

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOCHI BENCH**

CP (IBC)/58/KOB/2022

&

IA(IBC)/02/KOB/2024

IN

CP (IBC)/58/KOB/2022

CP (IBC)/58/KOB/2022

(Under Section 95(1) of the IBC, 2016 read with Rule 7(2) of IBBI (Application to Adjudicating Authority for Insolvency Resolution Process of Personal Guarantors to Corporate Debtors) Rules, 2019)

In the matter of

Union Bank of India vs. Dr Sahadulla M.I

MEMO OF PARTIES:

Union Bank of India

Chalai Bazar Branch

Chalai, Thiruvananthapuram

PIN 695036

... Applicant/Financial Creditor

-Vs-

Mr Sahadulla M.I

69, Rastanura, RPD Marg

Kuravankonam, Kowdiar

Thiruvananthapuram

PIN 695003

... Respondent/Personal Guarantor

IA(IBC)/02/KOB/2024

IN

CP (IBC)/58/KOB/2022

(Under Rule 11 of the NCLT Rules, 2016)

In the matter of

Union Bank of India vs. Dr Sahadulla M.I

MEMO OF PARTIES:

Dr Sahadulla M.I

69, Rastanura, RPD Marg
Kuravankonam, Kowdiar
Thiruvananthapuram
PIN 695003

... Applicant

-Vs-

Union Bank of India

Chalai Bazar Branch
Chalai, Thiruvananthapuram
PIN 695036

... Respondent

Order delivered on: 29.02.2024

Coram:

SHRI. SHYAM BABU GAUTAM
Hon'ble Member (Technical)

TMT. Justice (Retd.) T Krishna Valli
Hon'ble Member (Judicial)

Appearances

CP (IBC)/58/KOB/2022

For the Applicant : Mr C P Anil Raj, Advocate

For the Respondent : Mr Sankar P Panicker, Advocate

IA(IBC)/02/KOB/2024 in CP (IBC)/58/KOB/2022

For the Applicant : Mr Sankar P Panicker, Advocate

For the Respondent : Mr C P Anil Raj, Advocate

ORDER

Per Coram

1. The present application **CP (IBC)/58/KOB/2022** has been filed by Applicant/Financial Creditor, under section 95(1) of the Insolvency and Bankruptcy Code, 2016 (“Code”) 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 (“Rules”) by The Union Bank of India, for initiation of the insolvency resolution process of Mr Sahadulla M.I, Personal Guarantor to M/s. Green Gateway Leisure Limited, the corporate debtor.

The brief facts of the case are as follows:

2. M/s. Green Gateway Leisure Limited has availed various credit facilities from the Applicant. The Applicant/Financial Creditor has sanctioned a Term loan of Rs. 25 Crores on 12.06.2010 and that the security, for sanctioning the of Rupees 25 crores on the above credit facility was a) first charge on the entire fixed assets (movable and

immovable) of the Corporate Debtor, and b) Corporate Guarantee of Air Travel Enterprises India Limited, c) Personal Guarantee of Mr. E. M Najeeb, Mr. Sahadulla M I, Mr. E Iqbal and Mr. Zaheer E.N. Mr. Sahadulla M.I, respondent herein, was a director of the Corporate Debtor. The Corporate Debtor had executed Demand Promissory Note on 12.06.2010, 29.09.2012, 24.02.2014, 12.01.2015 and on 01.07.2016, Term Loan Agreement, Agreement of Hypothecation of Movables, Guarantee Agreement etc, in favour of the Financial Creditor to realize the term loan amount with interest and costs/and all other receivable charges or including proceedings against the mortgaged property and hypothecated assets, and M/s. Air Travel Enterprises India Limited, the parent company of the Corporate Debtor, represented by its chairman had executed Corporate Guarantee and other directors gave personal guarantee on 02.07.2010, 29.09.2012, 24.02.2014 & 12.01.2015 for the outstanding debt. The term loan was granted for setting up a five-star deluxe resort at Bekal.

