

IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
PRINCIPAL BENCH

(IB)-102(PB)/2017

IN THE MATTER OF:

Axis Bank Limited,

Having its registered Office at :

Trishul, 3rd Floor, Opposite Samartheshwar Temple,
Law Garden, Ellisbridge,

Ahmedabad-380006,

Gujarat and Stressed Assets Department (North) at

Plot No. 114, Tower I, IV Floor, Sector 128,

Noida-201304 and acting through its

Corporate Banking Branch-Delhi,

Red Fort Capital Parsvnath Tower,

2nd Floor, Gole Market,

New Delhi-110 001

Through its Assistant Vice President

..... Applicant

DBS Bank Limited,

Having its registered Office at :

12, Marina Boulevard, Marina Bay Financial Centre,
Tower-III, Singapore-018982 and registered address at

Ground Floor, Express Towers, Nariman Point,

Mumbai-400021 and its branch office at

Capital Point, Baba Khark Singh Marg,

Connaught Place, New Delhi-110 001.

.... Financial Creditor

Versus

Edu Smart Services Private Limited,

Having its registered Office at

L-74, Mahipalpur Extension,

New Delhi-110037

Through its Resolution Professional

.... Corporate Debtor

Judgement delivered on 27.10.2017

Coram:

CHIEF JUSTICE M.M.KUMAR

Hon'ble President

Ms. Deepa Krishan

Hon'ble Member (T)

For the Petitioner/Applicant : Mr. R.S. Randhawa, Adv.
Ms. Misha, Mr. Siddhant Kant, Adv.
For the Resolution Professional: Mr. Rajeev Mehra, Sr. Adv.
Mr. Sumeesh Dhawan, Ms. Vatsala Kak, Adv.

CHIEF JUSTICE (RETD.) M.M.KUMAR, HON'BLE PRESIDENT

JUDGMENT

This is an application filed by Axis Bank Limited under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 (for brevity the 'Code') with a prayer to set aside the decision of the Resolution professional dated 20.07.2017 (Annexure-5) and 06.09.2017 (Annexure-10) rejecting the claim of the Applicant filed before her. A further direction has been sought to the Resolution Professional to accept the claim of the applicant as a Financial Creditor of the Edu Smart Services Pvt. Ltd. -Corporate Debtor (for brevity the 'Corporate Debtor') to the extent of the amount of debt on account of invocation of the corporate guarantee by the applicant.

2. Brief facts of the case necessary for disposal of the application are that the Financial Creditor, namely DBS Bank Limited filed C.P. No. (IB)-102(PB)/2017, which was admitted in the matter of 'Corporate Debtor' under Section 7 of the Code. While admitting

the petition on 27.06.2017, we have also issued direction for the moratorium in terms of Section 14 of the Code as is evident from the perusal of para 11 of that order. The Interim Resolution Professional issued public notice inviting the claims, which was duly published on 30.06.2017 (Annexure-3). The applicant submitted its proof of claim in form 'C' on 11.7.2017 alongwith supporting documents to the IRP in respect of its claim aggregating to Rs. 396,76,07,676.68/-. The aforesaid amount was claimed being the amount guaranteed by the Corporate Debtor vide Corporate Guarantee furnished by it in favour of Educom Solutions Ltd. It is appropriate to mention that Educom Solutions Ltd. had entered into a Master Restructuring Agreement dated 25.03.2014, *inter alia* with the applicant-Axis Bank Ltd. for restructuring and reconstitution of the existing loans amongst other things and working capital facilities granted to Educomp Solutions Ltd. by a consortium of lenders. Thereafter, three addendums dated 03.09.2014, 29.09.2014 and 31.03.2015 were signed *inter alia*, between Educomp Solutions Ltd. and the applicant-Axis Bank Ltd. In addition to the Master Restructuring Agreement dated 25.03.2014, it has also been claimed by the applicant that various rules were sanctioned to the Educomp

Solutions Ltd. and later restructured by Standard Chartered Bank in the year 2014. In furtherance of the Master Restructuring Agreement, SBICAP Trustee Company Limited was appointed as the Security Trustee vide the amended and restated security trustee agreement dated 03.06.2015.

