

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH**

(MA 199/2018, MA 223/2018, MA 261/2018 in CP 1139/2017)

Under Section 60(5) of the IBC, 2016

ICICI Bank Ltd. (MA 223/2018) ... Applicant

IFCI Ltd (MA 199/2018) .. Applicant

Standard Chartered Bank Ltd (MA 261/2018) .. Applicant

Vs.

Mr. Sumit Binani ... Respondent

(Resolution Professional)

In the matter of

State Bank of India Financial Creditor

Vs.

Monnet Ispat & energy Limited ... Corporate Debtor

Order delivered on 05.06.2018

Coram: Hon'ble Shri B.S.V. Prakash Kumar, Member (Judicial)
Hon'ble Shri Ravikumar Duraisamy, Member (Technical)

For the Applicant: Adv. Gaurav Joshi, a/w Mr. Kersi Dastoor, Ms. Neha Naik, i/b Phoenix Legal, Adv. Nikita Panhalkar, i/b Vaish Associates, Adv. Shubhabrata Chakrabathi, Adv. Niket Mehta, i/b Juris Corp

For the Resolution Professional: Adv. Zal Andhyarujina a/w Adv Ishani Khanwilkar, Adv. Deepa Mani a/w Adv. Ruskshin Ghiara and Adv. Krishna Patel, Mr. Krishnava Dutt, Mr. Ranjit Shetty, Ms. Adity Chaudhary, Mr. Swapnil Gupte, Mr. Ashish Patel, i/b Argus Partners

Per B.S.V. Prakash Kumar, Member (Judicial)

COMMON ORDER

Order pronounced on 04.04.2018

In the three applications mentioned above, i.e. MA 199/2018, MA 223/2018 and MA 261/2018, at request of all the parties for pronouncement

of orders in these applications, before giving any reasons, this Bench allowed all these three applications holding that reasons to allowing these applications would be given later. Such an order has been passed for two reasons, one because all parties having requested to decide the applications first and then to give reasons, two, the stay being in vogue as on the date applications were allowed, i.e. on 4.4.2018, the stay of holding COC meeting has also been vacated so as to let COC proceed further in approving resolution plan.

The reasons for allowing these applications:

MA 199/2018

It is a Miscellaneous Application filed by Financial Creditor, viz. IFCI Ltd stating that on 24.10.2011, this applicant granted financial assistance comprising Subordinated Rupee Loan of ₹120 crores to Monnet Power Co. Ltd on the terms and conditions contained in the Subordinated Rupee Loan Agreement dated 24.10.2011, thereafter this loan was interalia secured by additional security created by the Corporate Debtor which owned 84% stake in the borrower by giving irrevocable and unconditional Corporate Guarantee by the Corporate Debtor vide Deed of Corporate Guarantee dated 28.2.2013, besides this, the Corporate Debtor created an equitable mortgage dated 16.11.2013 by deposit of Title Deeds in favour of the applicant over the immovable property admeasuring 200 sq.mtrs bearing Plot No.12, Block EFGH, Commercial Complex, Masjid Marg, Greater Kailash, Part II, New Delhi. Since the borrower (Monnet Power) failed to make payments as agreed between this applicant and the borrower, this account of borrower was classified as Non-Performing Asset (NPA) in accordance with the directives prescribed by RBI w.e.f. 31.3.2016. Since it was declared as NPA, this applicant issued a demand letter dated 13.7.2017 to the borrower and the Corporate Debtor demanding them to repay the dues outstanding against the borrower.

In between on 18.7.2017, since Insolvency Resolution Process was commenced against the Corporate Debtor under Insolvency & Bankruptcy Code, the Resolution Professional Mr. Sumit Binani on 1.8.2017 responded to the demand notice of this applicant stating that action under SARFAESI Act, 2002 cannot be initiated in view of the moratorium declared in terms of Section 14 of the Code. In the backdrop of it, the applicant submitted its claim in Form C in respect of various financial debts owed to it by the Corporate Debtor on 3.8.2017. Again on 22.8.2017, this applicant submitted claim in Form C in respect of various financial debts owed to it by the Corporate Debtor,

again on 7.12.2017, this applicant submitted the disputed claim in Form C dated 7.12.2017 towards the amount payable by the Corporate Debtor /Guarantor in satisfaction of the loan granted to the borrower which was secured by the exclusive charge by way of mortgage of property of the Corporate Debtor and also Instrument of Guarantee dated 28.2.2013.

Upon receipt of such claim mentioned in Form C dated 7.12.2017 amounting to ₹159,07,31,797 from the applicant, the Resolution professional, wrote an email on 5.1.2018 stating that he would not be able to accept it as the claim pertaining to a Corporate Guarantee given by the Corporate Debtor has remained un-invoked on or prior to 18.7.2017 as on the Insolvency commencement date. On seeing such a letter from the Resolution Professional, the applicant through letters dated 22.1.2018 and 27.2.2018 requested the Respondent to take note of the equitable mortgage created by the Corporate Guarantor and exclude such property from the purview of the resolution plan proposed for the company and reconsider the rejection of the claim but no avail.

