

IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD
DIVISION BENCH
COURT - 1

ITEM No.301 & 302
C.P.(IB)/233(AHM)2022
And
IA/984(AHM)2024

Order under Section 95 IBC

IN THE MATTER OF:

State Bank of India
V/s
Utkarsh Malvik Hathi

.....Applicant

.....Respondent

Order delivered on: 08/11/2024

Coram:

Mr. Shammi Khan, Hon'ble Member(J)
Mr. Sameer Kakar, Hon'ble Member(T)

PRESENT:

For the Applicant :
For the Respondent :

ORDER

(Hybrid Mode)

The case is fixed for pronouncement of the order. The order is pronounced in the open Court, vide separate sheet.

- Sd -

SAMEER KAKAR
MEMBER (TECHNICAL)

- Sd -

SHAMMI KHAN
MEMBER (JUDICIAL)

**BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT-I, AHMEDABAD**

CP (IB)/233(AHM)2022

With

IA/984(AHM)2024

[Application under Section 95(1) of the Insolvency & Bankruptcy Code, 2016 r.w. Rule 7(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantor to Corporate Debtor) Rules, 2019]

*In the matter of **Shri Utkarsh Malvik Hathi***

CP (IB)/233(AHM)2022

State Bank of India

Stressed Asset Management Branch,
2nd Floor, Paramsiddhi Complex,
Opp. V.S. Hospital, Ellisbridge,
Ashram Road, Ahmedabad-380006

....Applicant/Financial Creditor

VERSUS

Shri Utkarsh Malvik Hathi

(Personal Guarantor of M/s. Miku Polymers and Plastics Ltd.)

D-1 Janta Nagar Society,
B/h. Raturaj Complex,
Vasna Road, Vadodara,
Gujarat – 390015.

.... Respondent/Personal Guarantor

IA/984(AHM)2024:

Sunil Kumr Kedia

Resolution Professional,
210B, 21st Century Business Centre,
Near Udhna Darwaja, Surat – 395002.

... Applicant/IRP

VERSUS

Shri Utkarsh Malvik Hathi

(Personal Guarantor of M/s. Miku Polymers and Plastics Ltd.)
D-1 Janta Nagar Society,
B/h. Raturaj Complex,
Vasna Road, Vadodara,
Gujarat – 390015.

.... Respondent/Personal Guarantor

Order pronounced on: 08.11.2024

CORAM:

SH. SHAMMI KHAN, HON'BLE MEMBER (JUDICIAL)
SH. SAMEER KAKAR, HON'BLE MEMBER (TECHNICAL)

APPEARANCE:

For Applicant/RP : Mr. Atul Sharma , Advocate
For the FC : Mr. Biju A Nair, Advocate
For the PG : **Ex-parte**

ORDER

Per: Bench

1. The Present Company Petition i.e.
CP(IB)/233(AHM)2022 is filed on 18.04.2022 under
Section 95(1) of the Insolvency and Bankruptcy Code

2016, (IBC, 2016) read with Rule 7(2) of the I&B (AAA for IRP for PGCD) Rules, 2019 by the Applicant/FC (Financial Creditor) seeking initiation of Insolvency Resolution Process against **Shri Utkarsh Malvik Hathi** (hereinafter referred to as "Personal Guarantor") for a default amount of Rs.50,96,14,531.03ps. as on 11.11.2021 in respect of Deed of Guarantee dated 14.09.2020 executed in favour of Applicant Bank/FC.

2. IA/984(AHM)/2024 being report of IRP was filed physically on **25.06.2024** vide diary no. **E 1551**.
3. In so far as the Personal Guarantor to Corporate Debtor is concerned, the Hon'ble Supreme Court of India in the matter of **Lalit Kumar Jain vs. Union of India & Ors.** in the Transferred Case (Civil) No.245/2020 has upheld the vires of the notification issued by the Central Government vide S.O. 4126(E) dated 15.11.2019, in so far as it relates to coming into force of Insolvency and Bankruptcy Process of Personal Guarantors to Corporate Debtor. Thus, when a Corporate Insolvency Resolution Process in relation to Corporate Debtor is

pending before this Adjudicating Authority, then as per Section 60(2) of IBC, 2016 the NCLT would be competent forum to file an Application for Personal Guarantor in relation to such Corporate Debtor.