3. The Applicant submits that the Corporate Debtor defaulted on repayment of the credit facilities and was declared non-performing assets on 30.09.2015. The Financial Creditor has issued a demand notice to the Corporate Debtor and the personal guarantors under section 13(2) of the SARFAESI Act 2002 demanding payment of the amount in default on 29.12.2017. The debt due as of 29.12.2017 was Rs.26,85,08,554/- with future interest. Thereafter one time settlement scheme was offered by the Financial Creditor on 20.11.2019 and a revised approval letter on 27.11.2019, were

accepted by the Corporate Debtor, but failed to make payment within the prescribed time.

4. Initially, in IBA/01/KOB/2020 admission was granted by this Tribunal and the matter was taken up in appeal and by the judgment dated 09.09.2021, the Hon'ble NCLAT had set aside the admission of the Section 7 application and thereafter directed the corporate debtor to settle the account within 6 months from the date of the Appellate order. The amount as directed by the Appellate Tribunal was not paid by the Corporate Debtor and even now the amount remains outstanding in the loan account.
5. The Applicant/Financial Creditor has submitted the Account Statement (A/c no. 395806390240075) for the period from 30.07.2010 to 17.09.2022 of the Corporate Debtor with certificate issued under the Banker Book Evidence Act.
6. Record of default of the Corporate Debtor is filed with NESL (information utility) evidencing default on the part of the corporate debtor in repayment as per schedule.
7. The Applicant invoked the personal guarantee of the respondent on 16.09.2022 and served a demand notice on the guarantor in Form B as required under section 95(4)(b) of the Code read with Rule 7(1) of the Rules on 16.09.2022 demanding payment of the amount in default of Rs. 40,25,34,886/- as on 31.08.2022 with further interest.
8. The Corporate Debtor has not made any payment towards the amount due despite acknowledgement of notice of demand.

9. The Financial Creditor served a copy of the application to the respondent/ personal guarantor, as well as to the Corporate Debtor on 25.11.2022 through email. The registry also issued a notice of hearing to the respondents.
10. The amount of default of Rs. 40,25,34,886/- as on 31.08.2022 is greater than the minimum threshold of Rs. 1,000 for application under Part III of the code. The date of default stated in Part III of the petition is 09.03.2022 ie, 6 months after 09.09.2021 (date of order of the Hon'ble NCLAT)
11. The date of default is different from the date of classification of the accounts as an NPA, though there had been repayment of Rs. 25,13,000/- towards part payment of OTS settlement was deposited on 27.11.2019. The application filed on 22.11.2022 is not barred by limitation
12. The Applicant has proposed the Insolvency Professional, Mr. Kizhakkekara Kuriakose Jose (IBBI/IPA-001/IP-P00445/2017-2018/10788) having registered address at K K Jose & Associates, Yenvee Complex Temple Road, Aluva, Kerala, Pin: 683101. The Insolvency Professional has submitted that his authorisation for assignment no. valid till 13.12.2024 and his certificate of registration from the Insolvency and Bankruptcy Board of India along with the application and declared his eligibility to act as the Resolution Professional in Part IV of the application.
13. The Respondent filed a reply stating that he was the director of Corporate Debtor in December 2014 and during the time when he

was the director, he hadn't signed any letter of guarantee with the Applicant. The Respondent apprehends that the officers of the applicant have perpetrated fraud, therefore the Respondent has averred at different forums like DRT Kochi, Hon'ble JFCM - III Thiruvanthapuram, Hon'ble High Court of Kerala and this Tribunal. The matter is being investigated by the Thampanoor Police in Crime No. 208/2023. The Respondent enclosed Annexure-V, the expert opinion issued by the Forensic fingerprint expert opinion Mr Khan Sahib stating that the signature of the respondent was not original.

14. And further contended that the applicant has not produced the Letter of Confirmation dated 01.07.2016 alleged to be signed by the Respondent, which was submitted along with the documents before Hon'ble DRT in OA 417/2018. Respondent confirmed that the signature in the said document does not belong to him and the same has been forged to drag him to litigation and hand twist him to make payment, which is not legally obliged to pay. The other contention raised is there was no prior agreement between the Respondent(surety) and the Corporate Debtor which is the foundation upon which the contract of guarantee is based.

