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

MA 559/2018
MA 609/2018
MA 636/2018
MA 689/2018
in
CP No. 1202/IBC/NCLT/MB/MAH/2017

Under Section 60 (5) of the Insolvency and Bankruptcy Code, 2016

In the matter of

IDBI Bank Limited
….. Applicant in MA 559/2018

M/s. JM Financial Asset Reconstruction Company Limited
…..Applicant in MA 609/2018

Yes Bank Limited
…..Applicant in MA 636/2018

Axis Bank Limited
…..Applicant in MA 689/2018

v.

Mr. Mohan Lal Jain
….. Resolution Professional for KSS Petron

In

M/s. KSS Petron Private Limited
….. Corporate Debtor

Order Pronounced on : 12.10.2018

<u>Coram :</u>
Hon'ble M. K. Shrawat, Member (J)

<u>For the Applicant in MA 559/2018 :</u>
Mr. Karl Tamboli, Advocate a/w. Ms. Nisha Kabe, Advocate and Mr. Shantanu Gupta, Advocate i/b. M/s. Link Legal India Law Services – Advocates for the Applicant.

For the Applicant in MA 609/2018 :
Mr. Rohit Gupta, Advocate a/w. Mr. Nikhil Rajani, Advocate and Ms. Jyoti Sanap, Advocate i/b. M/s. V. Deshpande & Co – Advocate for the Applicant.

For the Applicant in MA 636/2018 :
Ms. Sukanya Bhaumik, Advocate – Advocate for the Applicant.

For the Applicant in MA 689/2018 :
Ms. Jyoti Singh, Advocate a/w. Ms. Smiti Verma, Advocate i/b. Phoenix Legal – Advocates for the Applicant.

For the Resolution Professional / Respondent :
Mr. Jitendra Kumar, Advocate – Advocate for the RP.

Per: M. K. Shrawat, Member (J)

COMMON ORDER

1. In this case, originally the Petition U/s. 10 of the Insolvency and Bankruptcy Code, 2016 (**the Code**) filed by the Corporate Applicant viz. 'M/s. KSS Petron Private Limited' (hereinafter as **Corporate Debtor**) was Admitted vide an order dated 01.08.2017 by this very Bench wherein 'Mr. Vineet K. Chaudhary (IBBI/IPA-002/IP-N00103/2017-18/10246)' was appointed as Interim Resolution Professional (**IRP**). Thereafter vide an Order of this Bench dated 07.03.2018 the IRP has been replaced by the Resolution Professional namely, Mr. Mohan Lal Jain (IBBI/IPA-002/IP-N00006/2016-17/10006).

2. On the commencement of the CIRP, the Learned IRP had made a public announcement about the commencement of the CIRP and for invitation of claims on 01.09.2017.

3. Pursuant to the said Advertisement the Applicants namely, IDBI Bank, JM Financial, Yes Bank and Axis Bank have filed their claims with the IRP / RP in Form – C alongwith proof of their claim as per the Regulation 8 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulation 2016 (hereinafter as **IBBI Rules**) on 17.01.2018, 24.01.2018, 29.05.2018 and 14.09.2017 respectively.

MA 559/2018 : -

4. It is noticed that the Applicant viz. IDBI Bank Limited (hereinafter as **IDBI Bank**) has filed its claim for an amount of ₹ 30,26,25,958/- in Form – C as a Financial Creditor with the RP of the Corporate Debtor.

5. Further that, the IDBI Bank has filed its claim for the reason that, the 'M/s. Petron Engineering Construction Limited' (hereinafter as **PECL**) had entered into a Working Capital Consortium Agreement with a consortium of Banks on 17.02.2009 for availing of Working Capital facilities aggregating ₹ 235,00,00,000/- which subsequently enhanced to ₹ 370,00,00,000/-.

6. It is further noticed that, for the said Loan Facilities the PECL had agreed to procure an irrevocable and unconditional guarantee from the Corporate Debtor and a Deed of Guarantee dated 19.09.2013 had been entered between the IDBI Bank, PECL and Corporate Debtor. The Copy of the same is annexed with the Application.

7. It is further noticed that, in the interregnum period the Corporate Debtor has been triggered with the Corporate Insolvency Resolution Process and the 'Moratorium' had come into effect w.e.f. 01.08.2017. Accordingly the IDBI Bank has filed its claim on 17.01.2018 alongwith the copy of Deed of Guarantee.

8. The RP vide an e-mail dated 18.04.2018 has advised to the Applicant that unless letter for invocation of guarantee, which had procured prior to commencement of the CIRP of the Corporate Debtor, is submitted to him, he will not admit the claim of the IDBI Bank.

9. The Learned Advocate has stated that being aggrieved by the aforesaid decision of the RP, the IDBI Bank has preferred this Application.

MA 609/2018 : -

10. This MA has been preferred by the 'M/s. JM Financial Asset Reconstruction Company Limited' (hereinafter as **JM ARC**) on the similar ground.

