



INSOLVENCY RESOLUTION PROCESS OF PERSONAL GUARANTORS:

STATE BANK OF INDIA VS. ANIL DHIRAJLAL AMBANI

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The matters of State Bank of India vs. Anil Dhirajlal Ambani¹ (“Anil Ambani cases”) have recently been filed before the National Company Law Tribunal, Mumbai Bench (“NCLT”), which calls into question the scheme of the Insolvency and Bankruptcy Code, 2016 (“IBC”) and the relevant rules and regulations relating to personal guarantors.

Chapter III of the IBC deals with insolvency of individuals. While IBC itself was enacted back in November, 2016, Chapter III still awaits notification. In December, 2019, the Central Government notified Chapter III of IBC partially, only for the purpose of bringing personal guarantors to corporate loans within the purview of IBC.² Since IBC itself does not differentiate between ‘guarantors’ and ‘debtors’, rules and regulations governing the process were also laid down from even date.³ In this write up, we have looked into the provisions relating to insolvency resolution of personal guarantors, and the interpretation of the same as seems to have been drawn by NCLT in the case involving Anil Ambani.

As per the scheme of the IBC, once an application under Section 95 is preferred by a creditor, the NCLT shall appoint a Resolution Professional, who can either be one suggested by the creditor moving the application, or, in the event of no such suggestion been made by the creditor, the Resolution Professional shall be appointed in terms of the recommendation from Insolvency and Bankruptcy Board of India (“IBBI”).⁴ At the same time, NCLT is also supposed to declare an interim moratorium in relation to all the debts of the personal guarantor against whom the application has been preferred. During such interim moratorium, all legal proceedings against any debt of the personal guarantor are stayed and the creditors of the personal guarantor are prohibited from initiating any fresh legal proceeding against any such debt.⁵

¹ C.P.(IB) 916 of 2020 & C.P.(IB) 917 of 2020.

² Ministry of Corporate Affairs, Notification No. S.O. 4126(E) dated 15.11.2019

<https://ibbi.gov.in/uploads/legalframework/1fb8c2b785f35a5126c58a2e567be921.pdf>

³ **Rules:** The Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Guarantors) Rules, 2019; The Insolvency and Bankruptcy (Application to Adjudicating Authority for Bankruptcy Process for Personal Guarantors to Corporate Guarantors) Rules, 2019.

Regulations: IBBI (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Regulations, 2019; IBBI (Bankruptcy Process for Personal Guarantors to Corporate Debtors) Regulations, 2019.

⁴ Section 97, Insolvency and Bankruptcy Code, 2016.

⁵ Section 96, Insolvency and Bankruptcy Code, 2016.

Upon appointment, the Resolution Professional is entrusted with the fact-finding duty. The Resolution Professional, at this stage, examines the application as filed by the creditor before NCLT, and seeks the response of the debtor. Upon being satisfied that the application merits admittance, or otherwise, the Resolution Professional is under a mandate to file a report with the NCLT with his observations and a recommendation regarding the admittance/ rejection of the application.⁶ Once the report has been submitted by the Resolution Professional, NCLT shall make an order, either admitting or rejecting the creditor's application.⁷ As the Resolution Professional is not a judicial authority and his conclusion is only a recommendation, the NCLT is at liberty to make an order contrary to the recommendation of the Resolution Professional.

It is only when the NCLT pronounces an order initiating insolvency proceedings against the personal guarantor that the Insolvency Resolution Process of the personal guarantor is considered initiated.

It would, at this stage, be pertinent to note certain key distinctions between the procedure prescribed under Chapter III of IBC with respect to Insolvency Resolution Process of Personal Guarantors, and such procedure as prescribed with respect to the Corporate Insolvency Resolution Process under Chapter II of IBC:

1. Appointment of the Resolution Professional:

Under Chapter II, an Interim Resolution Professional is appointed after the admittance of the insolvency application by NCLT⁸, and a Resolution Professional is confirmed by the Committee of Creditors constituted by the non-related Financial Creditors of the Corporate Debtor.⁹ On the contrary, under Chapter III, a Resolution Professional is appointed prior to the admittance of the insolvency application.

2. Fact-finding

Under Chapter II, it is the duty of NCLT to determine whether an insolvency application merits admittance or not, in terms of the pleadings of the creditor and the Corporate Debtor.¹⁰ However, under Chapter III, the duty to preliminarily determine the same is entrusted upon the Resolution Professional, which the NCLT may either confirm or deny.