4. It is stated that **M/s Miku Traders** initially as Partnership firm had availed financial assistance in form of Cash Credit Facility of Rs. 55.00 Crores and Bank Guarantee facility of Rs. 13.00 Crores aggregating to Rs.68.00 Crore. On **01.03.2019** the business of **M/s Miku Traders** was taken over by Corporate Debtor viz. **M/s. Miku Polymers and Plastics Ltd.** and hence the principle borrower and the guarantors executed a Confirmation Deed on **28.03.2019** through which the subsisting liability was confirmed in the favour of the Applicant Bank/FC and the Respondent/PG lastly executed a Personal Guarantee on 31.05.2019.
5. That vide Sanction Letter dated **14.10.2020**, the applicant renewed the existing credit facility from 44.00 Crores to 37.00 Crores and renewed the bank guarantee facility at Rs. 7.00 Crores thereby making the aggregate

credit facilities granted to the Corporate Debtor at Rs. 44.00 Crores and the personal guarantee was given by the personal guarantor in respect of such revised facilities. The Sanction letter dated 14.10.2020 is attached at **Page no. 60 – 62.**

- 6.** The Respondent being personal Guarantor of the Corporate Debtor also executed and signed Deed of Guarantee dated **14.09.2020** in favour of Applicant/FC to secure the credit facilities granted to the Corporate Debtor which are enclosed along with the Petition as **at Page no. 68-71.**
- 7.** However, after availing the Loan/Credit Facilities, the Corporate Debtor failed to maintain financial discipline as per terms and conditions of the loan agreement due to which loan account became irregular and committed default which was classified as NPA on **05.12.2020** as per the RBI Guidelines. Thereafter, the Applicant Bank/FC issued Demand Notice on **18.05.2021** under section 13(2) of the SARFAESI Act, 2002 which was delivered on 21.05.2021. In spite of the notice under

section 13(2) no payment was received by the Applicant Bank/FC. The copy of the notice under Section 13(2) dated 18.05.2021 is annexed at **Page no. 95 to 106.**

- 8.** The Applicant/FC the Applicant/FC also issued Recall Notice dated **23.08.2021** and served on the Corporate Debtor and its personal guarantor thereby calling upon them to clear the outstanding amount of Rs.49,65,81,025.44ps. However, the Respondent/PG failed to repay or reply to the recall notice. A copy of the Recall Notice is enclosed **at Page no. 91-94.**
- 9.** Original Application No. 717/2021 was filed by the Applicant Bank/FC on 21.09.2021 before the Ld. Debt Recovery Tribunal - II, Ahmedabad which is pending for consideration.
- 10.** Thereafter, the Applicant Bank/FC also issued Demand Notice being **Form-B** dated **11.11.2021** U/s 95(4)(b) of the IBC, 2016 r.w. Rule 7(1) of the I&B (AAA for IRP for PGCD) Rules, 2019 which was served to the Respondent/Personal Guarantor and requested to pay

the unpaid debt in default in full within 14 (fourteen) days from the receipt of this Demand Notice. A copy of the same is enclosed at **Page No. 143-146** along with the Petition.

- 11.** However, due to non-payment of the amount by the Corporate Debtor as well as the Personal Guarantors, the Applicant Bank/FC filed the present petition being Company Petition (IB) No. 233 (AHM) of 2022 for initiation of Insolvency Resolution Process against the Personal Guarantor in **Form-C** under Section 95 of 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.
- 12.** The proceedings in the 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 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.*

14. This Tribunal vide order dated **09.01.2024** appointed Interim Resolution Profession (hereinafter referred to as "IRP") as suggested by the Financial Creditors viz. **Mr. Sunil Kumar Kedia, having registration no. IBBI/IPA-001/IP-P00028/2016-17/10064** to carry out Insolvency Resolution Process of the Personal Guarantor as per section 97(3) of IBC, 2016 with directions to file his Report within 10 Days.

