

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH, (Court – II)
KOLKATA**

C.P. (IB)/136(KB)2021

***An application under Section 95(1) of the Insolvency and
Bankruptcy Code, 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.***

In the matter of:

(1) STATE BANK OF INDIA

... Applicant/Financial Creditor

-Versus-

(2) ANKIT PATNI

... Personal Guarantor

Date of pronouncing of the order: 23/04/2024

Coram:

Smt. Bidisha Banerjee	:	Member (Judicial)
Shri D. Arvind	:	Member (Technical)

Appearances (via video conferencing/physically):

Mr. Deepanjan Dutta Roy, Adv.	:	For the Financial Creditor
Ms. Vidhi Sharma, Adv.	:	
Ms. Sanjana Jha, Adv.	:	
Ms. Tripti Agarwal, FCA	:	For the RP

ORDER

Per: Bidisha Banerjee, Member (Judicial)

1. The court convened through hybrid mode.
2. Ld. Counsels appearing for the parties were heard in extenso.

3. The application has been preferred to seek the following reliefs, inter alia: -

(a) State Bank of India, being the financial creditor as per Section 5(7) of the Insolvency and Bankruptcy Code, 2016 (“Code”) requests that the Tribunal under Section 95(1) of the Insolvency and Bankruptcy Code, 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 initiate insolvency resolution process in respect of the personal guarantor of Rohit Ferro Tech Limited, Mr. Ankit Patni.

4. CP (IB) No. 136/(KB)/2021 has been filed under Section 95 of the IBC, 2016 by State Bank of India for initiating Insolvency Resolution Process of Mr. Ankit Patni, the Personal Guarantor to Corporate Debtor.

5. **Facts in a nutshell:** -

5.1 The Corporate Debtor is Rohit Ferro-Tech Limited in CP(IB) No.1214/KB/2018 under Section 7 of the IBC filed by the State Bank of India against Rohit Ferro-Tech Limited. CIRP was initiated in CP (IB) No. 1214/KB/2018 on 07.02.2020. Mr. Ankit Patni is the erstwhile Personal Guarantor of M/s. Rohit Ferro-Tech Limited.

5.2 Companies in which Mr. Rohit Patni was acting as Director as on the date of filing of Report includes Rohit Ferro Tech Ltd. [CIN: L27104WB2000PLC091629].

5.3 This Adjudicating Authority was pleased to pass interim moratorium against Mr. Ankit Patni in CP (IB) No. 136/KB/2021 on 21.09.2021.

5.4 Mr. Daulat Ram Jain was appointed as RP to file report under Section 99(7) of the IBC, 2016.

6. The contentions are noted.

7. A Report u/s. 99 of the Code has been prepared and filed by the RP Mr. Daulat Ram Jain, an extract whereof is as under: -

Particulars of Debts.

PARTICULARS OF DEBT		
1.	Total debt (including any interest or penalties)	<p>Rs. 2247,96,00,000/- (Rupees Two Thousand Two Hundred Forty Seven Crores and Ninety Six Lakhs Only)</p> <p>Amount in Default :Rs. 1332,96,13,251.99 (Rupees One Thousand Three Hundred Thirty Two Crores Ninety Six Lacs Thirteen Thousand Two Hundred Fifty One and Ninety Nine paisa only)</p> <p>Interest: Rs. 914,99,86,748.01 (Rupees Nine Hundred Fourteen Crores Ninety Nine Lacs Eighty Six Thousand Seven Hundred Forty Eight and One paisa Only)</p>
3.	Date on which debt was due	On 18 th May 2018 Financial Creditors issued Demand Notice upon the guarantor
4.	Date on which default occurred	26 th May, 2018 (Demand Notice received by them on 19 th May, 2018 and reply thereof received on 31 st May 2018 Copy attached – Annexure-A)

5.	Nature of the debt	Commercial Loan (Term Loan and Working Capital Loan)
6.	Secured debt including particulars of security held, the date of its creation, its estimated value as per the creditor (as applicable)	Security for the term loan consortium facilities amounting to Rs.271 crores (“Term Loan consortium Facilities”) under the facility Term Loan Agreement dated 19 September 2011: 1. First pari passu charge on the whole of Rohit Ferro Tech Limited’s movable properties relating to the captive power plant at Kalinganagar, Jajpur, Orissa, both present and future brought into or upon or stored or to be in or about all Rohit Ferro Tech Limited’s factories premise and godowns at IDCOL Industrial Estate, Jajpur, Orissa and second pari passu charge on stocks of raw materials, semi-finished and finished goods, stores and spares, bills receivable, book debts and all other movable both present and future, relating

