

**IN THE NATIONAL COMPANY LAW TRIBUNAL
AT MUMBAI BENCH, C-IV**

CP (IB) NO. 43/MB/2022

An application under section 100 read with 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.

Abhijit S. Gokhale

Insolvency Professional/Applicant

IN THE MATTER OF

LICHFL Trustee Company Private Limited
& Anr.

...Financial Creditor

Versus

Mrs. Harshada Natesh Shinde

...Personal Guarantor/ Respondent

Order delivered on: 17.01.2024.

Coram:

Ms. Anu Jagmohan Singh
Hon'ble Member (Technical)

Mr. Kishore Vemulapalli
Hon'ble Member (Judicial)

Appearances:

For the Applicant/Resolution Professional : Mr. Amey Hadwale, a/w
Ms. Geeta Lundwani, Ld. Counsel.

For the Respondent : Mr. Nimay Dave a/w Ms. Raksha
Thakkar and Mr. Karen Koya, Ld.
Counsel.

ORDER

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 **LICHFL TRUSTEE COMPANY PRIVATE LIMITED & ANR.** (hereinafter referred to as "Financial Creditors") for the purpose of initiating insolvency process against **HARSHADA NATESH SHINDE** (hereinafter referred to as "Personal Guarantor") for recovery of Rs.163,90,84,518/- including interest of Rs. 36,08,79,878/- being an amount payable from 01.04.2019 to 30.06.2021 alongwith further interest at the rate of 18 % till actual payment towards the satisfaction and discharge of the obligation under the deed of guarantee. The date of default is stated to be 31.03.2019. The Corporate Debtor was brought under CIRP under Section 7 of the IBC vide order dated 15.03.2021.

2. It is stated that, a Share Subscription Cum Debenture Subscription and Shareholders Agreement ("Subscription Agreement) dated 13.10.2016 was executed between the Financial Creditor and Anudan Properties Private Limited ("Corporate Debtor) pursuant to which the Financial Creditor had invested an amount of Rs. 79,90,00,000/- by subscribing to the Equity Shares and Series A Optionally Fully Convertible Debentures ("OFCDS") of the Corporate Debtor.
3. The parties also executed a Debenture Trust Deed Escrow Agreements, Share Pledge Agreement, Power of Attorneys by each Promotor, Indenture of Mortgage, Supplemental Deed of Mortgage, First Supplemental to the Subscription Agreement, First Supplement to the Subscription Agreement, and Revised Escrow Agreement dated 07.08.2019 to amend and modify all the Escrow Agreements dated 13.10.2016 in order to ensure compliance under the RERA.
4. The Respondent along with Mr. Subrahmanya Pandurang Shinde, Mr. Natesh Pandurang Shinde, Mrs. Sunita Pandurang Shinde, and Ms. Lolakshi Pandurang Shinde, (being promoters of the Corporate Debtor), executed a Promoters Guarantee dated 21.10.2016 in respect of the debt due from the Corporate Debtor.
5. The Applicants (through its Advocates), vide 5 (five) Demand Notices dated 10.06.2021, called upon the Respondent and the other guarantors to unconditionally pay the unpaid debt in default due from the Corporate Debtor in terms of the Personal Guarantee Deed. However, till date, the Respondent and the other guarantors have not paid the unpaid debt in default due from the Corporate Debtor. The Respondent has also not replied to the aforesaid Demand Notice dated 10.06.2021.
6. The Financial Creditor invoked the personal guarantee provided by Mrs. Harshada Natesh Shinde vide demand notice dated 10.06.2021 in form B, under Rule 7(1) of

the Insolvency and Bankruptcy Rules,2019.

