

S.No.5

**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH – 1
VC AND PHYSICAL (HYBRID) MODE
ATTENDANCE CUM ORDER SHEET OF THE HEARING HELD ON
11-09-2024 AT 10:30 AM**

**CP (IB) No. 66/95/HDB/2024
AND
IA (IBC) 1234/2024 in CP (IB) No. 66/95/HDB/2024**
u/s. 95 of IBC, 2016

IN THE MATTER OF:

Union Bank of India

...Petitioner

AND

M/s. K M R Enterprises, Personal Guarantor and
M/s. Smaat India Private Limited

...Respondent

C O R A M:-

**DR. VENKATA RAMAKRISHNA BADARINATH NANDULA, HON'BLE MEMBER (JUDICIAL)
SH. CHARAN SINGH, HON'BLE MEMBER (TECHNICAL)**

O R D E R

CP (IB) No. 66/95/HDB/2024

Orders pronounced. In the result, this **company petition is rejected as not maintainable**. No costs.

Sd/-

MEMBER (T)

Sd/-

MEMBER (J)

**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH -1
CP (IB) No. 66/95/HDB/2024**

*(Under Section 95 of the Insolvency and Bankruptcy Code, 2016 read with
Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency
Resolution Process for Personal Guarantors to Corporate Debtor) Rules, 2019.)*

In the matter of:

Union Bank of India,
Stressed Asset Management Branch,
3rd floor, Andhra Bank Building
Sultan Bazar, Koti,
Hyderabad 500095.

... Financial Creditor

Versus

M/s KMR Enterprises,
Plot No 12, Ward No.8,
Hanuman Nagar,
Karmanghat, Hyderabad-500097
At Also
6-104, old malhar, Sahar Estates,
Mansorabad, Hyderabad-500068

... Respondent No.1/Personal Guarantor

**M/s SMAAT INDIA PVT LTD
6-104, old malhar, salhar Estates,
Mansorabad, Hyderabad-500068**

...Respondent No.2/Corporate Debtor

Date of order:11.09.2024

Coram:

Dr. Venkata Ramakrishna Badarinath Nandula, Hon'ble Member (Judicial)
Shri Charan Singh, Hon'ble Member (Technical)

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Under Section 95 of the Code, 2016.
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Appearance of Parties/Counsels:

For the Creditor : Ms Sristi Bansal, Advocate
Resolution Professional : Mr B Naga Bhushan

PER: BENCH

ORDER

1. The present petition is filed by Union Bank of India (hereinafter referred to as “Creditor”) against M/s KMR Enterprises the personal Guarantor to the corporate debtor M/s. Smaat India Private Limited under section 95 of the Insolvency and Bankruptcy Code, 2016 r/w Rule 7(2) Insolvency and Bankruptcy Rules, 2019, seeking to initiate Insolvency Resolution Process against Personal Guarantor to the Corporate Debtor for a total outstanding amount of Rs. 71,84,02,803.07 /-.
2. It is averred by the Creditor that the Corporate Debtor availed OCC and Term Loans (fund based) from the Creditor and the latest renewal of the credit facilities was on 03.12.2006. The Corporate Debtor signed the acknowledgement of the sanction letter and its terms apart from executing other loan documents pertaining to the credit facilities.

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3. It is Further stated that respondent herein has provided Personal Guarantee for securing the repayment of credit facilities availed by the Corporate Debtor M/s. Smaat India Private Limited by executing a Deed of Guarantee dated 27.12.2016, in favour of the creditor.
4. It is further averred that the Corporate Debtor defaulted on the repayment of the availed credit facilities on 30.04.2016. Consequently, the accounts of the Corporate Debtor were classified as non-performing assets by the Creditor on the same date.
5. It is averred that the creditor has served a Demand Notice under Section 13(2) of SARFAESI Act against the corporate debtor and personal guarantor on 30.07.2016 for recovery of pending dues.
6. It is averred that M/s. SMAAT INDIA PRIVATE LIMITED (Corporate Debtor CD) was admitted into Corporate Insolvency Resolution Process vide CP(IB) No. 91/9/HDB/2018 by the order of Hon'ble NCLT dated 09.07.2018. As no Resolution Plan was received, the Tribunal vide order dated 06.06.2019 passed the order of Liquidation. The CD an MSME company, was bought as a going concern by Mr. Karunakar Reddy, promoter of the CD and the Hon'ble Tribunal granted the reliefs sought by the Successful bidder

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vide order dated 25.02.2020 and closure of Liquidation process of the Corporate Debtor was ordered vide order dated 13.08.2020.

7. It is averred that the creditor sent a Demand Notice dated 07.08.2023 in Form B as per Section 95 (4) (b) of the Code demanding payment of Rs.71,84,02,803.07 (Rupees Seventy one crores eighty four lakhs two thousand eight hundred and three and seven paise only), to the 1st respondent was duly served on 06.09.2023 through registered post with acknowledgement due.
8. The Creditor relied on the following documents to prove the existence of debt and amount in default: -
 - (1) The statement of accounts of the Corporate Debtor from the date of incurring of debt to till 29.02.2024, as per which the outstanding balance is Rs. 71,84,02,803.07 (Rupees Seventy one crores eighty four lakhs two thousand eight hundred and three and seven paise only) i.e. debt due till 30.06.2023 plus further interest at applicable rates.
 - (2) Sanction letter issued by creditor to corporate debtor acknowledged by the personal guarantor dated 16.03.2016.
 - (3) Guarantee Agreement executed by personal guarantor M/s KMR Enterprises in favour of creditor dated 02.05.2016.
 - (4) Demand Notice dated 07.08.2023 in Form-B as per Section 95 (4) (b) of the Code demanding payment within 14 days of

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receipt notice Copy of the demand notice was attached to Section 95 application filed by the creditor.

