

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH, COURT-II**

**IA No. 1721 of 2023**

**IA No. 2140 of 2023 &  
IA No. 2127 of 2023**

**IN**

**CP (IB) No. 527/MB/C-II/2022**

*In the Application*

Under Section 60(5) of the Insolvency and Bankruptcy  
Code, 2016 (“code”) r/w Rule of the NCLT Rules,  
2016

**Axis Trustee Services Ltd.**

**...Applicant**

V/s

**Mr. Vijaykumar V. Iyer**

**...Respondent**

*In the matter of*

**Bank of India**

**...Financial Creditor**

Versus

**Future Retail Limited**

**...Corporate Debtor**

**Order Delivered on :08.09.2023**

*Coram:*

**Hon’ble Member (Technical)**

**Mr. Anil Raj Chellan**

**Hon’ble Member (Judicial)**

**Mr. Kuldeep Kumar Kareer**

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***Appearances:***

For the Applicants : Sr. Counsel, Mustafa Doctor a/w Mr. Sunil  
Tilokchandani, Ms. Suchitra Valjee, Mr. Rashid  
Boatwalla, Ms. Riya Kamdar, Mr. Juan D'souza  
i/b MKA & Co.

For Respondent : Ms. Meghna Rajadhyakshya a/w Mr. Rishabh  
Jaisani i/b Shardul Amarchand Mangaldas &  
Co.

**ORDER**

***Per: Anil Raj Chellan, Member Technical***

1. By way of this order, we proposed to dispose of three IAs i.e. IA.No.1721/2023, IA.No.2140/2023 and IA.No.2127/2023 filed by the common Applicant i.e. Axis Trustee Services Limited which involved common questions of facts and law. The applicant has challenged the rejection of the claims of the applicant amounting to Rs.45,11,00,000/-, Rs.301,25,70,000/-, Rs.124,41,80,000/- respectively as notified in the agenda of CoC meeting dated 06.12.2022 and has sought direction to the Respondent RP to admit the aforesaid claim as submitted in the Claim Form (Annexure 'B' Colly).

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2. The present application (IA No.1721 of 2023) is filed by Axis Trustee Services Limited, the debenture trustee in respect of 5000 Non-Convertible Debentures (NCDs) each having a face value of Rs.10,00,000/- aggregating to Rs. 500,00,00,000/- (Rs. Five Hundred Crores) issued by Bhavna Asset Operators Private Limited (BAOPL) seeking (a) to quash and set aside the rejection of claim of the Applicant and allow and admit the claim of the Applicant in its entirety i.e. Rs.45,11,00,000/- (Rs. Forty-Five Crore Eleven Lacs only) and (b) to pass an order of temporary injunction restraining the Respondents from finalizing any Resolution Plan or Liquidation without considering the claim of the Applicant.
  
3. The facts of the case as narrated in the application No. IA.No.1721/2023 are that the Corporate Debtor (CD) entered into a Master Lease Agreement dated 06.08.2015 (MLA) under which certain assets were given by BAOPL to the CD, on an operating lease basis, for the duration of the term upon the terms and conditions mentioned therein. As per the MLA, the CD was required to pay monthly lease rentals on each payment date, and in the event of termination of the MLA, the CD was to pay the entire lease rentals for the unexpired term of the MLA on a net present value basis. CD's obligation to pay the lease rentals under the MLA is absolute, unconditional and irrevocable regardless of the state, condition or use of the assets leased under MLA.

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4. The Applicant was the debenture trustee appointed in respect of 5000 NCDs issued by BAOPL vide debenture trust deed dated 16.09.2015 (DTD). Under the terms of the issue, the debentures were to be secured by a first ranking mortgage created by BAOPL over the mortgaged property of BAOPL. In the event of occurrence of any of the events referred therein as 'Event of Default' the debenture trustee may terminate any of the MLAs, step into the shoes of BAOPL under the relevant MLA, take possession of the assets leased to BAOPL to realize its dues and require the relevant lessee to make payment of the lease rentals and termination charges into the escrow account.
  
