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IN THE NATIONAL COMPANY LAW TRIBUNAL,
KOLKATA BENCH, KOLKATA

CA (IB) No.1328/KB/2019
CP (IB) No.1702/KB/2019

In the matter of:

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

And

In the Matter of:

Esspee Sarees Private Limited, having is head office at 113, Park Street, Kolkata-700016, West Bengal.

.....Financial Creditor

And

In the Matter of:

M/s Skipper Textiles Private Limited, a company having its registered office at 5, Russel Street, Kolkata-700071, West Bengal.

.....Corporate Debtor

Date of Hearing: 4th December 2019

Order Delivered on 20th 2019

Coram:
Madan B Gosavi, Member (J)
Virendra Kumar Gupta, Member (T)

For the Financial Creditor : Mr. Shawnak Mitra, Advocate
Mr. Soumabho Ghose, Advocate
Mr. J. Choudhary, Advocate

For the Corporate Debtor : Mr.Nikunj Berlia, Advocate
Mr.Ratul Das, Advocate
Mr.M.Kejeriwal, Advocate

ORDER

Per Virendra Kumar Gupta, Member (Technical)

This application has been filed by the financial creditor under Sec.60 of the Insolvency & Bankruptcy Code, 2016 seeking re-constitution of Committee

of Creditors by considering claim of ICICI Bank at Rs.12,29,98,978.91 as against Rs.26,42,95,035.32 which includes amount of corporate guarantee. It has also been prayed that decision taken by CoC based upon voting share of ICICI Bank at 61.99% be declared null and void.

2. The facts, in brief, are that the corporate debtor was admitted under CIRP vide order dated 20/6/2019. The applicant had also filed an application under Sec.7 of the Insolvency & Bankruptcy Code, 2016 for initiation of CIRP against the same corporate debtor. Such CP (IB) No.1662/KB/2018 was disposed off for the reason that corporate debtor had already been admitted under CIRP and the applicant was granted leave to file its claim before the IRP as per Rules. Accordingly, the applicant filed its claim in the specified form which was admitted.

3. Ld. Sr. Counsel appearing on behalf of the applicant after narrating basic facts pleaded that the admission of corporate debtor in CIRP was an act of fraud as its application filed under Sec.7 of the Insolvency & Bankruptcy Code, 2016 which was filed prior to the other application was pending on the passing of order dated 20/6/2019. In this regard, it was pointed out by the Bench that the grievance against admission of other application filed under Sec.7 of the Insolvency & Bankruptcy Code, 2016 had already been argued in separate application filed in that regard, hence, Ld. Sr. Counsel was advised to address the Bench on the issues raised in this application.

4. Ld. Sr. Counsel, thereafter, contended that the corporate debtor had given corporate guarantee in respect of loan facilities granted to its associate/subsidiary company i.e. Skipper Furnishings Pvt. Ltd. The amount of guarantee stood at Rs.16,00,00,000/-. Such guarantee had not been invoked nor that firm had defaulted in payment of loan, hence, such claim was wrongly admitted.

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5. Ld. Sr. Counsel vehemently argued that intent and purpose of this action was to increase the voting share of ICICI Bank. To explain this aspect, he submitted that before consideration of such claim, the voting rights of ICICI Bank, financial creditor i.e. Esspee Sarees Private Limited and the applicant stood at 46.29%, 3.87% and 14.27% respectively. Subsequently, this voting right stood at 61.91%, 2.41% and 8.88% respectively. Thus, merely because of such inclusion, there was a significant increase in the voting share of ICICI Bank.

6. Ld. Sr. Counsel further contended that the financial creditor, Esspee Sarees Private Limited had a voting share of 2.41% after inclusion such additional claim of ICICI Bank. Voting right of financial creditor and ICICI Bank taken together were sufficient to hijack the process of CIRP and control everything as financial creditor and ICICI Bank were acting in control. Ld. Sr. Counsel in this regard referred to the documents regarding reconstitution of CoC members with their voting shares. Our attention was specifically drawn to the minutes of proceedings of second CoC meeting held on 9/9/2019 wherein the CoC deliberated on the issue of increase in voting share of ICICI Bank and directed the RP to seek a legal opinion before taking a final call thereon. It was contended that RP assured but, in fact, no legal opinion was ever taken and CoC was reconstituted with the increased voting share of ICICI Bank.

7. Ld. Sr. Counsel, thereafter, drew our attention to the email sent by Indusind Bank on 13/9/2019 whereby Indusind Bank protested such action and decided not to participate in e-voting. It was also mentioned therein that such decision of Indusind Bank was required to be brought to the notice of NCLT. Similar stand was taken by majority of financial creditors.