In the backdrop of the factual situation, the applicant says that this application is to be allowed because this Corporate Debtor not only stood as Guarantor but also created equitable mortgage against the loan facility provided to its subsidiary Monnet Power, therefore, it makes no difference whether guarantee invoked prior to 18.7.2017 or after 18.7.2017, to which, the counsel appearing on behalf of Resolution Professional submits that the claim should be matured as on the date insolvency resolution process has been commenced therefore, the guarantee given cannot be invoked and make a claim before the Resolution Professional.

On hearing the submissions from either side, I believe it is imperative to reproduce the provisions of this Code so as to find out what is meant by Claim and what claims could be placed before the Resolution Professional. The definition of "claim" is as below:

"Claim" means-

- a. a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;
- b. right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;"

Section 18 - Duties of Interim Resolution Professional:

- (1) The interim Resolution Professional shall perform the following duties, namely:-
 - (a) Collect
 - (b) Receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made under Sections 13 and 15.

On giving conjoint reading, it is very much clear that the claim means a right to payment or right to remedy for breach of contract under any law for the time being in force notwithstanding whether it is matured or unmatured, therefore, the rigors present for admission for the Company Petition filed under Section 7 or 9 are not applicable to make a claim before the Resolution Professional, the only requisite that is to be seen is as to whether it is a claim as mentioned under Section 3 subsection 6 of the Code or not. For it is evident that the Corporate Debtor not only executed Deed of Guarantee but also equitable mortgage for the payment made to Monnet Power, since Monnet Power defaulted in making repayment, the right will automatically get accrued to this Applicant to make claim against the Corporate Debtor. If at all the claimant is deprecated from making such claim before the Resolution Professional, then his right of remedy will itself get extinguished. In any event, for this applicant has placed material more than required to say that it falls within the ambit of claim as mentioned under Section 3 subsection 6 of the Code, this claim has to be considered as claim against the Corporate Debtor and the Resolution Professional is duty bound to accept this claim as envisaged under Section 18 of the Code.

MA 223/2018

It is a Miscellaneous Application filed by ICICI Bank Ltd against the Resolution Professional stating that its claim of USD 74,023,330.36 with respect to Guarantee application of the Corporate Debtor towards the ECB facility granted to its subsidiary, Monnet Power Co. Ltd has been rejected by the Resolution Professional, it has filed this Miscellaneous Application, for revision of the admitted claim of the applicant in the list of Financial Creditors to include the aforesaid amount and revive the percentage of the applicant's voting share.

Brief facts:-

ICICI Bank Ltd, (ICICI Bank) on 31.12.2010 had provided an External Commercial Borrowing (ECB) facility to Monnet Power Co Ltd (Monnet Power)

for the purpose of part financing the project cost in relation to development and operations of 1050 megawatt coal based power plant and related facilities in the State of Orissa (Project) vide Credit Arrangement Letter dated 31.12.2010 and ECB Facility Agreement dated 25.3.2011 (ECB Facility Agreement), on having ICICI Bank provided ECB facility to Monnet Power, the Corporate Debtor on 6.1.2012, executed a Letter of Comfort to ICICI Bank towards the ECB facility provided to Monnet Power by stating as a sponsor irrevocable and unconditionally agree, confirm and undertake that it shall ensure that the borrower repays the facility along with all interest, liquidated damages and various other costs and expenses payable by the borrower to the lender under the Facility Agreement and also stating that it will make funds available to the borrower to ensure payment by Monnet Power to ICICI Bank on the stipulated dates of all its debt obligation under the Facility Agreements and also to make good to the Lender of any damage and losses that accrued to the Lender agreeing that lender on its own discretion call upon the Corporate Debtor to pay in this connection. It also says that it would indemnify and keep the Lender indemnified against all the losses and damages which lender may suffer by reason of default on the part of the borrower and it says that the undertaking is irrevocable and constitutes legal binding and obligations on the Corporate Debtor and its successors. The same Corporate Debtor again on 26.12.2012 executed Tripartite Sponsor Support Agreement governing the obligations of the Corporate Debtor with respect to funding of the project and also repayments under the ECB Facility Agreement. For this Loan Facility had to be changed from Singapore Branch of ICICI Bank to ICICI Bank Dubai, another agreement had been entered on 5.6.2014 for change of Branch which was subsequently acknowledged by this Corporate Debtor on 5.6.2014 by sending a confirmatory letter from sponsor to ICICI Bank Ltd Dubai. Thereafter, when Monnet Power was in continuous default of the ECB facility granted to it by ICICI Bank, that account of Monnet Power was declared as Non-Performing Asset w.e.f. 31.12.2014 by ICICI Bank. In the meanwhile, in an application moved by State Bank of India against the Corporate Debtor under Section 7 of IBC, on 18.7.2017 it was admitted by the Adjudicating Authority. For IRP was appointed in this case, for carrying CIRP, ICICI bank on 7.8.2017 filed its proof of claims as a Financial Creditor by way of Form C informing the RP of the guarantee obligations of the Corporate Debtor and expressly reserved its rights to modify the claim of ICICI Bank against the Corporate Debtor as and when the guarantee obligations of the Corporate Debtor are invoked. In view of the reservation ICICI expressed on 7.8.2017, on 9.11.2017 ICICI bank issued recall letter setting out defaults and called