⁶ Section 99, Insolvency and Bankruptcy Code, 2016.

⁷ Section 100, Insolvency and Bankruptcy Code, 2016.

⁸ Section 16, Insolvency and Bankruptcy Code, 2016.

⁹ Section 22, Insolvency and Bankruptcy Code, 2016.

¹⁰ Section 7, Section 9 and Section 10, Insolvency and Bankruptcy Code, 2016.

3. Moratorium

Under Chapter II, generally the moratorium comes into effect only upon admittance of an insolvency application,¹¹ while under Chapter III, an interim moratorium comes into effect upon the filing of the insolvency application, and is confirmed upon admittance. Moreover, the moratorium under Chapter II has a narrower scope than the interim moratorium/ moratorium under Chapter III, as was observed by the Supreme Court in *State Bank of India vs. V. Ramakrishnan*.¹²

While the literal interpretation of IBC would confirm all the above distinctions, there appear to be certain glaring drawbacks in the process as envisaged under Chapter III of IBC. Two key drawbacks are as follow:

1. Bringing into effect an interim moratorium from the date of filing of the insolvency application causes prejudice not only to the personal guarantor but also several third parties, who are the creditors of such personal guarantor, without any discussion about the merits of the insolvency application or a prima facie argument with respect to its admissibility and maintainability, in absolute contravention of the principle of *Audi Alteram Partem*.
2. The preliminary fact-finding has been entrusted upon a Resolution Professional, who may be nominated for such appointment by the creditor making the insolvency application itself, thereby raising doubts on the unbiasedness of such Resolution Professional. Even otherwise, the scheme of Chapter III of IBC seems to have entrusted the judicial duty of fact-finding upon a private individual with no judicial powers or accountability.

It therefore, lies in the hands of the judiciary to draw an interpretation of the provisions of Chapter III of IBC which would solve, *inter alia*, the above the drawbacks and provide a fair and reasonable trial for all the parties involved.

Even though the provisions with respect to Insolvency Resolution Process of personal guarantors was enacted over more than six months ago, there have been hardly any high profile cases/ landmark judgments which would clarify position of the law in terms of such provisions.

In the Anil Ambani cases, by way of a mere one line direction, the NCLT seems to have drawn an unprecedented interpretation of such provisions relating to insolvency of personal guarantors. It is pertinent to look at the matter and the order of the NCLT to understand such interpretation.

The State Bank of India had filed two separate applications under Section 95 of IBC for the initiation of Insolvency Resolution Process against Mr. Anil Ambani, on the ground that he was the personal guarantor to the loan facilities extended to Reliance Communications Limited and Reliance Infratel Limited (both undergoing Corporate Insolvency Resolution Process).

¹¹ Section 14, Insolvency and Bankruptcy Code, 2016.

¹² Civil Appeal No. 3595 of 2018.

Vide two separate orders dated 11.06.2020, NCLT had directed the Respondent, Mr. Anil Ambani to file his reply to the two applications. The two identical orders of NCLT are as below:

“On hearing the submissions of the applicant’s counsel respondent side is hereby directed to reply and make submissions. List on 18.06.2020.”

On 18.06.2020, State Bank of India was given further time to file their rejoinder to the replies of the Respondent. While the order of the NCLT does not contain any details with respect to the arguments, it is clear that contrary to the literal interpretation of IBC, neither was a Resolution Professional appointed in the matter on the first or the second hearing, nor was an interim-moratorium imposed. In fact, the NCLT seems to have taken it upon itself to conduct the fact-finding by way of pleadings from the contesting parties, similar to the procedure as is followed under Chapter II of the Code.

While this approach seems much more straight forward and legally sound, it essentially nullifies the requirement for appointment of a Resolution Professional prior to the admittance of the insolvency application and his report, as well as the requirement for an interim moratorium. Thus, making this not merely an interpretation of the provisions, but a derogation from the process itself, which is beyond the jurisdiction of NCLT.

In a writ petition by Anil Ambani challenging the whole scheme on the basis that there is no enabling provision in the IBC for insolvency against personal guarantors, the Delhi High Court has stayed the personal insolvency resolution process proceedings. The Court has Anil Ambani from transferring, alienating, encumbering or disposing of his assets or legal rights and interests therein till the next date of hearing in the matter.

The matter is sub-judice and the outcome will be of great interest and relevance to lenders who look at invoking personal guarantee of promoters of defaulting borrowers as an effective enforcement mechanism in addition to corporate insolvency.

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