



Can personal guarantors facing insolvency under Section 95, IBC submit resolutions plans for an MSME corporate debtor? Delhi High Court to decide

03 February 2022

In *Varun Jajoo and Ors. v. Union of India and Ors.* [W.P. (C) No. 981/2022], a Division Bench of the Delhi High Court has issued notice in a petition filed by the promoters and personal guarantors of a micro, small, medium enterprise (“**MSME**”) corporate debtor challenging the constitutional validity of Section 95 and Section 101 of the Insolvency & Bankruptcy Code, 2016 (“**IBC**”).

The petitioners are promoters and personal guarantors to credit facilities availed by Emkay Automobile Industries Limited (“**Emkay**”) which is a registered MSME. The grievance of the petitioners is that Section 95 of the Code interferes with their right to submit a resolution plan for the MSME corporate debtor that is undergoing corporate insolvency resolution process (“**CIRP**”) and should therefore be held violative of Article 14 of the Indian Constitution. They have also sought for insertion of *pari-materia* provisions under Chapter II of the IBC which will permit personal guarantors to a MSME corporate debtor to submit a resolution plan.

While promoters of corporate entities are barred under Section 29A of the IBC to submit a resolution plan in the CIRP of such corporate entity, a special exception has been carved out for MSME Corporate Debtors under Section 240A of the IBC. Section 240A permits promoters of MSMEs as well as its guarantors to submit resolution plans for a MSME corporate debtor. On the other hand, once proceedings for initiation of personal insolvency against a personal

guarantor are initiated under Section 95 of the IBC, an interim moratorium comes into play under Section 96 in relation to all the debts of such personal guarantor. On admission of the application for personal insolvency, a moratorium is imposed Section 101 of the IBC on the personal guarantors.

The Petitioners' grievance is that once moratorium under Section 101 read with Section 95 of the IBC is imposed on the personal guarantors, they are unable to handle their assets and generate funds. As an effect, their right to participate in the CIRP of the MSME corporate debtor as a resolution applicant under Section 240A is defeated and rendered meaningless.

The Petitioners have also raised the challenge that while Section 240A recognises personal guarantors of MSME corporate debtors as a separate class whereas, Section 95 simultaneously precludes the personal guarantors to exercise the same. Resultantly, two classes, viz., personal guarantors of MSME entities and personal guarantors of non-MSME entities, have no distinction as such and are wrongly being treated as a homogenous class.

In our opinion, this is a reasonable and significant grievance highlighted by the Petitioners. Therefore, it will be interesting to see how this unfolds before the Delhi High Court.

- Kinshuk Chatterjee (Partner) and Srishti Gupta (Associate)