upon Monnet Power to forthwith repay the outstanding dues under the ECB Facility and Letter of Comfort shall be invoked on non-payment of dues. Then on 16.11.2017, ICICI Bank sent a letter invoking Letter of Comfort to the Resolution Professional calling upon him to make good the Corporate Debtor obligations to repay ICICI Bank under the Letter of Comfort. Basing on the invocation letter already sent on 29.11.2017, ICICI bank submitted a revised claim letter to the Resolution professional requesting revision of the claim in relation to Corporate Debtor obligations for payment of the outstanding amounts under the ECB Facility amounting to USD 74,023,330.36 which is approximately ₹476 crores. When the RP circulated an updated list of creditors on 21.2.2018 wherein additional claim of ICICI bank was not taken into consideration by the RP on the ground the guarantee obligation of the Corporate Debtor was not invoked as on the insolvency commencement date, i.e. 18.7.2017. On perusal of such list of creditors, without this claim being reflected in the list, ICICI Bank issued a detailed email on 9.3.2018 directing the attention of the RP to the relevant provisions of the Code as also the relevant provisions of IBC and CIRP Regulations. On having gone through the Resolution plan submitted by Resolution Applicant which was forwarded to COC for its consideration, it is evident that its claim has not been considered as part of the accepted debts in the list of creditors dated 21.2.2018.

Now the grievance of ICICI Bank is, its claim ought to have been taken into consideration because the present claim made by the Bank is fit into the definition of "Claim" (Section 3 (6)(b)) and "Financial Debt" (Section 5 (8)(i)) to say that since it is an amount of liability in respect of a guarantee given by the Corporate Debtor, this Bank is entitled to make a claim in respect to unmatured claims as well. It may be true that it is unmatured as on the date of admission but non invocation of guarantee as on the date of admission will not extinguish the right of the creditor to proceed against the guarantor. It has been clear that by 31.3.2016 itself the account of Monnet Power was declared as Non-Performing Asset with effect from 31.12.2014 by ICICI Bank, in view of the same, ICICI Bank sought for inclusion of its claim for the Bank is permitted to make its claim until before resolution plan has been approved.

On perusal of the facts of the application, it appears that the Corporate Debtor herein gave a Letter of Comfort to the applicant herein stating that sponsor (Corporate Debtor) shall ensure that the borrower repays the facility along with all interest, liquidated damages, front end fee, etc. and in the event of the fund of the borrower being insufficient to meet any debt obligations, the sponsor shall make funds available to the borrower (Monnet Power) to

ensure payment by the borrower to the lender on the stipulated date and on the debt obligations under the Facility Agreement by further saying that in the event the borrower defaults in any of its obligations to the lender, the Corporate Debtor shall make good to the lender any loss, damages, expenses or other costs as may accrue to the lender as a result thereof, and the sponsor shall immediately either make available funds to the borrower in order that the borrower is able to meet its commitments or pay to the lender any amounts that the lender may in its sole discretion call upon the sponsor to pay in this connection. The Corporate Debtor further states that it shall indemnify and keep the lender indemnified against all losses, damages, costs, claims and expenses whatsoever which the lender may suffer, incur or pay by reason of such default on the part of the borrower including legal proceedings taken against the borrower and/or the sponsor (Corporate Debtor) for recovery of all monies under the facility Agreement. By reading this Letter of Comfort and other documents given by this Financial Creditor, it is evident that a Corporate Debtor is under obligation to pay this claim amount in the event Monnet Power failed to make the dues outstanding, from the application it is very clear that Monnet Power defaulted in making payment to this lender in the year 2014 itself ever since this account has been running as NPA therefore, this has to be treated as a claim against the Corporate Debtor.

