NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Comp. App. (AT) (Ins) No. 1609 of 2024

(Arising out of the Order dated 31.05.2024 passed by the National Company Law Tribunal, New Delhi Bench (Court-II), in Company Petition No. (IB)-446(PB)/2021.)

IN THE MATTER OF:

Shantanu Jagdish Prakash
R/O F-5/2, DLF City Phase 1, Gurgaon, Haryana,
Presently In New Delhi **…Appellant**

Versus

1. **State Bank of India**
   SBI House, 3rd Floor, 1211, Padma Tower I,
   5, Rajendra Place, New Delhi-110008 **…Respondent No. 1**

2. **Mr. Kanti Mohan Rastogi**
   Resolution Professional,
   Registration No. IBBI/IPA-002/IPN00097/
   2017-18/10240
   email: Kanti.rustagi@patanjaliassociates.com
   F-14, First Floor, Kailash Colony,
   New Delhi, 110048 **…Respondent No. 2**

Present

For Appellants: **Mr. Sunil Fernandes, Sr. Advocate along with Ms. Rajshree Chaudhary, Mr. Abhinav Kumar & Ms. Diksha Dadu, Advocates.**

For Respondents: **Mr. Akhil Anand, Ms. Vishrutyi Sahni & Ms. Muskaan Gupta, for R-1.**

J U D G E M E N T

(23.01.2025)

NARESH SALECHA, MEMBER (TECHNICAL)

1. The present appeal has been filed by the Appellant i.e., Shantanu Jagdish Prakash under Section 61 of the Insolvency and Bankruptcy Code, 2016 ('**Code**') against the Impugned Order 31.05.2024 passed by the National Company Law Tribunal, New Delhi Bench (Court-II) ('**Adjudicating Authority**') in Company Petition No. (IB)-446(PB)/2021.

2. State Bank of India is the Respondent No. 1 herein.

Mr. Kanti Mohan Rastogi is the Resolution Professional of the Corporate Debtor and Respondent No. 2 herein.

3. The Appellant submitted that the Impugned Order has led to a gross miscarriage of justice, as it failed to recognize that the Petition filed by the Respondent No. 1 under Section 95 of the Code was barred by limitation. Furthermore, there was no privity of contract between the Appellant and State Bank of India ('**SBI**'), since the Personal Guarantee dated 03.06.2015 was executed solely between the Appellant and SBICAP. Additionally, the Appellant asserted that the Impugned Order disregarded the critical fact that if the auction of the shares of The Learning.com had been conducted in a fair, transparent, and unbiased manner, the principal borrower, Educomp Solution Limited ('**ESL**') being the major shareholder of Educomp Asia would have generated substantial revenues. This revenue could have satisfied the claims of all lenders including

Respondent No. 1 /SBI, thereby rendering the proceedings before the Adjudicating Authority unnecessary.

4. The Appellant submitted that ESL was incorporated in 1994 as the flagship company of the Educomp Group within the emerging Education Technology sector. The Appellant, an ex-director and promoter of ESL, highlights that ESL aimed to establish a digital network for modern education across over 25,000 schools in India. The Appellant further stated that ESL availed various credit facilities from a consortium of banks, including Respondent No. 1 /SBI, to support its business operations. However, due to an economic slowdown in 2013, ESL faced significant financial difficulties, leading to its accounts being declared as Non-Performing Assets (NPA) on 31.03.2013. Consequently, ESL was compelled to seek restructuring from the consortium of banks in accordance with the Reserve Bank of India's guidelines on Corporate Debt Restructuring ('**CDR**').

5. The Appellant submitted that following the financial difficulties faced by ESL, the Corporate Debtor underwent an extensive Techno-Economic Viability ('**TEV**') Study, which was a prerequisite for admission into the CDR process. This TEV Study was conducted by the one consultant, Matt McDonald who stated that the business was viable. The Appellant stated that Master Restructuring Agreement ('**MRA**') was executed between the CDR lenders and ESL, with a cut-off date of 01.04.2013.

6. The Appellant emphasized that the execution of personal guarantees was made a condition precedent to signing the MRA, leaving the Appellant with no

alternative but to comply and execute these guarantees. It is the case of the Appellant that the terms and conditions of these personal guarantees were imposed by the CDR lenders, over which the Appellant had no control and under duress, the Appellant provided personal guarantees in favor of SBICAP Trustee Company Limited whenever the financial facilities under the MRA were revised, with each new guarantee superseding the previous one. The final personal guarantee was executed on 03.06.2015. The Appellant further argued that the Appellant was coerced into pledging his shareholding in ESL as additional security. The Appellant highlighted that the personal guarantees and share pledge were not necessary for the CDR lenders to extend loans, as sufficient security had already been provided against these facilities, nonetheless, the CDR lenders, including Respondent No. 1 /SBI, insisted on obtaining the Appellant's personal guarantee and share pledge as further security measures.