3. In pursuance to the terms of the Master Restructuring Agreement, the SCB Loan Agreements and the Security Trustee Agreement, the loans granted under the said agreements to Educomp Solutions Limited were *inter alia*, secured by way of an irrevocable and unconditional corporate guarantee dated 03.06.2015 granted by the Corporate Debtor-respondent in favour of SBICAP and the lenders under the Master Restructuring Agreement and the SEB Loan Agreements. A copy of the Corporate Guarantee dated 03.06.2015 is on record (Annexure-2).

4. Axis Bank Ltd.- applicant made a claim before the Insolvency Resolution Professional. A communication was sent by the IRP vide email dated 20.07.2017 intimating that the claim cannot be verified as the corporate guarantee had not been invoked and the

liability of the Corporate Debtor- respondent to the Axis Bank Ltd.- applicant is contingent (Annexure A-5).

5. After the receipt of the communication from the IRP, the applicant vide letter dated 21.07.2017 invoked corporate guarantee in accordance with the terms of the corporate guarantee and intimation regarding the same was given to SBICAP vide letter dated 01.08.2017 (Annexure-5). The 'Corporate Debtor' sent a letter to the Axis Bank Ltd.-applicant inter alia, stating that invocation of the guarantee could not be accepted on account of CIRP and the moratorium (Annexure-7).

6. The factum of invoking corporate guarantee was brought to the notice of the Insolvency Resolution professional vide email dated 21.07.2017, who responded by stating that the liability under the corporate guarantee was contingent as on the date of commencement of insolvency process on 27.06.2017, therefore, it could not be verifiable. Another objection raised by the Resolution professional was that the applicant did not submit fresh claim form subsequent to the invocation of the Corporate Guarantee, therefore, the claim could not be accepted and verified

(Annexure-7) (Colly). The RP also raised objections to the invocation of the corporate guarantee by the applicant in view of the Security Trustee Agreement. Axis Bank Ltd.-applicant has submitted that each of the grounds for objecting to the tenability of applicant's claim and its consequent rejection were untenable and contrary to the provisions of the Code. In that regard, reliance has been placed on Regulations 12,13 and 14 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2016 (for brevity 'IBBI Regulations'). Axis Bank Ltd.-applicant has also placed reliance on the definition of 'Financial Creditor' as given in Section 5(7) to argue that it includes any person to whom financial debt is owed and also includes the person to whom the said debt has been legally assigned or transferred. Reliance has also been placed on the definition of 'financial debt' under Section 5(8) of the Code and various clauses of the corporate guarantee like clauses 1.3 and 11.10.

7. In response to the claim made by the applicant, the resolution professional has filed reply raising many preliminary objections.

The first objection raised is suppression of material facts and has

sought dismissal of the application on that ground. According to the Resolution Professional, Axis Bank Ltd.-applicant has already claimed the amount of debt in the corporate insolvency resolution process of the principal borrower-Educomp Solutions Ltd., which has been subject matter of proceeding in C.P. No. 101(PB)/2017. According to the preliminary objection, this is a material fact which ought to have been disclosed in the application which has substantial bearing on the adjudication of the present application. It has also been suggested that Axis Bank Ltd.-applicant ought to have made other Financial Creditor of the Corporate Debtor as a party to the present proceeding as any alternation in the claims would materially prejudice the rights of such creditors.

8. The Resolution professional has further pleaded in reply that the claim was made vide its communication dated 11.07.2017 by the applicant without even recalling its loan and without invoking or making any demand on the Corporate Debtor-Corporate Guarantor. It has also been highlighted that the applicant vis-à-vis other Corporate Debtors, like DBS Bank, PNB, SICOM, Indus Ind Bank and Standard Chartered Bank (Now KB-assignee).

The total claim of the secured creditors is about Rs. 112 crores,



whereas the corporate guarantee furnished by the Corporate Debtor is of the value of Rs. 2048 crores in favour of SBI trustee. The liquidation valuation of the assets of the Corporate Debtor is about Rs. 25 crores only. Therefore, it has been submitted that the claim made by the Axis Bank Ltd.-applicant on the basis of the corporate guarantee is a malafide attempt to create hurdle in the CIRP of the Corporate Debtor.

9. The Resolution professional has also taken stand that the amount cannot be claimed simultaneously against the principal borrower, i.e. Educomp Solutions Ltd. and the corporate guarantor under the insolvency resolution process as already noticed in the preceding paras. The submission made by the Resolution professional is that if such a claim is accepted under two different CIRPs, then the same would amount to unjust enrichment to such creditor and would lead to anomalous situation. It has thus been contended that once the Axis Bank Ltd.-applicant has exercised its right to file claim against the principal borrower, i.e. Educomp Solutions Ltd., it was incumbent upon it to wait for the CIRP of the principal borrower to get over before filing any claim against the guarantor.

