

**IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH
COURT III**

**I.A. 461/2022
IN
C.P. 4359/I&B/MB/2019**

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

YES Bank Limited. **.....Applicant**

Versus

Mr. Anish Gupta
Interim Resolution Professional
For Vijay Group Realty LPP **.... Respondent**

In the matter of:

Mrs. Bhanu Navin Nisar **..... Financial Creditor**

Virsus

Vijay Group Realty LLP **..... Corporate Debtor**

Coram:

Hon'ble Shri H.V. Subba Rao, Member (Judicial)

Hon'ble Smt Anuradha Sanjay Bhatia, Member (Technical)

Order pronounce on : 16.12.2022

Appearance:

For the Applicant: Mr. Shyam Kapadia, Advocate

For the Respondents: Mr. Nausher Kohli, Advocate

Per: Shri H.V. Subba Rao, Member (Judicial)

ORDER

1. Yes Bank Limited, who is the Applicant herein filed the above Interlocutory Application bearing No. 461 of 2022 challenging the action of the Resolution Professional in rejecting their claim dated 11.10.2021 for an amount of 420,16,00,000/- due and payable on 07.10.2021 and not including the applicant in the Committee of Creditor (CoC).
2. The Resolution Professional filed a detailed reply opposing the above application contending that the claim of the Petitioner basing on an uninvoked bank guarantee and the principle borrowers account being standard account.
3. Heard the submissions of Mr. Shyam Kapadia appearing for the Applicant and Mr. Nausher Kohli, counsel appearing for the RP and perused the record. It is an admitted fact that RP before rejecting the claim addressd an e-mail on 10.12.2021 to the Authorized Representative of YES Bank inter alia seeking clarification in respect of
 - (i) Whether the Corporate Guarantee dated 07.10.2017 given by the Corporate Debtor was invoked by YES Bank before the CIRP commencement date.? And
 - (ii) Whether Vijay Suraksha Realty LLP who is the principal borrower had defaulted in repayment of its loan, and also sought the documents in respect of invocation of Corporate Guarantee, if any.
4. In response to the said e-mail dated 10.12.2021, the RP received response from Yes Bank vide an e-mail dated 16.12.2021 *inter alia* stating that neither had Vijay Suraksha Realty LLP defaulted in repayment of its loan nor had the Yes Bank invoked the corporate guarantee dated 07.12.2017 given by the Corporate guarantor. However, Yes Bank insisted the

RP for admission of their claims as per the judgment of NCLAT in *Axis Bank Limited v. Edu Smart Services Private Limited & Anr. (Company Appeal (AT) (Insolvency) No. 302 of 2017)*.

5. Therefore, the entire controversy revolves in the above matter is:

Whether, the action of RP in rejection of the claim of the petitioner basing on an uninvoked bank guarantee in respect of a standard account of a borrower is legally correct and sustainable?

It is the submission of Mr. Kapadia, that the Maturity of claim, or default of claim or invocation of guarantee for claiming the amount has no nexus with filing of claim pursuant to public announcement made under section 13 (1) (b) R/w Section 15 (1) (c). In order to buttress his argument he has relied upon the following citations of the Hon'ble NCLAT in (i) *Export Import Bank of India Vs. Resolution Professional JEKPL Private Limited in Company Appeal (AT) (Insolvency) No. 304 of 2017* (ii) *Edelweiss Asset Reconstruction Company Vs. 1. V. Mahesh, 2. Mr. Rajendra Shanmugam in Company Appeal (AT) (Insolvency) No. 226 of 2021*

6. Mr. Nausher Kohli, countering the above argument has relied upon another judgment of the Hon'ble NCLAT in Edelweiss Assets Reconstruction Company v. Orrisa Manganese and Mineral Limited [(2019) 106 Taxmann 18 NCLAT] in Company Appeal (AT) (Insolvency) No. 437 of 2018

Wherein the NCLAT took contrary view stating that the uninvoked corporate guarantee cannot be considered as a claim as per the provisions of code 2016. Hence, not to be concluded in the list of claims maintained and updated by the RP.

7. It is appropriate to observe here that the above judgment of Hon'ble NCLAT in Orrisa Manganese and Mineral Limited was challenged before the Hon'ble Apex Court and the Hon'ble Apex Court passed a common order arising out of three SLP's including the judgment and order in ***Orrisa Manganese and Mineral Limited in Ghanshyam Mishra and Sons Private Limited through its Authorised Signatory v. Edelweiss Assets Reconstruction Company Limited through the Director and others in Hon'ble Supreme Court Civil Appeal No. 8129 of 2019.***

Whereunder, the Hon'ble Apex Court while preserving the order of the NCLT on the point of uninvoked bank guarantee, expunged Para's 28, 42, 43, 51, and 52 of NCLAT in the judgment of the Orrisa Manganese and Mineral Limited. The relevant Para's 'Para 110 and 133' in Ghanshyam Mishra and Sons Private Limited are extracted here under for ready reference.

In the judgment of the Ghanshyam Mishra and Sons Private Limited:

“Para 110: NCLT found that by email dated 6-1-2018 EARC had submitted its claim in Form 'C' for an amount of Rs. 648,89,62,395. In response to the said email, RP sought a clarification as to whether the corporate guarantee had been invoked by the applicant, RP had not received any response till 21-2-2018 from EARC. Despite repeated requests made by RP, EARC did not respond to the query made by RP. From the record placed before NCLT, it was clear that EARC had not invoked the corporate guarantee. NCLT, therefore posed a question to itself, as to whether an uninvoked corporate

guarantee could be considered as matured claim of the appellant. NCLT found that once the moratorium was applied under Section 14 of the I&B Code, EARC was prevented from invoking the corporate guarantee. NCLT further found that the OMML's guarantee had not been invoked by EARC till the date of completion of CIRP process and once the moratorium was imposed, it could not invoke the corporate guarantee. NCLT therefore found that there is no illegality or irregularity in not admitting the claim of EARC.

“Para 133: We are therefore of the considered view that the appeal deserves to be allowed by expunging SCC OnLine NCLAT paras 28, 42, 43, 51 and 52 from the judgment of NCLAT dated 23-4-2019. It is ordered accordingly. The judgment and order passed by NCLT dated 22-6-2018 is upheld. No costs.

8. Therefore, after hearing the submissions on both sides and upon perusing the above citations this bench is of the considered view that the RP has not committed any illegality or irregularity in rejecting the claim of the Petitioner basing on an uninvoked guarantee in respect of standard account of principle borrower and the decision of the RP is in accordance with the law laid down by the Hon'ble Apex Court.
9. For the aforesaid reasons there is no merit in the above application and the same deserves to be rejected.
Accordingly, the above I.A. No. 461/2022 is dismissed.

Sd/-
ANURADHA SANJAY BHATIA
MEMBER (TECHNICAL)
/Vithal/

Sd/-
H.V. SUBBA RAO
MEMBER (JUDICIAL)