8. Ld. Sr. Counsel also drew our attention to page 47 of the Paper Book to show ICICI Bank had given short term loan to the tune of Rs.12,29,98,575/-

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which comprised of loans repayable on demand and secured through hypothecation and charge on the fixed assets of the corporate debtor. Ld. Sr. Counsel, thereafter, referred to page 76 and 78 of the Paper Book and drew our attention to the details of guarantees that had been given in relation to the debts of the corporate debtor by other persons specifying which of the guarantors were related parties. In this schedule, the details of bank guarantee of Rs.14 crore given by Skipper Furnishings Pvt. Ltd. was mentioned. It was also mentioned that such concern was a related party. Thereafter, he drew our attention to clause 8.2 at page 78 of the Paper Book containing details of guarantees that had been given by the corporate debtor in relation to the debts of others which included bank guarantee worth Rs.16 crore given on behalf of Skipper Furnishings Pvt. Ltd. to ICICI Bank.

9. Ld. Sr. Counsel submitted that the actions of RP were not in accordance with the provisions of Insolvency & Bankruptcy Code, 2016 read with relevant regulations made thereunder and, consequently, such actions were liable to be declared null and void. Ld. Sr. Counsel relied on judicial decision and distinguished the decisions relied by the RP/ICICI Bank which we shall be dealing with in the later part of this order.

10. Ld. Counsel for ICICI Bank initiated his argument by submitting that a facility agreement was executed by and between ICICI and Skipper Furnishings Pvt. Ltd. on 25/7/2018 where under ICICI Bank extended cash credit limit and WCDL to the said party. The said facilities were secured by way of guarantee executed by the corporate debtor. It was also claimed that as per Clause 2 of the said corporate guarantee, the liability of corporate debtor was joint and several and coextensive with that of principal borrower. It was also claimed that the corporate guarantee formed one of the most vital security held by the bank and due to which loan facilities were granted to Skipper Furnishings Pvt. Ltd. After

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narrating these facts, it was claimed that the RP was duty bound to receive and collate of claims lodged before him irrespective of the fact whether a particular claim was a debt due or not. It was claimed that fact of non-invocation of guarantee for claiming an amount had no nexus with the filing of a claim pursuant to public announcement of CIRP against corporate debtor as claim, included a right to payment even in case of un-invoked bank guarantees. Our attention was also drawn to the definition of term "claim" and "debt" under the provisions of Insolvency & Bankruptcy Code, 2016. In support of its claim, reliance was also placed on the decision of Hon'ble NCLAT in the case of Export Import Bank of India vs. Resolution Professional JEKPL Private Limited reported in 2018 SCC OnLine NCLAT 465. It was also submitted that the order of Hon'ble NCLAT in the case of Export Import Bank of India vs. Resolution Professional JEKPL Private Limited (supra) was challenged before Hon'ble Supreme Court and such appeal had been dismissed. Hence, order of Hon'ble NCLAT had become final. Reliance was also placed on the decision of Hyderabad Bench of NCLT in the case of Canara Bank vs. IVRCL Limited

11. Ld. Counsel for ICICI Bank also placed reliance on the decision of Hon'ble NCLAT in the case of Andhra Bank vs. F.M.Hammerle Textile Ltd. in Company Appeal (AT) (Insolvency) No.61 of 2018 wherein in the similar circumstances, Andhra Bank was declared a financial creditor. On the basis of this decision, it was again reiterated that ICICI Bank was a financial creditor and its claim in respect of guarantee given by the corporate debtor was rightly admitted.

12. Ld. Counsel for the RP mainly supported the claim made by the ICICI Bank and drew our attention to the relevant provision of Insolvency & Bankruptcy Code, 2016. It was contended that the event of default of debt had nothing to do with the claim of a person whether secured or unsecured. Ld. Counsel, further, placed reliance of the order of Hon'ble NCLAT in the case of

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Axis Bank Ltd. vs. Edu Smart Services Pvt. Ltd. order dated 10/8/2018 in support of such plea. It was also claimed that RP had never stated that he would conduct e-voting of the CoC only after taking of the legal opinion, hence, this claim was an instance of wrong statement being made by the applicant.

13. Ld. Counsel for the RP also drew our attention to Circular No.IBBI/CIRP/018/2018 dated 14th September 2018 to show that in that circular it was mentioned that voting power of a member in the CoC was based on the amount of admitted claim in respect of a financial debt. Ld. Counsel, thereafter, placed reliance on the decision of Hon'ble NCLAT in the matter of Prasad Complex vs. Star Agromarine Exports Pvt. Ltd. & Ors. in Company Appeal (AT) (Insolvency) No.291 of 2018 order dated 1/2/2019 as regard the power of RP in respect of accepting or rejecting the claim of a financial creditor. Hence, once the claim was made, the RP had no other option but to collate its claim and consider the same.

