IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH-I

IA No. 550/MB/C-I/2021
In
C.P (IB) No.1061/MB/C-I/2017

An application under Section 42 of the Insolvency and Bankruptcy Code, 2016
Filed by

Suraksha Asset Reconstruction Limited
...Applicant

Versus

Rajendra K. Bhuta
Liquidator of
Guruashish Constructions Private Limited.
...Respondent

In the matter of

Union Bank of India
...Financial Creditor

Versus

Guruashish Constructions Private Limited.
... Corporate Debtor

Order Delivered on: 11.08.2023

Coram:

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

Appearances:

For the Applicant	:	Mr. Rohit Gupta a/w Mr. Ajit Singh Tawar i/b Ajit Singh Tawar & Co, Advocates

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

ORDER

Per: Anu Jagmohan Singh, Member (Technical)

1. The present Application is filed by the Applicant seeking:

    i. That the present Application be Allowed.

    ii. That the decision of the Liquidator dated 23.10.2023 rejecting the claim Applicant be set aside.

    iii. Direction to the Liquidator to accept the claim of the Applicant to the tune of Rs.825,88,90,204.89.

    iv. Direction to the Liquidator to amend and publish an updated list of stakeholders including the Applicant's claim therein.

    v. Pending the final disposal of this Application, this Tribunal direct the Liquidator to not distribute sale of assets of the Corporate Debtor to any creditors.

    vi. Any other reliefs as this Tribunal may deem fit in the facts and circumstances of this case.

Backdrop of facts

2. The Corporate Debtor was admitted in CIRP vide Order dated 24.07.2017. Since, no Resolution Plan was passed, the Corporate Debtor was Liquidated vide Order dated 04.09.2020 and the Respondent herein

was appointed as the Liquidator.

3. The Applicant submits that in the year 2015, Housing Development and Infrastructure Limited **("HDIL")** availed a term loan of Rs. 500 Crores ("Loan") from YES Bank Limited and the Loan is inter-alia secured by way of:

   i. Exclusive charge by way of registered mortgage in English form on development rights with minimum saleable area of 2 lacs sq.ft (Built Up Area 15999 Sq. mtr) of commercial space "Project Meadows" at Sector-10, Siddharth Nagar, Goregaon with total built up area of 6.31 lacs sq.ft.

   ii. Exclusive charge by way of hypothecation on all movable and current assets (both present and future) including sale proceeds and/or lease/ rental receivables (existing & future) (Owned by Corporate Debtor) of minimum saleable area 2 lacs sq.ft (Built up Area-15999 Sq. mtr) at siddharth nagar, Goregaon.

   iii. Corporate Guarantee dated 29th July, 2015 in favor of YES Bank Limited (the Assignor of the Applicant) for securing the due repayment of the loans aggregating to Rs. 500 Crore granted to HDIL, together with interest, cost, charges and other money payable thereon.

4. The Applicant submits that YES Bank Limited assigned the financial

asset pertaining to HDIL , together with the underlying security interest created therefor and all its right, title, interest therein in favor of the Applicant (acting in its capacity as Trustee of the Suraksha ARC 013 Trust) by and under an assignment agreement dated 31.03.2017.

5. Accordingly, by virtue of the covenants of the Assignment Agreement and the provision of SARFAESI Act, the Applicant is deemed to be the secured financial creditor to HDIL and all rights of YES Bank Limited in relation to the aforesaid financial assets of HDIL stand vested in the Applicant.

6. HDIL committed default in repayment of the principal amount as well as in payment of interest and other charges amounting to Rs. 825,88,90,204.89/- (Rupees Eight Hundred Twenty Five Crore Eighty Eight Lakhs Ninety Thousand Two Hundred and Four only) in respect of loan which fell due from time to time. Hence, the Corporate Debtor is liable for the debt as mentioned hereinabove in its capacity as Guarantor and Mortgagor in the event of Liquidation.

7. The Applicant sent a notice of default dated 09.08.2017 to the Corporate Debtor intimating about the default committed by HDIL.

8. The Respondent herein invited claims and accordingly the Applicant herein filed its claim in FORM C under Regulation 8 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. The

Applicant submits that it had filed two Miscellaneous Applications bearing No. 24/2018 and MA No. 28/2018 against the Respondent, for reinstating it as a member of CoC and reconstitution of the CoC. The Applicant submits that when the Corporate Debtor was undergoing CIRP, it had filed the claim which was admitted and the Applicant was made a CoC member. Subsequently, the Resolution Professional rejected the Applicant's claim, thereby deleting it as a member of the CoC. Therefore, the aforestated two Miscellaneous Applications were preferred by the Applicant, which were allowed by this bench vide order dated 19.03.2018.

