

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
NEW DELHI, COURT-III**

IA-2504/2021  
In  
IB-2130(ND)/2019

**IN THE MATTER OF IB-2130(ND)/2019:**

M/s. Dynacon Projects Private Limited

**..... Operational Creditor**

**Versus**

M/s. Today Homes & Infrastructure Private Limited

**..... Corporate Debtor**

**AND IN THE MATTER OF IA-2504/2021:**

Indian Renewable Energy Development Agency Limited

**..... Applicant**

**Versus**

Mr. Nilesh Sharma

Resolution Professional of the Corporate Debtor

**..... Respondent**

**Order Pronounced On: 09.04.2024**

**CORAM:**

**SHRI BACHU VENKAT BALARAM DAS, HON'BLE MEMBER (JUDICIAL)**

**SHRI ATUL CHATURVEDI, HON'BLE MEMBER (TECHNICAL)**

**PRESENT:**

For the Applicant : Mr. Aditya Vashisth, Adv.

For the Respondent/ RP: Mr. Kanishk Khetan, Adv. a/w Mr. Nilesh Sharma, RP

**ORDER**

**PER: BACHU VENKAT BALARAM DAS, MEMBER (JUDICIAL)**

1. The present Application has been filed by M/s. Indian Renewable Energy Development Agency Limited, through its authorized representative, Mr. Divyanshu Dubey under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the NCLT Rules, 2016 seeking following reliefs: -

*“(a) Pass order directing the RP to accept and admit the claims of the Applicant, and  
(b) Pass any other and further order which this Hon'ble Tribunal deems fits and proper in the facts and circumstances of the present case.  
(c) Direct the Respondent not to proceed with matters relating to Resolution Plan of the Corporate Debtor; and  
(d) Order that further proceedings on the application filed by the Respondent RP for liquidation of the Corporate Debtor shall be kept on hold.”*

**2. Brief Background of the Case:**

The facts which are relevant for the purposes of determination of the issues involved in this application are stated as under:

- i.** An application under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("IBC") was filed by the Operational Creditor i.e. M/s. Dynacon Projects Private Limited, against the Corporate Debtor i.e. M/s. Today Homes & Infrastructure Private Limited and the said application was admitted by this Adjudicating Authority vide order dated 31.10.2019 and a moratorium was declared and Mr. Deepak Bansal was appointed as Interim Resolution Professional.
- ii.** The Interim Resolution Professional issued the public announcement on 01.11.2019 and the last day for submission of claims was 14.11.2019 whereas the last date for filling proof of claims as per Regulation 12(2) of the CIRP Regulations was 30.01.2020.
- iii.** The Corporate Debtor is the Corporate Guarantor of the Applicant. The Applicant submitted its claim as a Financial Creditor (in Form-C) to the Resolution Professional for an aggregate amount of INR 360,95,17,540/- (Rupees Three Hundred Sixty Crore Ninety-Five Lakh Seventeen Thousand Five Hundred Forty only) as on 31.10.2019 vide E- mail dated 31.01.2020.
- iv.** Subsequently, the present Respondent namely Mr. Nilesh Sharma was confirmed as Resolution Professional vide order dated 09.01.2020 who vide Email dated 13.07.2020 rejected the aforesaid claim on the ground that the debt had not been disbursed to the Corporate Debtor and therefore, the claim amount cannot be

termed as a 'financial debt' as per Section 5(8) IBC. In response to the above Email by RP, the Applicant vide its Letter dated 16.09.2020, explained to the RP that debt arising out of guarantee and indemnity is expressly included as financial debt under Section 5(8) IBC and as such, requested to reconsider and admit the claim. However, the Resolution Professional again vide Email dated 23.01.2021 rejected the claim of the Applicant for the second time on the following grounds summarized as under:

- a. *“There has been no disbursement of debt to the Corporate Debtor against consideration for time value of money; and*
- b. *The corporate guarantee executed by the Corporate Debtor in favour of IREDA has not been invoked by IREDA prior to the commencement of CIRP of Corporate Debtor and the same cannot be said to be a debt disbursed to the Corporate Debtor against the consideration for the time value of money to be categorized as "financial debt". Therefore, the claim of IREDA as financial creditor of Corporate Debtor is not maintainable.”*