14. Ld. Counsel for the RP also placed reliance on the decision of the reference Bench constituted in the case of Jaypee Greens Present Buyers Welfare Association Ltd. vs. Jaypee Intratech Limited CA No.223/2018 and CA No.266/2018 in CP No.77/ALD/2017.

15. Ld. Counsel for the RP further produced copy of sanction letter i.e. credit arrangement letter dated 17/7/2018 wherein it had been mentioned, on any default committed by Skipper Textiles Pvt. Ltd. i.e. corporate debtor will be considered as default by Skipper Furnishings Pvt. Ltd. and vise versa. Thus when the corporate debtor was put under CIRP, hence, to protect the interests of the bank, such claim had to be lodged and to be accepted by the RP.

16. Ld. Counsel for the applicant assailed these decisions by distinguishing them on facts and placing reliance on the decision of the Hon'ble NCLAT in the case of Edelweiss Asset Reconstruction Company Ltd. vs. Orissa Manganese

and Minerals Ltd. as reported in [2019] 106 Taxman.com 18 (NCLAT) order dated 23/4/2019 wherein the Hon'ble Appellate Tribunal had rejected similar contentions which have been made by the RP and ICICI Bank in the present case and that too after considering its earlier decision in the case of Axis Bank Ltd. vs. Edu Smart Services Pvt. Ltd. which has been relied upon by ICICI Bank in the present case.

17. We have considered the submissions made by all the parties involved and have also perused the materials on record. In this IA mainly three issues are involved, hence, we shall take up each of them one by one.

18. First question is whether the amount of uninvoked corporate guarantee could be considered as claim as per the provisions of Insolvency & Bankruptcy Code, 2016?

19. In this regard, we consider it pertinent firstly to deal with the judicial decisions cited by the parties. In the case of Export Import Bank of India (supra) counter corporate guarantee had already been invoked and, therefore, that case is factually entirely different from the facts of the case in hand as in the present case it is an undisputed fact that neither the principal borrower has defaulted nor this guarantee has been involved. Hence, ratio of this decision is not applicable here.

20. As far as the case of Axis Bank Ltd. vs. Edu Smart Services Pvt. Ltd. is concerned, the Hon'ble NCLAT itself in its subsequent decision in the case of Edelweiss Asset Reconstruction Company Ltd. vs. Orissa Manganese and Minerals Ltd. (supra) has rejected the similar claim as made out in the present case. We also find that facts of the present case are similar to the facts of the case of Axis Bank Ltd. vs. Edu Smart Services Pvt. Ltd. Therefore, the said decision also does not help the cause of the ICICI Bank/RP.

21. Similarly, the decision of NCLAT in the case of Canara Bank vs. IVRCL Ltd. will not be of any help in view of subsequent decision of the Hon'ble NCLAT in the case of Edelweiss Asset Reconstruction Company Ltd. vs. Orissa Manganese and Minerals Ltd. (supra). Further, facts of the case of Canara Bank vs. IVRCL Ltd. are similar to the facts of the case of Axis Bank Ltd. vs. Edu Smart Services Pvt. Ltd. which has been overruled by the Hon'ble NCLAT in its subsequent decision. As per accepted judicial norms, later decision on the same issue wherein earlier decision has been considered and different view has been taken then such later decision is to be allowed, hence, decision relied on by the ICICI Bank does not render any assistance to its cause.

22. Similarly, decision of the Hon'ble NCLAT in the case of Andhra Bank vs. F.M. Hammerle Textile Ltd. is not applicable in view of subsequent decision of the same authority on the same point.

23. Thus, on the basis of above discussion itself, it can be concluded that action of RP is not correct in law. Moreover, having regard to the general importance of the issue, we consider it pertinent to discuss few aspects which have got a great bearing on such types of matters.

24. To start with, we draw attention to the observations of the Hon'ble Supreme Court in para 38 of the order in the case of Swiss Ribbons Pvt. Ltd. and Ors. vs. Union of India (UOI) and Ors. order dated 5th January 2019 as under:-

> *38. In this context, it is important to differentiate between "claim", "debt" and "default". Each of these terms is separately defined as follows:-*
>
> *3. Definitions - in this Code, unless the context otherwise requires- xxxx*
>
> *(6) "claim" means -*

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(a) a right to payment, whether or not such right is reduced to judgment, fixed,disputed, undisputed, legal, equitable, secured or unsecured;

(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured; xxxxxxx

(11) "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;

(12) "default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be; xxxxx

Whereas a "claim" gives rise to a "debt" only when it becomes "due", a "default" occurs only when a "debt" becomes "due and payable" and is not paid by the debtor. It is for the reason that a financial creditor has to prove "default" as opposed to an operational creditor who merely "claims" a right to payment of a liability or obligation in respect of a debt which may be due. When this aspect is borne in mind, the differentiation in the triggering of insolvency resolution process by financial creditors Under Section 7 and by operational creditors Under Sections 8 and 9 of the Code becomes clear."