11. It is noticed that, the JM ARC is the assignee of the Loan by the L & T Infrastructure Finance Company Limited. The JM ARC has filed its claim amounting to ₹ 93,27,56,920/- on 24.01.2018.

12. It is further noticed that this claim was filed on the basis that the Corporate Debtor had provided a Corporate Guarantee to the one company namely 'M/s. Bhubaneshwar Expressways Private Limited' (hereinafter as **BEPL**). The Learned Advocate for the JM ARC has brought to the notice that the Corporate Debtor has pledged its Shares in the BEPL in favour of SBI Cap Trustee Company Limited including L & T Infra, as a Security Trustee for the Lenders. Since the Account of BEPL turned into NPA w.e.f. 30.06.2017 the L & T Infra has assigned its Debt to the JM ARC.

13. Further it has brought to the notice that, after the commencement of the CIRP over Corporate Debtor the JM ARC has filed its claim with the IRP on 24.01.2018 and the same has been acknowledged by the IRP on 25.01.2018.

14. The Learned Advocate for the JM ARC has also stated that on 16.05.2018 the RP has rejected its claim on the ground that the JM ARC has not invoked the Corporate Guarantee before the commencement of the CIRP over the Corporate Debtor.

15. It is informed that, being aggrieved of the aforesaid decision of the RP the JM ARC has filed this Application for due adjudication.

MA 636/2018 ; -

16. This Application has been preferred by the Yes Bank Limited (hereinafter as **Yes Bank**) on the similar grounds.

17. It is noticed that the Yes Bank has provided Loan Facilities to the company namely 'M/s. Petron Engineering Construction Limited' (hereinafter as **PECL**) and for the said Loan facilities the Corporate Guarantee was provided by the 'M/s. Petron Investments Private Limited' (hereinafter as **PIPL**). The Deed of Guarantee to that effect was entered on 23.09.2010.

18. Subsequently, vide an Order dated 15.02.2013 of the Hon'ble Bombay High Court the PIPL got amalgamated with the Corporate Guarantee. Since the PECL has defaulted in re-payment of Loan the account of the PECL turned into NPA.

19. Accordingly, the Yes Bank has invoked the Corporate Guarantee against the Corporate Debtor and requested for the payment of entire debt within 5 days of the notice. The said notice was received by the RP on 22.05.2018. On 28.05.2018 the RP has requested the Yes Bank to submit the claim with him as the Corporate Debtor is already under CIRP.

20. The Learned Advocate for the Yes Bank has stated that pursuant to the request by the RP the Yes Bank has filed its claim in Form – C with the RP on 29.05.2018. But on 30.05.2018 the RP has informed that, as the Yes Bank has invoked the Corporate Guarantee after the commencement of the CIRP the claim of the Yes Bank cannot be considered and therefore it is rejected.

21. It is further stated that, being aggrieved by the aforesaid decision of the RP the Yes Bank has preferred this Application.

MA 689/2018 : -

22. This Application has been preferred by the Axis Bank Limited (hereinafter as **Axis Bank**) on the similar grounds.

23. The Axis Bank has provided the Loan Facilities to the Companies namely 'M/s. Bhubaneshwar Expressways Private Limited' (hereinafter as **BEPL**) and 'M/s. Petron Engineering Construction Limited' (hereinafter as **PECL**) and for the said Loan Facilities the Corporate Debtor has provided the Corporate Guarantees. It is also noticed that the Axis Bank has provided Bank Guarantees on behalf of the Corporate Debtor in favour of third parties / customers of the Corporate Debtor.

24. It is noticed that on the basis of above Corporate Guarantees and Bank Guarantee the Axis Bank has filed a claim aggregating ₹ 376,56,46,799/- in Form – C with the RP.

25. The Learned Advocate for the Axis Bank has informed that the IRP has already admitted a part of its claim which arisen out of the invocation of the Corporate Guarantee of the BEPL which was invoked by the Axis Bank on 26.06.2017. Hence the Axis Bank is already a member of the Committee of Creditors (**CoC**).

26. In the meeting of the CoC held on 20.06.2018 the Axis Bank had come to know that remaining part of its claim has been rejected by the RP since the Axis Bank has not invoked the Corporate Guarantees / Bank Guarantees before commencement of the CIRP over Corporate Debtor.

27. The Learned Advocate has pleaded that, since the RP has rejected the part of claim this Application has been preferred by the Axis Bank.

Submissions by the Applicants : -

28. The Learned Advocate Mr. Rohit Gupta who appeared for the JM ARC has vehemently pleaded that the duty of the IRP / RP is only to receive the claim and the Learned RP has rejected the claims of the Applicants without any justification or reasoning.

29. The Learned Advocate has pleaded that, nowhere the Learned RP has disputed the fact that the Applicants are not Financial Creditors to the Corporate Debtor however, it is informed from the side of the RP that since the Invocation of guarantee did not happened before the commencement of the CIRP the claim cannot be accepted.