### **3. Submissions made by the Applicant**

- i. It is submitted that the Applicant extended financial assistance to M/s. Today Clean Energy Private Limited, M/s. Photon Suryakiran Private Limited and M/s. Photon Sunbeam Private Limited for the purpose of setting up of Solar Photovoltaic Grid Power Project and a common facility agreement was executed. The credit facilities availed by the Borrowers were secured by various securities including the corporate guarantees executed by the Corporate Debtor in favour of the Applicant for securing the credit facilities are detailed as under: -

<b><u>Name of Credit Facility</u></b>	<b><u>Date of Facility Agreement</u></b>	<b><u>Date of Deed of Guarantee</u></b>	<b><u>Amount (INR)</u></b>
M/s. Today Clean Energy Pvt. Ltd.	21.09.2015	21.09.2015	68 Crore
M/s. Photon Suryakiran Pvt. Ltd.	19.08.2016	03.03.2016	200 Crore
M/s. Photon Sunbean Pvt. Ltd.	07.11.2016	29.12.2016	210 Crore

- ii. It is submitted that the Applicant's claim for an aggregate amount of Rs. 360,95,17,540 (Rupees Three Hundred Sixty Crore Ninety Five Lakh Seventeen Thousand Five Hundred Forty Only) as on 31.10.2019 comprised of claims against corporate guarantees for facilities availed by the principal borrowers wherein the Applicant has disbursed total sum of Rs. 425,82,53,953 (Four Hundred Twenty Five Crore Eighty Two Lakh Fifty Three Thousand Nine Hundred Fifty Three Only).
- iii. It is submitted that the Resolution Professional rejected the claim of the Applicant on the ground that since no debt has directly been 'disbursed' to the Corporate Debtor and has only given corporate guarantees, there is no element of debt against consideration for time value of money or 'financial debt' owed by the Corporate Debtor. In response, it is stated that the Resolution Professional has equated the guarantee in favour of the applicant as being the same as a security interest such as a mortgage wherein there is no element of disbursement of debt to the security provider, i.e., the Corporate Debtor. The liabilities of surety and principal borrower are distinct from each other as envisaged under the provisions contained in Sections 126, 127 and 128 of Indian Contract Act, 1872.
- iv. It is submitted that as a financial creditor has a right to seek payment, against both the borrower and the guarantor, and in no particular order, until the debt is satisfied. The liability of the guarantor and the principal borrower is co-extensive and not in the alternative. It is for this reason, amount of any liability arising out of a guarantee or indemnity for any of the items referred in Section 5(8)(a) to (h), is expressly included under Section 5(8)(i) of Insolvency and Bankruptcy Code, 2016.
- v. It is submitted that on the aspect of 'disbursement of debt' for the consideration of time value of money, the disbursement has to be to the borrower and not to a corporate guarantor. There has been substantial disbursement of loans to the tune of INR 425,82,53,953/- in favour of the principal borrowers having borrowed such monies against payment of interest and assurance of the repayment thereof given by the corporate debtor by executing corporate guarantees.

Therefore, the essential requirement of disbursement of debt is fully satisfied as against the Corporate Debtor being the corporate guarantor and it's said liability/obligation towards such a debt, in terms of Section 5(8)(i) IBC which qualifies as a "financial debt" owed to the Applicant/IREDA.

- vi. It is submitted that the Ground No. 2 for the rejection of the applicant's claim against the CD taken by the RP is that there is "no invocation of the corporate guarantees" by the applicant, prior to the commencement of CIRP of the Corporate Debtor. In response, it is stated that the Resolution Professional has acted in excess of his powers and delved into the aspect of adjudication of the claim of the Applicant.
- vii. It is submitted that the Hon'ble Appellate Authority in its judgment in the case of **Export Import Bank of India vs. RP, JEKPL Private Limited**, Company Appeal (AT) (Insolvency) No.304 of 2017 held 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) of the Code or for collating the claim under Section 18(1)(b) of the Code or for updating claim under Section 25(2)(e) of the Code.
- viii. It is submitted that the broad definitions of "claim", "debt" and "default" under the Code have been consciously drafted by the legislature to essentially include all types of claims against a corporate debtor in the event of insolvency being triggered and the legislature has consciously not included any contingent right or a conditional right to payment under the definition of a 'claim' and has been defined with a wide-enough amplitude to even include a situation where it will still be classified as a valid claim, even if it is a right to payment that has not yet matured or has not yet been fixed or is even disputed by the debtor. In the present case, the Applicant/ IREDA's claim against the Corporate Debtor/Corporate Guarantor would still be a valid claim despite the fact that the guarantee has not been invoked, as no such conditions can be unilaterally imposed by the Resolution Professional on the definition of a valid 'claim' under the IBC.
- ix. It is submitted by the Applicant that the Applicant is a secured creditor as per clause 11.1(h) of the Loan Agreement which states that the Corporate Guarantee