7. The Appellant submitted that, according to the Master Restructuring Agreement (MRA), the consortium members were obligated to extend a Capex LC limit of Rs. 108,49,00,000/- to ESL which was not honoured by the Lenders leading to further financial crises to ESL. It is brought to our notice that the relevant clause, Clause 2.15.1 of the MRA, which reads as under:

> *"2.15.1. the Parties agree and understand that the Borrower has changed its business model from 1 April, 2013 ('New Business Model'). Pursuant to the New Business Model, the borrower is selling its Smart Classes Products through third party i.e., Edu Smart Services Private Limited ("Outright*

Sales"). Pursuant to the New Business Mode, the Borrower would recognize the sale and expenses towards hardware in the same year for the contracts entered on Outright Sale basis, whereas for the contracts entered on Build Own Operate (BOO) basis, the Borrower would capitalize the assets created and book the revenue over a period of the contract (typically 3 years). The borrower further agreed that gradually it shall increase the proportion of the Outright Sales in future and bring down the sales done on BOO basis. Similarly, for JCT business, the Borrower would incur Capex for the contracts entered on BOO basis and for Outright Sales mode; the expense would be booked in profit & loss statement. For the contracts entered on BOO basis, the Borrower would require Capex LCs with a usance period of 3 (three) years for purchase of hardware and the same would be capitalized accordingly. "

(Emphasis Supplied)

8. The Appellant submitted that the Capex LC was essential for ESL to address its stressed financial situation and embark on a path of recovery and expansion under the New Business Model outlined in the MRA. The Appellant provided the Personal Guarantee under the belief that this Capex LC limit would indeed be extended to ESL. The Appellant castigated the CDR lenders, including Respondent No. 1 /SBI who failed to fulfill their part of obligations under the MRA, as no funds were released to ESL for the Capex LC limit. It is the case of the Appellant that the failure of lenders prevented the effective implementation

of the New Business Model designed to revive ESL and facilitate its recovery and expansion. The Appellant argued that actions of the CDR lenders in willfully violating the MRA's terms significantly exacerbated ESL's financial distress, hindering its ability to recover. The Appellant submitted that ESL underwent a Techno-Economic Viability Study (TEV Study) conducted by Price water house Coopers Pvt Ltd ('**PwC**') and a forensic audit by Grant Thornton, both of which found no adverse findings against ESL.

9. The Appellant submitted that both ESL and the Appellant have complied with all terms and conditions set forth in the MRA, and the CDR lenders have never raised any objections regarding this compliance. Consequently, the Appellant contends that the CDR lenders are entirely culpable for ESL's default. Furthermore, since the Personal Guarantee issued by the Appellant was based on the assumption of compliance with the MRA by the consortium banks, which was intentionally not fulfilled by lenders including Respondent No. 1 /SBI, the Appellant argues that this Personal Guarantee is rendered vitiated.

10. The Appellant submitted that in an effort to address the challenges associated with the CDR package, ESL submitted a re-work plan for a second restructuring during the joint lenders' meeting on 29.07.2015. Although the second restructuring was discussed in several meetings over the following two years, no decisions were made by the CDR lenders. The Appellant highlighted that during this two-year period, the CDR lenders continued to violate the terms of the MRA, worsening the ESL's financial situation.

11. The Appellant stated that ESL was admitted into Corporate Insolvency Resolution Process (‘**CIRP**’) by an order dated 30.05.2017, issued by the Adjudicating Authority in CP(IB) No. 101(PB)/2017 following which, Respondent No. 1 /SBI was included in the CoC for ESL after the entirety of SBI's claim was accepted.

12. The Appellant submitted that Educomp Asia Pacific Pte Limited (‘**EAPPL**’), ESL's step-down subsidiary, was placed into liquidation by an order of the High Court of Singapore. The Appellant explained that ESL, through EAPPL, acquired approximately 55% equity in the U.S.-based e-learning solutions company, 'The Learning Internet Inc' or 'Learning.com', after securing a loan facility of USD 20 million from State Bank of India, Singapore ('SBI Singapore'). This loan was further secured by a Corporate Guarantee issued by ESL in favor of SBI Singapore. Following ESL's admission into the CIRP, SBI Singapore became a member of the CoC.

13. The Appellant stated that, notwithstanding the aforementioned circumstances, the Respondent No. 1 /SBI filed O.A. No. 152/2019 before the Debt Recovery Tribunal - III, Delhi, against the Appellant under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 seeking recovery of a sum Rs. 404,74,85,005.90, which is based on the Personal Guarantee executed by the Appellant on June 3, 2015.

14. The Appellant submitted that in the aforementioned O.A. filed before the Debt Recovery Tribunal - III, Delhi, the Appellant has made a counterclaims of

Rs. 1,540 Crores against the Respondent No. 1 /SBI and other CDR lenders based on the direct commercial losses incurred by the guarantors of ESL, including the Appellant, due to the violation of the MRA by the CDR lenders including Respondent No. 1 /SBI. The Appellant seeks a set-off or equitable set-off against the sum of Rs. 404,74,85,005.90 claimed by SBI in the proceeding before DRT.

15. The Appellant submitted that the CoC of ESL, which includes the Respondent No. 1 /SBI, has approved the resolution plan submitted by Ebix Singapore Pte Ltd. The claims filed by SBI and SBI Singapore are incorporated within this Resolution Plan and by an order dated 09.10.2023, of the Adjudicating Authority in CP (IB) No. 101 of 2017 has approved the resolution plan submitted by Ebix Singapore Pte Ltd., during the CIRP of ESL, and this plan is currently pending implementation.

16. The Appellant submitted that the Respondent No. 1 /SBI, despite lacking locus standi, filed an application under Section 95 of the Code, as CP No. IB/446/(ND)/2021, based on the Personal Guarantee executed on 03.06.2015, in favor of SBICAP. The Appellant contended that this application is hopelessly barred by limitation, as ESL's account was declared a Non-Performing Asset (**NPA**) on 31.03.2013, implying that the limitation period expired on 30.03.016. The Appellant submitted that Respondent No. 1 /SBI has relied on a Revival Letter dated 30.11.2016; however, even if this letter is considered, it cannot serve as a valid basis for asserting that the application was filed within the limitation period. The Appellant submitted that the limitation period even counting from

the Revival Letter dated 30.11.2016, concluded on 30.11.2019. Following this, a Demand Notice under the Code was issued on 05.11.2020, and the application under Section 95 of the Code was filed on 01.04.2021 by the Respondent No. 1 / SBI and thus both the Demand Notice and the application under Section 95 of the Code are time-barred.