15. The Interim Resolution Professional has filed the report through IA No. 984 of 2024 on 25.06.2024 under dairy no. E 1551 recommending the admission of the application filed under Section 95 of IBC, 2016.

16. However, upon perusal it is found that the report of IRP was filed before this Tribunal on 25.06.2024, which is filed after the expiry of 10 day's period granted by this Tribunal. Ld. IRP has in its report has stated the reasons for such delay caused in filing the report within

the time limit as directed by this Tribunal in order dated 09.01.2024. The reason as stated by the IRP in its report is reproduced below:-

“4. That I have filed & submitted the Report and uploaded on online portal in the Case No. CP(IB)233(AHM)/2022 on 18th January 2024.

5. Thereafter, recently it has been noticed that Hon’ble AA in its order dated 09th January 2024 directed Interim Resolution Professional (IRP) files ‘Report’ through a separate IA in this matter after serving the same on to the Respondent/ Personal Guarantor.

6. Hence, this IA preferred to submit the Report of IRP u/s. 99 of IBC Code 2016 which was uploaded online on 18th January 2024.

7. Now I do hereby file ‘Report’ through a separate IA in this matter after serving the same on to the Respondent/ Personal Gurantor.”

17. The summary of grounds for admission of the application as per the Report dated 25.06.2024 filed by the IRP are as follows:-

“I have examined the application filed by State Bank of India (Creditor) in Form C and found that it is complete to the extent information available with them. The debtors and creditors relationship is established on the basis of agreements / deed executed by M/s. Miku Polymers & Plastics Limited

(Corporate Debtor) and by Mr. Utkarsh Malvik Hathi (Personal Guarantor). The debt in default claimed by the State Bank of India (Creditor) is still exists. The Guarantor, Utkarsh Malvik Hathi is personally liable to pay the debt in default of Corporate Debtor M/s. Miku Polymers & Plastics Limited. The application filed by creditor satisfied the requirement set out in Section 95 of IBC 2016 and information asked from the creditors has been provided by them to me. On the basis of the above facts, I recommend that the application may be accepted for initiation of Insolvency Resolution Process against Utkarsh Malvik Hathi.”

- 18.** After Issuance of fresh notice to the Respondent/PG vide order dated 03.07.2024 in IA/984/2024, the Applicant/RP has filed an Affidavit of service of notice upon the Respondent/PG vide diary no. D 5910 on 29.07.2024 along-with Postal Receipt as well as the postal Tracking Report. The notice dated 05.07.2024 issued by this Tribunal was duly served upon the Respondent/PG on 24.07.2024. However, despite due service neither the Respondent/PG appeared nor filed any reply. Hence, vide order dated 23.08.2024 the Respondent/PG was proceeded **Ex-parte**.

19. Thereafter, the Applicant Bank/FC has also filed an Affidavit before this Tribunal on 28.10.2024 vide diary no. D 8116 in response to the direction dated 09.10.2024 issued by this Tribunal. In the said affidavit the postal tracking record has been annexed for substantiating that the Demand Notice dated 11.11.2021 in **Form-B** was dispatched on 12.11.2021 and delivered as per the tracking report on 15.11.2021 to the Respondent/PG.

20. We have heard the learned counsel for the Applicant/RP as well as Applicant Bank/FC, Ex-parte against the Respondent/PG and perused the documents on record. We have also gone through the report dated 25.06.2024 filed by the IRP.

21. It is seen from the record that the Corporate Debtor viz. **M/s. Miku Polymers and Plastics Ltd.** availed financial assistance Applicant Bank/FC as Principle Borrower to the tune of Rs.68.00 Crore for which Corporate Debtor and others executed various loan/security documents from time to time in favour of

the Applicant Bank/FC. The Respondent/Personal Guarantor has also executed Deed of Guarantee on **14.09.2020** in favour of Applicant Bank/FC to secure the credit facilities granted to the Corporate Debtor.

22. However, after availing the Loan/Credit Facilities, the Corporate Debtor committed default. Consequently, the loan accounts of the Corporate Debtor were classified as NPA on 05.12.2020. Thereafter, the Applicant Bank/FC issued Demand Notice on 18.05.2021 under section 13(2) of the SARFAESI Act, 2002. In spite of the notice under section 13(2) no payment was received by the Applicant Bank/FC.