of Today Homes and Infrastructure Private Limited is part of the definition of security. The Applicant can proceed against the Corporate Debtor being Corporate Guarantor to the principal borrowers as per the Clauses (8) and (12) of the Deed of Guarantee: -

*“(8) The guarantee herein contained shall be enforceable against the Guarantor/s notwithstanding that no action of any kind has been taken by IREDA against the Borrower and an intimation in writing sent to the Borrower by IREDA that a default or breach has occurred shall be treated as final and conclusive proof as to the facts as stated therein.*

*(12) To give effect to this guarantee, IREDA may act as If the Guarantor was the principal debtors to IREDA”*

- x. It is submitted that the Applicant is protected by the Clause 28.10(b) of the Common Facility Agreement which defines the Event of Default to be occurrence of the following event: -

**“28.10 Winding Up, Bankruptcy and Dissolution-** *(b) If an involuntary proceeding against an Obligor or Material Project Participant has been commenced under any applicable bankruptcy, insolvency, winding up or other similar law now or hereafter in effect.”*

If the applicant's claim is not included in the CIRP of the Corporate Debtor (Corporate Guarantor) on the ground of Non-invocation of Corporate Guarantees prior to the commencement of CIRP Process, then the liability of the Corporate Debtor as a surety of the Applicant would simply stand discharged and would be released of its obligations under the guarantee, without any corresponding benefit or consideration to the Applicant. Therefore, the decision of the Resolution Professional to reject the claim of IREDA as a financial creditor of the Corporate Debtor, deserves to be set aside.

#### **4. Submissions made by the Respondent/ Resolution Professional**

- i. It is submitted that there has been no disbursement of debt to the Corporate Debtor against consideration for time value of money. The Applicant in terms of the provisions of the IBC has no legal right or basis to submit Form C in the ongoing CIRP proceedings of the Corporate Debtor. For a Creditor to be a Financial Creditor, it is imperative that there is disbursement of financial debt by the Creditor to the Corporate Debtor. It may be noted by this Adjudicating Authority that disbursement to the Corporate Debtor by such a creditor also needs to be against consideration for time value of money as held in the case of **Anuj Jain, IRP for Jaypee Infratech Ltd. vs Axis Bank Ltd.**, reported in 2019 SCC OnLine SC 1775, the disbursement to the Corporate Debtor is a sine qua non for a creditor to be treated as a Financial Creditor. Since, there is no disbursement in favour of the Corporate Debtor, hence Clause (a) to (h) of Section 5(8) of the IBC does not apply.
- ii. It is submitted that as on the date of commencement of CIRP, the Applicant had admittedly not invoked the guarantee towards the facilities extended. Further, it is also an admitted fact that the three Principal Borrowers are solvent companies and are servicing the respective loans qua the Applicant. Hence, in essence, as on the date of CIRP or even as on date, there is no default of the facilities extended by the Applicant to the Principal Borrowers. As per the Clause 3 of the Guarantee Deed in view of no default on the part of the Principal Borrowers, the Applicant could not have invoked the guarantee towards the Corporate Debtor.
- iii. It is submitted that as the Applicant is not a Financial Creditor of the Corporate Debtor, thus no case can be made out by the Applicant to participate in the CoC meeting of the Corporate Debtor and the Applicant cannot stand in the way of an ongoing Resolution Process and interfere in the time bound process.
- iv. It is submitted that the claim was filed vide E-mail dated 31.01.2020 and the last date to file the proof of claim was 30.01.2020 as per Regulation 12(2) of the CIRP Regulations. Also, the present claim application is filed on 01.04.2021 after 7 months since the first communication with the Respondent vide email dated 13.07.2020. The delay is critical and the application is liable to be rejected.