9. Pursuant to this Application, this Adjudicating Authority vide order dated 29.05.2024 appointed Mr. Naga Bhushan, as RP and directed him to file a report within 10 days. Subsequently, Learned IRP filed the report and proof of service of the report of the personal guarantor was also filed on 01.07.2024. As per the same, the report is served on the Personal Guarantor. A copy of postal receipt of speed post is also annexed. There after, the case was posted to 12.07.2024 for hearing on the objections on RP's report. Despite of the service of notice on the personal guarantor, personal guarantor called absent, hence, it was treated that personal guarantor has no objections to the Resolution professional report.
10. The Resolution Professional in his report, vide IA No.1234/2024 recommended for the admission of the Petition under Section 95 of the Code, 2016.
11. In the light of the above the point to be addressed before us is:
Point: Whether a petition under section 95 of the IBC, 2016 against a partnership firm is maintainable before this Tribunal ?

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12. We have heard the Learned Counsel Ms Shristi Bansal, for the Petitioner, and Learned Resolution Professional Mr B Naga Bhushan and perused the record.
13. On perusal of the record, we observe that the present 1st respondent is partnership firm which is evident from the Annexure A 51, the sanction letter dated 16.03.2016, wherein it is mentioned in the point (b) that KMR Enterprises is a partnership firm and even in the Demand Notice served by the Creditor, the 1st respondent it is mentioned that as Partnership firm and the signatures also reflect the same. Therefore, it is quite clear that the 1st respondent it is a partnership firm.
14. It is now pertinent to look into part III of IBC which deals with “Insolvency resolution and Bankruptcy for Individuals and partnership firms” to ascertain whether a section 95 petition can be filed against the partnership firm.
15. On a bare reading of the **Section 79 (1)** in Part III of IBC, 2016 , it is clear that the Adjudicating Authority for the partnership firms and individuals is DRT and not this Tribunal. The definition of AA in part III is extracted below:

“Section 79(1) “Adjudicating Authority” means the Debt Recovery Tribunal constituted under sub-section (1) of section 3 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993);”
16. While it is so, the Govt. of India has brought in certain amendments to the IBC, 2016 vide **Notification S.O. 4126(E) dated 15.11.2019**

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wherein for the first time a Personal guarantor to a corporate Debtor was brought under the ambit of IBC vide sections 94 – 187 and also brought amendments to various other sections inter alia bringing in the Personal Guarantors under the code. This means that now there is one more entity/ Individual that would come within the ambit of the code apart from the company who is described to be a corporate person. The Notification reads as follows:

MINISTRY OF CORPORATE AFFAIRS

NOTIFICATION

New Delhi, the 15th November, 2019

S.O. 4126(E).—In exercise of the powers conferred by sub-section (3) of section 1 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Central Government hereby appoints the 1st day of December, 2019 as the date on which the following provisions of the said Code only in so far as they relate to personal guarantors to corporate debtors, shall come into force:—

- (1) clause (e) of section 2;
- (2) section 78 (except with regard to fresh start process) and section 79;
- (3) sections 94 to 187 [both inclusive];
- (4) clause (g) to clause (i) of sub-section (2) of section 239;
- (5) clause (m) to clause (zc) of sub-section (2) of section 239;
- (6) clause (zn) to clause (zs) of sub-section (2) of section 240; and
- (7) section 249.

[F. No. 30/21/2018-Insolvency Section]
 GYANESHWAR KUMAR SINGH, Jt. Secy.

Note: Supreme Court in *Lalit Kumar Jain Vs. Union of India & Ors.* (2021) ibclaw.in 61 SC held that the impugned notification was issued within the power granted by Parliament, and in valid exercise of it. The exercise of power in issuing the impugned notification under Section 1(3) is therefore, not *ultra vires*; the notification is valid.

17. It is therefore, crystal clear that the provisions of IBC as on date are applicable only to Corporate Persons and Personal Guarantors to the Corporate Debtor. To answer the question as to who can be called as personal guarantor, we are use fully to refer to section 5(22) of IBC, 2016 which defines Personal Guarantor as an individual who is the surety in a contract of guarantee to a Corporate Debtor. It is important to note that partnership firm was not included under the definition of Personal Guarantor. Section 5(22) is extracted below for ready reference:

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*“Section 5(22) personal guarantor means an **individual** who is the surety in a contract of guarantee to a corporate debtor;”*

18. In the instant case the Respondent being a Partnership firm cannot be treated as an Individual and therefore is not covered under the definition of Personal Guarantor to file an application under section 95 of IBC.
19. We have carefully perused the notification issued by Ministry of Corporate Affairs on 15.11.2019, section 79(1) of IBC, 2016 and the section 5(22) of IBC, 2016 and conjoint reading of all the above provisions clearly conveys that section 95 proceedings cannot be initiated against the partnership firm which is not an individual.
20. Accordingly, the point is decided that the petition against the partnership firm is not maintainable under section 95 of IBC, 2016.
21. In view of the above answer to the point before us, report of the RP recommending admission of the present petition and the CP are liable to be rejected as not maintainable. Hence, we hereby reject the same, consequently, the CP stands dismissed as not maintainable. Hence without costs.

SD/-

Charan Singh
Member Technical

SD/-

Dr. Venkata Ramakrishna Badarinath Nandula
Member Judicial

D.shanmukha