10. It has further been stated by the Resolution professional that an un-matured claim at the time of commencement of the insolvency process cannot be accepted. According to the pleadings, the mature claim would be the one which are due on the date of admission of the petition, i.e. 27.06.2017. In that regard, reliance has been placed on Section 3(11) of the Code to argue that liability or obligation has to be due from any person in respect of a claim. The applicant had invoked the corporate guarantee on 21.07.2017, which is after the date of commencement of the insolvency process on 27.06.2017 and the claim has been rightly rejected. For the aforesaid submission, reliance has also been placed on Regulation 13 of the Regulations as the Resolution Professional has to verify only those claims which are existing as on the insolvency commencement date. The purpose of giving the cut-off date is to ensure that the assets and liabilities are frozen and a Resolution Plan is finalised on the basis of cut-off date. It is further submitted that the Resolution professional is under obligation to ensure that the Corporate Debtor remains a going concern and therefore, every claim before the commencement of the insolvency would not become a part of



the resolution process in terms of Regulation 14 of the IBBI Regulations. The Resolution professional would only revive the amount of the claim already admitted and there is no provision for admitting any new claim.

11. The Resolution Professional has also raised the issue that invocation of corporate guarantee against the Corporate Debtor was patently in violation of the moratorium imposed under Section 14 of the Code. In that regard, reliance has been placed on the provisions of Section 14(1)(c) of the Code to argue that invoking the corporate guarantee vide letter dated 21.07.2017 would amount to an action to cover the amount from the Corporate Debtor as Section 14 creates a calm period in which the rights under the contracts are suspended. It has further been pointed out that the Resolution Professional moved C.A. No. 257(PB)/2017 in (IB)102(PB)/2017, and vide order dated 21.08.2017, this Bench has disposed of the application by observing that the issues raised in the application were entirely in the domain of the insolvency professional and it was not considered proper to opine either way by us (Annexure-1).



12. The Resolution professional has also filed para-wise reply virtually taking similar stand as she has pleaded in the preliminary objections and has prayed for dismissal of the application.

13. In the rejoinder filed by Axis Bank Ltd.-applicant, it has been asserted that the liability of the principal debtor and the corporate guarantor is co-extensive and reliance has been placed on Section 128 of the Indian Contract Act, 1872. The applicant has also placed reliance on the Judgments of the Hon'ble Supreme Court in the case of ***Central Bank of India & Ors. v. C.L. Vimla & Ors. (2015) 7 SCC 337 and State Bank of India v. Saksaria Mills Limited & Ors., AIR 1986 SC 868***. Reliance has also been placed on various provisions of the Code, Rules and Regulations and other Judgments.

14. It has been categorically denied the allegations of concealment and has stated that it was not necessary to make disclosure with regard to the claim made against the principal borrower, i.e. Educomp Solutions Ltd.



15. The applicant has also claimed that there is no provision of raising the assets and liabilities of the Corporate Debtor on the date of commencement of the insolvency process as it is erroneously claimed by the Resolution professional.

16. We have heard learned Counsel for the parties at a considerable length and have perused the records with the able assistance.

17. The question which needs determination in the present proceedings is whether the Axis Bank Ltd.-applicant is entitled to make a claim by invoking the corporate guarantee after the date of commencement of the insolvency process. In order to appreciate the aforesaid issue, we may first refer to certain terms and conditions of the corporate guarantee executed between the parties on 03.06.2015 (Annexure-2). Under the caption '1.3 Terms of the Guarantee' clause-3 provides as under:

"In the event of any default on the part of the Borrower in payment/repayment and in reimbursement of any of the monies referred to above, or in the event of any default on the part of the Borrower to comply with or perform any of the terms, conditions and covenants contained in the



Restructuring Documents, the Guarantor shall, upon demand from the Security Trustee/Lenders, forthwith pay to the Security Trustee/Lenders without demur all the amounts payable by the Borrower under the Restructuring Documents”.

