

IN THE NATIONAL COMPANY LAW TRIBUNAL: NEW DELHI
PRINCIPAL BENCH

ITEM No. 17
(IB)-715(PB)/2021

IN THE MATTER OF:

State Bank of India (Through RP Mr.
Gian Chand Narang)

.... Petitioner

v.

Mr. Atul Mahindru

.... Respondent

Order U/s. 95(1) of (IBC)

Order delivered on 05.02.2024

CORAM:

JUSTICE RAMALINGAM SUDHAKAR
HON'BLE PRESIDENT

SH. AVINASH K. SRIVASTAVA
HON'BLE MEMBER (TECHNICAL)

(HEARING THROUGH PHYSICAL MODE & VC)

PRESENT:

For the RP : Adv. Bheem Sain Jain

For the Respondent : Adv. Shruti Nayar, Proxy Counsel

For SBI : Adv. Himanshu Lilani

ORDER

ORDER DICTATED IN OPEN COURT

IA-796/2022

This application has been filed through the RP Mr. Gian Chand Narang under Section 99(1) IBC, 2016. The prayer made in this IA reads as follows:-

- a. Allow the present Application.

- b. Take on record the report of the Applicant/Resolution Professional qua the Respondent under Section 99 of the Code, as filed by Resolution Professional/Applicant (**ANNEXURE-A**).

- c. Pass any such further order(s) that this Hon'ble Adjudicating Authority may deem fit and proper in the facts and circumstances of the case.

The report of the RP is annexed as **Annexure-A (Pages 7-54)**. Gist of the RP's report is as follows: -

6. In view of the above, I, Gian Chand Narang, the Resolution Professional in terms of directions issued by this Hon'ble Adjudicating Authority *vide* order dated 02.02.2022 in C.P. (IB) No. 715 (PB) of 2021, hereby confirm that I have perused/examined the Insolvency Application filed by the Financial Creditor u/s 95 of the Code along with all the underlying documents and annexures and have formed the opinion **to recommend the same for approval** to this Hon'ble Tribunal, based on following grounds:-

- The Insolvency Application has been filed in the requisite form, Form C, in terms of Rule 7 (2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019, supported by requisite fee and documents;
- The Insolvency Application satisfies the requirements set out in Section 95 of the Code, as explained above in paragraph 5 of the instant Report;
- The Personal Guarantor, the respondent herein, was duly served with demand notice dated 30.06.2021 by the Financial Creditor for repayment of the debt owed by him to the Financial Creditor in terms of the provisions of the Code prior to filing the Insolvency Application, but the Personal Guarantor, the respondent herein, failed to repay the same.

- In fact, even prior to the issuance of demand notice under the Code, a Legal Demand Notice, dated 01.02.2017 was served upon the Corporate Debtor and Personal Guarantor, Mr Ashutosh Mahindru, however, no payment has been made by the Personal Guarantor in terms of the Deeds of Guarantee executed and signed by him.
- The undersigned has also sent a communication/notice to the Personal Guarantor, Mr Ashutosh Mahindru, vide e-mail and letter sent by post, both dated 03.02.2022, immediately on receipt of aforesaid directions of this Hon'ble Tribunal, dated 02.02.2022, in terms of Section 99 (2) of the Code, asking him to prove repayment of debt claimed as unpaid by the Financial Creditor. However, till date no response has been received from him.
- The Insolvency Application does not relate to "excluded debts" as defined under Section 79(15) of the Code.
- The Debtor, Personal Guarantor/Respondent, is not eligible for fresh start under Chapter II of the Code.

The report filed by the RP is taken on record.

(IB)-715(PB)/2021

This Petition has been filed on behalf of State Bank of India through the RP Mr. Gian Chand Narang under Section 95(1) IBC, 2016. The notice was issued on 30.11.2021. Later, based on the IBBI's recommendation, the appointment of the RP was confirmed on 22.02.2022. The RP submitted its report dated 14.02.2022 under Section 99 of IBC which was served on the Personal Guarantor on the same date. Thereafter, the Personal Guarantor appeared through counsel and sought time to file the objections which was also granted from time to time. On 02.03.2022, one last opportunity was given to the Personal Guarantor to file objections, which he failed to do. Hence, on 08.06.2022, on failure of the Personal Guarantor in filing the reply, his right to file the reply was closed.

Thereafter, on account of proceedings going on with respect to the constitutional validity of Part III, Chapter III of IBC related to Insolvency Resolution Process for Individuals and Partnership Firms before the Hon'ble Supreme Court, the matter was adjourned from time to time. Hon'ble Supreme Court passed final order dated 09.11.2023 in the batch of 384 petitions including **WP (Civil) No. 1281/2021 titled Dilip B Jiwrajka vs. Union of India & Ors.** upholding the constitutional validity of the IBC provisions. Thereafter, one more opportunity was given to the Personal Guarantor on 05.12.2023 for filing the reply. However, the same has not been complied with and no reply is on record.

Today, Ld. Counsel for the RP Mr. Bheem Sain Jain appeared physically and sought to pursue the matter based on the report filed by the RP. Ms. Shruti Nayar, Ld. Counsel appeared for the Personal Guarantor through VC and stated that she is not on Vakalat and is a proxy counsel. Since, the counsel on Vakalat has not responded with proper objections to the report nor he is appearing before us, we are constraint to proceed further in the matter setting the Respondent *Ex-parte* in view of the various opportunities granted to the Personal Guarantor.

It is submitted by the Ld. Counsel for the RP that the RP's report is based on the bank having given working capital facilities to the Principal Borrower i.e., Advance Surfactants India Ltd, which has already been put into Corporate Insolvency Resolution Process (CIRP) vide our earlier order dated 28.05.2019 in a separate proceeding. Thereafter, the order for liquidation of Advance Surfactants India Ltd was passed on 14.01.2020. The liquidation process is stated to be at an advance stage.

