

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
CUTTACK BENCH  
CUTTACK**

**C.P (IB) No. 16/CB/2021**

***In the matter of:***

An application under Section 7 of the Insolvency & Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016;

**-And-**

***In the matter of:***

**UV Asset Reconstruction Company Limited**, having its registered office at 704, Deepali Building, 92, Nehru Place, New Delhi- 110019;

**...Financial Creditor**

**-Versus-**

**Electrosteel Castings Limited**, having its registered office at 8, Rathod Colony, Rajnagpur, Sundergarh, Odisha- 770 017.

**...Corporate Debtor**

***Coram:***

Shri P. Mohan Raj : Member (Judicial)

Shri Satya Ranjan Prasad : Member (Technical)

***Appearances (through video conferencing)***

For the Applicant : Mr. Joy Saha, Sr. Adv.  
Mr. Swatarup Banerjee, Adv.  
Mr. Dhruv Diwan, Adv.  
Mr. Avishek Guha, Adv.  
Mr. Sariful Haque, Adv.  
Mr. Bijay Jena, Adv.  
Mr. Chitresh Saroigi, Adv.

For the Respondent : Mr. Pulkit Deora, Adv.  
Mr. Saswat K. Acharya, Adv.  
Mr. Aditya S. Prasad Adv.  
Mr. Hemant Kothari, Adv.

**ORDER**

***Per: Satya Ranjan Prasad, Member (Technical)***

The Court convened *via* video conference.

1. This Petition has been filed by UV Asset Reconstruction Company Ltd. (“**UVARCL**”), i.e., the Financial Creditor (“**FC**”) / Petitioner herein under Section 7 of the Insolvency and Bankruptcy Code, 2016 (the “**Code**” for brevity) on the basis that Electrosteel Castings Ltd. (“**Corporate Debtor**”, “**CD**”, “**ECL**” “**the Respondent**”) herein has allegedly defaulted in discharging a financial debt owed by it.
2. The Petitioner i.e., UVARCL an asset reconstruction company (“**ARC**”) and assignee of the original lender SREI Infrastructure Finance Limited (“**SREI**”) claims herein that the Respondent – ECL is a guarantor of the debts owed by the principal borrower Electrosteel Steels Limited (“**ESL**”). Further, it is claimed that while ESL has paid some part of the debt to SREI, under a resolution plan offered by Vedanta Limited, ECL, as a guarantor, continues to remain liable to SREI/ the Petitioner for the balance outstanding debts.
3. It is alleged *inter alia* in the Petition that the CD committed default against the Loan Agreement (SRE -212) dated 26.07.2011 and as on March 01, 2021, whereby it is liable to pay a sum of Rs.607,60,00,000/- (Rs. Six Hundred and Seven Crore Sixty Lakh only) to the FC together with further interest etc. thereon. It is stated that the last payment was cash payment made on 21.06.2018.
4. The matter extensively heard from the perspective of IBC. Material on record perused and all such arguments/submissions considered which were permitted in accordance with the petition, reply, pleadings and the

connected Interlocutory Applications. The facts of the case are briefly stated hereunder:

**A. Facts in brief:**

- A.1 A rupee loan agreement number SRE-212 dated 26.07.2011 (“**Loan Agreement**”) was executed between SREI Infrastructure Finance Limited (“**SREI**” or “**SIFL**”) and Electrosteel Steels Limited (“**ESL**”) whereby SREI sanctioned a loan of INR 500,00,00,000/- in favour of ESL.
- A.2 The very next day after the Loan Agreement i.e., on 27.07.2011, ESL, SREI and the CD (which was a Promoter of ESL holding 34.40 % shareholding in ESL, a listed company at this time, entered into a Deed of Undertaking, Warranty and Indemnity (“**Deed of Undertaking**”) whereby ESL and the CD agreed to various covenants in respect of the loan facility under the Loan Agreement.
- A.3 The Loan Agreement was subsequently amended by a Supplementary Agreement executed on 21.11.2011 between SREI, ESL and the CD whereunder the CD was named as an ‘Obligor’. Under the provisions of Schedule-III of the Supplementary Agreement, the CD also agreed to secure the loan by creating a mortgage.
- A.4 Subsequently, on 23.11.2011, a mortgage by deposit of title deeds was created by the CD in favour of SREI over the factory land owned by it in Elavur, Tamil Nadu.
- A.5 The execution and existence of the aforesaid (i) Loan Agreement (ii) Deed of Undertaking (iii) Supplementary Agreement and (iv) the Declaration (collectively referred to as “**Financing Documents**”) has not been disputed by any of the parties. It has, however, contended by CD that these Financing Documents did not create a relationship of guarantee/suretyship between it

and SREI (now the assignee UVARCL, i.e., the FC). These aspects have been discussed in detail in the subsequent paragraphs of this Order.

- A.6 On or around 21.07.2017, a petition under Section 7 of the Code being **CP (IB) No. 361/KB/2017** filed by State Bank of India against ESL was admitted by the NCLT, Kolkata Bench. Accordingly, CIRP was initiated in respect of ESL.
- A.7 The resolution plan (“**Resolution Plan**”) submitted by the Vedanta Limited, the resolution applicant in respect of ESL, was approved by the Adjudicating Authority, Kolkata *vide* order dated 17.04.2018. As has been detailed below, the Resolution Plan bifurcated the debt of ESL into two components - Sustainable and Unsustainable debt. While Sustainable debt was paid upfront in full, Unsustainable debt was converted into equity shares of ESL, followed by capital reduction and consolidation. The petitioner herein claims that they could recover only a fraction of Unsustainable debt. **It is in respect of this alleged un-serviced Unsustainable Debt that the present Petition has been filed in this Tribunal against the CD.** As per the Resolution Plan, the total admitted debt of financial creditors of ESL was Rs. 13,395.25 crore. Out of this amount, an amount of Rs. 5,320 crore (less proportionate amount of Admitted Debt held by Dissenting Financial Creditors) was classified as ‘sustainable debt’ which was to be paid upfront to the financial creditors. The total admitted financial debt of SREI was Rs. 577.90 crore. Its proportionate share in the sustainable debt was Rs. 241.72 crore, which it received as upfront payment under the Resolution Plan. After the upfront payment of the sustainable debt, an amount of Rs. 7,619.24 crore (arrived at by subtracting upfront payment of Rs. 5,320 crore and non-fund-based facilities of Rs. 456.01 crore from the admitted debt of financial creditors) was treated as ‘unsustainable debt’. The Resolution Plan proposed to convert the unsustainable debt to new equity shares of ESL having a face value of Rs. 10/- each and issuance of the same to financial creditors in proportion to their respective portion of the unsustainable debt. Thus, the financial creditors

were to receive 761.92 crore shares of ESL aggregating to Rs. 7619.24 crore. Adding this to the existing shares issued, subscribed and paid-up capital of Rs. 2409.24 crore, the total paid up capital of ESL was to become Rs.10,028.44 crore comprising of 1002.844 crore shares of Rs. 10/- each fully paid up.

A.8 The Resolution Plan and its terms are admitted between the parties, however, the contention of the CD is that pursuant to the approval of the Resolution Plan, no debt or liability survives *qua* it. In other words, the CD has contended that after the effectuation of the Resolution Plan, it owed no debt to SREI and no such debt could therefore be assigned by SREI to UVARCL. Consequently, there exists no debt in relation to which the present proceedings under Section 7 of the Code could be filed against it.

A.9 On 30.06.2018, SREI and UVARCL executed an Assignment Agreement (“AA”) assigning rights, title and interest in respect of the Financing Documents, in favour of UVARCL. However, CD contends that Transaction in favour of Assignee is bad and illegal in terms of norms prescribed by the Reserve Bank of India (**RBI**).

5. The contentions made and arguments raised by the CD on the allegations of default are mainly on the following counts (discussed in detail in the later part of the Order):

- I. The CD is not a guarantor/ surety under the terms of the Financing Documents in respect of the loans advanced by SREI to ESL and, therefore, there is no financial debt owed by the CD to the FC;
- II. The approval of the Resolution Plan has led to extinguishment and effacement of the entire debt of ESL (including the liability owed by the CD) and thus there is no surviving debt which could be assigned

by SREI to the FC - in other words, there is no debt for which there could be a default;

III. The Assignment Agreement (“**AA**”) falls foul of the Securitization Companies and Reconstruction Companies (Reserve Bank) Guidelines and Directions, 2003 (“**RBI Guidelines**”).