25. From the perusal of the above observations, it is clear that a claim can be due or not. Unless a claim becomes due only then it gets converted into debt. Further, debt must be due and payable in law or fact for occurrence of event of default. Thus, there is a marked difference between both the terms i.e. "claim" and "debt". Both have got different implications on various aspects/process which are undertaken under the Insolvency and Bankruptcy Code, 2016. This can be summarized as under:-

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a) Application under Sec.7 or 9 of Insolvency and Bankruptcy Code, 2016 can be filed only when there is a default in respect of a debt which is due and payable whereas no such action can be taken in respect of a claim unless it becomes due and payable and default occurs thereafter.

b) Claim is wider in its scope than debt. A claim may be due or may not be due but debt must be a claim which is due.

c) During CIRP, Interim Resolution Professional is required to make a public announcement under Sec.30 of Insolvency and Bankruptcy Code, 2016 which contains information/details regarding submission of claim and last date thereof in terms of provisions of Sec.15 of Insolvency and Bankruptcy Code, 2016. Under Sec.18(1)(b), the IRP is required to receive and collate all claims submitted by creditors to him pursuant to the public announcement. The Resolution Professional under Sec.25(2)(e) of Insolvency and Bankruptcy Code, 2016 is required to maintain a updated list of all claims. RP as per clause **(g) of Sec.25(2)** is required to prepare information memorandum in accordance with the provisions of Sec.29 of Insolvency and Bankruptcy Code, 2016. Such information memorandum shall contain the information as may be specified for formulating a resolution plan. A resolution applicant may submit resolution plan to the RP prepared on the basis of information memorandum. Thus, information memorandum is critical for the success of CIRP. As per regulation 36(2) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the information memorandum shall contain following information:

> *"(2) The information memorandum shall contain the following details of the corporate debtor-*
>
> *(a) [assets and liabilities with such description, as on the insolvency commencement date, as are generally necessary for ascertaining their values.*
>
> *(b) The latest annual financial statements;*

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(c) Audited financial statements of the corporate debtor for the last two financial years and provisional financial statements for the current financial year made up to a date not earlier than fourteen days from the date of the application;

(d) A list of creditors containing the names of creditors, the amounts claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims;

(e) Particulars of a debt due from or to the corporate debtor with respect to related parties;

(f) Details of guarantees that have been given in relation to the debts of the corporate debtor by other persons, specifying which of the guarantors is a related party;

(g) The names and address of the members or partners holding at least one percent stake in the corporate debtor along with the size of stake;

(h) Details of all material litigation and an ongoing investigation or proceeding initiated by Government and statutory authorities;

(i) The number of workers and employees and liabilities of the corporate debtor towards them;

*(j) *******

*(k) ******

(l) *Other information, which the resolution professional deems relevant to the committee.*

Clause (d) as reproduced above, deals with the amount of claim in all respects.

(d) Thus, a conjoint reading of all these provisions/regulations make it apparent that in all these sections the term "claim" has been used.

26. In contrast, Sec.30(2)(b) provides for payment of "debt" of operational creditor in such manner as may be specified. The said clause also provides for payment of debt of financial creditor. Sec.32 also refers to Sec.53 of Insolvency and Bankruptcy Code, 2016 wherein the term "debt" has been used in its various sub-clauses. In Sec.52(4) again the term "debt" has been used.

27. Regulation 7 to 15 of Chapter IV of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 deal with the procedure relating to claims. In these regulations mechanism has been prescribed as to how claims by operational creditor, financial creditor, creditors in a class, claims by workman and employees and by other creditors would be made. It is also provided that how such claims would be substantiated. In these regulations when question of proving existence arises, the words "debt due" have been used. As per regulation 11 the cost of proving the debt due is to be borne by such creditor. Thus, ascertainment of quantum of debt due is next step or outcome of claim lodged. In other words debt due is an instance of ascertained liability or ascertainment of a liability in respect of a claim on the basis of certain documents.

28. On failure of CIRP, the natural consequence is liquidation. It is noteworthy that in Sections 35, 38, 39, 40, 41, and 42 of Insolvency and Bankruptcy Code, 2016 the words "claim" of claims have been used. Similarly, in Regulation 16 to 31A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the words claim/claims/admitted claims/debt due or payable have been used.