9. Since, the CIRP of the Corporate Debtor failed, the Corporate Debtor was decided to be Liquidated vide Order of this bench dated 04.09.2020. The Respondent herein was appointed as the Liquidator. The Applicant immediately filed its Claim in Form-D' under Regulation 18 of Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 pursuant to the public announcement dated 09.09.2020, before the Liquidator, Mr. Rajendra Karanmal Bhuta (IBBI/IPA-001/IP-P00141/2017- 18/10305) on 3rd October, 2020.

10. The claim was filed by the Applicant on 03.10.2020 for a total amount of Rs.8,25,88,90,204.89/-.

11. Thereafter, the Liquidator by an email dated 23.10.2020 rejected the

claim of the Applicant stating that the claim cannot be considered as financial debt. He relied on the Judgment of the Hon'ble Supreme Court in Anuj Jain vs Axis Bank, Civil Appeal No. 8512-8527 of 2019 dated 26.02.2020.

12. The Applicant argues that the Judgement of the Hon'ble Supreme Court in Anuj Jain is not applicable in the present case, as the properties were only mortgaged with the bank and the debt amount could have only been realized by sale of mortgaged properties but not from the Corporate Debtor therein. However, in the present case the Corporate Debtor has guaranteed repayment of debt of Serveall Construction and the guarantee provided by the Corporate Debtor is executable against the Corporate Debtor.

13. The Applicant submits that the Corporate Debtor has executed a Corporate Guarantee in order to secure the loan availed by HDIL dated 29.07.2015. The Applicant submits that the debt has been disbursed along with interest for the time value of money and the same is a financial debt.

14. The Applicant submits that the Liquidator has failed to consider the indenture of mortgage cum charge dated 29.07.2015 and record available with the MCA where a charge has been registered under section 77(1) of the Companies Act, 2013 in relation to the immovable

property of the Corporate Debtor.

15. The Applicant submits that the Respondent has accepted the claim of the Applicant as a 'Financial Creditor' on commencement of CIRP and the Respondent has rejected the claim of the Applicant without assigning any cogent reasons on commencement of Liquidation.

16. The Applicant submits that the Liquidator has failed to consider the afore mentioned aspects and rejected the claim. Hence, the present Application is filed.

Submissions advanced by the Respondent/Liquidator vide Affidavit in reply and report dated 03.02.2023

17. The Respondent/Liquidator submits that the rationale behind the rejection of the claim is that the Applicant cannot come within the purview of Financial Creditor as defined under section 5(8) of the Code as the Applicant has not disbursed any amount to the Corporate Debtor. The Respondent submits that the Corporate Debtor has not been a direct beneficiary of the loan advanced.

18. The Respondent has placed reliance on the Judgment of the Hon'ble Supreme Court in Anuj Jain vs Axis Bank, Civil Appeal No. 8512-8527 of 2019 dated 26.02.2020. The Respondent submits that for a debt to qualify as financial debt a basic element of disbursal against the time value of money must be there and for debts which are in the form of third

party securities given to secure the loans/advanced/facilities such ‘debt’ is not and cannot be covered under the expression ‘financial debt’.

19. The Respondent qua argument of the Applicant that he has failed to consider the fact that the financial debt is on account of Corporate Guarantee and mortgage provided by the Corporate Debtor, submits that the Hon’ble Apex Court has categorically held that the disbursal against the consideration of the time value of money is an essential ingredient for any creditor to classify as a financial creditor.

20. The Liquidator/Respondent submits that he has examined whether Corporate Guarantee issued under section 5(8)(i) is in respect of guarantee issued for any of the items referred to in section 5(a) to (h). The Liquidator states that the guarantee is not issued for the purpose of sub clauses (a) to (h).

21. The Respondent submits that since the claim of the Applicant was submitted in Form D which is for the Financial Creditors, the claim was verified keeping in mind the provisions of the Financial Creditors. The Applicant failed to satisfy the conditions of financial creditors and hence the claim of the Applicant was rejected.

22. The Respondent has filed its report dated 03.02.2023 wherein it has stated that the Applicant can make an Application to the liquidator in Form G ‘proof of claim by any other stakeholder under Regulation 20 of

the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulation,2016.