23. Further, the Applicant Bank/FC also issued Recall Notice dated 23.08.2021 and served on the Corporate Debtor and its personal guarantor thereby calling upon them to clear the outstanding amount of Rs.49,65,81,025.44ps. However, the Respondent/PG failed to repay or reply to the recall notice. Applicant Bank/FC also filed Original Application No. 717/2021

on 21.09.2021 before the Ld. Debt Recovery Tribunal - II, Ahmedabad.

24. Thereafter, the Applicant Bank/FC also issued Demand Notice being **Form-B** dated 11.11.2021 U/s 95(4)(b) of the IBC, 2016 r.w. Rule 7(1) of the I&B (AAA for IRP for PGCD) Rules, 2019 which was duly served to the Respondent/Personal Guarantor and requested to pay the unpaid debt in default in full within 14 (fourteen) days from the receipt of this Demand Notice.

25. It is seen from the petition that the present application is filed on **18.04.2022** within the three years period of limitation from the date of the issuance/service of Recall Notice dated 23.08.2021 as well as Demand Notice dated 11.11.2021 of invocation of Personal Guarantee which was also invoked within the three years period of limitation from the date of default of the Corporate Debtor.

26. Further, Applicant Bank/FC has claimed defaulted amount as Rs.50,96,14,531.03ps. as on 11.11.2021

and filed statement of account of the Corporate Debtor at **Page no. 147-150**. Moreover, it is noted that the threshold for Part-III of IBC, 2016 is provided under Section 78 the same is reproduced below.

*“This Part shall apply to matters relating to fresh start, insolvency and bankruptcy of individuals and partnership firms where the amount of the default is not less than **one thousand rupees**.”*

27. It is also noted under section 128 of Indian Contract Act, 1872 that when a default is committed the Principal Borrower and Surety are jointly and severally liable to Creditor and 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 Contract Act, 1872 is reproduced below:

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

28. Moreover, from the report of IRP, it is clear to us that:

- i. IRP has recommended accepting the application for the reason as stated in the report dated **25.07.2024**.
- ii. The Applicant/FC has demanded the amount outstanding from the Respondent/PG initially vide Recall Notice dated 23.08.2021 and again vide Demand Notice being **Form-B** dated 11.11.2021.
- iii. Resolution Professional report states that no evidence was placed before him by the Respondent/PG having paid the amount demanded by the Applicant/FC and as such in over view entire amount demanded is unserviced as on the date of order.

29. In our view, IRP has filed report with due application of mind, on the contrary the Respondent/PG has failed to provide proof of discharge of debt to the RP. Therefore, considering the reasons explained for delay in filing the Report, this Bench condone the delay caused in filing of the Report and admit the Report of the IRP.

30. In view of the foregoing paras we are left with no other choice but to order as under: -

- 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. Sunil Kumar Kedia**, having registration no. IBBI/IPA-001/IP-P00028/2016-17/10064, office at 210B, 21st Century Business Centre, Near Udhna Darwaja, Surat - 395002. (e-mail id kedia_kedia@yahoo.com) who was appointed when the Section 97 application was allowed vide Order dated 09.01.2024, 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 Ahmedabad 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 the 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.
- V. 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.
- VI. 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.

VII. 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.

VIII. In case the Resolution Professional recommends that a meeting of the creditors is not required to be called, he shall record the reasons therefor. 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.

IX. 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.

X. The Resolution Professional shall submit his periodic reports before this Tribunal, every 30 days.

XI. 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.

31. In terms of the above, **CP (IB)/233/(AHM)/2022** filed under Section 95 (1) of the IBC, 2016 is admitted and the Insolvency Resolution Process stands initiated against the Respondent/Personal Guarantor.

32. In view of the above, **I.A. No.984 of 2024** is disposed of.

- Sd -

SAMEER KAKAR
MEMBER (TECHNICAL)
RS

- Sd -

SHAMMI KHAN
MEMBER (JUDICIAL)