6. In the matter, Ld. Counsel of both the sides were extensively heard. Material on record perused. The allegations of the petitioner and the above three main contentions of the Respondent and the facts that emerges thereby have been discussed below in detail.

**B. Whether the CD is not a guarantor/ surety under the terms of the Financing Documents in respect of the loans advanced by SREI to ESL and therefore there is no financial debt owed by the CD to the FC**

B.1.1 It is noted that there are four primary documents that have been entered into in respect of which the Company Petition has been filed, the details of which are as follows:

- a) ESL availed a loan of Rs. 500 Crore (“**Loan**”) from SREI in terms of the Sanction Letter dated 26.07.2011, as modified by Letter dated 26.07.2011;
- b) ESL and SREI entered into a Rupee Loan Agreement dated 26.07.2011 (“**Loan Agreement**”);
- c) As per the Sanction Letter, Sanction Letter Addendum and the Loan Agreement, the primary security for the loan was a subservient charge on all movables and project assets of ESL;
- d) Under the Loan Agreement, the promoters of ESL were required to provide certain undertakings *inter alia* to arrange for infusion of funds

into ESL to enable ESL to meet cost overrun and its financial covenants under the Loan Agreement. Pursuant thereto, the Respondent executed Deed of Undertaking, Warranty and Indemnity dated 27.07.2011 (“**Undertaking**”);

- e) Thereafter, in terms of the Supplementary Agreement dated 21.11.2011 entered into between SREI, ESL and the Respondent, the security under the Loan Agreement was amended to include a third-party mortgage to be created by ECL in favour of SREI over the Respondent’s factory land situated at Elavur Village, Ponneri Taluk, Chengelpet District, Tamil Nadu (“**Scheduled Property**”);
- f) Pursuant thereto, the Respondent and SREI executed a Declaration dated 23.11.2011 (“**Mortgage Declaration**”) in terms of which a mortgage was created over the Scheduled Property in favour of SREI to secure the due repayment of the Loan by ESL to SREI.

B.1.2 FC has argued based on the above documents that the status of the CD as a surety, i.e., the person who has contracted to perform the promise and/or discharge the liability of ESL in the event of default, is borne out from a composite reading of the relevant clauses of the Financing Documents and contemporaneous facts, as detailed below.

Relevant provisions of the Loan Agreement dated 26.07.2011 between SREI and ESL relied upon by FC

B.1.3 Schedule IV of the Loan Agreement makes a provision for other terms and conditions of the loan. Clause (d) contains three undertakings to be provided by the promoters. The third undertaking reads as under:

*“3. to arrange for the infusion of funds in a form and manner acceptable to SREI at the end of each financial year to comply with the Financial Covenants in case of breach of such Financial Covenants”*

Financial Covenants referred in the third undertaking above is traceable to Clause 6.3 of the Loan Agreement. The relevant Clause 6.3.1 reads as under:

*“6.3.1 The Borrower shall make payments of interest and repayment of principal in accordance to the terms of this Agreement and deposit all payment/ repayment in the manner specified by SREI, which shall be subject to verification by SREI and shall utilise all payments solely for the purpose mentioned in Section 2.1 and for no other purpose”*

B.1.4 Petitioner has submitted that it is apparent from a combined reading of clause (d)(3) of Schedule IV with clause 6.3.1 of the Loan Agreement, that the CD, had, as the promoter of ESL (and later as an Obligor) agreed to **infuse funds** so that ESL complies with its obligations.

This Adjudicating Authority notes here that aforesaid clause of the agreement referred by the petitioner refers to **infusion of fund to borrower and not to the creditor.**

B.1.5 In this regard, FC has further submitted that CD is now estopped from taking a stance different from the one taken before various courts and judicial *fora*. The admissions made by the CD, relieve/ discharge the FC from the burden of proving the existence of a surety/ creditor relationship.

B.1.6 FC has also stated that CD had made a direct payment of Rs. 38 Crore to SREI, which indicate that they are Guarantor. However, this Tribunal notes that no details/documents have been produced, which suggest that any amount has been paid by FC to the CD in the capacity or role of a guarantor/ surety. CD has reiterated that they never stood as a guarantor/surety so the question of making any such payment for any such purpose is out of question.

B.1.7 In view of the above arguments of the FC, it becomes imperative to look into the primary submissions of CD that it is not a “guarantor” to the debts

of ESL, and as such owes no financial debt as claimed to SREI or the Petitioner within the meaning of Section 5(8)(i) of the IBC by stating the following reasons:

- i. UVARCL relies on a Deed of Undertaking, Warranty and Indemnity dated 27.07.2017 to make a claim against the Respondent as a guarantor. However, this is not a Deed of Guarantee. More importantly, Clause 2.2 of this Deed expressly provides only that in the event the borrower (ESL) is not in a position to comply with its financial covenants towards SREI, the Respondent will be obliged to “arrange for infusion of such amount of funds into the borrower” through whatever sources/ arrangements, so that the borrower is in a position to comply with its financial covenants towards SREI.
- ii. It is evident that this is NOT a guarantee *qua* ECL to assume the liability of the borrower ESL and itself become liable to directly pay to the financial creditor SREI, the amount of debt that the borrower was liable to pay.
- iii. Clause 2.2 therefore does not satisfy the requirement of a guarantee stipulated by Section 126 of the Contract Act. It is settled law that the plain words of a contract have to be read exactly as the parties intended and impose no more obligations on ECL than what it has undertaken in Clause 2.2 of the Undertaking.
- iv. Other than this, the Respondent had undertaken to create a mortgage on certain assets to offer security to SREI to recover any outstanding dues from the borrower. This security offered by way of a mortgage also does not turn the Respondent into a guarantor or make the Petitioner a financial creditor *qua* the Respondent. In this regard, the Respondent has relied on certain judgements viz. of *Anuj Jain vs. Axis Bank Limited &*

Ors. ,[(2020) 8 SCC 40 at para 50.2], which have been discussed in the later part of this Order.

7. On the above aspect of guarantee respondents have made further submissions to the effect that, an obligation to arrange for infusion funds is not a guarantee for the *purposes of Section 126 of the Indian Contract Act, 1872 and Section 5(8)(i) of the IBC*. Respondent supplements his arguments that it is not a guarantor by stating the following:
- a) The security for the Loan as mentioned in the Loan Agreement does not mention any guarantee to be provided by the Respondent.
  - b) The Sanction Letter Addendum (*Annexure D pg. 49 Vol 1 of Company Petition*) by which the security for the Loan was modified to include a subservient charge over movable and project assets of ESL specifically mentions about no personal guarantee as follows:

*“We would like to further confirm that, as on date, as per the terms of the Sanction Letter and other Financing Documents, no personal guarantee from Mr. Umang Kejriwal or corporate guarantee from Electrosteel Castings Limited is required for securing the Facility.”*

Here, it is pertinent to mention that the Petitioner side has argued in this regard that the said sanction letter was issued prior to execution of the agreement, therefore the subsequent loan agreement shall prevail.

This Tribunal notes that sanction letter with certain terms and conditions is a very important document in context of any loan. It shows the intent of the creditor. Had there been an intent of ‘Guarantee’ that should have been spelt out clearly in the loan agreement. The question here that arises is that how can the terms in loan agreement can be different from the sanction letter terms.