8. The RP has examined the following: -

- a. Copy of security document executed by the corporate debtors in favour of the Financial Creditor – As described in point 6 of Particulars of Debt.
- b. Recall/Demand Notice by the Financial Creditor dated 18.05.2018.
- c. Demand notice served by financial creditor on the personal guarantor in **Form B – 26.03.2021.**

9. The RP has sent a letter dated 27.09.2021 enquiring u/s 99(2) of IBC, with regard to the payment if any made to the financial creditor. (Annexure E). No reply has been received by him. A further notice dated 05.10.2021 has been sent to Mr. Rohit Patni for the following details: -

- KYC Documents like PAN Card, Aadhar Card, Passport
- List of all immovable & movable assets with full description, value and location

- List of Vehicle with complete details like RC Copy, insurance policy
- Details regarding investment in shares of listed companies, shares of unlisted companies, Jewellery, Pension Policy, Insurance Policies, Mutual Fund Investments
- Details regarding possession of Gold, Silver
- Any investments in foreign countries
- Details of Secured and unsecured creditors as on 21.09.2021
- Details of Debtors as on 21.09.2021
- Details of Provident Fund, Gratuity Fund and others.
- Full details of all bank account – bank name, branch, address of branch, account no., account type, IFSC code, Email ID
- Details of Lockers with banks
- Cash in hand as on 21.09.2021
- Bank statements of all bank accounts from 1st April, 2017 till date.
- Details of guarantee given to other banks or any other entity, individuals
- Audited financial statements (Balance Sheet, Notes) for F.Y. 17-18, 18-19, 19-20, and 20-21.
- Income Tax Returns for F.Y. 17-18, 18-19, 19-20, and 20-21
- Books of accounts for the previous year to till date
- List of all pending litigation/tax assessments/tax appeals/civil suits/proceedings/claims etc. with case files and full details as on date
- Details of Income Tax ID, Password and PAN
- Details about current operations

- Details of group companies and companies in which you have interest and how much Director Remuneration is receiving by you from the company/group of company in which you are the Director/KMP
- Bank statements of all the bank accounts from inception which are closed
- KYC documents of Company in which you are the director
- Latest Electricity & Municipality Bill

Response is awaited from Mr. Rohit Patni.

10. The RP has referred to the following: -

- a. Master Data of the Corporate Debtor
- b. Director Master Date (having DIN: 00034876)
- c. Account Statement in the books of Financial Creditor till 7th February, 2020.
- d. Securities Document executed by the Corporate Debtor in favour of the Petitioner.
- e. Hon'ble NCLT Kolkata Bench Order copy of initiation of CIRP of Corporate Debtor, i.e., M/s. Rohit Ferro-Tech Limited.
- f. Order passed by the Hon'ble Debt Recovery Tribunal 1, Kolkata dated 22.08.2019 in the matter of OA/309/2018
- g. CIBIL Report
- h. Demand/Recall Notice – 18.05.2018
- i. Demand Notice in Form B – 26.03.2021
- j. Relevant extract of application

11. RP has recommended: –

Accepting the application against Mr. Ankit Patni filed by the financial creditor, i.e., State Bank of India to initiate insolvency resolution process, on the grounds that: -

- i.** The application is found to be satisfying all the ingredients of Section 95 of IBC.
- ii.** No evidence of repayment of the debt claimed in Section 95 petition from Mr. Ankit Patni, has been received.
- iii.** No document whereby the Personal Guarantee agreement dated 17.09.2014 was cancelled by both the parties is available.
- iv.** He has not received any Order of Court or any other Forum whereby the personal guarantee agreement dated 17.09.2014 was cancelled or set aside.