## **5. Analysis and Finding**

- i. We have heard the submissions of Ld. Counsel appearing for the Applicant as well as Ld. Counsel appearing for the Resolution Professional/Respondent and perused the records.
- ii. The main issue involved in this case is whether the Applicant's claim was rightly rejected by the Resolution Professional which was communicated by E-mail dated 13.07.2020 and 23.01.2021, on the ground that the Bank Guarantees were not invoked prior to CIRP Process by the Applicant and therefore there is no element of disbursement of any Financial Debt.
- iii. In order to answer the above question and to appreciate the case of the Applicant, it is essential to refer to the two E-mails dated 13.07.2020 and 23.01.2021 sent by the Resolution Professional. The relevant portion of the E-mail dated 13.07.2020 reads as follows: -

*“That IREDA has claimed an amount of Rs. 360,95,17,540/- as the Financial Debt due from THIPL as on 31.10.2019 on account of the Corporate Guarantees issued by THIPL to IREDA in respect of the debts disbursed by IREDA to M/s. Photon Suryakiran Pvt. Ltd, M/s. Photon Sunbeam Pvt. Ltd. and M/s. Today Clean Energy Pvt. ltd. The amount claimed is stated to be after due credit of the amount paid/received.*

*After verifying your claim, I regret to inform you that the claim of IREDA as a Financial Creditor of THIPL cannot be admitted for the reason that the debt claimed by IREDA has not been disbursed to the CD (THIPL) and that the said debt, which is claimed to be arising out of the guarantees claimed to have been held by IREDA from the CD, do not amount to a debt disbursed to the CD against the consideration for the time value of money. In this regard, it is relevant to refer to the judgement passed by Hon'ble Supreme Court in the matter of Anuj Jain, Interim Resolution Professional for Jaypee Infratech ltd. Vs Axis Bank Limited etc. in Civil Appeal Nos. 8512-8527 of 2019 (date of judgement 26<sup>th</sup> February, 2020) wherein it has been held that as per*

*the definition of the words "financial debt" as occurring in Section 5(8) of the Insolvency & Bankruptcy Code, 2016 (IBC for short), for a debt to become "financial debt" the basic requirement is that it ought to be disbursed against the consideration for time value of money and that it should be owed towards any loan, facility or advance to the corporate debtor or towards protecting any facility or security of the corporate debtor.*

iv. The Applicant, in response to the E-mail dated 13.07.2020 given by the Resolution Professional gave a reply on 16.09.2020. The relevant portion of the reply is given below:-

*"Since then we have been requesting you to confirm the status of our claim. To our utter shock on 13.07.2020, we received a mail from you rejecting our claim for the reasons best known to you. We have carefully gone through your order mail and examined the same and we submit as under: -*

- The Judgment of Hon'ble Supreme Court in the matter of Anuj Jain, Interim Resolution Professional for Jaypee Infratech Ltd. v. Axis Bank Limited etc. has been misinterpreted in your mail. The facts and circumstances of matter, patently it can be seen without any deep examination of the said judgment our claim has been rejected. The facts in the case are completely different & intention of Hon'ble Supreme Court was not to exclude the Corporate Guarantor. In the said matter, the issue was whether a third-party mortgagor can be treated as Financial Creditor.*
- Your attention is invited to Section 5(8) of I&B Code expressly includes the 'guarantee' and 'indemnity' within the meaning of financial debt as defined in clause (8) of Section 5 of the I&B Code and the amount of any liability in respect of a*

*“Corporate Guarantee provided by the CD to any ‘person’ for “money borrowed against the payment of interest” shall thus, constitute a ‘financial debt’.*