- c) Thereafter, the only further modification of the security for the Loan was the creation of a third-party mortgage over the Respondent's Scheduled Property, which was created in terms of the Mortgage Declaration.
- d) The Assignment Agreement under which the Petitioner is claiming to have rights against the Respondent itself records clear and unequivocal admission of SREI and UVARC as to there being no guarantee in Schedule I, which clearly states "NIL" against the column titled "*details of the guarantor/co-borrower (Annexure Q at pg. 378 Vol 2 Company Petition)*".
- e) As per the terms of the Assignment Agreement, it is clear that the Petitioner has acquired the loan from SREI after undertaking extensive due diligence on the Loan and security available in respect of the Loan (*Recital C of Annexure Q at pg. 358-359 Vol 2 Company Petition*). There is no mention of Guarantee. Therefore, it is evident that the Petitioner was not only aware that there is no guarantee provided by the Respondent but also recorded the same in the Assignment Agreement.
- f) Further, the Information Memorandum prepared by the resolution professional of ESL does not mention any guarantee provided by the Respondent in favour of SREI. Even in the section on "*Security Interest as per Form C submitted by the Financial Creditor*", there is no mention of any guarantee executed by the Respondent in favour of SREI.
- g) The Petitioner's case as per the Form 1 filed with the Company Petition is that by executing the Undertaking, the Respondent has agreed to jointly and severally repay the Loan to SREI/ the Petitioner as a guarantor (*Form 1 at pg. 14-15 Vol 1 Company Petition*) and in Paras 2 and 3 at pg. 14 and 15 of the Company Petition, the Petitioner has wrongfully misquoted and misleadingly suggested that the Undertaking uses the words "guaranteeing" to infuse. It is noted by this Tribunal that actually there **is no such word guaranteeing used in the Undertaking**. The exact and correct words used in Clause 2.2 of

**the Undertaking is to “arrange” for infusion of funds which is reproduced as under:**

*“2.2. Financial Covenants*

*In the event the Borrower is not in a position to comply with the Financial Covenants in the Financing Documents, or has breached such Financial Covenants, the Obligors will arrange for the infusion of such amount of fund into the Borrower such that the Borrower is in a position to comply with the abovementioned Financial Covenants.”*

Therefore, the Petitioner cannot substitute the word “arrange” with the word “guarantee” on its own.

- h) On the above argument of the CD, The Petitioner has also contended that because the absence of the word guarantor is not relevant, and the fact that the Respondent has executed the Undertaking and the Supplementary Agreement in the capacity of an “obligor” is sufficient.

On the above said contention of the petitioner this Tribunal notes that there is nothing in the available documents and records provided, which justifies that the obligor has stepped into the shoes of the borrower and has assumed a liability towards the financial creditor, “coextensive with that of the principal borrower” and such that it has contracted with the financial creditor to discharge the liability of a third person in case of his default and pay the financial creditor. No such terms occur in Clause 2.2 of the Undertaking, as above.

Further, that the question of whether an obligor is a guarantor depends on whether the concerned obligor has undertaken an obligation which constitutes a guarantee in terms of Section 126 of the Contract Act. In the Case laws cited by the Petitioner it is noted that the facts and circumstances are different from the instant matter, the party referred to as “obligor” was

under a specific obligation to make repayment of the debt of the principal borrower to the lender in case of an event of default.

This Tribunal notes that **there is no document entered into between the Respondent and SREI/ the Petitioner that indicate any obligation on the Respondent to make repayments to SREI/ the Petitioner.** Obligation in terms of the financing documents is in respect of infusion of fund to the **Principal Borrower, ESL and not to SREI/the Petitioner.**

- i) Respondent has further contended that there is no other provision in the Undertaking that casts any obligation on the Respondent to make payment to SREI (or consequently the Petitioner) in respect of the Loan availed by ESL from SREI. The only other obligation that the Respondent undertook towards the Petitioner was in terms of the Mortgage Declaration which is dealt with in the later part of this order.
- j) Further respondent states that the undertaking does not in any manner create an obligation on the Respondent to make payment of any amounts under the Loan availed by ESL to SREI, and is not a guarantee within the meaning of Section 126 of the Contract Act. Section 126 of the Indian Contract Act, 1872 (“Contract Act”) defines a contract of guarantee as follows:

*‘Contract of guarantee’, ‘surety’, ‘principal debtor’ and ‘creditor – A contract of guarantee’ is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the ‘surety’; the person in respect of whose default the guarantee is given is called the ‘principal debtor’, and the person to whom the guarantee is given is called the creditor’. A guarantee may be either oral or written.”*

- k) In this regard respondent has relied on the judgement in *Yes Bank Limited v. Zee Entertainment Enterprises Limited and Ors.* , wherein the Hon’ble Bombay High Court, while dealing with a claim by a lender has held that an

undertaking to infuse equity/debt into the principal obligor *inter alia* for the purposes of honouring its payment obligations to the lender under a put-option right does not amount to a “guarantee” in terms of Section 126 of the Contract Act.

- 1) Respondent has also relied and stated that The Hon’ble High Court of Karnataka in *United Breweries (Holding) Ltd v. Karnataka State Industrial Investment and Development Corporation Ltd. and Others*<sup>1</sup> held that an obligation to ensure that the principal obligor meets all its financial and contractual obligations does not constitute a guarantee.

In respect of the aforesaid citation petitioner has submitted that the fact and circumstances of these cases are different from those prevailing in the instant matter.

- m) The Petitioner vide notices dated 20.09.2019 and 06.02.2020 addressed to the Respondent has made a claim for damages under the undertaking and invoked arbitration under Clause 8.7 of the Undertaking. Therefore, it is evident that the Petitioner itself only sought to claim “damages” and not a “financial debt” against the Petitioner under the Undertaking. Therefore, the instant petition is an afterthought.

In this regard, FC submits as: (a) the Notice was only sent under the Deed of Undertaking and not under the Loan Agreement and/or the Supplementary Deed; (b) just because a breach of Clause 2.2 has been alleged to be a loss, does not mean that the said clause, if the same is otherwise in law a clause providing for a guarantee, loses its status as such.

Tribunal notes that FC has not explained here that how the damages claimed as such shall amount to Financial Debt. FC has not clarified that why Notice was only sent under the Deed of Undertaking. Therefore, the possibility cannot be ruled out that initially the claims / arbitration etc. as referred above

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<sup>1</sup> 2011 SCC OnLine Kar 4012

were in context of damages only and as has been alleged by the CD the instant petition is an afterthought.

n) As per Section 5(8)(i) of the IBC, “*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*” is defined to be a financial debt. In view of the above submissions, the Respondent submits that they have not in any manner guaranteed the repayment of any form of financial debt as defined in sub-clauses (a) to (h) of Section 5 (8) of the IBC. Accordingly, there is no financial debt owed by them.

8. In respect of the mortgage property, it emerges from the submissions and the material on record that the liability of ECL under the Mortgage Declaration is limited to the right of SREI to enforce its security interest over the Scheduled Property in respect of any dues that may be payable by ESL to SREI. The relevant clause of the Mortgage Declaration is as follows:

*“Clause 4:- The Mortgaged Properties is now proposed to be mortgaged and charged, on an exclusive basis, by way of deposit of title deeds, in favour of SREI, to secure the due repayment, discharge and redemption by the Borrower, to SREI, of the financial assistance advanced or to be advanced by SREI under the Facility Agreement, together with all interest, Additional Interest, Default Interest, principal amounts of the Loan(s), and any other amounts due and payable to SREI hereunder, premia on prepayment, any fees, costs, charges, expenses and other monies whatsoever stipulated in or due, owed or payable under Facility Agreement or the Finance Documents to SREI and all other present and future obligations, and liabilities (whether financial, performance or otherwise, whether actual or contingent or whether owed jointly or severally or in any capacity whatsoever) of the Borrower owed, due or payable to SREI under the Finance Documents (hereinafter collectively referred to as the “Secured Obligations”).*”

9. Respondent has claimed that a person having security interest over the assets of a corporate debtor is not a financial creditor of such corporate debtor for the purposes of Section 5 (8) and Section 7 of the IBC claim and in this regard relied on the judgement of the Hon'ble Supreme Court in the matter of *Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited v. Axis Bank Limited and Ors*<sup>2</sup> has observed that a person having only security interest over the assets of corporate debtor would not be considered a 'financial creditor' as per the definitions contained in Section 5(7) and 5(8) of the IBC. Relevant portions of the judgement are as follows:

*“50.1. Keeping the objectives of the Code in view, the position and role of a person having only security interest over the assets of the corporate debtor could easily be contrasted with the role of a financial creditor because the former shall have only the interest of realising the value of its security (there being no other stakes involved and least any stake in the corporate debtor's growth or equitable liquidation) while the latter would, apart from looking at safeguards of its own interests, would also and simultaneously be interested in rejuvenation, revival and growth of the corporate debtor. Thus understood, it is clear that if the former i.e., a person having only security interest over the assets of the corporate debtor is also included as a financial creditor and thereby allowed to have its say in the processes contemplated by Part II of the Code, the growth and revival of the corporate debtor may be the casualty. Such result would defeat the very objective and purpose of the Code, particularly of the provisions aimed at corporate insolvency resolution.*

*50.2. Therefore, we have no hesitation in saying that a person having only security interest over the assets of corporate debtor (like the instant third party securities), even if falling within the description of 'secured creditor' by virtue of collateral security extended by the corporate debtor, would nevertheless stand*

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<sup>2</sup> 2019 SCC OnLineSC 1775

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*outside the sect of 'financial creditors' as per the definitions contained in sub-sections (7) and (8) of Section 5 of the Code. Differently put, if a corporate debtor has given its property in mortgage to secure the debts of a third party, it may lead to a mortgage debt and, therefore, it may fall within the definition of 'debt' under Section 3(10) of the Code. However, it would remain a debt alone and cannot partake the character of a 'financial debt' within the meaning of Section 5(8) of the Code"*

In view of the above, even assuming that there is a subsisting security interest held by the Petitioner in terms of the Mortgage Declaration over the Scheduled Property of the Respondent, it has submitted that there is no financial debt owed to the Petitioner under the Mortgage Declaration.

