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IN THE NATIONAL COMPANY LAW RIBUNAL, DIVISION BENCH – I, CHENNAI

CP(IB)/225(CHE)/2022

(filed under Section 95(1) of the Insolvency and Bankruptcy Code, 2016

Phoenix ARC Private Limited
Acting in its capacity as Trustee of Phoenix Trust FY22-16
Dani Corporate Part,
5th Floor, 158, CST Road, Kalina, Santacruz,
Mumbai – 400 098

.....Applicant

Versus

Shri Shyam Prasad Thikkavarapu
Old No.41/1, New No.26, Kanni Koil Street,
Dr. Ranga Road, Abhiramapuram,
Chennai – 600 004

....Respondent

Order pronounced on ***20th December, 2023***

CORAM :

SANJIV JAIN, MEMBER (JUDICIAL)
VENKATARAMAN SUBRAMANIAN, MEMBER (TECHNICAL)

For Petitioner : *B. Dhanaraj, Advocate*

ORDER

(Hearing through Video Conferencing)

The Applicant, Phoenix ARC Private Limited has filed this application under Section 95(1) of the Insolvency and Bankruptcy Code, 2016 ("IBC") for initiating Insolvency Resolution Process against the

Personal Guarantor / Respondent Shri Shyam Prasad Thikkavarapu of **M/s. Virgo Properties Private Limited.**

2. As per the averments made in the application, M/s. Virgo Properties Private Limited had taken credit facilities from M/s. L&T Finance Limited and thereafter by way of an Assignment Agreement dated 29.03.2022, the Loan were assigned to the Applicant herein. The Respondent herein had given personal guarantee to the said loan.

3. In Part-III of the application, the Applicant has given the particulars of the total debt as Rs.35,11,64,864/-, the amount of default as Rs.19,43,35,289/- and date of default as 13.11.2021. The Applicant has placed the Guarantee Agreement executed by the Respondent and also Deed of Mortgage. The documents are placed at **Page 150-168**. The Applicant has also filed the statement of accounts at **Page 576-579** including Form-B sent by the Applicant to the Respondent.

4. The Demand Notice issued under Rule 7(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtor) Rules,

2019 to the Personal Guarantor dated 11.02.2022 is placed at **Page 558-561** of the typed set filed along with the application.

5. We have heard Learned Counsel for the Applicant.

6. Section 95 of IBC provides that a creditor may apply either by himself, or jointly with other creditors, or through a Resolution Professional to the Adjudicating Authority for initiating an Insolvency Resolution Process under the Section by submitting an application. The application shall be accompanied with details and documents relating to the debts or by the debtor to the creditor as on the date of application, failure by the debtor to pay the debt within a period of 14 days of the service of the Notice of Demand and the relevant evidence of such default or non-payment of debt. It also provides that "the creditor shall provide a copy of the application to the debtor and the application shall be in such form and manner.

7. Hon'ble Supreme Court in the matter of **Dilip B Jiwrajka –Vs-Union of India & Ors** in *Writ Petition (Civil) No 1281 of 2021* while dealing with the jurisdiction of NCLT in relation to adjudication of cases filed under Section 94 and 95 of IBC, 2016 has summarized in para-86 as follows;

86. We summarise the conclusion of this judgment below:

(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 for the purpose of determining 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.*

8. Hon'ble Supreme Court has held that no judicial adjudication is involved at the stages envisaged in Sections 95 to Section 99 of the IBC and also 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. The Respondent / Personal Guarantor will be given an opportunity to file a reply once the RP has filed his Report under Section 99 of IBC, 2016.

9. Considering the above facts and the case supra, we appoint the Resolution Professional who will collate all the facts relevant to the examination of the application for the commencement of the Insolvency Resolution Process in respect of the Personal Guarantor.

10. In the instant case, the Applicant has not proposed the name of the Resolution Professional. We therefore, upon verification of disciplinary status with the IBBI portal, appoint **Shri. V Murali** with

Reg. No. **IBBI/IPA001/IP-P02403/2021-2022/13658 (email id:- ca.venumurali@gmail.com)** as Interim Resolution Professional in respect of the Personal Guarantor / Respondent.

11. The Applicant is directed to pay a sum of **Rs.25,000/-** *(Rupees Twenty Five Thousand Only)* to the Interim Resolution Professional to meet out the expenses to perform the functions assigned to him.

12. The Resolution Professional is directed to examine the application as set out in Section 97(6) of IBC, 2016 who after examining, may recommend for the acceptance / rejection of the application as provided under Section 97(6) of IBC, 2016, **within a period of 10 days** as contemplated under Section 99(1) of IBC, 2016.

13. The Applicant is directed to serve copy of the application and the order on the Interim Resolution Professional.

14. List this application for report / hearing on **30.01.2024.**

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VENKATARAMAN SUBRAMANIAM
Member (Technical)

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SANJIV JAIN
Member (Judicial)