12. Per contra, the Personal Guarantor would aver as under: -

I. The Invocation of Alleged Guarantee Itself Is Bad in Law

- a.** Between 2011 and 2014, Rohit Ferro Tech Limited approached the State Bank of India (SBI) seeking grant of various loan facilities which were lent and advanced by the applicant amounting to Rs. 1269,59,00,000/-. For the said purpose Rohit Ferro Tech Limited, had entered into several Agreements with SBI from time to time being Term Loan Consortium Facility dated 19.09.2011, Supplemental Agreement of Loan dated 30.03.2013, Supplemental Working Capital Consortium Agreement dated 17.07.2013 and Agreement for Loan for overall limited dated 29.03.2014.
- b.** The respondent being the promoter and Director of Rohit Ferro Tech Limited had also executed a Deed of Guarantee and Supplemental Deed of Guarantee in connection with the said loans being Deed of Guarantee

dated 19.09.2011 (@pgs. 282 to 300), Supplemental Deed of Guarantee dated 30.03.2013 (@pgs. 301 to 307), Deed of Guarantee dated 25.07.2013 (@pgs. 308 to 316) and Deed of Guarantee dated 29.03.2014 (@pgs. 317 to 348).

- c.** Rohit Ferro Tech Limited, had started facing financial difficulties, reason whereof, there were some irregularities on the part of the Company in making payment in terms of the aforementioned Loan Facility Agreements. As such, on 11th December, 2013, the debt of Rohit Ferro Tech Limited was allegedly declared as Non-Performing Asset (“NPA”) by SBI.
- d.** On 31.04.2014, Rohit Ferro Tech Limited and other lenders including SBI entered into a Master Restructuring Agreement (@pgs. 1787 to 1877). In terms of the said Agreement, the parties had, *inter alia*, agreed to restructure the then existing loan of the Company and agreed that the lenders would waive any date of default and all rights and remedies and powers that may have arisen in connection therewith. As such, the account classified as NPA was also restructured and the default was waived off.
- e.** In pursuance of the same, the respondent also executed an alleged Deed of Personal Guarantee on 17.09.2014. (@pgs. 349 to 361)
- f.** When the entire loan facility was restructured and the date of default was waived of by virtue of the Master Restructuring Agreement dated 31.04.2014, then the question of relying on the account being classified as NPA on 11.12.2013 does not and cannot arise. As such, the

notice dated 18.05.2018, issued on the basis of such date of NPA, *inter alia*, itself is bad in law and cannot be relied upon.

- g.** SBI filed the instant application under Section 95 also on the basis of the alleged notice dated 18.05.2018, wherein the date of default and date on which the debt became due are both on the basis of the demand notice dated 18.05.2018.

II. Pendency of appeal before the Hon’ble NCLAT against Order dated 21st September, 2021

- a.** By an Order dated 21.09.2021, the Hon’ble NCLT has, *inter alia*, declared moratorium under Section 96(1)(a) of the Code and appointed Mr. Daulat Ram Jain as the RP under Section 97 of the Code.
- b.** By the said Order dated 21.09.2021, the Hon’ble NCLT has virtually decided the application under Section 95 in favour of the applicant, even before the presentation of the Report by the RP. At paragraph 9 of the impugned Order of the Hon’ble NCLT has held:

“The applicant has clearly brought it out in its application coupled with admissible evidence that the personal guarantor has committed default in making payment of the various loan facility along with interest to the Applicant for which he has given the personal guarantee as above on behalf of RFTL”.

- c.** In a matter with identical issue the Hon’ble National Company Law Appellate Tribunal by its order dated 12th August, 2021 in **Company Appeal (AT) (Insolvency) No.**

316 of 2021 – Mr. Ravi Ajit Kulkarni vs. State Bank of India has held that:

47. “It was an error on the part of the Adjudicating Authority to observe in Para 10 as reproduced above and hold that there is a “default” when matter was at the stage of acting on the application under section 95 read with section 96. According to us, as mentioned, the stage for considering default would arrive when the matter is taken up under section 100 of IBC. The Appellant is right when the Appellant submits that if the Adjudicating Authority gives such finding in advance, the report under Section 99 could not be in the negative.”

The same analogy will squarely apply here.

- d.** The Hon’ble National Company Law Appellate Tribunal by its Order dated 27th August, 2021 in **Company Appeal (AT) (Insolvency) No. 464 of 2021 – Vinod Sehwaag Vs. Siemens Financial Services Pvt. Ltd. & Anr.** has held that:

7. “at the stage at which the matter stood such finding in advance should not have been recorded as the said stage would be after receipt of Report under section 99 of the IBC when the matter is taken up under section 100 of the IBC.”

- e.** In view of the aforesaid, the Order dated 21.09.2021 itself is contrary to the provisions of law.