**10.** The Petitioner has contended that the Respondent has allegedly admitted in its pleadings before other courts and tribunals that it is a guarantor of ESL, and that therefore the Respondent is a guarantor in respect of the Loan availed by ESL. In this regard, Respondent has stated that pleadings must be read as a whole to look into at the substance and cannot be relied upon to interpret the obligations of parties to a written contract. Submissions of Respondent are noted by this Tribunal as follows:

- a)** Respondent submits that the Petitioner has filed only selected pleadings from the proceedings before the Hon'ble High Court while suppressing other pleadings of the Respondent, which clearly shows that the pleadings of the Respondent were to the effect that the Respondent has "*acted as surety by offering its immoveable property*". This is borne from the following paragraphs from the pleadings filed by the Respondent:
- i.** Draft plaint before Madras High Court – *Para 5 at pg. 10 of the IA No. 104 of 2022;*
  - ii.** Rejoinder to Counter-Affidavit of SREI before Single Judge, Madras High Court - *Para 8 at pg. 12 of Respondent's Reply to IA No. 104 of 2022;*

- iii. Rejoinder to Counter-Affidavit of the Petitioner before Single Judge, Madras High Court - *Paras 16 at pg. 21 of Reply to IA No. 104 of 2022;*
  - iv. Rejoinder to Counter-affidavit of SREI in Appeal, Madras High Court – *Para 17 at pg. 34 of Reply to IA No. 104 of 2022;* and
  - v. Rejoinder to Counter-affidavit of UVARC in Appeal, Madras High Court – *Para 15 at pg. 49 of Reply to IA 104 of 2022.*
- b) In this regard, respondent has relied on the Judgement of the Hon'ble Allahabad High Court in the matter of *Pratap Narain v. The Fifth Additional District Judge, Allahabad and Ors*<sup>3</sup> held that “7...pleadings should be read and construed as a whole and not in piece-meal. It would be a bad construction and may end in startling results if any particular word or sentence is picked up and used for or against the party pleading in isolation of other part of the pleading. The true import of the pleading can be ascertained only if it is read as a whole and it is not permissible to pull out a sentence or passage to read it out of the context, in isolation.”
- c) In other words, the pleadings of the Respondent above are that, it is a guarantor were in the context that it in terms of the Mortgage Declaration, has given a guarantee with recourse limited only to the Scheduled Property, and no personal recourse. This interpretation has been upheld in the matter of *State Bank of India v. Kusum Vallabhdas Thakkar*<sup>4</sup>, the Hon'ble Gujarat High Court has held that the nature of obligation of a mortgagor is akin to that of a guarantor, but where the liability is limited to the mortgaged property. The relevant portions of the judgment are as follows:

*“12. ...By making the promise by Ex. 20, defendant has agreed to provide collateral security of a legal mortgage to secure repayment of all the moneys due from Nitin Pharmaceuticals. Thus, the defendant has promised to discharge the liability of a third person (the debtor) in case of his default. This guarantee is limited to the security offered by the promisor, namely, the mortgage and no further personal liability is*

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<sup>3</sup> 1998 SCC OnLine All 215 at para 7

<sup>4</sup> 1991 SCC OnLine Guj 14

*taken by the promisor. Thus, the promisor has become a surety and this would be an agreement to offer security for due performance of that promise to that extent....*

*13. The liability of the surety is co-extensive with that of – the debtors. However, in the present case, the liability of the surety is as otherwise provided by the contract Ex. 20. Therefore, the liability of the defendant is as provided in the agreement and to that extent of securing dues by a creation of mortgage, no personal liability is accepted by the surety. It is, therefore, fallacious to say that the defendant is not a debtor and, therefore, the defendant could not have created a mortgage in favour of the creditor. The defendant has rendered herself liable for the dues of Nitin Pharmaceuticals by agreeing to provide security in the form of mortgage for the dues. Just as the principal debtor can create a mortgage of his immovable properties, a third person can also agree to create a mortgage so as to secure the dues of the principal debtor. In that manner, he becomes a surety to the extent of the security or the mortgage....”*

- d) Respondent has relied on several judgements wherein it has been *inter alia* decided viz. in the matter of *Anuj Jain* (supra), the Hon’ble Supreme Court has upheld the proposition in *Kusum Vallabhdas* that a mortgagor is akin to a guarantor without personal recourse, but clarified that for the purposes of the IBC, a third-party mortgagee would not be a financial creditor. (Viz in the matter of *Anuj Jain* (supra) in Hon’ble Supreme Court, *Kusum Vallabhdas* (supra), in *Edavan Kavingal Kelappan Nambiar v. Moolakal Kunhi Raman and Ors*<sup>5</sup>, in the Hon’ble Madras High Court etc.).

In *Edavan Kavingal Kelappan Nambiar v. Moolakal Kunhi Raman and Ors*<sup>6</sup>, the Hon’ble Madras High Court has quoted Chitty on Contracts (paragraph 812, on page 447) on the proposition that a guarantee “28 ... is a collateral engagement, either by way of personal liability or by a charge on property or by both,

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<sup>5</sup> MANU/TN/0160/1956

<sup>6</sup> MANU/TN/0160/1956

*to answer for the debt, default, or miscarriage of another as distinguished from an original and direct engagement for the party's own act*

From the above, it emerges that for the purpose of IBC a third-party mortgagee would not be a financial creditor.

- e) However, FC states that it is not the case of the CD that a mortgage amounts to a guarantee. In fact, the case of suretyship/ guarantee is not based on the cumulative reading of the Financing Documents and the CD's admissions contained in pleadings before court and tribunal. In any event, the question at hand involves the determination of the obligations of the Respondent arising from a contract reduced to writing, i.e., the Undertaking. In this regard, Section 91 of the Indian Evidence Act, 1872 dealing with "*Evidence of terms of contracts, grants and other dispositions of property reduced to form of documents*" reads as follows:

"91. Evidence of terms of contracts, grants and other dispositions of property reduced to form of document.

*When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained...."*

- f) In the matter of *U.P State Electricity Board and Ors v. Aziz Ahmad*<sup>7</sup>, the Hon'ble Supreme Court has held that "*17... Pleadings are required to be proved and so long evidence is not led in support of the pleadings no reliance can be placed only on the pleadings without there being any cogent evidence in support of the pleadings.*

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<sup>7</sup> MANU/SC/0048/2009

*Pleadings are required to be proved by leading evidence.*” In view thereof, the respondent claims that there is no evidence shown by petitioner, therefore pleadings, which were made in a specific context as referred above, cannot by itself create an obligation of guarantee upon the Respondent.

- g) Further, the Petitioner has contended that in view of certain orders of the Hon’ble Madras High Court and Supreme Court noting in the narration of facts that the Respondent is a guarantor, the Respondent is now estopped from contending that it is not a guarantor, respondent submits that the rule of issue estoppel would only arise when a judgment has determined the issue in question in a proceeding between the same parties (*Hope Plantations Limited v. Taluk Land Board, Peermade and Ors.*<sup>8</sup>) In this regard, it is submitted the order dated 30.09.2019 (pg. 44 – 53 of IA No. 104/2022), order dated 05.11.2019 (pg. 68 of IA No. 104/2022) passed by the Hon’ble Madras High Court and judgment dated 26.11.2021 of the Hon’ble Supreme Court solely dealt with the issue of jurisdiction of a civil court in view of Section 34 of the SARFAESI Act. The recording of facts in the said orders are of no bearing on the issues to be determined by this Tribunal under the provisions of IBC. In any event, the Hon’ble Supreme Court in its judgment dated 26.11.2021 has clarified in para 9 that “*it is made clear that we have not expressed anything on merits in favour of either of the parties*”.
- h) Lastly, in view of the pleadings of the Respondent, the Petitioner has stated that the intention of the parties to the Loan documents was that the Respondent would stand as guarantor. However, the respondent claims that this is contrary to a number of documents which establish that the Respondent is not a guarantor, including documents executed by the Petitioner itself such as the Sanction Letter Addendum, the Assignment Agreement and the Information Memorandum prepared by the RP of ESL.