5. BAOPL, CD and the Applicant (debenture trustee) also entered into a Tripartite Agreement dated 06.08.2015 (TPA) wherein CD, severally and jointly, unconditionally and irrevocably undertook that notwithstanding anything to the contrary contained in the MLA and/or any other writing executed/ which might have been executed between BAOPL and CD, neither the BAOPL nor CD shall without prior written consent of the debenture trustee (acting on the instruction of the debenture holders) do anything which would result in any waiver, set off or reduction in respect of CD's obligations under the MLA or do anything to modify the MLA in any manner whatsoever. Neither BAOPL or CD shall be entitled to terminate the MLA or the escrow agreement or TPA without the prior written consent of the debenture trustee. If for any reason, the MLA is terminated prior to the expiry of the term, CD agreed and undertook to pay the lease rental and the termination charges (as applicable). In

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the event that, for any reason whatsoever (including without limitation due to any award, order or judgments passed by any arbitrator or court), CD does not deposit the moneys required to be deposited by the CD into the escrow account on termination of the MLA, both BAOPL and CD agreed and undertook that they would indemnify and keep indemnified the debenture trustee and the debenture holders from any damages, loss, costs incurred by the debenture trustee and/or the debenture holders as a consequence of such deposit. CD further undertook that, in the event CD failed to pay the lease rentals or the management and services fee in accordance with the MLA and /or the terms and conditions of the TPA, the BAOPL and CD shall be entitled to take possession of the assets, and collect the lease rentals and advance payment value payable under the MLA and the management and services fees. The obligations of BAOPL in respect of NCDs are to be secured, inter alia, by creation of first ranking exclusive mortgage over the cash flows and receivables arising out of the MLA and all cash flows and receivables arising out of the MLA were to be directly deposited by the CD into an escrow account. MLA, DTD and TPA are hereinafter collectively referred to as "Transaction Documents".

6. BAOPL and the CD acknowledged and agreed that the debenture holders subscribed to the debentures relying on, and on the basis of, the terms and conditions incorporated in the MLA on the basis of escrow mechanism contemplated under the escrow agreement and on the basis of the representations, warranties, covenants and

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undertaking of the CD and BAOPL contained in TPA and would not have so subscribed to the debentures in the absence thereof.

7. BAOPL defaulted in payment of its obligations under the debentures. The CD also committed defaults in depositing the receivables in the escrow account. The Applicant, therefore, lodged its claim on 02.08.2022 as a Financial Creditor of the CD which had guaranteed to make the outstanding payments due and payable by BAOPL. Subsequently, the Applicant through the agenda of the meeting of Committee of Creditors (CoC) dated 06.12.2022 became aware that its claim had been rejected.
8. So far as IA.No.2127/2023, IA.No.2140/2023 and IA.No.2127/2023 are concern, similar facts have been pleaded in these IAs also and only the claim amounts are different which has been specified in the opening para of this order.

**Reply filed by the Respondent**

9. In the reply submitted by to the IAs, the Respondent has stated that none of the clauses of DTD, MLA and TPA relied on by the Applicant were in the nature of a guarantee or indemnity for considering the applicant's claims as a financial debt of the CD, According to the Respondent the applicant's claims are not financial debts as the Corporate Debtor never contracted to perform the promise or discharge the liability of a third person but its own liability

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under a different agreement and therefore does not amount to any guarantee or indemnity under Section 5(8) (i) of the Code. The respondent has prayed for the dismissal of the applications.

10. The Applicant being aggrieved by the rejection of the claim by the Respondent preferred the present application for the consideration of this Authority.

**Contentions of the Applicant**

11. According to the counsel for the applicant, the provisions of MLA and the TPA make it clear that the subscription to the debentures of BAOPL was entirely predicated on the CD's assurance and indemnity that it was in substance and effect assuming the liability of BAOPL to pay back the amounts due in respect of the NCDs. In support of the above, the Applicant referred to (a) clause 5 of MLA requiring the CD to deposit entire lease rentals including the future lease rentals into the escrow account in the event of termination of MLA, (b) recital G of TPA requiring creation of a first ranking exclusive mortgage over the cash flows and receivables arising out of the MLA, (c) Clause 4.3 of TPA that the parties shall not terminate the MLA, TPA or escrow agreement without the prior written consent of the debenture trustee. (d) By way of Clause 4.5 of TPA, BAOPL and CD agreed and undertook that they shall indemnify and keep indemnified the debenture trustee and the debenture holders from any damages, loss,

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costs incurred by the debenture trustee and / or the debenture holders as a consequence of such non-deposit.