Findings and Directions:

23. We have perused records and heard the submissions advanced by the parties.

24. It is observed that the Applicant was made part of the CoC as the Financial Creditor during CIRP period pursuant to the order of this Tribunal dated 19.03.2018 wherein it was directed to the erstwhile RP present Liquidator to restore the Applicant as a CoC member.

25. Subsequently, at the Liquidation stage when proof of claim was submitted by the Applicant, the claim was erroneously rejected by the Liquidator by placing reliance of the Judgement of the Hon'ble Supreme Court in Anuj Jain vs Axis Bank. The Liquidator failed to appreciate the fact during Liquidation, a creditor is merely classified as secured and unsecured creditor and hence the question of rejecting the claim of the Applicant as a Financial Creditor does not arise.

26. The Liquidator has admitted that the Applicant can be classified as secured creditor and has based its decision for rejection of claim on the fact that since the Applicant has filed its claim in Form D which is for financial creditors and the Applicant herein does not qualify for the same, the claim is liable to be rejected.

27. The Liquidator failed to consider the fact that the Liquidation regulations provides for separate forms for submissions of claims by claimants under various heads only to facilitate ease in collation and verification of claims. The Liquidator has mechanically rejected the claim of the Applicant without giving due consideration to order of this Tribunal dated 19.03.2018 wherein it was categorically held that the claim made by Applicant falls within the definition of claim.

28. Even if we decide the matter on merits it is an admitted fact that the Corporate Debtor executed an indenture of mortgage and Corporate Guarantee Agreement dated 29.07.2015.

29. It is the Liquidator's stand that the claim of the Applicant cannot come within the purview of financial debt. The said argument advanced by the Liquidator cannot sustain, as the Corporate Debtor has vide the agreement dated 29.07.2015 guaranteed repayment of the loan in event of default committed by the borrower i.e HDIL.

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

> *"Section 5(5A)- 'corporate guarantor' means a corporate person who is the surety in a contract of guarantee to a corporate debtor."*

31. Further, the definition of financial debt under sub clause (i) of section 5(8) clearly provides that – "the amount of any liability in respect of any

of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause." Since, the original lender Yes Bank had advanced term loan of Rs. 500 Crore to the principal borrower i.e. HDIL. The guarantee was provided in respect of clause (a) of section 5(8) – "money borrowed against the payment of interest." The debt clearly falls within the definition of financial debt. Accordingly, the issue that the claim of the Applicant is not a financial debt is decided in favor of the Applicant and against the Respondent/Liquidator.

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

"18. …..The expression "financial debt" has been defined in Section 5(8). Amongst other categories specified therein, it could be a debt along with interest, which is disbursed against the consideration for the time value of money and would include the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of the same clause. It is so provided in sub- clause (i) of Section 5(8) of the Code to take within its ambit a liability in relation to a guarantee offered by the corporate person as a result of the default committed by the principal borrower. The expression "debt" has been defined separately in the Code in Section 3(11) to mean a liability or obligation in respect of "a claim" which

is due from any person and includes a financial debt and operational debt. The expression "claim" would certainly cover the right of the financial creditor to proceed against the corporate person being a guarantor due to the default committed by the principal borrower. The expression "claim" has been defined in Section 3(6)which means a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured. It also means a right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment in respect of specified matters.

19. Indubitably, a right or cause of action would enure to the lender (financial creditor) to proceed against the principal borrower, as well as the guarantor in equal measure in case they commit default in repayment of the amount of debt acting jointly and severally. It would still be a case of default committed by the guarantor itself, if and when the principal borrower fails to discharge his obligation in respect of amount of debt. For, the obligation of the guarantor is coextensive and coterminous with that of the principal borrower to defray the debt, as predicated in Section 128 of the Contract Act. As a consequence of such default, the status of the guarantor metamorphoses into a debtor or a corporate debtor if it happens to be a corporate person, within the meaning of Section 3(8) of the Code. For, as aforesaid, expression "default" has also been defined in Section 3(12) of the Code to mean non-

payment of debt when whole or any part or instalment of the amount of debt has become due or payable and is not paid by the debtor or the corporate debtor, as the case may be."

33. In that view of the matter, the Liquidator is directed to categorize the Applicant as the Secured Creditor and verify its claim.

34. With the aforesaid observation, **IA No. 550 of 2021 in CP(IB) No. 1061 /MB/C-I/2017** stands disposed of.

Sd/-	**Sd/-**
ANU JAGMOHAN SINGH	**H.V. SUBBA RAO**
MEMBER (TECHNICAL)	**MEMBER (JUDICIAL)**

11.08.2023

Priyal