IA(IBC)/02/KOB/2024 in CP(IBC)/58/KOB/2022

15. This application has been filed by the Mr Sahadulla M I, Applicant herein against the Respondent, Union Bank of India to produce the original of the documents alleged to be signed by the Applicant specifically mentioned below

- Original Loan Document alleged to be signed by the Applicant

- Original Letter of Guarantee alleged to be signed by the Applicant.
 - Original of the latest net worth statement of the Applicant which carries the signature of the Applicant.
16. The Applicant herein apprehends fraud has been committed on him by forging his signature on all documents which the Respondent has produced along with the CP(IBC)/58/KOB/2022. An FIR (No. 208/2023) was lodged against the complaint filed by the Applicant herein against the 'GM' and 'officers' of the Chalai Branch of Union Bank of India with an ongoing investigation. The respondent herein had approached the Hon'ble High Court of Kerala requesting the court to quash the above-mentioned FIR, where the Hon'ble High Court but the court ordered the investigation to proceed. Also, an Interlocutory Application IA 1405/2019 is still pending before the Hon'ble DRT in OA 417/2018, seeking the production of original documents to get them verified by a forensic expert. Meanwhile the Debt Recovery Tribunal No: 1, Ernakulam transferred the files of OA no: 417 of 2018 to the Debt Recovery Tribunal No: 1, Chennai. Unfortunately, the proceedings in OA no: 417 of 2018 have now come to a standstill. The Applicant herein filed OP(DRT) No: 510 of 2022 before the Hon'ble High Court of Kerala inter alia seeking a declaration that Debt Recovery Tribunal No: 1, Ernakulam has the required jurisdiction to adjudicate OA no: 417 of 2018 which has also now come to a standstill.
17. The Applicant further submitted that he wants to subject all the documents namely Loan Agreement, Letter of Guarantee and Net

worth statement to a detailed forensic enquiry by an independent Forensic expert as the Applicant apprehends that his signature has been forged to process the loan.

18. The Respondent submitted a counter affidavit arguing that the mere allegation of forgery by the applicant does not warrant the production of original documents for thorough examination before this Tribunal. The Respondent further contended that all disputed matters are already under adjudication in the appropriate forum.
19. Additionally, in the application filed under Section 95, the applicant's right to be heard is not yet ripe at this point. Only upon the submission of a report by the IRP can the applicant's objections be considered. Thus, the current Interlocutory Application is deemed premature.
20. We have heard the learned counsel for the Applicant and Respondent in both applications and perused the materials available on record, it is prima facie seen that there exists a transaction between the Corporate Debtor and the Financial Creditor involving a credit facility amounting to Rs 25 Crores, as outlined in the Loan Agreement provided in Annexure A7. Additionally, a copy of the letter of guarantee signed by the personal guarantor has been submitted as Annexure A9.
21. Furthermore, it is apparent from the documents that the Corporate Debtor defaulted on the repayment of the aforementioned loan. The primary argument put forth by the Respondent in the Company Petition is the alleged forgery of their signature on the loan

documents. Subsequently, an FIR (First Information Report) has been lodged against the 'GM' and 'officers' of the Financial Creditor (Union Bank of India) under sections 120-B, 406, 417, 419, 420, 465, 468, 471 of the Indian Penal Code, as FIR No. 208/2023 at Chalai Police Station where the investigation is going on.

22. In this aspect we are relying on Hon'ble Supreme Court's decision in **Dilip B Jiwrajka v Union of India in WP(C) No. 1281 of 2021**,

86 (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;

23. In view of the aforementioned precedent, we hold the considered view that adjudicating the fraud allegations against the officials of the Financial Creditor at this juncture would exceed the jurisdiction of this Tribunal, as outlined in Section 95 of the Code. This is particularly pertinent considering the ongoing criminal investigation and the existence of other pending applications addressing the same fraud allegations in various other forums.
24. It's important to emphasize that the appointment of the Resolution Professional under Section 95 serves only as a preliminary step in the consideration of this Company Petition. The Resolution Professional, appointed at this stage, functions solely as a facilitator tasked with

gathering pertinent facts for the evaluation of the application filed under Section 95 of the IBC. The Resolution Professional's responsibilities include soliciting information/explanations and thoroughly examining the application submitted by the Financial Creditor before submitting the report.