A perusal of the aforesaid clause clearly postulates that in the event of any default on the part of the Borrower, i.e. Educomp Solutions Ltd. in payment/repayment or in the event of any default to comply with or perform any of the terms, conditions and covenants in the Restructuring Documents, the Guarantor under obligation upon demand from the Security Trustee/Lenders to forthwith pay to the Security Trustee/Lenders without demur all the amounts payable by the Borrower under the Restructuring Documents.

18. At this stage, we may refer to the provisions of Regulations 12 & 13 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2016. The aforesaid Regulations read as under:

“Submission of proof of claims



12. (1) Subject to sub-regulation (2), a creditor shall submit proof of claim on or before the last date mentioned in the public announcement.

(2) A creditor, who failed to submit proof of claim within the time stipulated in the public announcement, may submit such proof to the interim resolution professional or the resolution professional, as the case may be, till the approval of a resolution plan by the committee.

(3) Where the creditor in sub-regulation (2) is a financial creditor, it shall be included in the committee from the date of admission of such claim:

Provided that such inclusion shall not affect the validity of any decision taken by the committee prior to such inclusion.

Verification of claims

13.(1) The interim resolution professional or the resolution professional, as the case may be, shall verify every claim, as on the insolvency commencement date, within seven days from the last date of the receipt of the claims, and thereupon maintain a list of creditors containing names of creditors along
with the amount claimed by them, the amount of their claims

admitted and the security interest, if any, in respect of such claims, and update it.

(2) The list of creditors shall be –

(a) available for inspection by the persons who submitted proofs of claim;

(b) available for inspection by members, partners, directors and guarantors of the corporate debtor;

(c) displayed on the website, if any, of the corporate debtor;

(d) filed with the Adjudicating Authority; and

(e) presented at the first meeting of the committee.

A co-joint reading of the aforesaid Regulations would show that a creditor has to submit proof of claim on or before the last date mentioned in the public announcement and if he has failed to submit proof of claim by the stipulated date, then he may still submit the proof to the Resolution professional till the approval of a Resolution Plan by the committee of creditors. As per Regulation 13(1) of IBBI Regulations, the claims are to be verified by the Resolution Professional as on the date of commencement of insolvency process. The verification has to be completed within seven days from the last date of the receipt of the claims.

Thereupon, the Resolution Professional is obliged to maintain a list of creditors containing the names of creditors alongwith the amounts claimed by them. The list has to be kept available for inspection by any person who submitted proofs of claim and is required to be filed with the Adjudicating Authority/NCLT. It is also required to be presented at the first meeting of the Committee of Creditors. It is thus evident that in order to qualify as a 'debt' firstly provisions of the corporate guarantee must be satisfied by raising a demand which is expressed by invoking the corporate guarantee and the date of its invocation has to be earlier than the insolvency commencement date. In the present case, the CIRP commenced on 27.06.2017 and the corporate guarantee was admittedly invoked on 21.07.2017, which is much after the insolvency commencement date. Therefore, we find that the Resolution professional would not be in a position to verify the claim as it will not be reflected in the Books of Accounts which are supposed to be updated as on 27.06.2017. In the absence of any record to verify the claim, it will be impossible for the Resolution Professional to accept any such claim which has become a debt

after after 27.06.2017.

19. In order to substantiate the aforesaid thesis, we may also refer to the definition of expression 'debt' as given in Section 3(11) of the Code which has been defined in Section 3(6), 'Corporate Debtor' as defined in Section 3(8), 'Creditor' as defined in Section 3(10) and 'Default' as defined in Section 3(12) of the Code. All the aforesaid clauses are set out below for facility of reference, which read as under:

3.(6) "claim" means—

(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;

(8) "corporate debtor" means a corporate person who owes a debt to any person;

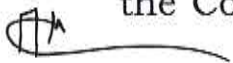
(10) "creditor" means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder;

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(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 repaid by the debtor or the corporate debtor, as the case may be;

A co-joint reading of the aforesaid provisions would show that a claim would mean a right to payment whether reduced to any judgment etc. It also includes right to remedy for breach of contract under any law for the time being in force. The 'Corporate Debtor' has been defined to mean a corporate person, who owes a debt to any person and 'creditor' has been defined to whom a debt is owed and includes all types of creditors, like a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder. The emphasis appears to be on the expression 'payment and the debt, claim and the debt which is due from any person and includes financial debt and operational debt. Going by the aforesaid provisions, debt has not become due from the Corporate Debtor on the insolvency commencement date, i.e.