30. The Learned Advocate has placed a reliance on the definition of 'Claim' as defined U/s. 3 (6) of the Code which is worth to be reproduced as under :

> *"(6) "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;*

31. In light of definition it is pleaded that the Learned RP should only verify the fact that whether there is right to payment or not? Consequently, if the answer to this question is in positive then the Learned RP shall not reject the claim.

32. It is further submitted that the liability of Guarantor is co-extensive with the Principal Borrower and as the Corporate Debtor is a guarantor he is jointly and severally liable for the liabilities of the Principal Borrower. As the Accounts of the Principal Borrowe i.e. PECL and BEPL had turned into NPA and there is default in repayment of Loan amounts on their part therefore the Corporate Guarantee can be invoked rightly against the Corporate Debtor and therefore there is no question arises where right to payment of the Applicants had not arrived.

33. Mr. Gupta has also placed a reliance on the decision of the Hon'ble National Company Law Appellate Tribunal in the case of *Andhra Bank v. M/s. F. M. Hammerle Textile Ltd. [Company Appeal (AT) (Insolvency) No. 61 of 2018]* dated 13.07.2018. The relevant portion is reproduced as under :

> *"…….*
>
> *6. The 'Corporate Insolvency Resolution Process' thereby is not a recovery proceeding and cannot be termed to be litigation between two adversaries. No dispute is settled in the process but steps for 'Corporate Insolvency Resolution Process' are taken not only for maximizing of value of assets of such person and to promote the entrepreneurship, availability of credit and balance the interests of all the stakeholders. If a 'Resolution Applicant' is successful on approval of 'Resolution Plan' under Section 31, the 'Corporate Debtor' instead of going through the rigor of liquidation process,*

continues, though there may be change of management and ownership; the right of the Creditors does not extinguish, if claim is not taken care in the 'Resolution Plan'.

……..

9. It is not necessary that all the claims as are submitted by the Creditor should be a claim matured on the date of initiation of Resolution Process/admission, even in respect of debt, which is due in future on its maturity, the 'Financial Creditor' or 'Operational Creditor' or 'Secured Creditor' or 'Unsecured Creditor' can file such claim. Therefore, the definition of 'Claim' as defined under Section 3 (6) is to be read along with Section 13 read with Section 15 of the 'I&B Code'.

……..

11. For example, if there is a default, a 'Financial Creditor' or 'Operational Creditor' may file application under Sections 7 or 9 for initiation of 'Corporate Insolvency Resolution Process'. Once it is initiated, order of 'Moratorium' is passed and the advertisement is issued all claimants whether his claim is matured or not are supposed to file claim before the 'Resolution Professional.' The 'Resolution Professional' cannot reject one or other claim on the ground that only the person whose claim has been matured can be looked into and other claim not matured cannot be entertained."

34. In light of above submissions the Learned Advocate has vehemently prayed that the Learned RP may be directed to accept the claims of the Applicants. All other Learned Advocates for other Applicants have obtained the arguments of the Mr. Gupta and reiterated the same.

Submissions by the RP : -

35. The Learned Advocate for the RP reiterated the submission that since the Corporate Guarantees / Bank Guarantees are not invoked and in one case it was invoked after the commencement of the CIRP the claims have been rejected.

36. It is further pleaded that the CIRP process is at the verge of completion and this stage addition of new members into CoC will hamper the resolution process.

37. In light of above submissions the Learned Advocate has pleaded that all the Applications may be dismissed and no relief shall be granted to the Applicants.

Findings : -

38. The Bench has perused the pleadings on record and the submissions made by both sides.

39. It is noticed that the Learned RP has **never** said that the Applicants are not 'Financial Creditors' of the Corporate Debtor however, the claims cannot be entertained because they are not matured.

40. It is further noticed that, beside this ground the Learned RP has not taken any ground for the rejection of claims submitted by the Applicants herein.

41. The Bench has also perused the definition of the claim as defined U/s. 3 (6) of the Code and accordingly, it can be concluded that the Creditor can file the claim as soon as right to payment accrues.

42. Further that, the Hon'ble NCLAT has also made it clear that the RP shall accept all the claims and a distinction cannot be made on the ground of matured and un-matured claim.

43. Hence, in light of the facts of the Applications and respectfully following the decision cited *supra* of the Hon'ble NCLAT this Bench is of the view that the Application under adjudication deserves to be allowed. However the RP shall prepare chart of each Applicant describing the particulars of the Bank Guarantees; whether invoked and if invoked how much Guaranteed amount stood liquidated.

44. Accordingly, this Bench hereby orders that the Learned RP shall accept the claim submitted by the Applicants herein i.e. IDBI Bank, JM ARC, Yes Bank and Axis Bank as a Financial Creditor. The IDBI Bank, JM ARC and Yes Bank shall be members of the CoC hereinafter. The voting percentage of these Financial Creditors shall be based upon their Debt / claimed amount.

45. All the Applications are disposed-of as **Allowed.** To be consigned to Records.

SD/-

Dated : 12.10.2018

M. K. SHRAWAT
MEMBER (JUDICIAL)

Avinash