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<sup>8</sup> MANU/SC/0686/1998 at paras 26, 27 and 29

In any event, the Petitioner not being party to the original Loan documents cannot make submissions as to what the intention of the parties to the original documents was.

11. Therefore, going by the submissions of the FC and CD as above and the details / documents made available this Tribunal is of the view that it cannot be conclusively established that in context of the present IBC proceedings before this Tribunal, CD can be considered as a Guarantor and thereby a financial creditor in view of the following reasons-

- a. Clause 2.2 of the deed of undertaking, which has been relied upon by the petitioner only provides that in the event of breach of Financial Covenants, the Obligors are required to “*arrange for the infusion of such amount of fund into the borrower*” and that such stipulation is qualitatively different from a guarantee, where a surety directly discharges the liability of the principal borrower to the creditor. (This Tribunal observes that Stress in this clause is on “infusion of funds” and “into the borrowers” and not to the creditors, i.e., no guarantee in respect of the creditors.)
- b. FC’s reliance on the clause 2.1 of the Supplementary Agreement dated 21.11.2011 between ESL, SREI and the CD is not conclusive to arrive at a decision that creation of a mortgage on its land situated in Ponneri, Tamil Nadu, in favour of SREI *vis-à-vis* aforesaid Clause 2.1 stated below makes the FC a guarantor from the perspective of IBC -

*“2.1 The Borrower and the Obligors hereby unconditionally, absolutely and irrevocably agree that the security as mentioned in Recital B above will continue to be valid and secure all the Obligations of the Borrower under the Financing Documents, subject to any amendments expressly specified herein”*

In this regard, the Tribunal notes from the various documents more particularly referred to at para 8 and 9 above indicate that the pleadings of the Respondent were to the effect that the Respondent has “*acted as surety by offering its immovable property*” and for the purpose of IBC a third-party mortgagee does not make the respondent a financial creditor.

- c. FC has claimed that in the present case, the contractual interpretation of the clauses to discern the true meaning thereof is not required since the CD has itself unequivocally admitted its status as a guarantor/ surety before various courts and fora. However, in view of the above clarifications and submissions of CD more particularly referred to at para 10 a) to para 10 h) above this Tribunal is of the view that the CD has adequately clarified (as above) its position in respect of Guarantor in various other forums.

Further, this Tribunal is of the view that from the perspective of IBC this Tribunal is not obliged to take cognizance of such factors but take an independent view in respect of initiation of CIRP under Section 7 of the IBC, 2016. And the Tribunal cannot take the pleadings and submissions in other Fora as a conclusive factor in the instant independent IBC proceeding and from the perspective of IBC in arriving at a decision that in respect of debt of ESL the respondent is an affirmed guarantor. Moreover, the respondent has adequately clarified that his pleadings in other Fora are to the effect that it acted as surety by offering its immovable property.

- d. As has been referred to by both the sides, Black’s Law Dictionary, 11<sup>th</sup> edn., at pg. 1294 has defined the term “obligor” as “*someone who has undertaken an obligation; a promisor or debtor.*” However, this Tribunal notes that a plain reading of the language of the aforesaid

agreements nowhere give any indication that the obligor has stepped into the shoes of the borrower and has assumed a liability towards the financial creditor, “coextensive with that of the principal borrower” and such that it has contracted with the financial creditor to discharge the liability of a third person in case of his default and pay the financial creditor. No such terms occur in Clause 2.2 of the Undertaking.

- e. Further, it is evident from Recital C (*Recital C at pg. 201 Vol 1 Company Petition*) of the Undertaking that it was executed as a temporary stop gap arrangement until the perfection of a charge in respect of the Loan of ESL. The said charge was perfected upon on creation of mortgage over the Scheduled Property on 23.11.2011 and upon the execution of the Deed of Hypothecation dated 26.12.2011 in relation to movable assets of ESL.
- f. The security for the Loan as mentioned in the Loan Agreement does not mention any guarantee to be provided by the Respondent.
- g. The Assignment Agreement under which the Petitioner is claiming to have rights against the Respondent has recorded clear and unequivocal admission of SREI and UVARC as to there being no guarantee in Schedule I, which clearly states “NIL” against the column titled “*details of the guarantor/co-borrower*.”
- h. Further, the Information Memorandum prepared by the resolution professional of ESL does not mention any guarantee provided by the Respondent in favour of SREI (“*Details of guarantees*” at pg. 188 of the *Reply to IA No. 104/2022*). Even in the section on “*Security Interest as per Form C submitted by the Financial Creditor*”, there is no mention of any guarantee executed by the Respondent in favour of SREI.
- i. Even the Sanction Letter by which the security for the Loan was modified to include a subservient charge over movable and project assets of ESL specifically mentions about no guarantee from

Electrosteel Castings Limited, i.e., CD herein, is required, which clearly shows the intent of the Creditor.

12. Apart from the above noted observations this Tribunal is of view that CD has adequately clarified (as above), its position in respect of “Guarantor” in various other forums. Therefore, this Tribunal is of firm opinion that the allegations and submissions of the FC and the material on record do not establish it that the CD is a guarantor from the perspective of IBC. As has been stated above and claimed by CD, the possibility cannot be ruled out that this entire issue of projecting Respondent as a Guarantor for the purpose of IBC is an afterthought and it is nothing but an attempt to bypass a binding resolution plan approved by the NCLT.

13. However, in the interest of justice it would not be appropriate for this Tribunal to conclude the matter at this stage only after arriving at the conclusion that the CD here is not a guarantor from the perspective of IBC. Therefore, before arriving at a final decision it becomes imperative to take into consideration the other factors such as to whether the approval of the Resolution Plan has led to extinguishment and effacement of the entire debt of ESL and thereby the financial liability of the CD in respect of FC, as far as the instant proceedings are concerned as has been contended by the FC. Therefore, we move on to the second question arising in this case

C. **Whether the approval of the Resolution Plan has led to extinguishment and effacement of the entire debt of ESL (including the liability owed by the CD) and thus there is no surviving debt which could be assigned by SREI to the FC - in other words, there is no debt for which there could be a default**

C.1 The incidence of debt and alleged liability of the CD has been broadly referred to at Para A.7 of this Order above.

- C.2 FC, herein claims that in lieu of the unsustainable debt of Rs.7,619.24 crore, under the Resolution Plan, the financial creditors were to ultimately receive shares worth only Rs. 152.38 crore. The difference between 7,619.24 crore and Rs. 152.38 crore is the haircut taken by the financial creditors *vide* the approved Resolution Plan. *In lieu of* its unsustainable debt of Rs. 336,18,55,240, SREI received 67,23,710 equity shares of ESL having a face value of Rs. 10/- per share after reduction and consolidation steps.
- C.3 Here, the FC has relied on the letter dated 02.06.2018 addressed by Vedanta (successful resolution applicant) to the Committee of Creditors of ESL. This document shows that while initially in lieu of conversion of unsustainable debt of ESL, SREI was allotted 33,61,85,524 shares of Rs. 10/- each its ultimate and effective holding post capital reduction and consolidation was only 67,23,710 shares of Rs. 10/- each aggregating to Rs. 6,72,37,100/- as against its unsustainable debt of Rs.336,18,55,240.
- C.4 However, CD has contended that pursuant to the approved Resolution Plan, the entire debt of ESL (i.e., both sustainable and unsustainable debt) stood resolved/extinguished by upfront payment and conversion into equity shares of ESL, no guarantee for such resolved/extinguished debt could survive.
- C.5 Thus, the real question which arises for consideration in this case is whether the entire debt of ESL stood resolved pursuant to the Resolution Plan *pro tanto* extinguishing the guarantee extended by the CD or whether the Resolution Plan preserved anything to proceed against CD after approval/implementation of the Resolution Plan.
- C.4 In order to answer this issue, it is imperative to take note of the following facts from the Resolution Plan.
- C.4.1 As per the Resolution Plan, the total admitted debt of financial creditors of ESL was Rs. 13,395.25 crore. Out of this amount, an amount of Rs. 5,320 crore (less proportionate amount of Admitted Debt held by Dissenting

Financial Creditors) was classified as ‘sustainable debt’ which was to be paid upfront to the financial creditors.