12. The main contention of the counsel for the Applicant is that, on a cumulative and harmonious reading of the Transaction Documents, the CD intended to be bound and liable in respect of the NCDs issued by BAOPL and the claim is in the nature of a guarantee given by the CD on repayment obligation on behalf of BAOPL which can be read from the conjoint reading of the Transaction Documents.
13. The counsel for applicant has further submitted that it is trite law that parties to a commercial contract may intend to bind a principal entity/parent of a group in respect of the obligations of a subsidiary /group company and the true intent of entering into such a transaction must be examined in order to understand its correct implications. In support of the above contention, the Applicant places reliance on the decision of the Hon'ble Supreme Court in *Cheran Propertis Limited v. Kasturi & Sons Limited & Ors* (2018) 16 SCC 413.

**Contentions of the Respondent**

14. The counsel for the Respondent contended that none of the clauses of the DTD, MLA and TPA relied on by the Applicant were in the nature of a guarantee or indemnity for considering Applicant's claim as a financial debt of the CD. The covenants in the aforesaid documents relate to payment/ discharge of CD's obligation under the

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lease arrangement with BAOPL. The Form 'C' filed by the Applicant has also not categorised its claim as guarantee as evident from item 5 of the Form 'C'.

15. The counsel for the applicant has further argued that as per Section 126 of the Indian Contract Act, 1872, “ a contract of guarantee is a contract to perform the promise, or discharge the liability, of the third person in case of his default” and the claim of the applicant cannot be said to be covered under the definition given in Section 126 of the Indian Contract Act, 1872.
16. The claim of the Applicant can also not be classified also as an indemnity. The language of clause 4.5 of the TPA refers to obligations of the CD to BAOPL and not to the debenture holders or the Applicant.
17. Clause 5 of the DTD which specifies the security for the debentures does not mention any guarantee or indemnity by the CD for the reason that no guarantee or indemnity had been provided by the CD as security for the debentures in favor of the applicant.
18. The counsel for the Respondent /RP has further argued that the obligations of CD under the Transaction Documents is to discharge its own liability by way of payment of lease rentals, there is no agreement or arrangement in the nature of guarantee or indemnity from CD towards the obligations of BAOPL in respect of the debentures. The CD has never contracted to redeem or discharge the liability of BAOPL under the debentures. The only obligation of CD

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is to pay the lease rentals under the MLA. Hence, the Applicant claim, at best be considered as a debt towards payment of lease rentals which would be an operational debt as per the Insolvency and Bankruptcy Code, 2016 (the Code).

19. The counsel for the Respondent has placed reliance on the decision of the Hon'ble Supreme Court in Phoenix ARC (P) Ltd v. Ketulbhai R. Patel (2021) 2 SCC 799.

**FINDINGS**

20. We have heard the contentions of the parties and also perused the documents on record.
21. A minute perusal of the various covenants contained in the Transaction Documents make it clear that redemption/repayment of debentures is dependent upon the payment of lease rentals and other payments under the MLA by the CD to BAOPL. This is evident from the recital in the TPA requiring the CD to make the payments under the MLA in the manner and upon the terms and conditions set out in MLA and the stipulation that the obligations of BAOPL in respect of the debentures are required to be secured, inter alia, by the creation of a first ranking exclusive mortgage over the cash flows and the receivables arising out of MLA. However, in the event of occurrence of an Event of Default as defined in the DTD, including default in payment of lease rentals under MLA, the remedy available to the

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Applicant acting on behalf of the debenture holders is to terminate MLA and/or step into the shoes of BAOPL under the MLA and take possession of the assets leased to CD to realize its dues which means that the applicant at the most will enter into the shoes of BAOPL who is a lessor as per the MLA and would be entitled to recover all outstanding dues under the MLA directly from the Corporate Debtor.

22. Debenture is an instrument of debt issued by BAOPL under the Companies Act, and the issue, redemption etc. of debentures are governed by the provisions of the Companies Act, 2013 and the rules framed thereunder. The obligation to redeem the debentures vests entirely with BAOPL and the said obligation cannot be shifted to another person. Even if we accept the argument for a moment that the subscription to the debentures of BAOPL was entirely predicated on the CD's assurance and indemnity, it cannot be considered that the CD would assume assuming the liability of BAOPL to pay back the amounts due in respect of the NCDs.
  
