

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

ITEM No.302
C.P.(IB)/251(AHM)2021

Order under Section 95 IBC

IN THE MATTER OF:

State Bank of India
V/s
Sejal Himanshu Varia

.....Applicant

.....Respondent

Order delivered on 06/03/2024

Coram:

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

PRESENT:

For the Applicant :
For the Respondent :

ORDER

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-I, AHMEDABAD**

CP(IB)251(AHM)2021

*Filed under Section 95 of the Insolvency & Bankruptcy Code,
2016*

*In the matter of **Smt. Sejal Himanshu Varia***

State Bank of India

SAM (Stressed Assets Management) Branch,
Paramsiddhi Complex, 2nd Floor,
Ellis Bridge, Ahmedabad,
Gujarat-380 006

... Applicant/Financial Creditor

VERSUS

Smt. Sejal Himanshu Varia

(Personal Guarantor)
C/1001, Ashavari Tower,
Ramdev Nagar Road,
Near Gulmohar Park,
B/h Devarc Mall,
Ahmedabad-380 015

... Respondent/Personal Guarantor

Order pronounced on 06.03.2024

CORAM:

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

For the Applicant/FC : Ms. Aishwarya Reddy, Advocate
For the Respondent/PG : Mr. Ankit Sharma, Advocate.

ORDER
Per: Bench

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 State Bank of India (hereinafter referred to as "Financial Creditors") for the purpose of initiating Insolvency Process against Smt. Sejal Himanshu Varia (hereinafter referred to as "Personal Guarantors") for a default amount of Rs.300,06,05,812.83/- which includes unapplied interest Rs.123,84,19,915.92/-, and other charges Rs.39,23,723/- less recovery Rs.20,95,24,715/-. The date of default is stated to be **13.12.2018.**

2. 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. The Corporate Insolvency Resolution process in respect of **M/s. Varia Engineering Works Private Limited** (hereinafter referred to as “**Corporate Debtor**”) was ordered by this Adjudication Authority on 21.12.2017. Hence, the present application in respect of the Insolvency and Bankruptcy proceedings of the Personal Guarantor of the Corporate Debtor is filed by the Creditor before this forum.

3. It is stated that M/s. Varia Engineering Works Private Limited being principal borrower applied for a loan for its operations from the Applicant Bank which was approved vide letter dated 15.12.2009. The Respondent was Director and personal Guarantor of the Corporate Debtor and executed and signed various standard loan documents in favour of Applicant Bank.
4. It is stated that the Respondent also entered into a Deed of Guarantee on 26.03.2013 and Mortgage Deed executed on 29.10.2013 by M/s. Varia Engineering Works Private Limited, Shri Himanshu P. Vari and Smt. Sejal H. Varia in favour of PNB Investment Services Limited. Further, an affidavit dated 31.03.2014 was executed by the Personal Guarantor regarding the statement of Assets and Liabilities.
5. By order dated 21.12.2017, the Corporate Debtor M/s Varia Engineering Works Pvt. Ltd. was admitted to CIRP and order of moratorium was passed by the Hon'ble Adjudicating Authority in CP (IB) No. No.149/7/NCLT/AHM/2017.

6. It is stated that the order was passed by the Debts Recovery Tribunal-1 at Ahmedabad on 13.12.2018 crystallising the debt liability of the Respondent and others.
7. It is stated that the Statement of Account from 13.12.2018 along with interest calculation up to 21.09.2021 has been annexed with the application.
8. However, due to non-payment of the amount by the Corporate Debtor, the Financial Creditor has filed this application for initiation of Insolvency Resolution Process against the Guarantor under Section 95(1) of IBC, 2016. The Financial Creditor invoked the personal guarantee and issued demand notice to the Respondent on 22.09.2021 under Rule 7(1) of the Insolvency and Bankruptcy Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019.

9. On presentation of the application by the Applicant/Financial Creditor, this Tribunal vide order dated 20.12.2021 held that the name of Resolution Professional (hereinafter referred to as "RP") as suggested by the Financial Creditors, Mr. Sunil Kumar Kedia to be appointed as RP to carry out Insolvency Resolution Process of the Personal Guarantor as per Section 97(3) of IBC, 2016. This Tribunal directed the RP to file his report. The Resolution Professional has filed the report dated 06.01.2022 vide Inward No. D87 recommending the admission of the application filed under Section 95 of IBC, 2016. The recommendation of RP is 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. Varia Engineering Works Private Limited (Corporate Debtor) and by Mr. Sejal Himanshu Varia (Personal Guarantor) The debt in default claimed by the State Bank of India (Creditor) is still exists. The Guarantor, Sejal

Himanshu Varia is personally liable to pay the debt in default of Corporate Debtor M/s. Varia Engineering Works Private 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 Sejal Himanshu Varia.

10. 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.
11. 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.*
12. After issuance of notice to the Respondent/Guarantor as well as to the Corporate Debtor, the Respondent/Guarantor appeared through his Counsel. However, no reply or objection was filed to the IRP Report. On the hearing dated 27.02.2024 on the query of the Bench the Learned Counsel for the Respondent/Guarantor submitted that:
- *“.....There is no need to file any reply/objection as the Respondent/Personal Guarantor admits the debt liability.....”*
13. We have heard the learned counsel for both the parties and perused the documents on record. We have also gone through the report dated 06.01.2022 filed by the RP.
14. It is seen from the petition that the present application is filed on 08.12.2021 within the period of limitation as by order dated 21.12.2017, the Corporate Debtor M/s Varia Engineering Works Pvt. Ltd. was admitted to

CIRP and order of moratorium was passed by the Hon'ble Adjudicating Authority in CP (IB) No. No.149/7/NCLT/AHM/2017.

15. 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".

16. Further, on 13.12.2018 order was passed by the Debts Recovery Tribunal-1 at Ahmedabad crystallising the debt liability of the Respondent. Further Demand Notice dated 22.09.2021 invoking Personal Guarantee within the period of limitation, was served upon the Respondent who is one of the Directors/Guarantor of the Cooperate debtor which is not denied by the Respondent.

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

- i. IRP has recommended to accept the application for the reason as stated in the report dated 06.01.2022.
- ii. The Respondent has admitted to have executed the Guarantee Agreement.
- iii. The Applicant has demanded the amount outstanding from the Respondent vide Demand Notice dated 22.09.2021.
- iv. Resolution Professional report states that no evidence was placed before him by the Respondent having paid the amount demanded by the Applicant and as such in over view entire amount demanded is unserviced as on the date of order.

18. In view of the foregoing 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 Section 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- 2017/10064, 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 95 application was allowed vide Order dated 20.12.2021, 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.

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 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.

- 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 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.

19. In terms of the above, **CP(IB)/251(AHM)/2021** filed under Section 95 of the IBC, 2016 is admitted and the Insolvency Resolution Process stands initiated against the Respondent/Personal Guarantor.

-Sd-

SAMEER KAKAR
MEMBER (TECHNICAL)
Swetambary/Steno

-Sd-

SHAMMI KHAN
MEMBER (JUDICIAL)