29. Further, a financial creditor has to submit its claim under Regulation 8 of CIRP Regulation 18 in Form C. Clause 10 of this form provides for list of documents attached to this claim **in order to prove the existence and non-payment of claim due to the financial creditor.** Thus, in case of a corporate guarantee or counter corporate guarantee, which has not been invoked, we are unable to comprehend as to how the requirement of this clause would be met or have been met by ICICI Bank by its claim in respect of such uninvoked bank guarantee issued by the corporate debtor and how the IRP/RP has accepted

such claim of ICICI Bank. For the ready reference we reproduce the said form as under: -

FORM C

SUBMISSION OF CLAIM BY FINANCIAL CREDITORS

(Under Regulation 8 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016)

From

[Name and address of the financial creditor, including address of its registered office and principal office]

To

The Interim Resolution Professional/Resolution Professional,

[Name of the Insolvency Resolution Professional/Resolution Professional] [Address as set out in public announcement]

Subject:- Submission of claim and proof of claim.

Madam/Sir,

[Name of the financial creditor], hereby submits this claim in respect of the corporate insolvency resolution process of [name of corporate debtor]. The details for the same are set out below:

	Relevant Particulars	
1.	Name of financial creditor	
2.	Identification number of financial creditor (if an incorporated body, provide identification number and proof of incorporation.If a partnership or individual provide identification records of all the partners or the individual	
3.	Address and email address of the financial creditor for correspondence	
4.	**Total amount of claim (including any interest as at the insolvency commencement date)**	
5.	**Details of documents by reference to which the debt can be substantiated**	
6.	**Details of how and when debt incurred**	
7.	Details of any mutual credit, mutual debts, or other mutual dealings between the corporate debtor and the creditor which may be set-off against the claim	
8.	Details of any security held, the value of the security, and the date	

	it was given	
9.	Details of the bank account to which the amount of the claim or any part thereof can be transferred pursuant to a resolution plan	
10.	**List of documents attached to this claim in order to prove the existence and non-payment of claim due to the financial creditor.**	

30. From the perusal of the above, it appears that total amount of claim mentioned in column 3 is in relation to principal plus interest which equals to claim. This also requires details of nature of claim which is suffixed by whether term loan total, secured, unsecured. In column 6 the details of debt as to how and when such debt was incurred are to be given. In Column 5, order of the Tribunal or a Court is to be spelt out in regard to non-payment of debt. Column 11 requires listing and attachment of documents in respect of claim. On overall basis, it can be held that it is the debt only which is to be considered. Regulation 28 of (liquidation process) regulations prescribes as how debt payable at future time would be given effect to. Similar regulation do not exists in CIRP regulation 2016. As per regulation 28 debt which is not fallen due before distribution is to be distributed in the manner as prescribed therein. The crucial aspect is that this specific provision takes care of a claim, whose payment was not yet due on liquidation commencement of debt and is entitled to distribution in the same manner as in other stake holder. Stake holder has been defined in Clause 2(K) to mean that stake holders are entitled to distribution of proceeds under Sec.53. We have seen earlier that section 53 refers to financial debt or debts owed to secured creditor or any remaining debts and dues and meaning thereby that any debt which is not payable or not due as on the date of approval of resolution plan will have to be taken care of by the resolution applicant as and when such debt/claim becomes due and payable. This is also so because if such claims are to be paid by the resolution applicant

without being due the consideration would be enhanced and more cash may be required. Thus, resolution may become difficult. Hence, for this reason also uninvoked corporate guarantee, in our considered opinion, would not fall within the definition of claim at the very outset and consequently, not a debt owed to financial creditor or operational creditor.

We also reproduce Form D as prescribed under IBBI (Liquidation Process) Regulations, 2016 as under:-

FORM D

PROOF OF CLAIM BY FINANCIAL CREDITORS

(Under Regulation 18 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016)

To

The Liquidator

[Name of the Liquidator]

[Address as set out in the public announcement]

From

[Name and address of the registered office and principal office of the financial creditor]

Subject:- Submission of proof of claim in respect of the liquidation of [name of corporate debtor] under the Insolvency and Bankruptcy Code, 2016

Madam/Sir,

[Name of the financial creditor], hereby submits this proof of claim in respect of liquidation of [name of corporate debtor]. The details for the same are set out below:

1.	Name of financial creditor (If an incorporated body provide identification number and proof of incorporation, if a partnership or individual provide identification records of all the partners or the individual)	
2.	Address and email of financial creditor for correspondence	
3.	**Total amount of claim, including any interest, as at the liquidation commencement date and details of nature of claim (whether term loan, total secured, unsecured)**	**Principal :** **Interest:** **Claim:**
4.	**Details of documents by reference to which the debt can be substantiated**	