- *There is no finding in the Jaypee judgment that the holder of a ‘Guarantee’ or a Corporate Debtor would not be considered as a financial creditor of Corporate Debtor.*
- *The rationale of the Jaypee Judgment does not apply to a guarantee as the Jaypee Judgment does not negate the rights of a Creditor holding a guarantee under the Contract Act. The rights of a creditor under Section 128 are not overridden by the I&B Code and only put in abeyance until the moratorium under sections 14 of the I&B Code is in operation.*
- *It has been held by Hon’ble Supreme Court in numerous judgments that the very object of the guarantee will be defeated if the creditor is asked to postpone its remedies against the guarantor, if not allowed to pursue its remedies against the guarantor. The security of guarantee will likely become useless if rights against the guarantor can be easily cut down.*

*The principle laid down in the Jaypee Judgment that there should be a disbursement of amount by the Corporate Debtor to a creditor to qualify as a Financial Creditor would not apply to a creditor holding the Guarantee. In light of the above, you are requested to reconsider your view communicated in your email dated July 13, 2020 and admit the claim of IREDA as a Financial Creditor, and consequently invite IREDA as a member of the CoC as a Financial Creditor within a week of receipt of this letter failing which IREDA will pursue appropriate Legal remedies.”*

- v. The relevant portion of the E-mail dated 23.01.2021 given by the Resolution Professional to the Applicant reads as follows: -

*“After verification of the claim, it was informed to you vide email dated 13.07.2020 that your claim as a Financial Creditor of THIPL could not be admitted for the reason that the debt claimed by IREDA to be arising out of the guarantees given by THIPL did not amount to a debt disbursed to the Corporate Debtor against the consideration for the time value of money, in view of the judgement passed by Hon'ble Supreme Court in the matter of Anuj Jain, Interim Resolution Professional for Jaypee Infratech Ltd. Vs Axis bank Limited etc. in Civil Appeal Nos. 8512-8527 of 2019, wherein it was held that as per the definition of the words "financial debt" as occurring in Section 5(8) of the Insolvency & Bankruptcy Code, 2016, the basic requirement for a debt to become "financial debt" is that it ought to be "disbursed" against "the consideration for time value of money" and that it should be owed towards any loan, facility or advance to the corporate debtor or towards protecting any facility or security of the corporate debtor.*

*The legal opinion obtained by you in this regard from Mr Sumant Batra, Advocate and as forwarded by you to me opines that Jaypee Judgement does not apply to guarantee and the principal of disbursement of amount by the corporate debtor to qualify as financial creditor would not apply to a creditor holding guarantee, is per se wrong interpretation of the said precedent and untenable in law. Though the Hon'ble Court in the said Judgment has not traversed specifically in answering the said question, but reading the ratio decidendi of the Judgment would suggest that the answer to the question whether guarantee is qualified as financial debt would be a clear 'no', as there has been no disbursement to Corporate Debtor against the consideration of time value of money by the said creditor.*

*In reference to your email dated 14.01.2021, it is observed that in the matter of Indian Renewable Energy Development Agency Limited v. Mr. T.S.N Raja (Resolution Professional of M/s. VBC Industries Limited) as*

*relied upon by you, the claim of IREDA was rejected by the RP as well as the Hon'ble Adjudicating Authority and the resolution plan was also approved by the COC and placed before the Hon'ble Adjudicating authority for approval. The issue before Hon'ble NCLAT was that the Resolution Applicant who submits the resolution plan should not face any undecided claims after the resolution plan has been submitted by him. The Hon'ble NCLAT observed that the loan was extended by IREDA to principal borrower for which CD had mortgaged property, however no default had occurred as on filing the claim with the Guarantor (CD), thus held that IREDA may bring the contingent existing right to the notice of the successful resolution applicant by filing application before the Hon'ble adjudicating authority. The aforesaid order cannot be said to be a direction or finding on merit for admission of the claim filed by IREDA in the present matter and hence cannot be relied upon.*

*Further, in the matter of Ascot Realty Private Limited vs Ajay Kumar Agarwal & Ors CA(AT) no. 658 of 2020, the Corporate Debtor had issued guarantee for securing the financial debt of a third party & in default the said guarantee/s was "invoked" by the Financial Creditor, pursuant to which the Hon'ble NCLAT held that the Corporate Debtor is liable to pay the amount being amount of liability in respect of guarantee issued, which is invoked before the commencement of CIRP and therefore the same falls in the definition of Section 5(8)(i) of IBC. In light of the facts of the said case and without prejudice to the ground for not admitting your claim vide the mail of the undersigned dated 13.07.2020, it can further be said that as the corporate guarantee has not been invoked by IREDA in the present matter prior to the CIRP date, the same cannot be said to be a debt disbursed to the CD against the consideration for the time value of money to be categorized as "financial debt".*