27.06.2017. It became due only when the corporate guarantee was invoked by the Axis Bank Ltd.-the Corporate Debtor-applicant on 21.07.2017.


20. Therefore, we are unable to persuade ourselves to accept the submissions made by the applicant-Axis Bank Ltd.

21. The argument of Ms. Misha, learned Counsel for the applicant-Axis Bank Ltd. may now be noticed. It was submitted that the liability of the guarantor under Section 128 of the Indian Contract Act, 1872 is joint and severable. In other words, the applicant-Axis Bank Ltd. could invoke the guarantee against the principal borrower namely, Educomp Solutions Ltd. and/or against the Corporate Debtor. There can be no quarrel with the aforesaid proposition of law. However, the issue before us is whether the debt was crystallised and it was due and payable on the date of commencement of resolution process, which is 27.06.2017. The aforesaid issue stands already answered against the applicant. In equity also, the applicant-Axis Bank Ltd. would not suffer any prejudice as it has already claimed the amount of debt in CIRP of the principal borrower-Educomp Solutions Ltd. in



a separate proceedings initiated by admission of C.P. No. (IB)-101(PB)/2017. We are therefore, not inclined to examine the contention in detail on the facts and circumstances of the present case although the judgment in the cases of Central Bank of India & Ors. v. C.L. Vimla & Ors. (2015) 7 SCC 337 and State Bank of India v. Saksaria Mills Limited & Ors., AIR 1986 SC 868 were cited before us.

22. We are also not impressed with the arguments based on Regulations 12 & 13 of the IBBI Regulations. The aforesaid Regulation provides that a creditor must submit proof of claim on or before the last date mentioned in the public announcement. However, those who failed to submit proof of claim have been still held entitled to do so later but before the approval of Resolution Plan by the committee. A careful perusal of Regulation 12 read with Regulation 13 would show that the Resolution Professional has to verify every claim as on the insolvency commencement date and maintain a list of creditors containing names of all such creditors alongwith the amount claimed. Therefore, the applicant-Axis Bank Ltd. would not qualify to the consideration of its claim as it has become due and payable after the insolvency

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commencement date. The provisions of Regulations 12 and 13 would not come to the rescue of the applicant-Axis Bank Ltd. An ancillary submission is that there was no intention to conceal the claim made in the CIRP initiated against the Educomp Solutions Ltd.-principal borrower would also not require any detailed consideration as we are not proceeding to decide the application on the aforesaid issue.

23. Another submission made by learned Counsel for the applicant-Axis Bank Ltd. is that Section 22(3) of the Sick Industrial Companies (Special Provisions) Act, 1985 has been deliberately omitted from the Scheme of the Code and therefore, it should be taken to mean that no such bar would operate against the invocation of bank guarantee by virtue of moratorium imposed under Section 14 of the Code. An ancillary argument is that in any case there is no provision in the Code declaring the insolvency commencement date as the date to determine the claims of the parties. A perusal of Section 22(3) of the SIC Act would reveal that it is not different in sum and substance than the provision of Section 14 of the Code. In our view, Section 14 would clearly cover the invocation of guarantee after the insolvency commencement

date. The moratorium prohibiting a number of things has been contemplated and for the present case clause (c) of sub-section (1) of Section 14 would suffice and the same reads as under:


14. (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:

(a)

(b)

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

A perusal of the aforesaid provision makes it absolutely clear that there would be moratorium prohibiting any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property. It appears to us that invocation of

 corporate guarantee against the Corporate Debtor-respondent

would result in enforcing of security interest and it would thus be in violation of the moratorium provision of Section 14(1)(c) of the Code. Therefore, we do not find any substance in the submission.

24. The other argument that no cut-off date is provided in the Code would also not warrant any detailed consideration because there is no challenge to the validity of the IBBI Regulations which are presumed to be framed in pursuance of powers conferred by Section 196 read with Sections 208 & 240 of the Code. Accordingly, the aforesaid argument is also devoid of merit and is hereby rejected.

25. As a sequel to the above discussion, this application fails and the same is dismissed. However, in the peculiar facts and circumstances of the case, we leave the parties to bear their own costs.

Sd/-

(CHIEF JUSTICE M.M.KUMAR)
PRESIDENT

Sd/-

(DEEPA KRISHAN)
MEMBER(TECHNICAL)

Dated, the 27th October, 2017

V. Sethi