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5.	**Details of any order of a court of tribunal that has adjudicated on the non-payment of debt**	
6.	**Details of how and when debt incurred**	
7.	Details of any mutual credit, mutual debts, or other mutual dealings between the corporate debtor and the financial creditor which may be set-off against the claim	
8.	Details of any security held, the value of the security, and the date it was given	
8[A.	*Whether security interest relinquished*	Yes/No]
9.	Details of any assignment or transfer of debt in his favour	
10.	Details of the bank account to which the financial creditor's share of the proceeds of liquidation can be transferred	
11.	**List out and attach the documents relied on in support of the claim**	(i) (ii) (iii)
Signature of financial creditor or person authorised to act on his behalf (Please enclose the authority if this is being submitted on behalf a financial creditor)		
Name in BLOCK LETTERS		
Position with or in relation to creditor		
Address of person signing		

31. The term "claim" as defined in Sec.3(6) of Insolvency and Bankruptcy Code, 2016 which has two clauses. In clause (a) the word "unmatured" has not been used though the same have been used in Clause (b) thereto, thus unless an amount is related to a right of the nature mentioned in Clause (b) of Sec.3(6), such unmatured amount, at the very outset, cannot be considered as a claim. For this reason also, uninvoked corporate guarantee which undisputedly fall under clause (a) of Sec.3(6) cannot be considered as a claim. Consequently, the question of such claim being debt does not arise.

32. We are further of the view that uninvoked corporate guarantee or counter corporate guarantee is of the nature of contingent liability which may or may not arise. As per established accounting practices as well as accounting

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standard in some cases where principal borrower might have defaulted but if the guarantee holder has not invoked such guarantee, then a provision fair valuation on the basis of prudence or as per accounting standard AS 29 or Ind AS 37 may be made. Therefore, even accounting and business practice do not recognise uninvoked corporate guarantee as a debt due or ascertained liability as on a particular date. Hence, when viewed from this angle uninvoked corporate guarantee cannot be considered as debt due and payable.

33. Admittedly, corporate guarantee has been issued by the corporate debtor and it cannot be considered as a debt due and payable then the question arises as to whether this can be ignored at all? In our considered view, this cannot be done for the simple reason that some financial commitment exists in law which may have implications for viability and implementation of resolution plan. Resolution applicant has to submit a plan which should be prepared on the basis of information memorandum provided to him by the resolution applicant in consultation/after approval of CoC. If details uninvoked corporate guarantee(s) are not disclosed, then a situation may arise in future whereby the resolution applicant may not implement the resolution plan and back out in case guarantee is invoked. As per regulation reproduced herein before, it is apparent that the corporate guarantees given in favour of corporate debtor are only to be disclosed in a specific manner. No specific clause as regard to disclosure of corporate guarantee issued by the corporate debtor either to an independent party or to a related party is mentioned. However, as stated earlier, non-disclosure of such information relating to such guarantee may result into failure of resolution plan or some other unintended consequences, such as, litigation etc. Thus, to avoid the happening of such events, in our considered view, the information relating to such guarantee given must be given in the

information memorandum as per clause 36(2)(l) which would take care of all eventualities.

34. It is also noted that the RP has included corporate guarantee issued in favour of ICICI Bank only but as per information memorandum at page 78 of the Paper Book, it appears that corporate debtor has also issued a corporate guarantee in relation to the same entity i.e. Skipper Furnishings Pvt. Ltd. in favour of Magma Fincorp Ltd. The value of such corporate guarantee is Rs.75 lakh. However, the said guarantee has not been considered in arriving as a claim or in arriving of voting percentage. Hence, the action of RP appears to be contradictory and tilted in favour of ICICI Bank.

35. Thus, on the basis of above discussion, it is apparent that "claim", "admitted claim" and "debt" due and payable have got different significance and consequences depending upon the context where such terms have been used. We may add that at some places it may appear that these terms have got the same meaning/object but this cannot be applied on uniform basis. Having reached to the above conclusion that such uninvoked guarantee cannot be considered as a claim, in our considered view, the natural outcome is that it cannot be considered for any other purposes except disclosure of the same in information memorandum.

36. Having concluded so, if it is assumed that such an uninvoked corporate guarantee can be considered as a claim considering the divergent judicial views, the question arises, whether even it is so then also this claim can be considered for the purpose of determination for voting share of a financial creditor?

37. This question is very significant and of paramount importance because CIRP is CoC driven. The RP is required to take various approvals from CoC and such approvals are based on a thresh hold limit of voting percentage. Unless such approval comes with specified minimum percentage of voting, the action

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cannot be taken. For example Sec.28, 30, 12A and 27 are the provisions where specified percentage of votes are required for taking certain action/ decision. It is also noteworthy that CoC is comprised only of financial creditors except where there are no financial creditors, CoC may be comprised of operational creditor. Thus, if a financial creditor gets a higher voting share, such financial creditor can dominate the whole CIRP and even can become unreasonable. Having understood this implication, now, we would have to address the core issue as to how the voting percentage/rights are to be calculated .