7. On 07.07.2022 during the course of hearing of the Section 95 Petition filed by the Applicants against Mr. Natesh Pandurang Shinde who is also one of the Personal Guarantors of the Corporate Debtor, the Advocate appearing for the Respondent objected that a wrong Demand Notice, i.e. addressed to another of the Personal Guarantors rather than Mr Natesh Shinde. The present Advocates appearing for the Applicants, reviewed the captioned Petition including the Demand Notice. Further, the said Advocates realized that, inadvertently, the Demand Notice addressed to Ms. Sunita Pandurang Shinde (another of the Personal Guarantors) was inadvertently annexed to the captioned Petition instead of the said correct Demand Notice addressed to the Respondent. Thus, in order to rectify the inadvertent error, and to clarify the position, the Applicants have filed the affidavit to produce on record the correct Demand Notice addressed to the Respondent herein along with proof of service.
8. On presentation of the application by the Financial Creditor, under section 95(1) of the IBC,2016 for initiating Insolvency Resolution Process against the Personal Guarantor, this tribunal This Tribunal vide order dated 11.04.2022 had appointed Mr. Abhijit S Gokhale bearing Registration No. IBBI/IPA-002/IP-N00964/2020-2021/13092 as Resolution Professional and directed to exercise all the powers as enumerated u/s.99 of the Code, R/w. Rules made thereunder. Accordingly, he has filed a report on 21.04.2022 and was further directed to make recommendations with reasons in writing for acceptance or rejection of the Company Petition.
9. The Resolution Professional sought additional information and explanation from personal guarantor vide email dated 13.04.2022 in accordance with provisions of Section 99(5) of the Code, a time period of seven days was granted for proving the requisite information. However, the personal guarantor has failed to provide the

requisite information apart from the KYC documents which were received on 21.04.2022. The Resolution Professional also intimated the Financial Creditor and sought additional documents via email dated 14.04.2022.

10. The ground for admission of the application recorded in report are as follows:
 - a. That the applicant has filed the Application in respect of debts, which are not excluded debts;
 - b. The debts owed by the debtor to the creditor as on the date of the application i.e. 17th September, 2021, made under Section 95 of the IBC,2016;
 - c. Copy of the Notice of Demand in Form B dated 10th June, 2021 issued to Mrs. Harshada Natesh Shinde.
 - d. The failure by the debtor to pay the debts within a period of 14 (fourteen) days of the service of the notice of demand; and
 - e. Copy of record of default with information utility is relevant evidence of such default and non-repayment of the debt by the Corporate Debtor.
 - f. The Resolution Professional has recommended to Initiate Insolvency Resolution Process against the Personal Guarantor.

11. The respondent/Personal Guarantor filed an affidavit in reply dated 10.08.2023 wherein it is stated that the report filed is baseless and not up to the mark. The Bank Guarantee mentioned to shift the liability on respondent is void and the said is not stamped and executed resultantly it is not registered and enforceable in the court of law under section 17 of the Registration Act, 1908. It is a well settled law that insufficiency of stamp duty paid on a document is a mere technical deficiency and does not affect admission under Insolvency and Bankruptcy Code, 2016. However, this bench finds no merits in the contentions of the Corporate Debtor the defect of the stamp duty is a curable defect.

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12. The proceedings in the present 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 CP/IB/243/AHM/2021 State Bank of India v/s Rohit S Sharma 12 of 22 Court in the matter of **Dilip B. Jiwrajka V/s Union of India & Ors.** in WP (civil)No. 1281 of 2021.
13. 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.*

ORDER

14. We have heard the learned counsel for both the parties and perused the documents on record.
15. In terms of the above, CP(IB)/43/MB/2022 filed under Section 95 of the IBC, 2016 is **admitted** and the Insolvency Resolution Process stands initiated against the Applicant/Personal Guarantor.
- 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. Abhijit S Gokhale having Registration No. IBBI/IPA-002/IP-N00964/2020-2021/13092, having registered address at A /1903, 19th Floor, N L Aryavarta ,N L Complex,

Dahisar East ,Opp. Anand Nagar ,Mumbai City, Maharashtra ,400068 [abhijitgokhale07@gmail.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'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 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 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 applicant is directed to deposit Rs.2 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)
17.01.2024.

Sd/-
KISHORE VEMULAPALLI
MEMBER (JUDICIAL)