III. Resolution plan has already been approved with respect to the Corporate Debtor

- a. By an Order dated 7th April, 2022, resolution plan with respect to Rohit Ferro Tech Limited was duly approved by the Hon'ble NCLT.
- b. The instant application was filed on 21st June, 2021, much before the resolution plan of Rohit Ferro Tech Limited was approved.
- c. The alleged debt on the basis of which the instant application has been filed has already been covered in the resolution plan. Neither has any fresh notice been issued by the applicant, *inter alia*, demanding any amount from the respondent nor has any amendment been made to the instant application.
- d. As such, the quantum of debt that now remains allegedly due by the respondent to the applicant, itself has not been ascertained.

IV. Report submitted by the RP is arbitrary, unreasoned and without any application of mind

- a. The Report dated 21st February, 2022, submitted by RP is arbitrary, and unreasoned and has been prepared without application of any mind.
- b. The RP has not given any reason as to why the application should be admitted.
- c. The RP has failed to consider that there is no valid invocation of the guarantee in the instant case by SBI.
- d. The RP failed to consider that the account of the Company was restructured after the date of NPA.

e. It is a settled position of law that Report submitted to the Adjudicatory Authority is recommendatory in nature, as such this Hon'ble Tribunal is not bound to follow the recommendations of the RP. Reliance is placed on the judgment passed by the Hon'ble Supreme Court of India in the matter of **Dilip. B. Jiwrajka v. Union of India & Ors.** in W.P. (Civil) No. 1281 of 2021 dated 09.11.2023.

13. We have considered the rival contentions and discerned the following: -

- (i) The Personal Guarantor has emphatically admitted having executed a Deed of Guarantee and Supplemental Deed of Guarantee in connection with the said loans being Deed of Guarantee dated 19.09.2011 (@pgs. 282 to 300), Supplemental Deed of Guarantee dated 30.03.2013 (@pgs. 301 to 307), Deed of Guarantee dated 25.07.2013 (@pgs. 308 to 316) and Deed of Guarantee dated 29.03.2014 (@pgs. 317 to 348).
- (ii) Even after loan restructuring *vide* Master Restructuring Agreement dated 31.04.2014, the Corporate Debtor Rohit Ferro Tech Limited is in insolvency and its management has been taken over. Therefore, there is no gainsaying that the restructuring of loan would absolve the Personal Guarantor of its liability as debt liability of Corporate Debtor has not been waived. Further the liability for restructured facilities under Master Restructuring Agreement dated 31.04.2014 is Rs. 960 crores.
- (iii) The Personal Guarantor has failed to demonstrate that the Resolution Plan extinguishes liability of a Personal

Guarantor as liability of a Personal Guarantor is co-extensive with the Corporate Debtor.

14. In the aforesaid backdrop, having perused the Report and the documents referred to therein we find no reason to reject the application. Accordingly, it is admitted invoking power u/s. 100 of IBC.

15. We have noted that Hon'ble Supreme Court in the judgment of **Dilip B. Jiwrajka V/s Union of India & Ors. In WP (civil) No. 1281 of 2021** dated 09.11.2023 has upheld the Constitutional Validity of the Sections 94 to 100 and the propositions that can be culled out from the Judgments inter-alia 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. No adjudicatory function of Adjudicating Authority is contemplated at the admission 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*

CP/IB/337/AHM/2020 12 of 17 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; CP/IB/337/AHM/2020 13 of 17*
- 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.*

16. Accordingly, the provisions of Section 100 will come into play.

- (1)** When the application is admitted under Section 100, a moratorium shall commence in relation to all the debts and shall cease to have effect at the end of the period of one hundred

and eighty days beginning with the date of admission of the application or on the date the Adjudicating Authority passes an order on the repayment plan under Section 114, whichever is earlier.

(2) During the moratorium period: -

(a) Any pending legal action or proceeding in respect of any debt shall be deemed to have been stayed;

(b) The creditors shall not transfer, alienate, encumber or dispose of any of his assets or his legal rights or beneficial interest therein;

(3) Where an order admitting the application under Section 96 has been made in relation to a firm, the moratorium under Sub-Section (1) shall operate against all the partners of the firm.

(4) 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.

17. The Registry is directed to send e-mail copies of the order forthwith to the Board and all the parties and their Ld. Counsel for information and for taking necessary steps.

18. Certified copy of this order may be issued, if applied for, upon compliance of all requisite formalities.

D. Arvind
Member (Technical)

Bidisha Banerjee
Member (Judicial)

Order signed on: 23rd of April, 2024.

Ar.