

**IN THE NATIONAL COMPANY LAW TRIBUNAL,  
MUMBAI BENCH-I**

**IA No. 2165/MB/C-I/2020**

**In**

**C.P (IB) No.1061/MB/C-I/2017**

An application under Section 60(5) of the Insolvency and  
Bankruptcy Code, 2016  
Filed by

**IL&FS Financial Services Limited**

**...Applicant**

Versus

**Rajendra K. Bhuta**

Liquidator of

Guruashish Constructions Private Limited.

**...Respondent**

In the matter of

**Union Bank of India**

**...Financial Creditor**

Versus

**Guruashish Constructions Private Limited.**

**... Corporate Debtor**

**Order delivered on: 11.08.2023**

***Coram:***

Hon'ble Member (Judicial) : Mr. H.V. Subba Rao  
Hon'ble Member (Technical) : Ms. Anu Jagmohan Singh

***Appearances:***

For the Applicant : Mr. Luckyraj Indorkar and Mr.  
Ranjit Shetty i/b. Argus Partners,  
Advocates

For the Respondent/Liquidator : Mr. Darryl Pereira, Advocate.

**ORDER**

*Per: Anu Jagmohan Singh, Member (Technical)*

1. The present Application is filed seeking the following main relief:
  - i. That this Tribunal be pleased to set aside the impugned decision dated 06.11.2020 of the Liquidator and direct the Liquidator to accept the claim of the Applicant for the amount of Rs.247,71,88,335/- in respect of Serveall Loan.

**Backdrop of facts**

2. The Corporate Debtor was admitted in CIRP vide Order dated 24.07.2017. Since, no Resolution Plan was passed, the Corporate Debtor was Liquidated vide Order dated 04.09.2020 and the Respondent herein was appointed as the Liquidator.
3. The Applicant submits that it had entered into a loan agreement dated 30.06.2015 with one of the group companies of the Corporate Debtor namely Serveall Construction Private Limited (**“Serveall Construction”**). The Applicant granted a loan of Rs.155,00,00,000/- (Rupees One Hundred and Fifty Five Crore only) to Serveall Construction.
4. The Corporate Debtor for securing the aforesaid loan, granted to

Serveall Construction created a mortgage over its assets and issued a Corporate Guarantee dated 30.06.2015 in favour of the Applicant to make payment in case of default by Serevall Construction.

5. The Applicant submits that as on 24.07.2017, with respect to loan granted to Serveall Construction Private Limited an amount of Rs.154,13,01,627/- (Rupees One Hundred Fifty Four Crore Thirteen Lakh One Thousand Six Hundred and Twenty Seven only) was due and payable by Serveall Construction Private Limited. However, since serveall construction defaulted in repayment of the aforesaid loan.
6. The Applicant pursuant to the public notice dated 01.08.2017, filed two separate proof of claims, the first proof of claim dated 09.08.2017 was filed for Guruashish Loan for Rs.6,69,88,218/- (Rupees Six Crore Sixty Nine Lakh Eighty Eight Thousand Two Hundred and Eighteen Only). The second proof of claim dated 31.08.2017 was filed for Serveall Loan for Rs.154,13,01,627/- (Rupees One Hundred Fifty Four Crore Thirteen Lakh One Thousand Six Hundred and Twenty Seven only).
7. After commencement of Liquidation, pursuant to the second public notice dated 09.09.2020 issued by the Liquidator, the Applicant filed its proof of claim dated 06.10.2020 aggregating to Rs.258,58,11,933/- (Rupees Two Hundred Fifty Eight Crore Fifty Eight Lakh Eleven Thousand Nine Hundred and Thirty Three Only) for both Guruashish

and Serveall Loan.

8. The Liquidator after filing the claim, has vide his letter dated 28.10.2020 rejected the claim relying on the Judgement of the Hon'ble Apex Court in Anuj Jain vs Axis Bank 2020 SCC Online 237 stating that the claim cannot be considered as a Financial Debt.
9. The Applicant replied to the said letter by email dated 03.11.2020 and submitted that in addition to mortgage the Liquidator has also provided Corporate Guarantee to secure the aforesaid loan and accordingly it is covered under the definition of financial debt. The Liquidator once again vide letter dated 06.11.2020 iterated that the reason for rejection of claim is that Corporate Debtor has not gained any benefit from the transaction and no consideration for time value of money was involved. He further stated that transaction is a preferential transaction. However, till today no application under section 43 of the Code is filed.
10. The Applicant submits that the Liquidator was directed by this bench on 16.01.2023 to reconsider the claim and submit a report. In compliance of the order dated 16.01.2023, the Liquidator filed his report dated 03.02.2023 where he has once rejected the claim of the Applicant for loan advanced to Serveall Construction.

