

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL,  
PRINCIPAL BENCH, NEW DELHI  
Comp. App. (AT) (Ins) No. 464 & 465 of 2021**

**In the matter of:**

**Vinod Sehwaq  
(Personal Guarantor of Xalta Foods & Beverages Pvt.  
Ltd.)**

**Presently At 6148/ B-8, Vasant Kunj  
New Delhi- 110070**

**....Appellant**

**Vs.**

**1. Siemens Financial Services Pvt. Ltd.  
Plot No.2, Sector 2, Kharagar Node  
Navi Mumbai- 410210**

**...Respondent No.1**

**2. Amit Ojha  
Resolution Professional  
A-A015, Sector XU 1, Greater Noida  
Near Scholars Home International School  
Gautam Buddha Nagar, Uttar Pradesh- 201306**

**...Respondent No.2**

**For Appellant: Mr. Abhishek Anand, Mr. Kunal Godhwani, Mr.  
Viren Sharma, Advocates.**

**For Respondents: Mr. Ashwini Kumar Singh, Advocate for R1.  
Mr. Samar Vijay Singh, Mr. Azeem A Dost,  
Advocates for R2-RP.**

**ORDER**

**(Through Virtual Mode)**

**27.08.2021:** This Appeal has been filed by the Appellant- Personal Guarantor of the Corporate Debtor- 'Xalta Foods & Beverages Pvt. Ltd.' against impugned orders dated 22<sup>nd</sup> March, 2021 and 9<sup>th</sup> June, 2021 passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi Bench, Court-II) in CP No. (IB)-116(ND)2021. By the impugned order dated 22<sup>nd</sup> March, 2021, the Adjudicating Authority in a motion under Section 95 of the

Insolvency and Bankruptcy Code, 2016 (“IBC” for short) appointed Respondent No.2 as the Resolution Professional and directed the Resolution Professional to make recommendations along with the reasons in writing for acceptance or rejection of the Application filed under Section 95(1) of the IBC r/w Rule 7(2) of the “Insolvency and Bankruptcy (Application to Adjudicating Authority for IRP for Personal Guarantors to Corporate Debtor) Rules, 2019” (“Rules” for short). The Adjudicating Authority sought Report under Section 99 by the impugned order.

2. The second impugned order dated 9<sup>th</sup> June, 2021 has been passed in I.A 1774/2021 in the same Company Petition by which order, Application of the Appellant to set aside the earlier order on the basis that notice was not given to the Appellant was rejected.

3. Learned Counsel for the Appellant submits that in the matter, action was initiated under Section 95 of the IBC. The Appellant did not get any notice from the Tribunal which violated the principles of natural justice with regard to the Appellant and that the Resolution Professional was appointed by the Adjudicating Authority on Application being moved by the Respondent No.1- Financial Creditor. It is stated that the Adjudicating Authority while passing the first impugned order in Para 12 has already concluded that there is a default in repayment of the loan for which the personal guarantee has been given. It is stated that in view of that, Report which was sought from the Resolution Professional under Section 99 of the IBC could not be different. The Learned Counsel submits that in the second impugned order the Adjudicating

Authority in Para 33 of the order declined to recall the first impugned order on the basis that the provisions did not warrant issuance of notice.

4. We have heard Counsel for Respondent Nos.1 & 2 also. There is no dispute that CIRP was initiated against the Corporate Debtor and that the said matter is at the stage of liquidation. The Learned Counsel for the Respondents as well as the Learned Counsel for the Appellant have referred to judgment of this Tribunal dated 12<sup>th</sup> August, 2021 in Company Appeal (AT) (Insolvency) No. 316 of 2021- *“Mr. Ravi Ajit Kulkarni vs. State Bank of India”* and the Learned Counsel for both sides agree that the Personal Guarantor of Corporate Debtor may be given the opportunity before the Resolution Professional and orders on similar lines as in the matter of *“Mr. Ravi Ajit Kulkarni vs. State Bank of India”* could be passed.