23. With respect to the contention of the Applicant that, CD intended to be bound and liable in respect of the NCDs issued by BAOPL and the claim is in the nature of a guarantee given by the CD on repayment obligation on behalf of BAOPL, it is pertinent to note that the Form 'C' filed by the Applicant has not categorised its claim as guarantee/indemnity as evident from item 5 of the Form 'C'. Further, Section 126 of the Indian Contract Act, 1872 postulates that a guarantee must possess two essential attributes i.e. a contract to

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perform or discharge the liability of a third party, and the contract to perform a third party's promise in case of that third party's default. In the present case, the CD has not contracted to perform the promise or discharge the liability of BAOPL/third person but its own liability under the MLA. It is also observed that the Applicant, through its advocates vide its notice dated 01.07.2022 called upon BAOPL to make the outstanding payments under the debentures, and not made a demand on the CD till it was admitted in CIRP on 20.07.2022.

24. The judgement of *Cheran Propertis Ltd v. Kasturi and Sons Ltd* (supra) has no application in the present case as it is not on the nature of obligation as guarantor or deciding the claim of a debtor under the Code. Even on a cumulative and harmonious reading of the Transaction Documents, it is observed that the CD has not guaranteed payment to the Applicant at any point of time. In the circumstances, we are not inclined to accept the argument that the commercial arrangement is in the nature of a guarantee on a cumulative and harmonious reading of the Transaction Documents.
  
25. On analysing the Transaction Documents, we find that CD has only under taken to pay the lease rentals as per the terms of MLA. The obligations of BAOPL in respect of NCDs are to be secured, inter alia, by the creation of first ranking exclusive mortgagage over the cash flows and receivables arising out of the MLA and all cash flows and receivable arising out of the MLA are to be directly deposited by CD into an escrow account. Hence, in our view a liability or obligation to

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pay the lease rentals cannot be equated with a financial debt nor can it be said that the CD stood as guarantor for payment of the NCDs.

26. As per the Code, for a person to be designated as a financial creditor of the CD, it has to be shown that the CD owes a financial debt to such person. As already stated, the obligation of the CD is to make payments of lease rentals and other charges to BAOPL as per the terms of MLA. In this connection, it is observed that clause 2.1 of the MLA clearly provides that the renting of assets is on an operating lease basis. In clause 6.5 of MLA, the CD warrants and represents that the lease of assets shall be in the nature of operating lease and accordingly the lessee is not entitled to and shall not capitalise the assets in its books of account. The plain reading of the above clauses make it clear it is an operating lease and therefore, do not qualify to be a financial debt even under section 5(8)(d) of the Code.
27. The counsel for the applicant has referred to Clauses 4.3, 4.4, 4.5 and 4.8 of the TPA which, according to him, clearly stipulate that the applicant subscribed to the debentures relying only on the basis of payments of receivable to be made by the CD pursuant to the MLA and MFA on the basis of escrow mechanism contemplated under the escrow agreement. The counsel for the applicant further refers to Clause 4.5 wherein it is stated that the BAOPL and the CD agree and undertake they shall indemnify and keep indemnified the debenture trustee and the debenture holders from any damages, loss, costs. The counsel for the applicant further contended that these clauses clearly

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shows that the CD executed indemnity as well as guarantee in favor of the applicant which falls within the definition of financial debts.

28. We have considered the aforesaid contentions of the counsel for the applicants but are not able to concur with him. If all the clauses specially Clause 4.3 to 4.8 are read minutely, it is found that the liability of the CD is limited to the payments under the MLA or the MFA. No indemnity or guarantee is shown to have been given by the CD so far as the payment of redemption of the debentures issued by BAOPL is concerned. Therefore, the essence of the Transaction Documents cannot be taken to be falling within the definition of a financial debt so far as CD is concern. Therefore, the relief sought in the IAs cannot be granted.
29. In view of the above, **IA.No.1721 of 2023, IA.No.2140/2023 and IA.No.2127/2023 are dismissed being devoid of merits.** The applicant shall however have liberty to lodge a fresh claim, if any, in the capacity of an Operational Creditor which will be dealt with by the respondent strictly as per law.

Sd/-

**ANIL RAJ CHELLAN**  
**MEMBER (TECHNICAL)**

Sd/-

**KULDIP KUMAR KAREER**  
**MEMBER (JUDICIAL)**