**Submissions advanced by the Respondent/Liquidator vide Affidavit in**

**reply and report dated 03.02.2023**

11. The Respondent/Liquidator submits that the rationale behind the rejection of the claim is that the Applicant cannot come within the purview of Financial Creditor as defined under section 5(8) of the Code as the Applicant has not disbursed any amount to the Corporate Debtor. The Respondent submits that the Corporate Debtor has not been a direct beneficiary of the loan advanced.
12. The Respondent has placed reliance on the Judgment of the Hon'ble Supreme Court in Anuj Jain vs Axis Bank, Civil Appeal No. 8512-8527 of 2019 dated 26.02.2020. The Respondent submits that for a debt to qualify as financial debt a basic element of disbursement against the time value of money must be there and for debts which are in the form of third party securities given to secure the loans/advanced/facilities such 'debt' is not and cannot be covered under the expression 'financial debt'.
13. The Respondent qua argument of the Applicant that he has failed to consider the fact that the financial debt is on account of Corporate Guarantee and mortgage provided by the Corporate Debtor, submits that the Hon'ble Apex Court has categorically held that the disbursement against the consideration of the time value of money is an essential ingredient for any creditor to classify as a financial creditor.
14. The Liquidator/Respondent submits that he has examined whether

Corporate Guarantee issued under section 5(8)(i) is in respect of guarantee issued for any of the items referred to in section 5(a) to (h).

The Liquidator states that the guarantee is not issued for the purpose of sub clauses (a) to (h).

15. The Respondent submits that since the claim of the Applicant was submitted in Form D which is for the Financial Creditors, the claim was verified keeping in mind the provisions of the Financial Creditors. The Applicant failed to satisfy the conditions of financial creditors and hence the claim of the Applicant was rejected.
16. The Respondent has filed its report dated 03.02.2023 wherein it has stated that the Applicant can make an Application to the liquidator in Form G 'proof of claim by any other stakeholder under Regulation 20 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulation,2016.

**Findings and Directions:**

17. We have perused records and heard the submissions made by the parties.
18. It is an admitted fact that the Corporate Debtor executed an indenture of mortgage dated 1308.2015 and Corporate Guarantee Agreement dated 30.06.2015.
19. It is the Liquidator's stand that the claim of the Applicant cannot come within the purview of financial debt. The said argument advanced by the

Liquidator cannot sustain, as the Corporate Debtor has vide the agreement dated 30.06.2015 guaranteed repayment of the loan in event of default committed by the principal borrower i.e. Serveall Construction.

20. The term corporate guarantor is defined under section 5(5A) of the Code which reads as follows:

*“Section 5(5A)- ‘corporate guarantor’ means a corporate person who is the surety in a contract of guarantee to a corporate debtor.”*

21. Further, the definition of financial debt under sub clause (i) of section 5(8) clearly provides that – “the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause.” Since, the Applicant IL&FS had advanced loan of Rs. 155 Crore to the principal borrower i.e. Serveall Construction. The guarantee was provided in respect of clause (a) of section 5(8) – “money borrowed against the payment of interest.” The debt clearly falls within the definition of financial debt. Accordingly, the issue that the claim of the Applicant is not a financial debt is decided in favor of the Applicant and against the Respondent/Liquidator.

22. The Hon’ble Supreme Court in Laxmi Pat Surana vs Union Bank of India and Anr. Civil Appeal No. 2734 Of 2020 dated 26.03.2021 has held as under:

*“18. ....The expression "financial debt" has been defined in Section 5(8). Amongst other categories specified therein, it could be a debt along with interest, which is disbursed against the consideration for the time value of money and would include the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of the same clause. It is so provided in sub- clause (i) of Section 5(8) of the Code to take within its ambit a liability in relation to a guarantee offered by the corporate person as a result of the default committed by the principal borrower. The expression "debt" has been defined separately in the Code in Section 3(11) to mean a liability or obligation in respect of "a claim" which is due from any person and includes a financial debt and operational debt. The expression "claim" would certainly cover the right of the financial creditor to proceed against the corporate person being a guarantor due to the default committed by the principal borrower. The expression "claim" has been defined in Section 3(6)which means a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured. It also means a 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 in respect of specified matters.*

*19. Indubitably, a right or cause of action would enure to the lender (financial creditor) to proceed against the principal borrower, as well as the guarantor*

*in equal measure in case they commit default in repayment of the amount of debt acting jointly and severally. It would still be a case of default committed by the guarantor itself, if and when the principal borrower fails to discharge his obligation in respect of amount of debt. For, the obligation of the guarantor is coextensive and coterminous with that of the principal borrower to defray the debt, as predicated in Section 128 of the Contract Act. As a consequence of such default, the status of the guarantor metamorphoses into a debtor or a corporate debtor if it happens to be a corporate person, within the meaning of Section 3(8) of the Code. For, as aforesaid, expression "default" has also been defined in Section 3(12) of the Code to mean non-payment of debt when whole or any part or instalment of the amount of debt has become due or payable and is not paid by the debtor or the corporate debtor, as the case may be."*

23. The Liquidator has admitted that the Applicant can be classified as secured creditor and has based its decision for rejection of claim on the fact that since the Applicant has filed its claim in Form D which is for financial creditors and the Applicant herein does not qualify for the same, the claim is liable to be rejected.
24. The Liquidator failed to consider the fact that the Liquidation regulations provides for separate forms for submissions of claims by claimants under various heads only to facilitate ease in collation and

verification of claims. The Liquidator has mechanically rejected the claim of the Applicant.

25. In that view of the matter, the Liquidator is directed categorized the Applicant as the Secured Creditor and verify the claim of the Applicant.

26. With the aforesaid observation, **IA No. 2165 of 2020 in CP(IB) No. 1061 /MB/C-I/2017** stands disposed of as **allowed**.

**Sd/-**

**ANU JAGMOHAN SINGH**  
**MEMBER (TECHNICAL)**

11.08.2023

Priyal

**Sd/-**

**H.V. SUBBA RAO**  
**MEMBER (JUDICIAL)**