17. The Appellant submitted that the Respondent No. 1 /SBI has failed to properly invoke the Personal Guarantee, which is in any case is an afterthought, as the purported letter of demand dated 22.06.2018, issued under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ('**SARFAESI Act**'), amounted to an invocation of the Personal Guarantee. The Appellant asserts that SBI incorrectly claims that the date of default was August 21, 2018, which cannot be valid as it falls after the declaration of the account as a NPA on 31.03.2013.

18. The Appellant submitted that the Respondent No. 1 /SBI is not a signatory to the Personal Guarantee dated 03.06.2015, and therefore, could not have invoked this guarantee against the Appellant. Furthermore, the invocation of the Personal Guarantee was executed in blatant disregard of its express terms, as Clause 9 of the guarantee explicitly prohibits lenders from enforcing it severally. The Appellant stated that even Clause 17 of the Personal Guarantee has also been overlooked, as it requires the issuance of a certificate by the Security Trustee or lenders detailing the amount due from the guarantors, which Respondent No. 1 /SBI failed to provide.

19. The Appellant stated that SBI Singapore, in a manner that lacks transparency, sold shares of 'Learning.com' pledged to it by EAPPL at a significantly undervalued price at USD 7.1 million, intentionally obscuring the sale from creditors and other stakeholders of ESL. The shares were valued at USD 42.049 million in 2014 by the global audit and consulting firm M/s Mazars. It is the case of the Appellant that a fair and authentic valuation of 'Learning.com' would have placed its worth in the range of USD 400 million, which means that ESL's 55% stake would have been sufficient to settle the entire debt owed to the CoC.

20. The Appellant submits that on 21.09.2021, the Appellant sent an email to the Respondent regarding the shares of Learning.com, requesting information about the auction process for these shares, including an independent valuation report, a copy of the share purchase agreement with the buyers, approvals obtained for the sale, and the latest financial statements for the past three years. Additionally, the Appellant was compelled to send a legal notice to the CoC of ESL and the Resolution Professional, urging them to investigate the sale of this asset and disclose all relevant details to the entire CoC. The notice also called for appropriate legal actions, including approaching the Adjudicating Authority to reverse the transactions undertaken by SBI in India and Singapore, citing the illegal, arbitrary, and non-transparent nature of these actions, however, SBI and SBI Singapore failed to provide any of the requested information concerning the auction of Learning.com shares.

21. The Appellant submitted that the Resolution Professional has erroneously relied on Clause 9 of the Personal Guarantee to assert that this clause allows lenders to enforce the guarantee jointly and severally against the Appellant as the Personal Guarantor. The Appellant contends that the RP has completely misconstrued Clause 9, which explicitly refers to the two guarantors, not the lenders. This clause permits enforcement of the guarantee either against both guarantors or against one guarantor individually, thereby indicating that the enforcement cannot be applied to the Appellant alone without considering the other guarantor. The said Clause 9 does not permit the lenders to severally enforce the Personal Guarantee.

22. The Appellant stated that Clause 17 of the Personal Guarantee, mandates the issuance of a certificate by the Security Trustee, to be annexed with any application filed under Section 95 of the Code. However, the application submitted by Respondent No. 1 /SBI under Section 95 of the Code does not include such a certificate from the Security Trustee or the lenders, nor has the Security Trustee invoked the Personal Guarantee therefore action of Respondent No. 1/SBI is illegal.

23. The Appellant stated that a careful examination of the recitals and Clause 29 of the Personal Guarantee reveals that the rights to enforce the personal guarantee have been ceded to the Security Trustee. Specifically, Recital F states that "In order to create a joint guarantee for the Loans, the Security Trustee has called upon the Guarantors to execute, and the Guarantors have executed, this

Guarantee in favor of the Security Trustee for the benefit of all Lenders." Additionally, Clause 29 clarifies that "The Guarantors agree and declare that the rights and powers conferred on the Security Trustee/Lenders by these presents may be exercised by the Security Trustee acting for the benefit and on behalf of all or any of the Lenders." The Appellant submitted that enforcement actions must be taken by the Security Trustee rather than by individual lenders.

24. The Appellant submitted that he presented objections to the petition filed under Section 95 of the Code and the report submitted by the Resolution Professional under Section 99 of the Code. Among other grounds, the Appellant categorically stated that:

(a) there was no privity of contract between SBI and the Appellant as Guarantor, thus Respondent No. 1 /SBI could not invoke a guarantee executed by the Appellant and the Security Trustee, SBICAP;

(b) the purported Personal Guarantee, upon which the application was based, is void ab initio and non-est as it contravenes Section 28 of the Indian Contract Act, 1872;

(c) the demand notice issued by Respondent No. 1 /SBI on November 5, 2020, and the subsequent application under Section 95 of the code were both time-barred, having been initiated after the expiration of three years from the date when the cause of action arose; and

(d) the application was premature as Respondent No. 1 /SBI's claim against the Appellant had not yet crystallized.

(e) Additionally, during the liquidation process of EAPPL, shares of Learning.com were sold on 03.09.2021, at a grossly undervalued price in a deliberate attempt to conceal the sale from creditors and other stakeholders of ESL, which owned nearly 55% of Learning.com. There was no satisfactory explanation provided by Respondent No. 1 /SBI or SBI Singapore regarding the sale of this asset at such a low price.