38. For this purpose, the primary section which is required to be considered is Sec.5(28) of Insolvency and Bankruptcy Code, 2016. The same is reproduced as under:-

> *"(28) "Voting share" means the share of the voting rights of a single financial creditor in the committee of creditors which is based on the proportion of the financial debt owed to such financial creditor in relation to the financial debt owed by the corporate debtor."*

39. From the perusal of the above section, it emerges that voting rights of a single financial creditor in the CoC are calculated on the basis of proportion of the financial debt owed to such financial creditor in relation to the financial debt owed by the corporate debtor. There is no reference to the word "claim" in the aforesaid section and, therefore, on the face of it unless a claim gets converted into a financial debt owed such claim cannot be taken into consideration to determine the voting share. Voting share of two or more financial creditors as part of consortium or agreement prescribed in Sec.21(3) of Insolvency and Bankruptcy Code, 2016 which is reproduced as under:-

> *"(3) [Subject to sub-sections (6) and (6A), where] the corporate debtor owes financial debts to two or more financial creditors as part of a consortium or agreement, each such financial creditor shall*

be part of the committee of creditors, and their voting share shall be determined on the basis of the financial debts owed to them."

Again, the voting share is to be determined on the basis of financial debt owed to them.

40. Voting share of a person who is a financial creditor as well as operational creditor are to be determined as per Sec.21(4) which is reproduced as under:-

"(4) Where any person is a financial creditor as well as an operational creditor, -

(a) Such person shall be a financial creditor to the extent of the financial debt owed by the corporate debtor, and shall be included in the committee of creditors, with voting share proportions to the extent of financial debts owed to such creditor;

(b) *Such person shall be considered to be an operational creditor to the extent of the operational debt owed by the corporate debtor to such creditor."*

From the above it is clear again that voting share is based on the quantum of only financial debt owed to such creditor.

41. As per Sec.21(5) an assignee or a transferee of a operational debt may be a financial creditor and even if it is so, such assignee or transferee being a financial creditor will not have any voting share, as such person would be considered as a operational creditor only. Similarly, as per Sec.21(6)(d) the reference is of voting share of one or more financial creditors which can be exercised jointly or severally. As noticed earlier voting share is based upon financial debt owed, hence, again it is the financial debt owed which is required to be considered. Similarly, in Sec.21(6)(A) the reference is to the terms "financial debt" and "financial creditor" which are also based upon the element of financial debt owed.

42. Thus, on conjoint reading of all these provisions the significant factor which emerges our consideration is the meaning of the term financial debt

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owed. This term has been used in Sec.5(7) which defines who will be a financial creditor. Similarly, in Sec.5(20) operational creditor has been meant as a person to whom an operational debt is owed. In Sec.3(11) debt has been defined as a liability obligation in respect of a claim which is due. Sec.3(12) prescribes a situation of default on non-payment of debt which has become due and payable. Thus, in our considered view the rights of a person are obligations to other persons to that transaction, hence, debt due and payable by a person is debt owed to a person. Thus, when the scheme of the Code is read as a whole, it can be safely concluded that voting rights are to be determined only on the basis of financial debt owed.

43. We also reject the claim of the RP which has been made on the basis of circular of IBBI dated 14/9/2018. In this regard, we consider it pertinent to further mention that the language/words used in the circular cannot be interpreted in a manner so as to defeat the substantive provisions of Insolvency and Bankruptcy Code, 2016 as well as regulation made thereunder. Sec.240 also prescribes that regulations made should be consistent with the provisions of the Insolvency and Bankruptcy Code, 2016. This provision, in our view is also applicable for circular issued by IBBI.

44. We further hold that if such contingent claims are considered in determining voting share, then a situation may arise where debts due and payable are not that magnitude and if such corporate debtor has given a number of corporate guarantees, then financial creditors holding such guarantees will have largest chunk of voting share which, in our considered opinion cannot be the intention of the legislature as contingent claims are inferior to actual claims.