C.4.2 The total admitted financial debt of SREI was Rs. 577.90 crore. Its proportionate share in the sustainable debt was Rs. 241.72 crore, which it received as upfront payment under the Resolution Plan.

C.4.3 After the upfront payment of the sustainable debt, an amount of Rs. 7,619.24 crore (arrived at by subtracting upfront payment of Rs. 5,320 crore and non-fund-based facilities of Rs. 456.01 crore from the admitted debt of financial creditors) was treated as ‘unsustainable debt’

C.4.4 The Resolution Plan proposed to convert the unsustainable debt to new equity shares of ESL having a face value of Rs. 10/- each and issuance of the same to financial creditors in proportion to their respective portion of the unsustainable debt. Thus, the financial creditors were to receive 761.92 crore shares of ESL aggregating to Rs. 7619.24 crore. Adding this to the existing shares issued, subscribed and paid-up capital of Rs. 2409.24 crore, the total paid up capital of ESL was to become Rs.10,028.44 crore comprising of 1002.84 crore shares of Rs. 10/- each fully paid up.

C.4.5 The CD has relied upon the expression “*This would have the effect of retiring the unsustainable debt...*” occurring at the bottom of the table at page 320 (Vol. II) to contend that since the financial creditors of ESL received upfront payment of Rs. 5,320 Crore plus equity shares worth another Rs. 7619.24 crore the total unsustainable debt of Rs.13,395.25 stood resolved and there remained no unpaid debt.

C.4.6 FC claims that almost immediately post allotment, the Resolution Plan contemplated that the face value of the newly allotted 761.92 crore shares was to be reduced from Rs.10/- each fully paid up to Rs. 0.20 fully paid up (Ref. - First bullet point under “Step 2” pg. 320, Vol II as a mandatory step 2).

- C.4.7 As a result of this reduction in the face value of shares, the paid-up share capital of ESL was liable to stand reduced from Rs. 10,028.44 crore comprising of 1002.84 crore shares of Rs. 10/- each fully paid up to Rs. 200.57 crore divided into 1002.84 equity shares of Rs. 0.20 each fully paid up. Simultaneously, with the above, 50 equity shares of Rs. 0.20 each were consolidated into one fully equity paid up share of Rs. 10 /-each. Resultantly, while the paid-up share capital remained the same i.e., Rs. 200.57 crore, the number of shares reduced from 1002.84 crore of Rs. 0.20 each to 20.06 crore shares of Rs. 10 each. Ultimately, as per the Resolution Plan, the financial creditors were to hold shares worth Rs. 152.38 crore.
- C.5 Further, FC states that during the course of *sur-rejoinder* arguments on behalf of CD on 12.05.2022 and 13.05.2022, the attention of this Tribunal was drawn to Form No. PAS-3 (return of allotment in respect of ESL which shows the details of shares allotted on 06.06.2018) and the accompanying list of allottees, which showed that SREI had been allotted 33,61,85,524 equity shares of Rs. 10 each of ESL.
- C.6 FC's objection here is that these two documents do not form part of the record in the present case and no leave was sought to produce these documents. As such, ought not to be taken on record. However, this Tribunal is of the view that these documents only substantiate implementation of the provisions made in the Resolution plan and therefore no new fact in the instant petition has been brought in by the CD. Therefore, in the interest of justice, this tribunal has no hesitation in taking the said documents on record, primarily on the count that no new facts have been brought in. In this regard, CD has submitted that even if the said documents are taken on record, these documents in any case, do not further the case of the CD. All that these documents show is that SREI had been allotted 33,61,85,524 equity shares on or around 06.06.2018. However, post allotment of these 33,61,85,524 shares, these shares by a process of reduction in face value and consolidation

stood reduced to 67,23,710 shares of Rs.10/-each as originally envisaged by the Resolution Plan itself.

C.7 In view of the aforesaid reduction in face value of the shares as per the resolution plan, as FC claims that the Resolution Plan did not in effect extinguish the unsustainable debt of ESL.

C.8 CD has brought to notice of this Tribunal that the amount equivalent to capital reduction was credited to the reserves and surplus account of ESL, which is part of the equity capital. In this regard, FC claims that as the ESL has accumulated losses, no value accrued to the shareholders by virtue of transfer of capital reduction amount to capital reserves.

However, this Tribunal do not agree with this contention of the FC, as accumulated losses, if any, will have overall impact on the share price of all the shares and not only on reserve funds and thereby value accrued to shares by such transfer to the Reserve and surplus account of the Company shall not change effectively.

C.15 In light of the above facts, the main issue that remains here is that whether the approval of the Resolution Plan has led to extinguishment and effacement of the entire debt of ESL (including the liability owed by the CD, if considered as guarantor). Therefore, it becomes pertinent to refer to the relevant provisions made in the Resolution Plan in this regard.

- i. As per the terms of the Resolution Plan (*Annexure O at pg. 252 – 351 Vol 2 Company Petition*), the admitted debt of ESL of all financial creditors of ESL (including SREI), aggregating to a sum of Rs. 127,19,13,20,548.14 (as finally verified by the Resolution Professional of ESL and reflected at *Annexure P at pg. 118 of IA No. 66/2022*) (“Total Financial Debt”), was discharged through a combination of upfront cash payment and conversion of balance debt into equity shares in the following manner:

IN THE NATIONAL COMPANY LAW TRIBUNAL  
CUTTACK BENCH

C.P (IB) No.16/CB/2021

*In re: UV Asset Reconstruction Company Limited Vs. Electrosteel Castings Limited*

<b>Mode of Payment</b>	<b>Amount (INR)</b>
Upfront Cash Payment on 04.06.2018 (released to financial creditors from escrow account on 21.06.2018)	Rs. 5320 Crore (defined as “Sustainable Debt”) *
Balance debt converted and issued/ allotted to financial creditors as 739,99,10,000 equity shares of INR 10/- each on 06.06.2018	Rs. 7399.14 Crores <sup>+</sup> (defined as “UnsustainableDebt”)**) **
<b>TOTAL</b>	<b>INR 12,719.14 Crores</b>

\*Sustainable debt is an amount of Rs. 5320 crores forming part of the admitted debt for financial creditors. (Annexure O pg. 272 Vol 2 of Company Petition)

\*\* Unsustainable debt is arrived at an amount of Rs. 7399.14 crores (13,175.15 crore less 456.01 crore less 5320 crore) by subtracting upfront payment of Rs. 5320 crores and non-fund-based facilities of Rs. 456.01 crore from the admitted debt for financial creditors (Annexure O at pg. 318 Vol 2 Company Petition).

<sup>+</sup> Resolution Plan states the Unsustainable Debt amount to INR 7619.24 Cr, subsequently, on account of the RP of ESL rejecting a portion of INR 220.10 Cr of SREI’s claim, the total Unsustainable Debt reduced to INR 7399.91 Cr.

- ii. Therefore, the consequence of the cash payment and issuance and allotment of shares is that the claim of SREI of Rs. 577.90 Cr was discharged as Rs. 241.71 Cr as cash and issuance and allotment of equity for Rs.336.18 Cr. This is being “Step 1” under the Resolution Plan, as tabulated below:

Admitted claim / debt amount of SREI	INR 577,90,40,079
Cash Payment	INR 241,71,84,839
Conversion of balance debt into equity and	INR 336,18,55,240

IN THE NATIONAL COMPANY LAW TRIBUNAL  
CUTTACK BENCH

C.P (IB) No.16/CB/2021

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allotment of shares of the ESL of INR 10/- each	

- iii.** However, it is noted that pursuant to the issuance of shares since share capital of ESL has increased to 980,83,67,078 equity shares of face value INR 10/- each, *inter alia* in order to reduce the total share capital of ESL, a capital reduction and consolidation of shares of ESL was undertaken in terms of the Resolution Plan approved by its financial creditors, including SREI on 14.06.2018 i.e., 8 days after Step 1.

We note that this was “Step 2” under the Resolution Plan and entirely unconnected with Step 1. Step 2 had no effect on the discharge of debt under Step 1. The face value of the shares, including those issued to the financial creditors was reduced from Rs. 10/- to Rs.0.20 per share.