25. The Appellant submitted that, by way of I.A. No. 187/ND/2022 in CP (IB) No. 101 (PB)/2017, the Appellant sought directions from the Adjudicating Authority to hold SBI and SBI Singapore liable for damages or compensation to ESL and/or its lenders for the surplus or profit that would have benefited the lenders and other stakeholders of ESL. The Appellant argued that based on this IA, in an order dated 25.08.2023, the Adjudicating Authority found merit in the Appellant's submissions and directed for re-evaluation of the shares of Learning.com.

26. The Appellant submitted that the Adjudicating Authority further directed that if the re-evaluated valuation of the shares exceeds USD 7.1 million, which is the amount for which the shares were sold on 03.09.2021, then the claim of SBI Singapore against ESL would be reduced accordingly. The Appellant contends that had the shares of Learning.com been sold at their correct valuation, ESL's entire debt would have been settled, leaving nothing to be recovered from the Appellant as Guarantor.

27. Concluding his arguments, the Appellant urged this Appellate Tribunal to dismiss the Impugned Order and allow his appeal.

28. Per contra, the Respondent denied all the averments made by the Appellant in the present appeal.

29. The Respondent No.1 submitted that the Corporate Debtor availed a range of credit facilities, which included Rupee Term Loans totalling Rs. 636.82 crores from existing term loan lenders, and working capital facilities, both fund-based and non-fund-based, amounting to Rs. 543.80 crores from working capital lenders. Additionally, the Corporate Debtor secured external commercial borrowings ('**ECB**') of Rs. 434 Crores from ECB lenders. The Corporate Debtor also acquired equipment through financial leases and obtained financial facilities backed by pledged promoter's shares. The Respondent No.1 stated that to secure these credit facilities, the Corporate Debtor created charges over its movable assets and mortgaged its immovable properties in favor of the lenders. Despite, these measures, the Corporate Debtor encountered significant adverse financial conditions, leading to its classification as a NPA on 31.03.2013.

30. The Respondent No.1 submitted that the Corporate Debtor acknowledged its debt under Section 18 of the Limitation Act, 1963, by executing a Revival Letter dated 30.11.2016. However, the Corporate Debtor subsequently defaulted on its obligations to Respondent No. 1, with the last payment of ₹1,56,842 made on 02.02.2017. The CIRP for the Corporate Debtor commenced on 30.05.2017, during which Respondent No. 1 filed and had its claim admitted. Nonetheless, the

approved Resolution Plan under the CIRP allocated only Rs. 40.77 crores against Respondent No. 1's total claim of Rs. 532.99 crores.

31. The Respondent No.1 submitted that on 22.06.2018, Respondent No. 1 issued a demand notice under Section 13(2) of the SARFAESI Act to the Appellant, invoking the Personal Guarantee and requesting repayment of the outstanding amount. The Appellant failed to discharge the outstanding dues within the stipulated 60 days, constituting a default. Subsequently, on 05.11.2020, Respondent No. 1 issued another demand notice under Rule 7(1) of the Insolvency and Bankruptcy Rules, 2019, demanding payment of Rs. 532,99,88,089.76 as of 28.02.2021. In response, the Appellant admitted the execution of the Personal Guarantee and its failure to pay the debt due in its reply to Respondent No. 1's demand notice dated 18.11.2020. Despite this admission, neither the Corporate Debtor nor the Appellant has cleared the outstanding dues or accrued interest. As a result, Respondent No. 1 filed the Company Petition on 01.04.2021.

32. The Respondent No.1 submitted that the Resolution Professional, who was appointed on 17.11.2021, submitted a report dated 28.01.2022, under Section 99 of the Code to the Adjudicating Authority recommending the admission of the Company Petition against the Appellant. Furthermore, in the Reply/Objections to the RP's report filed by the Appellant on 08.04.2022, the Appellant admitted to the execution of the Personal Guarantee and acknowledged its failure to pay the debt due.

33. The Respondent No.1 submitted that allegation of the Appellant that there exists no privity of contract between Respondent No. 1 and the Appellant, which precludes Respondent No. 1 from invoking the Guarantee executed by the Appellant and the security trustee, SBICAP Trustee Company Limited ("**SBICAP**") is far from truth. The entries in Form B (Notice of Demand) and Form C (Application) are specifically related to the filing of a Section 95 petition by a creditor. Importantly, there is no provision in the Code that prohibits a lender from filing a petition, even in cases where a security trustee has been appointed to hold the security interest. Therefore, the assertion that Respondent No. 1 cannot proceed based on the lack of direct contractual relationship with the Appellant is unfounded.

34. The Respondent No.1 submitted that the terms of the MRA and the Security Trustee Agreement (STA) clearly indicate that the security trustees are holding 'Security' not for their own benefit, but on behalf of and for the benefit of the Claimant/Lender. Consequently, the Lender has the right to enforce the security documents even if they are not a party to the trusteeship agreement. Furthermore, it is well-established law that beneficiaries under a contract are entitled to enforce its covenants. This principle is supported by the case of ***M.C. Chacko v. State Bank of Travancore, Trivandrum***, *[(1969) 2 SCC 343]* at Paras 9-12, which affirms that a party can indeed enforce a contract made for its benefit. Therefore, the Lender's ability to act upon the security documents is valid and enforceable, irrespective of their direct involvement in the trusteeship agreement.