25. The Adjudicating Authority is to carry out the actual judicial evaluation by determining whether to admit or reject the Company Petition based on the report submitted by the Resolution Professional and this process is strictly in adherence with the principles of natural justice, ensuring that the opposing party is afforded an opportunity to present their case before a final decision is made. Hence, we do not deem it proper to entertain IA(IBC)/02/KB/2024 at this point in time.
26. As far as the question of limitation is concerned, there is a debt that includes interest and there is a default of debt and having a continuous cause of action of OTS settlement, appropriately brings the Company Petition within the scope of limitation.
27. Hence, we have come to the conclusion that prima facie there is a default on the part of the Respondent/Personal Guarantor in respect of the outstanding debt which is apparent from the documents placed on record. We are satisfied that the debt in default is above the threshold limit prescribed under the Code and that the application is filed within the limitation period.
28. In view of the decision of Supreme Court in ***Mahendra Kumar Jajodia v. State Bank of India***, Creditor can initiate proceedings

against the Personal Guarantors regardless of whether a CIRP has been initiated against the Corporate Debtor. Therefore, this Tribunal ordered as under: -

29. This application CP(IBC)/58/KOB/2022 filed under Section 95 of the Insolvency and Bankruptcy Code, 2016 (IBC) read with Rule 7(2) of the Insolvency and Bankruptcy Rules, 2019 by The Union Bank of India against Personal Guarantor of the Corporate Debtor, M/s Green Gateway Leisure Limited, Mr Sahadulla M I, is **allowed** with the following directions:

(a) The interim moratorium under Section 96 of the Code has commenced on the date of the application by the Creditor i.e., 09.08.2023 in relation to all the debts and will cease to have an effect on the date of admission.

(b) During such an interim moratorium period:

- i. Any legal action or proceeding pending in respect of any debt shall be deemed to have been stayed; and
- ii. the creditors of the debtor shall not initiate any legal action or proceedings in respect of any debt.

(c) **Mr. Kizhakkekara Kuriakose Jose (IBBI/IPA-001/IP-P00445/2017-2018/10788)** having registered address at K K Jose & Associates, Yenvee Complex Temple Road, Aluva, Kerala, Pin: 683101, is appointed as the Resolution Professional under section 97 of the Code to carry out the insolvency resolution process of Mr Sahadulla M.I. The fee payable to the Resolution

Professional (RP) shall be in accordance with the Insolvency and Bankruptcy Board of India (IBBI) Regulations/ Circulars/ Directions issued in this regard.

- (d) This Tribunal also directs an advance payment of Rs.2,00,000 (Rupees Two Lakhs only) to be paid by the Applicant/Creditor to the Resolution Professional immediately to initiate the process which shall be adjusted towards the fee and expenses payable to the Resolution Professional.
- (e) The Resolution Professional shall examine the application filed under section 95 within 10 days of appointment and submit a report to this Tribunal recommending approval or rejection of the application along with reasons for the recommendation.
- (f) The Resolution Professional shall exercise all the powers as enumerated under Section 99 of the Code read with Rules made thereunder. The resolution professional shall provide a copy of the report under sub-section 7 of section 99 to the Creditor as soon as the same is filed before this Adjudicating Authority.
- (g) The Resolution Professional for the purposes of examining an application may seek such further information or explanation in connection with the application under section 99(4) 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. The persons from whom information or explanation is sought shall furnish such information or explanation within seven days of receipt of the request.

- (h) The Resolution Professional is directed to look into the authenticity of the personal guarantee documents produced along with this Company Petition subject to strict proof in light of the allegations raised by the Respondent against the Financial Creditor.
- (i) The Registry is hereby directed to send e-mail copies of the order forthwith to the creditor, personal guarantor, corporate debtor and the Resolution Professional. The Registry shall place a compliance report of this direction in this file.
11. The application bearing number IA(IBC)/02/KOB/2024 is dismissed and disposed of accordingly.
12. A certified copy of the order is to be issued upon compliance with requisite formalities.
13. List the above Company Petition for further proceedings on 02.04.2024.

SHYAM BABU GAUTAM Digitally signed by SHYAM BABU GAUTAM
Date: 2024.02.29 15:09:06 +05'30'

SHYAM BABU GAUTAM
(MEMBER TECHNICAL)

T.KRISHNAVALLI Digitally signed by
T.KRISHNAVALLI
Date: 2024.02.29 15:08:43 +05'30'

T KRISHNA VALLI
(MEMBER JUDICIAL)

Signed on this the 29th day of February, 2024.

Krishna