- iv.** In regard to conversion of debt into equity the Respondent has relied on the judgement of *The Delhi High Court in Commissioner of Income Tax – V vs. Rathi Graphics Technologies Limited* wherein it is held that the conversion of debt to equity amounts to extinguishment of liability. The relevant portions of the judgment are as follows:

*“15. When pursuant to a settlement the creditor agrees to convert a portion of interest into shares, it must be treated as an extinguishment of liability to pay interest to that extent. In essence there will be no further outstanding interest to that extent. Consequently, the situation where an interest payable on a loan is converted into shares in the name of the lender/ creditor is different from the situation envisaged in Explanation 3C to section 43B of the Act, viz., conversion of interest into “a loan or borrowing”. In the latter instance, the liability continues, although in a different*

*form. However, where the interest or a part thereof is converted into equity shares, the said interest amount for which the conversion is taking place is no longer a liability.”*

- v. In *Canara Bank v. IVRCL Limited* the NCLT Hyderabad Bench has also observed that once a debt is converted into equity, it cannot revert back to the category of debt. The relevant portions of the judgment are as follows:

*“32. With respect to the claim of the Applicant bank, that the lenders have to be consider reverting to their position from Equity Shareholder to lender once the CDR/SDR fails is unacceptable. The Applicant Bank contents that under Accounting Standard the acquisition of equity in lieu of debt does not attract Accounting Standard No. 23 is not acceptable in as much as the debt converted into equity has transformed into equity in all respects and therefore, it cannot again become Debt merely because the revival plans under the CDR/SDR did not fructify. The Applicant Bank has not been able to show any provision of the scheme under CDR/SDR or any regulations or guidelines issued by Reserve Bank of India, that the amount converted into equity will revert to the category of debt the moment the CDR/SDR fails.”*

- vi. Therefore, going by the aforesaid facts this Tribunal is of firm view that the issuance of equity shares in lieu of a debt amounts to “payment of the debt” is an undisputed fact. Step 1 of Annexure 2 of the Resolution Plan (*Annexure O pg. 252 at pg. 318-320 Vol 2 of Company Petition*) lays down the terms of the conversion of the balance debt into equity shares and states as follows:

*“This would have the effect of retiring the unsustainable debt and the equity shares issued in lieu of the same would be recorded in the books of accounts at an amount equal to the carrying value of the unsustainable debt and consequentially the transaction would get recorded only in the balance sheet of the company.”*

- vii.** Therefore, issuance and allotment of equity shares to SREI on 06.06.2018 pursuant to conversion of the balance/ unsustainable debt results in the former (i.e., unsustainable debt) coming to an end to be substituted in its place by the equity shares.
- viii.** The capital reduction and consolidation of equity shares was subsequent to SREI ceasing to be a creditor of ESL, having become a shareholder of ESL. The reduction in value of equity shares of a shareholder cannot in any manner be termed a debt in the hands of such shareholder. It is also noted that the entire equity share capital of ESL was reduced, i.e., the equity shares of all financial creditors of ESL as well as the then existing shareholders of ESL. It was not a case where one shareholder's shareholding was selectively reduced.
- ix.** Furthermore, the amount of reduction in the value of equity shares was not a loss but was to be credited to the Capital Reserve of ESL. In this regard, the Resolution Plan states as follows:
- “Accounting Treatment: The amount of reduction in the equity share capital of the Company shall be credited to the capital reserve of the Company” – Step 2 of Annexure 2 of the Resolution Plan (Annexure O pg. 252 at pg. 321 Vol 2 of Company Petition)*
- x.** In accounting terms, 'Capital Reserve' is considered to be an asset of the shareholders of the company, and in the instant case all lenders of ESL including SREI are also shareholders of ESL themselves. Hence, any suggestion that post capital reduction, the shareholders including lenders have lost their value is misplaced in as much as such capital reserve can be utilised by ESL for the benefit of its shareholders (such as for issuance of bonus shares irrespective of balance in other ledgers such as Securities Premium, Retained Earnings, etc)) and such huge capital reserve also creates wealth for the shareholders of ESL, including SREI/ the Petitioner.

- xi.** Further, the respondent has, submitted and we agree with it, that the issuance of the equity shares in lieu of the balance debt has been treated to be actual payment made to the financial creditors as per the accounting treatment accorded in terms of the Resolution Plan. In this regard, Clause 3.3 of the Indian Accounting Standards (IndAS) 109 reads as under  
*“3.3 Derecognition of financial liabilities*

*3.3.1 An entity shall remove a financial liability (or a part of a financial liability) from its balance sheet when, and only when, it is extinguished—i.e. when the obligation specified in the contract is discharged or cancelled or expires.*

...

*3.3.3 The difference between the carrying amount of a financial liability (or part of a financial liability) extinguished or transferred to another party and the consideration paid, including any non-cash assets transferred or liabilities assumed, shall be recognised in profit or loss.”*

- xii.** Therefore, had the conversion of debt to equity not been regarded as *“the consideration paid”*, the accounting treatment would have necessarily required that the difference between the carrying amount of the debt and the cash component of the consideration paid (i.e., Rs. 5320 Crore) be recognized in profit or loss. Further, the conversion of debt to equity has been done *“at an amount equal to the carrying value of the unsustainable debt”*, which demonstrates that there is no ‘difference’ i.e., there is no ‘hair-cut’ taken by banks and/or consequent gain for ESL. Accordingly, the Resolution Plan specifies that the *“transaction would get recorded only in the balance sheet”*. Had the cash component been less than the carrying amount of the debt, the same would have been recorded as profit in the books of ESL. However, no such profit is recorded in the books of ESL considering that the aforesaid difference amount of Rs.7,339.14 Crore was also paid by way of issuance and allotment of equity shares to the financial creditors of ESL (including SREI). Accordingly, in the instant case, in total “the

consideration paid” in terms of paragraph 3.3.3 of the IndAS 109 is the entire debt of ESL being Rs. 7,339.14 Crore (by way of issuance of the equity shares) and Rs. 5,320 Crore (as upfront cash payment).

- xiii.** Respondent has claimed that even the definition of financial debt under the IBC under Section 5(8)(d) refers to Indian Accounting Standards, and therefore Ind AS 109 must be relied upon to determine the effect of the accounting treatment given under the Resolution Plan so as to see if there is any unpaid debt.
- xiv.** The Petitioner has wrongfully contended that the only equity shares SREI received under the Resolution Plan was post capital reduction of ESL worth Rs. 6.72 Cr. The question here as to whether SREI received equity shares of INR 10/- in lieu of debt of Rs. 336.18 Crore is purely a question of fact that is borne from the following documents:
- i.** Form PAS-3 (Return of Allotment) filed by ESL with the ROC in respect of the allotment of 739,91,25,055 fully paid-up equity shares of ESL having a face value of Rs. 10/- to the allottees mentioned in the “List of Allottees” attached to Form PAS-3. PAS-3 along with List of Allottees are publicly available document on the website of the Ministry of Corporate Affairs.
  - ii.** SREI is one of the allottees featuring at Sr. No. 6 of the List of Allottees and has been duly allotted 33,61,85,524 equity shares of ESL having a face value of Rs. 10/- on 06.06.2018;
  - iii.** At Sr. No. 8 of PAS-3, it is clarified that pursuant to the allotment of 739,91,25,055 equity shares of ESL having a face value of Rs. 10/- to the respective allottees, *the only debt subsisting in the books of ESL are secured loans of Rs. 5320 Crore* (which was subsequently discharged by

release of upfront cash payment of Rs. 5,320 Cr to the financial creditors from escrow account on 21.06.2018);

- iv.** Disclosure under Regulation 30 of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 vide letter dated 06.06.2018 by ESL to the National Stock Exchange and BSE Limited, disclosing that 739,91,25,055 equity shares of ESL having a face value of Rs.10/- has been allotted to the allottees mentioned in Annexure A to the said letter. It is seen that SREI is one of the allottees featuring at Sr. No. 6 of Annexure A and has been allotted 33,61,85,524 equity shares of ESL having a face value of Rs.10/- on 06.06.2018.
- xv.** FC submits that the aforementioned reporting and disclosures have been undertaken by ESL in accordance with Step 1 of Annexure 2 of the Resolution Plan. Further, the requirement to file PAS-3 under Sections 39(4) and 42(9) of the Companies Act, 2013 is to hold them as public records in the ROC and ensure transparency. Therefore, ESL has complied with requirements of law by making adequate, proper and timely disclosures. Above facts have not been brought to notice of this Adjudicating Authority by the Petitioner. Further, the Petitioner has feigned ignorance of the allotment of shares despite the name of SREI occurring as an allottee in the reporting letter dated 06.06.2018 to the stock exchanges (*Annexure B pg. 53-58 of IA No. 66/2022*) and list of allottees filed with the PAS-3 dated 06.06.2018.
- xvi.** It is further noted that during the hearing before this Tribunal on 13.05.2022, the Petitioner sought to rely on a Demat Account Statement of SREI (shown by screen-sharing during the virtual hearing) as on October 2021 to assert that SREI has not received 33,61,85,524 equity shares of ESL having a face value of Rs. 10/- on 06.06.2018. However, it is noted by this Tribunal that this is another attempt by the petitioner to mislead, as it has

not produced any Demat Account Statement as on 06.06.2018 after issuance and allotment of equity shares the financial creditors of ESL, including SREI under the Resolution Plan.

