
(2024) 02 NCLT CK 0004

In the National Company Law Tribunal

Case No : CP (IB) NO. 1274/MB/2021

Bank of Baroda Vs Mr. Amir Jamal Dodhia ?

Date of Decision : 01-02-2024

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 7, 94, 95, 95(1), 96, 97, 97(5), 98, 99, 99(1), 99(2), 99(4), 100
Securitisation And Reconstruction Of Financial Assets And Enforcement Of Security Interest Act, 2002 — Section 13(2)
Insolvency and Bankruptcy (Application to the Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors), Rules, 2019 — Rule 7(2)

Citation : (2024) 02 NCLT CK 0004

Hon'ble Judges : Kishore Vemulapalli, Member (J); Anu Jagmohan Singh, Member (T)

Bench : Division Bench

Advocate : Priyank Jadav, Ayush Rajani, AKR Legal, Ld, Darshit Rupda, Devanshu Desai

Final Decision : Disposed Of

Judgement

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 Bank of Baroda (hereinafter referred to as "Financial Creditors") for the purpose of initiating insolvency process against Mr. Amir Jamal Dodhia (hereinafter referred to as "Personal Guarantor/Respondent") for recovery of Rs.50,14,15,575 as on 31.10.2020 plus unapplied interest w.e.f. 01.11.2020 and other relevant charges till the date of full and final payment. The date of default is stated to be 10.02.2018. The Corporate Debtor was brought under CIRP under Section 7 of the IBC vide order dated 25.09.2019.

2. It is stated that, a letter of Guarantee dated 23.04.2015 and 18.01.2016 was executed by the Personal Guarantors in favour of the Financial Creditor i.e. Bank of Baroda for an Amount of Rs. 27,19,00,000/- and 30,00,00,000/-.

3. A Supplemental Composite Agreement of Hypothecation of Goods, Book Debts & Moveable Machinery dated 18.01.2016 was executed between Corporate Debtor and Financial Creditor for securing the various credit facilities aggregating to Rs.30 Crores.

4. A Supplemental Memorandum of Entry for Mortgage by Deposit of Title Deeds dated 08.03.2016 was executed by the Corporate Debtor in favour of Financial Creditor for securing the various credit facilities aggregating to Rs. 30 Crores.

5. The Financial Creditor issued notice under section 13(2) of SARFAESI Act,2002 dated 12.12.2017 against the Personal Guarantors viz Mr. Amir Jamal Dodhia for recalling of the outstanding amount.

6. The Applicant vide demand notice dated 31.10.2020 in form B, under Rule 7(1) of the Insolvency and Bankruptcy Rules,2019 issued to the Respondent as well as the Personal Guarantor which was successfully delivered to Personal Guarantor on 02.11.2020 where upon the Respondent and the other guarantors were required to pay the unpaid debt in default due from the Corporate Debtor in terms of the Letter of Guarantee. However, till date, the Respondent and the other guarantors have not paid the unpaid debt in default due from the Corporate Debtor.

7. 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 08.03.2022 had appointed Mr. Shailesh Bhalchandra Desai bearing Registration No. IBBI/IPA-001/IP-. P00180/2017-18/10362 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 31.03.2022 and was further directed to make recommendations with reasons in writing for acceptance or rejection of the Company Petition.

8. The ground for admission of the application was recorded by the RP (Resolution Professional) in report is reproduced below:

a. That report is being prepared in compliance with the requirements of section 99(1) of the Code.

b. That RP has issued an intimation under section 99(2) to the personal guarantor requiring the personal guarantor to prove repayment of the debt claimed as unpaid by the creditor in compliance with provisions of section 99(2) of the code. The RP has received a letter dated 29.03.2022 vide email from the personal guarantor. The RP has concluded that as on date, the debt is outstanding against the personal guarantor which is payable to the Bank of Baroda.

c. That the present application satisfies the requirements of provisions of section 95 of the code.

d. That the personal guarantor herself admitted vide his letter dated 29.03.2022 that she had approached the Bank of Baroda, Creditor, on various occasion for One Time Settlement scheme which was not successful. Furthermore, she has also in para 8 of his letter admitted that his guarantee will stand discharged only on the contingent of the receipt of a Resolution Plan of a higher value in the ongoing CIRP. Hence, the debt exists and the same is outstanding as of today.

9. The Personal Guarantor filed an affidavit in reply dated 31.10.2023 wherein it is stated are as follows: -

a. That the report dated 31.03.2022 is nothing but an abuse of law. The respondent vide Reply dated 29.03.2022 categorically denied the liability of Bank of Baroda. However, in the said report the applicant has stated that the respondent has not denied the liability.

b. That the Company Petition is barred by law of limitation.

c. That the Applicant had already filed the company petition against the other Personal Guarantor, wherein the Resolution Professional is already appointed and therefore appointing of Resolution Professional in respect of the same debt against this respondent as Guarantor for the same claim is not permissible under the law.

d. That the Applicant has filed the Application and seeking relief against the Respondent in respect of the loan already paid off/ settled of the principal borrower i.e. Calchem Industries (India) Limited, under the Resolution Plan (which is pending approval), will be considered as payment of the entire debt due and payable by the borrower under the loan transaction facilities granted by Bank of Baroda to the Borrower i.e. Calchem Industries (India) Limited, and there is no cause of action in favour of the Applicant against this Respondent.

10. 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 Personal 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.

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.

FINDINGS

12. We have heard the learned counsel for both the parties and perused the documents on record.

13. The contentions raised by Personal Guarantor are devoid of merit. There is no bar in IBC (Insolvency & Bankruptcy Code, 2016) to proceed against each separate Personal Guarantor for same debt. Moreover, pendency of CIRP (Corporate Insolvency Resolution Process) against the Principal Borrower does not debar lender from proceeding against Personal Guarantor. Additionally, pendency of Resolution Plan approval also cannot be a ground for dismissal of proceedings against the Personal Guarantor.

14. The Financial Creditor issued notice on 12.12.2017 under section 13(2) of the SARFAESI Act, 2002 invoking the guarantee and calling upon the Guarantor to pay the said amount within 60 days.

15. The Financial Creditor issued another demand notice on 31.10.2020 addressed to the Principal Borrower and Personal Guarantor and is relying on this notice for limitation.

16. This bench holds that the guarantee was invoked on 12.12.2017 and the limitation began on that day and any subsequent notice of demand cannot be considered for the purpose of limitation. Since the invocation of guarantee was on 12.12.2017 and the present Company Petition was filed on 21.12.2021, it is beyond the limitation period and hence the Company Petition deserves to be rejected.

ORDER

17. The Petition bearing C.P NO. 1274 of 2021 filed by the Applicant, seeking initiation of Corporate Insolvency Resolution Process (CIRP) against the Personal Guarantor stands Rejected.