IN THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH - IV

C.P. (IB) NO. 1039/MB/2021

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.

Rajendra R. Agrawal
Resolution Professional of Financial Creditor
…Applicant

In the matter of

STCI Finance Limited
[*CIN: U51900MH1994PLC078303*]
...Financial Creditor

Versus

Hina Sanjay Karani
…Personal Guarantor

Order delivered on: 07.02.2024

Coram:

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

Mr. Kishore Vemulapalli
Hon'ble Member (Judicial)

Appearances:

For the Financial Creditor/ Applicant — Ms. Mitali Bhatt *a/w* Ayush Rajani *i/b* AKR Legal, Ld. Counsel for the Petitioner.

For the Personal Guarantor — Amey Hadwale, Ld. Counsel for the Respondent.

ORDER

1. The present petition is filed *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 **STCI Finance Limited** ("Financial Creditor") through its Resolution Professional for the purpose of initiating insolvency resolution process against **Ms. Hina Sanjay Karani** ("Personal Guarantor") for recovery of Principal Amount of INR 19,12,47,951/- along with Interest of INR 3,62,29,829/-, amounting to INR 22,74,77,780/- (Indian Rupees twenty-two crores, seventy-four lakhs, seventy-seven thousand, seven hundred and eighty only) as on 20.07.2021. The Date of Default, as specified in Part-III of the present petition, is 06.07.2021.

2. The Financial Creditor herein submits that, at the request of the **Himadri Foods Limited** *[CIN: U15136MH1995PLC088963]* ("Corporate Debtor"), it granted a Corporate Term Loan with a Credit Limit of INR 25 Crores *vide* Letter of Intent/ Sanction Letter *dated* 06.12.2017 *r/w* amended Letter of Intent/ Sanction Letter *dated* 29.01.2018. In accordance with the afore-mentioned, a Loan Agreement was executed by and between the Financial Creditor and the Corporate Debtor on 02.02.2018 for sanctioning the afore-stated Corporate Term Loan of INR 25 Crores.

3. Pursuant to the same, the Personal Guarantor *viz.* Respondent herein along with one Mr. Sanjay Laxmichand Karani executed a Deed of Guarantee *dated* 02.02.2018 ("Guarantee") in favour of the Financial Creditor herein for securing and guaranteeing the financial assistance provided by the Financial Creditor to the Corporate Debtor.

4. The Corporate Debtor herein was subsequently admitted into Corporate Insolvency Resolution Process ("CIRP") u/s. 9 of IBC, 2016, *vide* Order *dated* 09.12.2020 in C.P. No. 4336/MB/C-II/2019. Further, the Corporate Debtor's Corporate Term Loan A/c No. A20105 was classified as 'NPA' on 05.01.2021.

5. The Financial Creditor thereby recalled the afore-stated loan by invoking the Guarantee *dated* 02.02.2018 of the Respondent Guarantor *via* Guarantee Invocation Notice *dated* 29.06.2021. Furthermore, it sent a Demand Notice *dated* 23.07.2021 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.

6. On presentation of the present application by the Financial Creditor, under section 95(1) of the IBC, 2016 for initiating Insolvency Resolution Process against the Personal Guarantor *viz.* Respondent herein, this tribunal *vide* Order *dated* 01.04.2022 had appointed **Mr. Rajendra R. Agrawal** (Applicant herein), Insolvency Resolution Professional, having Registration No. IBBI/IPA-001/IP-P01209/2018-19/11923 as the Resolution Professional ("RP") and directed him to exercise all the powers as enumerated u/s. 99 of the Code, *r/w* rules made thereunder. In accordance with the said Order, the RP duly filed his report and the same has been recorded in Order *dated* 27.07.2022.

7. The Applicant RP *via* his afore-mentioned Report, after due examination of the application, documents filed along with the application, and the Reply filed by the Respondent, in addition to the requirements as mandated under clauses (1), (2), (3), (4), (5), (6), (7), (8), (9) and (10) of Section 99 of the IBC, 2016, has recommended the admission of the present application by the Financial Creditor u/s. 95 of IBC, 2016.

8. This Tribunal was pleased to approve the Resolution Plan filed *u/s.* 30(6) of the IBC, 2016, in C.P. No. 4336/MB/C-II/2019 *vide* Order *dated* 07.10.2022 as against

the Corporate Debtor herein. The Guarantor *viz.* Respondent herein has filed an Affidavit-in-Reply *dated* 02.11.2022, wherein the Demand Notice *dated* 29.06.2021 for invocation of guarantee *dated* 02.02.2018 and its contents therein have been disputed forthwith.

9. It is trite in law, that the liability of surety is co-extensive with that of the principal debtor. Be that as it may, 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..*"

10. In light of the afore-stated, with approval of the Resolution Plan *vide* the said Order *dated* 07.10.2022, we find no merit in the contentions of the Corporate Debtor disputing the veracity of the Demand Notice dated 29.06.2021 and as to the purported reduction/ extinguishment of the personal guarantor's liability.

11. 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.*

12. It is noted that *u/s.* 128 of the Indian Contract Act, 1872, when a default is committed, the Principal Borrower and Surety are jointly and severally liable to Creditor and the 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 Indian Contract Act is reproduced hereunder:

> *"The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract."*

In light of the afore-stated observations, it is accordingly hereby ordered.

ORDER

13. We have heard the learned counsel(s) for both the parties and have perused the documents on record.

14. In terms of the above, the C.P. (IB)/1039/MB/2021 filed under Section 95 of the IBC, 2016 is hereby **Admitted** and the Insolvency Resolution Process stands initiated against Ms. Hina Sanjay Karani *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 1BC, 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 Applicant - Resolution Professional *viz.* **Mr. Rajendra R. Agrawal**, Insolvency Resolution Professional, having Registration No. IBBI/IPA-001/IP-P01209/2018-19/11923, having registered address at 1306, Oberoi

Woods Tower B, Mohan Gokhale Road, Goregaon East, Mumbai-400063 [E-Mail: *rajdendra.agrawal29@gmail.com* ; Mob: 9820516095] 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)
07.02.2024
Aditya Kalia

Sd/-

KISHORE VEMULAPALLI
MEMBER (JUDICIAL)

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