*In view of the above, your claim as a Financial Creditor of THIPL is not maintainable and therefore the same has rightly been not admitted and that the legal opinion shared and the case law referred to by you have*

*failed to establish that your claim should be admitted as a Financial Creditor of THIPL. As such, your claim is not admitted even after considering the said legal opinion and the case law. You may, however, file your claim as a creditor falling within the appropriate category of Creditors, in the prescribed Form, if you so desire. Any such claim, if received, shall be considered, as per the provisions of IBC Regulations issued thereunder.”*

- vi. In the present application the Applicant has raised a specific objection stating that the Resolution Professional has exceeded in his jurisdiction and has in effect adjudicated the claim although the Resolution Professional has no adjudicatory powers and therefore, decision taken by Resolution Professional vide E-mail dated 13.07.2020 and 23.01.2021 cannot be sustained in the eyes of law, in view of the law laid down by the Hon’ble Supreme Court in the case of **‘Swiss Ribbons Pvt. Ltd. & Anr.’ Vs. Union of India & Ors.**, reported in (2019) 4 SCC 17 wherein it held that Resolution Professional has no adjudicatory power and that he is “really a facilitator of the resolution process, whose administrative functions are overseen by the Committee of Creditors and by the Adjudicating Authority.”
- vii. We have carefully perused the two E-mail sent by the Resolution Professional and we are of the considered view that the decision taken by the Resolution Professional vide the said two E-mail tantamounts to adjudication and therefore cannot be sustained in the eyes of law. We find that the Resolution Professional has while rejecting the claim has taken into consideration, various judgements passed by the Hon’ble Supreme Court in the case of **Anuj Jain, Interim Resolution Professional for Jaypee Infratech Ltd. Vs Axis bank Limited etc.** reported in (2020) 8 SCC 401, and Hon’ble NCLAT in case of **Ascot Realty Private Limited v. Ajay Kumar Agarwal** reported in 2020 SCC OnLine NCLAT 732 and proceeded to decide the claim on merits instead of collating the claim and performing his duties as Resolution Professional as envisaged under Section 18 and 25 of the Code.
- viii. It is trite law that the Resolution Professional has only been vested with administrative as opposed to quasi-judicial power. In view of the above, the

Resolution Professional by rejecting the claims at his own level without presenting the complete facts to the Committee of Creditors has misconstrued his role, duties, and responsibilities. Such an act by the Resolution Professional in rejecting the claim by effectively holding that since there is no invocation of the guarantees, there is no valid claim of the applicant relying upon the judgment of the Hon'ble Supreme Court amounts to adjudication. Such an act by the Resolution Professional is in excess and abuse of the powers and duties of a Resolution Professional conferred by the IBC. The Resolution Professional is obligated under law only to collate and admit or reject a claim and maintain an updated list of creditors of the Corporate Debtor.

- ix. For the ongoing reasons we set aside the decision taken by the Resolution Professional vide E-mail dated 13.07.2020 and 23.01.2021 and direct the Resolution Professional to re-consider the claim of the Applicant in the light of the powers and functions envisaged under Section 18 and 25 of the Code and place the same before the CoC for approval.
  - x. The claim was filed vide E-mail dated 31.01.2020 and the last date to file the proof of claim was 30.01.2020 as per Regulation 12(2) of the CIRP Regulations. The delay of 1 day in filing the claim with the Resolution Professional is condoned in the interest of justice.
6. In view of the above facts and circumstances and the foregoing discussion. It is accordingly ordered as follows:
- i. The Application bearing **IA-2504/2021** filed by the Applicants is **disposed of in above terms.**
  - ii. The Registry is directed to send a copy of this order to the Insolvency and Bankruptcy Board of India for their record.
- No order as to costs.

-Sd-

**(ATUL CHATURVEDI)**  
**MEMBER (TECHNICAL)**

-Sd-

**(BACHU VENKAT BALARAM DAS)**  
**MEMBER (JUDICIAL)**