MA 261/2018

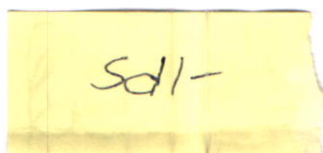
The Applicant/Financial Creditor sanctioned credit facilities aggregating to USD 40 million to the Corporate Debtor vide Banking Facility Letter (BFL) dated 3.8.2011, the facilities were thereafter revised/modified from time to time vide BFL dated 25.11.2013, the applicant renewed the working capital limits of ₹200 crores and sanctioned additional short term loan of ₹125 crores. Vide another BFL dated 1.9.2014, the above mentioned credit facilities were renewed at reduced level of ₹112.50crores comprising short term loan of ₹62.50crores and other working capital facilities of INR 50 crores however, the Corporate Debtor defaulted in repayment of the last two short term loan instalments of ₹31.25 crores along with accrued interest due on 30.9.2014 and 5.12.2014. Owing to the default committed by the Corporate Debtor, the short term loans were restructured to be paid in instalments, but the Corporate Debtor again defaulted in complying with the terms and conditions specified in the BFL dated 23.3.2015. In view of the default, recall notice dated 20.6.2017 declaring the amounts due from the Corporate Debtor and calling upon the Corporate Debtor to forthwith make payments of the said amounts

was issued by the applicant. As on the date of commencement of Insolvency Resolution process, i.e. on 18.7.2017 the total amount due from the Corporate Debtor to the applicant was ₹145,72,84,604.30. These facilities mentioned above was secured by Share Pledge Agreement dated 26.9.2014 executed by the Corporate Debtor in favour of the applicant for pledge of 55 lakh equity shares of Orissa Sponge Iron and Steel Ltd (OSIL) held by the Corporate Debtor. The applicant further submits that despite a notice was issued on 20.6.2017 for invoking the pledge against this Corporate Debtor, for no payment being made by the Corporate Debtor, the applicant invoked the pledge over 55 lakh equity shares of OSIL provided as security on 22.6.2017 where upon the Corporate Debtor challenged invocation of the pledge by the applicant before the Hon'ble Delhi High Court but that was rejected on 29.6.2017. Then the applicant obtained an independent valuation opinion dated 10.7.2017 for fair valuation of the equity shares which states that owing to the prevailing status of OSIL for example, suspension of trading of shares since 25.2.2016, non-execution of mining lease, suspension of production by OSIL since 2012, default in repayment of dues by OSIL to its lenders with SARFAESI action having been initiated by the lenders, the fair valuation of the equity shares cannot be ascertained. On appointment of Interim Resolution Professional as Resolution Professional on 23.8.2017, the applicant filed claim application, which was acknowledged by the Resolution Professional and the full amount of the claim stated in the claim form was accepted subject to rider that the Resolution Professional may contest the invocation of pledge and the appropriation of equity shares as reflected in the list of creditors circulated by the Resolution Professional and the Information Memorandum captured the full claim amount of the applicant. In the Information memorandum circulated, as to this claim amount is concerned, it has been stated that the applicant has appropriated an amount of ₹ 5.5 crores by invoking pledge of equity shares of 55 lakh of OSIL held by the Corporate Debtor which has been contested by Interim Resolution Professional. It has been said that the claim presented by the applicant is mentioned subject to the outcome of the steps initiated by the Resolution Professional to contest the invocation of pledge and appropriation of the proceeds without taking into account the order dated 29.6.2017 passed by the Hon'ble High Court of Delhi. Thereafter, suddenly on 21.2.2018, i.e. 8 days prior to circulation of the final resolution, for the approval by the Committee of Creditors, unilaterally and without any notice to the applicant, reduced its claim amount from ₹145,72,84,604.30 to ₹58,27,84,604 stating that OSIL equity shares are @ ₹169 each, but no information has been provided that the valuation of OSIL shares is @ ₹169 each.

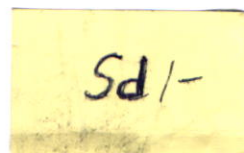
The Applicant submits that the Resolution Professional without circulating the correct and updated list of creditors has also included "voting on the Resolution Plan" as one of the agenda items.

On hearing the submissions of the applicant herein, it appears that this claim is admittedly a claim falling under Section 3 subsection 6 of the Code for it is a loan given on pledging the shares, since it has not been ascertained the valuation of the shares for the reasons already mentioned above, this claim amount is shown as ₹145,72,84,604.30. After having appropriated an amount of ₹5.5 crores by invoking shares, the Resolution Professional has to take the claim into consideration, if at all material on record is not enough to take a call, the Resolution Professional has either to place it before COC or to bring it to the notice of this Bench but he is not supposed to unilaterally and arbitrarily without giving any reasons reduce the claim of ₹145,72,84,604.30 to ₹58,27,84,604, for this reason, this Bench has not found any merit in Resolution Professional reducing the claim amount from ₹145,72,84,604.30 to ₹58,27,84,604.

For the reasons mentioned above, these applications were allowed.



RAVIKUMAR DURAISAMY
Member (Technical)



B.S.V. PRAKASH KUMAR
Member (Judicial)