It is submitted that in consideration to the grant of the credit facilities, separate deeds of guarantee dated 13.03.2013 were executed by Mr. Ashok Mahindru, Mr. Atul Mahindru, Mr. Ashutosh Mahindru and Mr. Ashish Mahindru. The account of the Corporate Debtor was declared as NPA on 28.12.015. On 09.02.2018, the Corporate Debtor gave an OTS proposal to the Bank thereby acknowledging the debt and liability to pay (Page 882 Volume 5 of the Petition). The OTS proposal was not honoured by the Principal Borrower/Corporate Debtor.

The Applicant served a demand notice dated 30.06.2021 under Section 95(4)(b) of IBC upon Mr. Atul Mahindru and three others, demanding payment of debt amount of Rs. 258,97,35,449.55/- (Rupees Two Hundred and Fifty-eight Crore Ninety-seven Lakh Thirty-five Thousand Four Hundred Forty-nine and Fifty-five Paise Only) (Page 875 Volume 5 of the Petition). On the Respondent's failure to pay the outstanding dues within the statutory period of 14 days, the Applicant Bank (SBI) filed the application for Insolvency Resolution of the Personal Guarantor through RP on 18.08.2021. It is submitted that the acknowledgement and OTS proposal dated 09.02.2018 given by the Principal Borrower is also binding on the Personal Guarantor in view of the provisions of Deed of Guarantee dated 13.02.2023 (Clause 27.1 of the Deed of Guarantee, page 3 para 12 of the Brief Note dated 02.03.2022) which is extracted below:-

*"27.1 The Guarantor agrees that **any admission or acknowledgement in writing signed by the Borrower of the liability or indebtedness of the Borrower or otherwise in relation to the above mentioned credit facilities and or any part payment as may be made by the Borrower towards the Principal sum hereby guaranteed or any judgment, award or order obtained by the Lead Bank against the Borrower shall be binding on the Guarantor** and the Guarantor shall accept the correctness of any statement of account that may be served on the Borrower which is duly certified by any office of the Lead Bank and the same shall be binding and conclusive as against the Guarantor also and the Guarantor further agree that in the Borrower making an acknowledgment or making a payment, the Borrower shall in addition to his personal capacity be deemed to act as the Guarantor's duly authorized agent in that behalf for the purpose of Section 18, 19 of the Limitation Act. 1963."*

To a query raised by the Bench, it is submitted by the Ld. Counsel for the RP that period of limitation was getting over during the COVID-19 period for which the Hon'ble Supreme Court has already granted relaxation in suo-moto Writ Petition bearing no. WP (Civil) 03/2020. On this count, the application is to be treated as within limitation. He also referred to para 13 of the Brief Note dated 02.03.2022 referring to Hon'ble Supreme Court's judgment passed in the matter of ***Laxmi Pat Surana Vs. Union Bank of India and Ors. [(2021)8SCC481]*** to justify limitation. The same is extracted below:

13. At this stage reference may also be made to the following observations of the Hon'ble Apex Court in the case of "**Laxmi Pat Surana vs. Union Bank of India and Ors. [(2021)8SCC481]**":

"44. In the present case, the NCLT as well as the NCLAT have adverted to the acknowledgments by the principal borrower as well as the corporate guarantor corporate debtor after declaration of NPA from time to time and lastly on 08.12.2018. The fact that acknowledgment within the limitation period was only by the principal borrower and not the guarantor, would not absolve the guarantor of its liability flowing from the letter of guarantee and memorandum of mortgage. The liability of the guarantor being coextensive with the principal borrower Under Section 128 of the Contract Act, it triggers the moment principal borrower commits default in paying the acknowledged debt. This is a legal fiction. Such liability of the guarantor would flow from the guarantee deed and memorandum of mortgage, unless it expressly provides to the contrary."

We are satisfied with the submissions made by the Ld. Counsel for the RP that the Company Petition bearing No. **(IB)-715(PB)/2021** is within the limitation period. Further, in terms of the report of the RP, there is a total amount of default of Rs. 258,97,35,449.55/- (Rupees Two Hundred and Fifty-eight Crore Ninety-seven Lakh Thirty-five Thousand Four Hundred Forty-nine and Fifty-five Paise Only) against four (4) Personal Guarantors namely Mr. Ashok Mahindru, Mr. Atul Mahindru, Mr. Ashutosh Mahindru and Mr. Ashish Mahindru.

In view of the above, we are inclined to admit the present petition bearing No. **(IB)-715(PB)/2021** under the Provisions of Section 100(1) of IBC, 2016 for initiation of Insolvency Resolution of the Personal Guarantor i.e. Mr. Atul Mahindru.

Accordingly, the present petition bearing No. (IB)-715 (PB)/2021 stands admitted under Section 100 of IBC, 2016. The RP is directed to proceed further in accordance with the provisions of the Code. Interim moratorium which came into effect in terms of Section 96(1)(a) on the date of filing the application i.e. 18.08.2021 shall cease to have effect. A moratorium in terms of Section 101 of the Code shall commence as applicable. RP is directed to take all further steps in accordance with Part III, Chapter III of the Code.

Copy of this admission order along with the report of RP be made available to SBI in terms of Section 100(3) of the Code, by the RP.

Copy of this order be also sent to IBBI by the Registry.

-Sd/-
(RAMALINGAM SUDHAKAR)
PRESIDENT

-Sd/-
(AVINASH K. SRIVASTAVA)
MEMBER (TECHNICAL)

05.02.2024
Lalit