..”

9. The proceedings in the present matter were put on hold since the constitutional validity of the Sections 94 to 100 of IBC, 2016, 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.* [WP (Civil) No. 1281 of 2021] The Hon’ble Apex Court made the following key observations:

- 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.*

In light of the aforesaid observations, it is accordingly hereby ordered.

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ORDER

- 10.** We have heard the learned counsel for both the parties and perused the documents on record.
- 11.** In terms of the above, the C.P. (IB)/120/MB/2022 filed under Section 95 of the IBC, 2016 is hereby **Admitted** and the Insolvency Resolution Process stands initiated against Mr. Harish Agarwal *viz.* the Respondent herein. We hereby direct as hereinafter:
- 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 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. Birendra Kumar Agrawal**, Insolvency Resolution Professional, having Registration No. IBBI/IPA-001/IP-P00564/2017-18/11040, having business address at 402, Corporate Annex, Sonawala Road, Near Udyog Bhavan, Goregaon East, Mumbai - 400063

[Mob: 9769379944 | E-Mail: bk@bhamaconsulting.com] 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 Mumbai 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 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, business or trade on his behalf or in his name: or

- b.* realise the assets of the debtor; or
- c.* administers 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 thereof. 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.
- 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 Applicant is directed to deposit **INR 2,00,000/-** (Indian Rupees Two lakhs) to the bank account of the Resolution Professional within one week, towards his fees. This shall be subjected to the rules and regulations under the provisions of the Insolvency and Bankruptcy Code, 2016.
- X.** 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.

Sd/-
ANU JAGMOHAN SINGH
MEMBER (TECHNICAL)
22.02.2024

Sd/-
KISHORE VEMULAPALLI
MEMBER (JUDICIAL)