35. The Respondent No.1 submitted that the arguments of the Appellant about the demand notice dated 05.11.2020, and the present Company Petition being time-barred, as the Corporate Debtor was declared a NPA on 31.03.2013 are misplaced because it relates to loans that predate the MRA, which restructured these liabilities with the consent of all parties, culminating in the MRA dated 25.03.2014. Thus, the argument regarding the NPA from 2013 is irrelevant. Furthermore, the appellant acknowledged its liability through a Revival Letter dated 30.11.2016. Consequently, any limitation period for the Corporate Debtor commenced on that date and expired on 30.11.2019. Respondent No. 1 issued a Demand Notice on 22.06.2018, requiring payment within 60 days (i.e., by August 22, 2018). Therefore, for the present application against the appellant, the limitation period commenced on August 22, 2018, and expired on 23.08.2021. Since the application was filed on 31.03.2021, it is well within the limitation period following the Section 95 Demand Notice issued on 05.04.2020.

36. The Respondent No.1 submitted that it is settled law that when a guarantor becomes liable due to a valid demand made in a timely manner, the creditor retains the right to sue the guarantor within three years, even if the claim against the principal debtor subsequently becomes time-barred. This principle is established in the case of ***Syndicate Bank v. Channaveerappa Beleri & Ors.,*** [(*2006) 11 SCC 506*] at Paras 9-14. The respondent asserts that the timing of the demand and subsequent actions taken by the creditor are valid and enforceable

under the law, irrespective of any limitations that may apply to the principal debtor's obligations.

37. The Respondent No.1 submitted that the Adjudicating Authority correctly determined that since Respondent No.1/SBI issued the notice demanding payment of the entire loan amount within 60 days of service on 23.08. 2018, the limitation period for the claim commenced on that date. Consequently, the Company Petition was filed within the applicable limitation period. This interpretation aligns with established legal principles regarding the commencement of limitation periods in insolvency proceedings, reinforcing the validity of the petition and the timely actions taken by SBI.

38. The Respondent No.1 submitted that the appellant's contention that the Notice of Demand dated 22.06.2018, under Section 13(2) of the SARFAESI Act is not an invocation of the personal guarantee is unfounded. Respondent No. 1 issued the Notice specifically against the Appellant, clearly referencing the Personal Guarantee dated 03.06.2015. The Notice explicitly states, *"The said financial assistance is also secured by the personal guarantee of Sh. Shantanu Prakash & Sh. Jagdish Prakash & corporate guarantee of Edu Smart Services Pvt Limited for consortium advance."* This unequivocal mention demonstrates that the personal guarantee was indeed invoked, thereby validating the present petition.

39. The Respondent No.1 submitted that the Notice of Demand dated 22.06. 2018, while referencing Section 13(2) of the SARFAESI Act, explicitly called

upon the Appellant to discharge in full the borrower liabilities stated hereunder to the Bank within 60 days of this notice which clearly indicates that the Notice fulfils all conditions stipulated under the Personal Guarantee and constitutes a valid invocation. Furthermore, the Appellant did not raise this objection in its reply to the Demand Notice dated 05.11.2020, suggesting that this argument is an afterthought intended to evade the admission of the Application.

40. The Respondent No.1 submitted that the appellant's claim regarding SBI Singapore selling a 55% stake in Learning.com during EAPPL's liquidation at an undervalued price, leading to insufficient debt recovery is completely unfounded, baseless and illegal and with purpose to derail CIRP under section 95 of the code.

41. The Respondent No.1 submitted that the appellant's claim that the Personal Guarantee is vitiated due to a breach of the MRA by the CDR Lenders, specifically regarding the failure to extend the Capex LC limit of Rs. 108.49 Crores and the alleged non-implementation of a second restructuring, is without merit. The Respondent No.1 submitted that the issues pertain to the terms of the MRA, which govern the relationship between the CDR Lenders and the Corporate Debtor, and do not impact the enforceability of the Personal Guarantee, which remains valid until the underlying debt is fully discharged. Additionally, the Revival Letter executed by the appellant on 30.11.2016, further confirms their acknowledgment of the outstanding debt and reinforces their continuing liability under the Personal Guarantee, irrespective of any disputes regarding MRA performance. The Respondent No.1 submitted that appellant's argument fails to

provide any valid legal basis for vitiating the Personal Guarantee, especially considering that the default by the Corporate Debtor occurred after both the restructuring and the acknowledgment of debt by the Appellant.

42. Concluding, his arguments the Respondent No.1 defended the Impugned Order and requested this Appellate Tribunal to dismiss the appeal with exemplary costs.

Findings

43. We note that application under Section 95 of the Code filed by the Respondent No.1/SBI was admitted vide the Impugned Order dated 31.05.2024 and Personal Insolvency Resolution Process ('**PIRP**') has been initiated against the Appellant who is the guarantor of the of the Corporate Debtor ESL.

44. We have already noted the facts from the pleadings of the Appellant and the Respondent herein above and therefore shall not repeat. The Impugned Order has been challenged by the Appellant based on the following grounds :-

a) The application filed under Section 95 of the Code was barred by limitation.

b) There was no privity of contract between Applicant/ SBI and Appellant/ personal guarantor.

c) The Adjudicating Authority could not have passed the Impugned Order based on invocation of personal guarantee by 3rd party.

d) The Appellant has also challenged on the ground that the debt itself has not been crystalised.

e) The Impugned Order did not issue direction under Section 100 (2) of the Code regarding negotiations to be held in Appellant/ personal guarantor and the Creditor/ Respondent.

f) The Impugned Order ignored the fact regarding under valued sale of shares in learning.com held by of Corporate Debtor subsidiary EAPPL leading to groups under recovery for the principal borrower.

45. These points are interconnected and inter dependent and shall be dealt in conjoint manner in the following discussions :-

(a) <u>The application filed under Section 95 of the Code was barred by limitation.</u>

(i) As regards, the issue of limitation, it is the case of the Appellant that ESL was declared as NPA on 31.03.2013 and thus, limitation period should have ended on 30.03.2016. The Appellant considered that even based on the revival letter dated 30.04.2016, the limitation period could have been only up to 30.11.2019.