**xvii.** It is an unassailable fact that on 06.06.2018, SREI was duly allotted 33,61,85,524 equity shares of ESL having a face value of Rs. 10/- in lieu of its share of entire balance unsustainable debt of Rs. 336,18,55,240/-, thereby discharging and satisfying the entire Unsustainable Debt component payable to SREI under the Resolution Plan.

**15.** Therefore, going by the aforesaid facts, it is evident that in terms of the Resolution Plan approved by the Kolkata bench of this Tribunal, the entire claim of SREI gets discharged at the Step 1 under the resolution plan. FC has further argued during the hearing that aforesaid Step 1 is a dummy step and the ultimate effect on their claim shall come into effect after Step 2, wherein the face value of shares gets reduced from Rs.10/- to Rs.0.20. However, this Tribunal notes that such capital reduction has been effected in terms of the approved resolution plan. Step 2 is a subsequent step which can be effected only after completion of Step 1 and at Step 1 level only all the sustainable as well as unsustainable debt of the financial creditors including that of SREI gets discharged. Therefore, once the sustainable and unsustainable debts have been discharged as aforesaid at Step 1 level only, FC cannot make a claim based on capital reduction implications, which is a subsequent step in terms of the approved resolution plan. Since, without implementing step 1, the step 2 cannot be implemented in terms of the Resolution Plan, therefore, the claim of the FC that Step 1 is a dummy step is not at all acceptable. Further, the claim of FC that on conversion of the balance debt of ESL into equity shares under the Resolution Plan on 06.06.2018, SREI did not receive any equity shares of Rs. 10/- for its entire share of the balance debt being Rs. 336.18 Crore is not true as is evident from the documents and relevant details produced by the CD. Accordingly,

based on the aforesaid terms of the resolution plan we agree with the contention of the CD that **approval of the Resolution Plan has led to extinguishment and effacement of the entire debt of ESL.**

16. With the aforesaid discussions we conclude on this aspect that all debts owed by ESL, the principal borrower, stood paid and all liabilities stood extinguished by virtue of an approved and binding resolution plan under which such payment has been made by the successful resolution applicant Vedanta, through a combination of cash and equity. SREI having accepted the payment in cash and having been allotted equity proportionate to its balance debt, all debt owed to SREI (and consequently to FC) stood satisfied/ extinguished.

17. Now, apart from the above two issues, the Respondent has raised another issue in its defence that assignment agreement between SREI and the CD is void by alleging that the required mandatory Reserve Bank of India norms have not been adhered to while the Assignment Agreement was executed. Observations of this Tribunal in this regard are as under –

**D. Whether the Assignment Agreement (“AA”) falls foul of the Securitization Companies and Reconstruction Companies (Reserve Bank) Guidelines and Directions, 2003 (“RBI Guidelines”)**

D.1 The CD made this contention during the arguments made in respect of the main Section 7, IBC petition. However, it is noted that CD in I.A (IB) No. 78/CB/2022 (“**Application**”) has already contended that the AA is void for being in violation of the RBI Guidelines, more particularly proviso (iii) to Clause 5. (*Ref. Paras 7.5 and 7.6 @12 and 13 of Application*).

D.2 It is the CD’s case that the FC as a Securitization Company/Reconstruction Company (“**SC/RC**”), is obligated to invest its ‘owned fund’ of at least 15% of the security receipts issued by the trust set up for the purpose of securitization.

It is further contended that in the present case, the amount of Rs.36 Crore invested by the FC towards the security receipts issued by the UVARC XIII Trust (“**UVARC Trust**”) were directly/indirectly provided by SREI itself and thus, the said amount of Rs. 36 Crore, not being out of the FC’s owned fund, renders the AA void.

D.3 At the outset, this Tribunal is of the view that the issue of whether there is an alleged violation of the RBI Guidelines or not is a matter solely and exclusively within the province of the RBI, which is the regulatory authority for asset reconstruction companies under the SARFAESI Act, 2002. The CD has already lodged a complaint dated 10.03.2022 with the RBI in respect of the aforesaid issues. Pursuant to the above complaint, the RBI had sought an explanation from the FC, which has been provided by the FC. Thus, it is now for the RBI to consider the complaint and the response given by the FC. If the RBI is of the opinion that any contravention of the RBI Guidelines is made out, it may take action as may be deemed appropriate.

D.4 In view of the above, this Tribunal is not taking any cognizance of this issue raised by the CD in the instant Section 7, IBC matter since, this aspect comes within the purview of RBI, and the matter is already before RBI. Therefore, this issue is not being considered at this stage in arriving at a decision in respect of this Section 7 IBC matter. In view of the same, **I.A (IB) No. 78/CB/2022 shall stand DISMISSED.**

**18.** Based on the above discussions and observations this Tribunal arrives at the following broad conclusions in the instant matter –

- a) An obligation to arrange for infusion of funds to the borrower is not a guarantee in respect of the creditor;
- b) A person having security interest over assets of a corporate debtor is not a financial creditor of such corporate debtor for the purposes of Sections 5 (8) and 7 of the IBC;

- c) Pleadings must be read as a whole to look at the substance, and cannot be relied on to interpret the obligations of parties to a written contract;
- d) Conversion of debt into equity shares in terms of the Resolution Plan tantamount to extinguishment of liability;
- e) Reduction in value of equity shares on account of capital reduction in Terms of the Resolution Plan does not reinstate a debt already converted to equity shares.

**19.** In view of the forgoing, this Tribunal is of firm view that Respondent is not a guarantor from the perspective of this petition filed under Section 7 of the IBC, 2016 as such cannot be considered as a financial creditor *qua* the Petitioner from the perspective of IBC. Further, that all debts owed by ESL, the principal borrower, stood paid and all liabilities stood extinguished by virtue of an approved and binding resolution plan under which such payment has been made by the successful resolution applicant Vedanta, through a combination of cash and equity. SREI having accepted the payment in cash and having been allotted equity proportionate to its balance debt, all debt owed to SREI (and consequently to FC) stood satisfied/ extinguished. This Tribunal also notes with concern that *prima facie* this Petition attempts to bypass a binding resolution plan approved by the NCLT, Kolkata Bench (order dated 17.04.2018) and the Hon'ble NCLAT (order dt 10.08.2018 in Company Appeal (AT) (Insolvency) No 175 of 2018), which has gone all the way up to the Hon'ble Supreme Court (appeal subsequently withdrawn by order dt 20.11.2020 in Civil Appeal No(s). 10067/2018).

**20.** In view of all the above, we arrive at the decision that this petition lacks merit and is liable to be dismissed. In result this Petition **C.P (IB) No. 16/CB/2021** stands **DISMISSED**.

IN THE NATIONAL COMPANY LAW TRIBUNAL  
CUTTACK BENCH

C.P (IB) No.16/CB/2021

*In re: UV Asset Reconstruction Company Limited Vs. Electrosteel Castings Limited*

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21. Registry is hereby directed to communicate this Order to both the parties.
22. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.
23. File be consigned to records.

**SATYARANJAN PRASAD** Digitally signed by  
SATYARANJAN PRASAD  
Date: 2022.06.24  
16:21:09 +05'30'

**Satya Ranjan Prasad**  
Member (Technical)

**PANDIAN MOHAN RAJ** Digitally signed by  
PANDIAN MOHAN RAJ  
Date: 2022.06.24  
16:32:58 +05'30'

**P. Mohan Raj**  
Member (Judicial)

Signed this 24<sup>th</sup> day of June, 2022

Ravijeet \_P.S.