45. On behalf of the RP reliance has been placed on the decision in the case of Prasad Gempas (supra) for the proposition that RP had power only to collect,

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verify and collate the claims and, therefore, once a claim was submitted RP had to consider the same. There is no quarrel with this proposition. However, consequence of the same needs to be understood. Once RP collate the claims then the same are presented for consideration for CoC who takes final call on the admissibility of such claims. When such claims are found to be admissible in accordance with the provisions of Insolvency and Bankruptcy Code, 2016, then such claims become debt due and payable. Thereafter, RP has to determine voting share of each financial creditor in accordance with the financial debt owed to a financial creditor in proposition to total financial debt owed by the corporate debtor. In the present case, CoC has not accepted the decision of RP in regard to inclusion of uninvoked corporate guarantee given to ICICI Bank, hence, such voting share cannot be considered to have been rightly allocated. We may further add that in case CoC accepts a claim which is not acceptable to any financial creditor, then such financial creditor can approach Adjudicating Authority under Sec.60(5) of Insolvency and Bankruptcy Code, 2016 for redressal of its grievance. As such, decision of CoC must meet the requirements of Sec.30(2)(e) of Insolvency and Bankruptcy Code, 2016. Thus, in our considered view, a complete mechanism has been provided in the Insolvency and Bankruptcy Code, 2016 as to how and when claims become due and payable/debt owed and, consequently how voting share of a financial creditor is to be determined. As stated earlier, in the present case, there is a violation of this mechanism.

46. In conclusion, we hold that even if uninvoked corporate guarantee is found to be considered as claim, the same cannot be taken into consideration for determining the voting share of a financial creditor.

47. The next question which remains to be dealt with is whether the decision of the RP can be said to be in line with the scheme and objects of Insolvency

and Bankruptcy Code, 2016. The role of IRP/RP is very crucial. IRP has to constitute CoC as per the provisions of Sec.18(1)(c) of Insolvency and Bankruptcy Code, 2016. The IRP is also obliged to make every endeavour to protect and preserve the value of property of the corporate debtor and manage the operations of corporate debtor as a going concern. The RP is required to conduct CIRP and convene the meeting of CoC as well as to chair the same. As per Sec.24(6) each creditor is required to vote with the voting share assigned to him based on the financial debt owed to such creditor. As per Sec.24(7) the resolution professional has been given authority to determine the voting share to be assigned to each creditor in the manner specified by the Board. If resolution professional assigns higher voting share to any creditor, then such creditor gets an added advantage. In the present case, the facts have already been narrated and findings have been given as regard to both contentions of the applicant in his favour which also refers to mode and manner of process which has been adopted. The other facts are that in one of the meetings of the CoC, this issue was discussed and it was agreed that for assigning voting shares one of rights, RP would take a legal opinion which he has not done till date. Further, almost all the financial creditors other than the ICICI Bank have sent mails whereby they have not accepted the manner in which voting share has been determined by the RP (Copies placed at pages 125 to 189). It has also been stated in the said mails that this grievance be brought to the notice of NCLT. Even in this background, RP has not taken any legal opinion.

48. As have been mentioned in earlier part of this order that while claim of ICICI Bank has been considered but identical claim of Magma Fincorp Ltd. has not been considered. Thus, if all the facts and circumstances of the matter is considered, then we reach to an opinion that RP needs to be changed as there will always remain problem which will be detrimental for smooth

implementation of CIRP. This may also happen because now the percentage of voting share of ICICI Bank will get reduced substantially but still ICICI Bank may oppose any proposal in CoC meeting for removal of RP as 66% thresh hold limit may not be achieved without ICICI Bank, all other financial creditors vote together. This will create stalemate in the process. For this reason also, we consider it prudent to replace RP. Accordingly, we order that the present RP be replaced by new RP. Consequently, we appoint Shri Nitesh Kumar More, IP Registration No.IBBI/IPA-001/IP-P01087/2017-18/11785 email address nmore2091@gmail.com Mobile No.8336087901 as new RP to conduct CIRP as per rules.

49. Our findings are summarised as under:-

a) The uninvoked corporate guarantee cannot be considered a claim as per the provisions of Code, 2016, hence, not to be concluded in the list of claims maintained and updated by the RP.

b) Uninvoked corporate guarantee would also not be considered as a debt due and payable or financial debt owed to financial creditor, hence, the same would not be taken into consideration in determining voting share of financial creditor. This remains so assuming that a view is taken that uninvoked corporate guarantee is categorised as a claim.

c) Claim and voting share of ICICI Bank is to be recomputed in terms of our above findings. If any decision has been taken with the increased voting share of financial creditors which has material impact, or claims or interests of stake holders/creditors then such decision must be reviewed in the next CoC meeting having revised voting share of financial creditors as a consequence of our above findings.

d) The present RP shall hand over all the documents/assets in possession to new RP forthwith. The claims of present RP regarding fees and expenses, if any, would be considered as per Rules.

50. This IA being CA (IB) No.1328/KB/2019 stands disposed of in terms indicated above.

51. No order as to costs.

52. Urgent certified copies of this order, if applied for, be supplied to the parties upon compliance of all requisite formalities.

Sd 9/20/20

(Virendra Kumar Gupta)
Member (T)

Sd 20/12/2019

(Madan B Gosavi)
Member (J)

Signed on 20th December 2019