(ii) The Appellant argued that the demand notice was issued on 05.11.2020 and an application under Section 95 was filed by the Respondent No. 1 on 01.04.2021. Hence, both the demand notice and the Section 95 application were time barred.

(iii) In this connection, we note that although the account of the Corporate Debtor was declared as NPA on 31.03.2013, however, the loans were predating, the MRA was restructured on 25.03.2014 with the consent of all parties including the Appellant herein and therefore, the NPA date ceased to the relevant as such.

(iv) We further note that the Appellant acknowledged its liability through a revival letter dated 30.11.2016 and therefore the limitation would have expired on 30.11.2019.

(v) We further note that the Respondent No. 1 issued a demand notice on 22.06.2018 requesting for payment within 60 days i.e., by 22.08.2018 and therefore, for the purpose of calculating limitation period in the present case would have started on 22.08.2018 and would have ended on 21.08.2021. We note that the application was filed on 31.03.2021 much before the expiry of the limitation period.

(vi) Thus, we hold that both the demand notice as well as Section 95 application were filed within period the period of limitation.

(vii) The arguments of the Appellant on the issue of limitation stand rejected.

(b) <u>There was no privity of contract between Respondent No.1/ SBI and Appellant/ personal guarantor.</u>

(c) <u>The Adjudicating Authority could not have passed the Impugned Order based on invocation of personal guarantee by 3rd party</u>.

(i) As regard, the issue of privity of contract, it has been pleaded by the appellant that the personal guarantee was between the Appellant along with other guarantor with SBICAP Trustee Company Limited and the Respondent No. 1 was not signatory to personal guarantee as such the Respondent No. 1 could not have initiated Section 95 application. On this account, we note that concept of trusteeship is to act on behalf of the creditors or consortium of creditors.

(ii) Thus, such trusteeship deeds are generally signed between the trust on behalf of the lenders and the personal/ corporate guarantor of the principal borrower. However, by its inherent nature and intent, the lenders or the Financial Creditors are the true beneficiaries of such deed of guarantee.

(iii) We further note that Section 95 of the Code provides right to the creditors to file application to initiate PIRP.

(iv) It has been pleaded that security trustee is merely holding security in favour of the creditor or consortium of creditors and therefore either the trust or creditors may file application under Section 95 of the Code.

(v) The wording of Section 95(1) of the Code clearly stipulate that creditor may apply "either by himself or generally with other creditors". Therefore, the creditor i.e., Respondent No. 1 is within his right to initiate Section 95 application and does not prevent him based on alleged lack of privity of contract with the Appellant. It is settled law that a party can enforce the contract made for its benefit.

(vi) From the terms of the MRA and the STA, it is clear that the security trustees are holding 'Security' not for themselves, but on behalf of, and for the benefit of, the Claimant/Lender. The Lenders, can therefore, enforce the security documents even if they are not a party to the trusteeship agreement.

(vii) In this connection, we note Clause 'O' of MRA, which reads as under :-

> *"O. The Borrower has appointed SBICAP Trustee Company Limited as the Security Trustee in accordance with the terms of the security trustee agreement dated 25/03/2014 ("Security Trustee Agreement") for the purpose of holding the security interest for the benefit of the CDR Lenders (as defined in Article 1 of this Agreement) and Non CDR Lenders (as to give effect to Approved CDR Package)."*
>
> *(Emphasis Supplied)*

(viii) It is settled law that beneficiaries under the terms of a contract have the right to enforce the covenants thereof as held by the Hon'ble Supreme Court of India in case of ***M.C. Chacko v. tile State Bank of Travancore, Trivandrum,*** *[(1969) 2 SCC 343]*.

(ix) The MRA acknowledges the Lenders' right to recover their independent loans. Thus, by way of the MRA, the CDR Lenders had not waived their right to recover their respective Restructured Loans, the New Working Capital Facilities and the Corporate Loans.

(x) We note the following part of Agreement :-

> *"**WAIVER OF EXISTING EVENTS OF DEFAULTS***
>
> ***Subject to Section 7.3 (Consequences of Revocation**), each of the CDR Term Loan Lenders and the CDR Working Capital Lenders hereby waives any Existing Events of Default relating to such Existing Term Loans and the Existing Working Capital Facilities and any and all rights, remedies and powers that may have arisen in connection therewith. For avoidance of doubt, it is hereby clarified that the CDR Lender.; do not hereby waive their right to recover their respective Restructured Loans, the New Working Capital Facilities and the Corporate Loans in accordance with the terms of this Agreement. In the event any such CDR Lender had already committed any action against the Borrower and/or its guarantors, such action shall not*

abate, unless such action is brought to a close through consent terms or otherwise pursuant to Restructuring Documents."

(Emphasis Supplied)

(xi) This makes position very clear and give rights to the Lender/ Financial Creditor/ Respondent No. 1 herein to pursue its legal rights.

(xii) We have noted that Guarantors has confirmed the existence of the existing guarantee given to the Existing Term Loan Lenders and Working Capital Lenders through the following :-

1.3.1 The Guarantors hereby irrevocably acknowledge and confirm the existing guarantee given by the guarantors to the Existing Term Loan Lenders and the Existing Working Capital Lenders and the amount of the Existing Term Loan outstanding to each of the Existing Term Loan Lenders and the amount of the Existing Working Capital Facilities of the Existing Working Capital Lenders and agrees to and acknowledges the reconstitution of the Existing Term Loans due to the Existing Term Loan Lenders and conversion of irregular portion of the Existing Working Capital Facilities due to the Existing Working Capital Lenders pursuant to the Approved CDR Package and the other Restructuring Documents."