5. In Judgment in the matter of *“Mr. Ravi Ajit Kulkarni vs. State Bank of India”*, this Tribunal had in para 47 observed as under:-

*“47. We also find that it was an error on the part of 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. Again the Adjudicating Authority mentioned in Para 11 of the impugned order that it was “allowing” the application under Section 95. At the stage of Section 95 Adjudicating Authority is to act upon the application to take further steps. The stage for “allowing” Application to admit or reject the*

*application would be under Section 100. At the stage of appointment of Resolution Professional, such allowing is not contemplated. In Section 97 no adjudication as such is involved.”*

6. In the present matter, the Adjudicating Authority has in para 12 of first impugned order held as under:-

*“12. The Applicant has clearly brought out in its application annexed with documents that the Personal guarantor/ Debtor has committed default in making repayment of the loan along with the interest to the Applicant, for which he has given the personal guarantee to the Applicant on behalf of the Corporate Debtor.”*

7. In our view, 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.

In para 42 of judgment in the matter of *“Mr. Ravi Ajit Kulkarni vs. State Bank of India”* we have held as follows:-

*“42. However, considering the judgment of the Hon’ble Supreme Court in the matter of ‘Swiss Ribbons’, it appears to us that keeping principles of natural justice in view, limited notice of the application should be given to the Personal Guarantors of the Corporate Debtors. The limited notice has to be only to secure presence of the Personal Guarantor referring to the Interim Moratorium which has commenced. Before appointment of the Resolution Professional no hearing as such is contemplated and before appointment of the Resolution Professional the Debtor cannot be allowed to raise disputes for which the stage would be Section 100.*

*Under NCLT Rule 11, Adjudicating Authority is duty bound to pass orders to prevent abuse of process. As such, limited notice to appear may be given to the Personal Guarantors so that when Resolution Professional is appointed, he may provide material as per Section 99(2) of IBC. Till the stage of Section 100, the process is of collecting necessary evidence.”*

8. We have held as above that there has to be limited notice to be sent by the Adjudicating Authority so that the Personal Guarantor can appear and when the Resolution Professional is appointed can respond to the Resolution Professional for compliance to be done under Section 99 of the IBC. In para 39 of judgment in the matter of *“Mr. Ravi Ajit Kulkarni vs. State Bank of India”*, we have observed:-

*“39. ....What the Resolution Professional under Section 99 would be doing was requiring the Debtor to furnish proof of repayment as per Section 99(2) and after doing the necessary spade work Resolution Professional has to recommend acceptance or rejection of the application with reasons.....”*

9. In the present matter, now the Personal Guarantor is already available and did appear before the Adjudicating Authority to submit that the impugned order should be recalled. As such, the requirement of serving formal notice would not be necessary but the matter needs to be sent back to the Adjudicating Authority so that the procedure is duly followed as indicated by us in the matter of *“Mr. Ravi Ajit Kulkarni vs. State Bank of India”*.

10. For the above reasons, the Appeal is partly allowed.

The findings and observations made by the Adjudicating Authority in para 12 of the first impugned order dated 22.03.2021 and the observations in the second impugned order dated 09.06.2021 that the notice is not necessary are set aside. The appointment of Respondent No.2 as the Resolution Professional is not disturbed. It is stated that he has already given report. As we have set aside the premature observations made, with regard to default, by the Adjudicating Authority, we set aside the report given in consequence to such order. We remit back the matter to the Adjudicating Authority. Parties to appear before the Adjudicating Authority on 7<sup>th</sup> September, 2021. The Resolution Professional will give opportunity to the Appellant in terms of Section 99 and complying provisions give fresh report. The Adjudicating Authority will then proceed further with the matter as per law in the light of our observations and findings in the judgment in the matter of "*Mr. Ravi Ajit Kulkarni vs. State Bank of India*". With these observations, the present Appeal is disposed of. No order as to costs.

11. The 10 days for compliance by the Resolution Professional as prescribed in Section 99(1) shall commence from 7<sup>th</sup> September, 2021.

**[Justice A.I.S. Cheema]  
The Officiating Chairperson**

**[Dr. Alok Srivastava]  
Member (Technical)**

**Anjali/g**