(Emphasis Supplied)

(xiii) Now, we will look into various provisions of Personal Guarantee deed, which stipulates the rights and obligations. The relevant clauses are :-

- As per Clause 1.3.4 of Terms of Guarantee, in case of default of the Borrower, the Guarantors without protest will pay on their behalf upon demands by the Security Trustee/Lenders. Clause 1.3.4 of terms of guarantee reads as under :-

  "1.3.4 In the event of any default on the part of the Borrower in payment/repayment and in reimbursement of any of the monies referred to above, or in the event of any default on the part of the Borrower to comply with or perform any of the terms, conditions and covenants contained in the Restructuring Documents, the Guarantors shall upon demand from the Security Trustee/Lenders, forthwith pay to the Security Trustee/Lenders without demur and protest all the amounts payable by the Borrower under the Restructuring Document."

- This Clause 1.3.4 makes amply clear that both Trustee as well the Lenders have full rights to ask guarantor to pay.

- Further in terms of Clause 1.3.6 of Terms of Guarantee, the guarantor shall also indemnify and keep the Security

Trustee/Lenders indemnified against all losses, damages, costs, claims and expenses whatsoever which the Security Trustee/Lenders may suffer, pay or incur by reason of, or in connection with any such default on the part of the Borrower, including the legal proceedings taken against the Borrower and/or the Guarantor for the recovery of monies referred to in Clause 1.3.3 and 1.3.4. The Clause 1.3.6 reads as under :-

> *"1.3.6 The guarantors shall also indemnify and keep the Security Trustee/Lenders, indemnified against all losses damages, costs, claims and expenses whatsoever which the Security Trustee/Lenders may suffer, pay or incur by reason of or in connection with may such default on the part of the Borrower including legal proceedings taken against the Borrower and/or the Guarantors for recovery of the monies referred to in Clause 3 and 4 above."*
>
> *(Emphasis Supplied)*

- Further in terms of Clause 1.3.8 of terms of guarantee the Security Trustee/Lenders have the liberty to exercise the power given to the Lenders, to enforce the payment of the Loans. Clause 1.3.8 of terms of guarantee reads as under :-

"1.3.8 The Security Trustee/Lenders shall have full liberty, without notice to the Guarantors and without in any way affecting this Guarantee, to exercise at any time and in any manner any power or powers reserved to the Lenders under the Restructuring Documents, to enforce or forbear to enforce payment of the Loans or any part thereof or interest or other monies due to the Lenders from the Borrower or any of the remedies or securities available to the Lenders, to enter into any composition or compound with or to grant time or any other indulgence or facility to the Borrower AND the Guarantors shall not be released by the exercise by the Security Trustee/ Lenders of its liberty in regard to the matters referred to above or by any act or omission on the part of the Security Trustee/the Lenders or by any other matter or thing whatsoever which under the law relating to sureties would but for this provision have the effect of so releasing the Guarantors and the Guarantors hereby waive in favour of the Security Trustee/the Lenders so far as may be necessary to give effect to any of the provisions of this Guarantee, all the surety ship and other rights which the Guarantors might otherwise be entitled to enforce."

(Emphasis Supplied)

(xiv) Clause 28 of terms of guarantee clarifies that the rights and powers of the Security Trustee/Lenders are deemed to be joint and severable. Clause 28 of terms of guarantee reads as under :-

" 28. The Guarantors agree and declare that the rights and powers conferred on the Security Trustee /Leaders by these presents to joint and several and shall be deemed always to be so and they may be exercised by the Security Trustee/Lenders accordingly."

(Emphasis Supplied)

(xv) In addition, as per Clause 30 of terms of guarantee the Lenders have the powers against the Guarantors notwithstanding any security given or being given to the Lenders may be void or defective. Clause 30 of terms of guarantee reads as under ;-

"30. The Guarantors agrees that the Lenders shall not be bound to enquire into the powers of the Borrower and the Lenders have powers against the Guarantors notwithstanding any security given or being given to the Lenders may be void or defective."

(Emphasis Supplied)

(xvi) Similarly, Clause 34 (d) stipulate that the liability of the Guarantor shall not be prejudiced or affected by way of any irregularity or enforceability of any person or security. Clause 34(d) of terms of guarantee reads as under :-

"34 (d) any irregularity with respect to or enforceability, or of any obligations of any other person or security, to the intent that the

Guarantor's obligations hereunder shall remain in full force and this Guarantee be construed accordingly as if there were no such Irregularity, unenforceability, Illegality, invalidity or frustration."

(Emphasis Supplied)

(xvii) We also note that according to Clause 45 of terms of guarantee the Security Trustee or the Lenders or the Monitoring Institution can initiate any actions against the Guarantors in any courts or tribunals. Clause 45 reads as under :-

"Clause 45. Any legal action or proceedings arising out of this Guarantee shall be brought in the courts or tribunals at Delhi In India and the parties hereto irrevocably submit themselves to the non- exclusive jurisdiction of such court or tribunal. The Security Trustee and/or the Monitoring Institution and/or the Lenders may, however, in their absolute discretion commence any legal action or proceedings arising out of this Guarantee In any other court, tribunal or other appropriate forum, and all the other parties to this Guarantee hereby consent to that Jurisdiction."

(Emphasis Supplied)

(xviii) We hold that the Adjudicating Authority has rightly held in para 14 of the Impugned Order that merely because the trustee acted on behalf of Respondent No. l/SBI, it cannot be said that the

beneficiary/creditor cannot enforce the Personal Guarantee executed by the Appellant. As can be seen from clause O of the MRA, SBICAP was appointed as Security Trustee in accordance with the terms of the Security Trustee Agreement dated 25.03.2014 for the purpose of holding the security interest for the benefit of the CDR lenders and non-CDR lenders. Thus, SBI had the locus to file the Company Petition.

(xix) Thus, on this point, we do not find any merit and the pleadings of the Appellant on this account stand rejected.

(d) <u>The Appellant has also challenged on the ground that the debt itself has not been crystalised.</u>

(i) On this issue pleaded by the Appellant, we note that Section 95 of the Code has been initiated demanding payment of Rs. 532,99,88,089.76 with the date of default specified as 21.08.2018.

(ii) It is the case of the Appellant that O.A. No. 152/2019 before the Debt Recovery Tribunal - III, Delhi was filed by the Respondent No. 1 is pending where the Appellant has also filed a counter claims of Rs. 1540 Crores against the Respondent No. 1 and further seeking set off/ equitable set off for the sum of Rs. 404,74,85,005.90/- and thus, the debt has not been crystallised.

(iii) We find that the personal guarantor signed the personal guarantee on 03.06.2015 and became guarantor on behalf of principal borrower. The borrower amount has been stipulated therein. We have already noted that there has been established the case of default of debt and subsequently CDR was sanctioned which also failed.

(iv) We further note from the particulars furnished in Section 95 application of the Respondent No. 1 (relevant portion has been reproduced in the Impugned Order) that details of the debts along with relied upon documents for debt has been furnished by the Respondent No. 1/ SBI.

(v) We, therefore, do not appreciate the arguments of the Appellant on this account based on argument that mere fact that the case is pending before the DRT and certain counter claims have been filed by the Appellant will not make debts payable by the Appellant as debts not have been crystalised.

(vi) Therefore, the contention of the Appellant on this ground stand rejected.

(e) <u>The Impugned Order did not issue directions under Section 100 (2) of the Code regarding negotiations to be held in Appellant/ personal guarantor and the Creditor/ Respondent</u>.

(i) The Section 100 (2) Code reads as under :-

> *"(2) Where the Adjudicating Authority admits an application under sub-section (1),it may, on the request of the resolution professional, issue instructions for the purpose of conducting negotiations between the debtor and creditors and for arriving at a repayment plan."*
>
> *(Emphasis Supplied)*

(ii) We note that Section 100 (2) Code is applicable if repayment plan is prepared by the debtor under Section 105 of the Code then opportunity should be offered to the debtor. The order of the Adjudicating Authority is only if the Resolution Professional makes an application for the same.

(iii) On this issue, we specifically put a query to the Appellant herein whether he is in position to repay the demanded money by the Respondent No. 1/ SBI and whether he can offer any repayment plan even at this stage. The Appellant could not give any concrete reply, as such we do not find any substance that debtor/ appellant has not been offered an opportunity to offer the repayment plan and has suffered on this account.

(f) The Impugned Order ignored the fact regarding under valued sale of shares of Corporate Debtor subsidiary in learning.com leading to gross under recovery for the principal borrower.

(i) This subject of sale of shares of Learning. com/ The Learning network.com has already been challenged by SBI Singapore in connected Appeal bearing Comp. App. (AT) (Ins.) No. 1351 of 2023 and is before us. We have examined this issue in great detail and judgement is being pronounced in the separate judgement in this regard allowing the appeal of SBI Singapore and setting aside Para 27(a) and 27 (b) of the Impugned Order dated 25.08.2023 passed by the Adjudicating Authority in IA. No. 187/ND/2022 in Company Petition No. (IB)-101/(PB)/2017.

(ii) As such, we do not find any merit on this ground in the present appeal. For purpose of brevity, we are not elaborating the detailed reasons once again here as we have heard both the cases together, pleaded by the Appellant through same counsel and order was reserved on same date and order is pronouncing on the same date in both the appeals.

46. We shall also deal some other points which have been raised by the Appellant. The Appellant contended that the notice of demand dated 22.06.2018 under Section 13(2) of the SARFAESI Act is not an invocation of personal guarantee and therefore present petition cannot be invoked in absence of proper invocation of property. On this point we note that the Respondent No. 1 has issued notice to the Appellant specifically mentioning the personal guarantee dated 03.06.2018 which clearly stipulated that "The said financial assistance is also

secured by the personal guarantee of Sh. Shantanu Prakash & Sh. Jagdish Prakash & corporate guarantee of Edu Smart Services Pvt limited for consortium advance." It has further brought to our notice that while notice was issued under Section 13(2) of the SARFAESI Act, which has also specifically called upon the Appellant to discharge in full the borrower liability stated therein within 60 days of the notice. Thus, the notice fulfils all the condition stipulated under personal guarantee and can be treated as valid invocation. On this issue, the Adjudicating Authority has also held that the demand notice issued by the Respondent No. 1 under Rule 7(1) of the I&B (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 as valid. Thus, we do not find any error in the Impugned Order on this account.

47. One of the issues raised by the Appellant was regarding breach of the MRA by the CDR Lenders which led to collapse of the Corporate Debtor, therefore, the Personal Guarantee of the Appellant stood vitiated. It is the case of the Appellant that the CDR lenders did not extend the Capex LC limit of Rs. 108.49 Crores. On this issue, it has been brought out that the issue of Capex LC limit and failure of the Corporate Debtor to implement CDR Plan was relating to MRA and between the CDR Lenders and the Corporate Debtor and do not give any right to the Appellant/ Personal Guarantor to wriggle out of the personal guarantee. We find merit of the contention of the Respondent No. 1.

48. In view of detailed examination of various issues brought out in the present appeal, we do not find any merit in the Appeal. Appeal stands rejected. No costs. I.A, if any, are closed.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

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