

FIT FOR INDEXING .

IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI

PRINCIPAL BENCH

CA 366(PB)/2017

Connected with (IB)-102(PB)/2017

IN THE MATTER OF:

ICICI Bank Limited
Vs.
CA Ritu Rastogi

.... Applicant/Petitioner
.... Respondent / Resolutional
Professional (for Corporate
Debtor)

Connected with Main Petition(IB)-102(PB)/2017

DBS Bank Ltd.
Vs.
Edu Smart Service Pvt. Ltd.

.... Original Petitioner /
Financial Creditor
.... Original Respondent /
Corporate Debtor

Order under Section 7 of Insolvency & Bankruptcy Code, 2016

Order delivered on 23.01.2018

Coram:

CHIEF JUSTICE (Retd.) M.M.KUMAR
Hon'ble President

Ms. DEEPA KRISHAN
Hon'ble Member (T)

For the ICICI : Mr. Krishnendu Datta, Ms. Nayan Agarwal,
Ms. Padmaja Kaul,
Ms. Vishakha Gupta, Advocates

For the R-1 Resolution Professional: Mr. Sumesh Dhawan, Advocate

For the Committee of Creditors : Mr. Ajay K. Jain, Mr. Atanu Mukherjee,
Mr. Yash Karan Jain, Advocate



M M KUMAR, PRESIDENT

ORDER

1. This is an application filed by ICICI Bank Ltd. u/s 60(5) of the Insolvency & Bankruptcy Code 2016 (for brevity of the Code). The prayer made in the application is that the decision of the Resolution Professional, (C.A. Ms. Ritu Rastogi) dated 6.9.2017 rejecting the claim of the applicant be set aside by directing her to admit its entire claimed amount arising out of Edu Smart Services Pvt. Ltd. (for brevity 'ESSL') Guarantee- 'the Corporate Debtor' by treating it as a 'financial debt.' A further prayer has also been made for issuance of direction to the Resolution Professional – non applicant to allow the applicant to join as a Member of the Committee of the Creditor and grant it proportionate voting share in the COC. A restrained order against the Resolution Professional –non-applicant has also been sought so that she may not act upon any decision taken or approval given by the Committee of the Creditor in furtherance of the CIRP of the Corporate Debtor till the final decision of the present application.
2. Brief facts of the case necessary for disposal of the controversy raised in this application are that the 'Financial Creditor' namely DBS Bank Ltd. being one of the lenders filed an application under section 7 of the Code 2016 against the Corporate Debtor namely 'ESSL'. That application was admitted on 27.06.2017 and moratorium under section 14 of the Code was declared. The Resolution Professional – non applicant was firstly appointed as IRP and then as Resolution Professional to conduct the Corporate Insolvency Resolution Process.



3. The Applicant ICICI Bank from time to time extended credit facilities to Edu Comp Solution- a company other than the 'ESSL'- which amounted to Rs.76,20,00,000/- (Rs. Seventy Six Crores Twenty lakhs only). The ESSL-Corporate Debtor furnished a guarantee in favour Applicant-ICICI in addition to other lenders. The agreement for guarantee was executed on 25.03.2014 and 31.03.2014. Later on 03.05.2016 the ESSL-Corporate Debtor amended the originally executed guarantees and executed a fresh guarantee deed in favour of the Security Trustee i.e. (SBI Cap Trustee Company Ltd.) which acted on behalf of the applicant. The ESSL, inter alia undertook to unconditionally and irrevocably guarantee for the repayment of loan to the lenders including the Applicant- ICICI. The allegation made by the applicant is that on account of default committed by the Edu Comp Solution in repayment of its loan the Applicant-ICICI addressed a letter of invocation of guarantee to ESSL-Corporate Debtor on 29.5.2017 calling upon it to honour their obligation in accordance with the terms of guarantee agreement. As already stated above DBS bank has filed an application under section 7 of the Code which was admitted on 27.06.2017.
4. The RP-non applicant published a Public Notice inviting proof of claim from the creditors of the Corporate Debtor which were to be filed by 11.07.2017. The Applicant-ICICI submitted its claim to the RP for a sum of Rs.86,45,00,000/- on 11.07.2017 against the ESSL - Corporate Debtor being a guarantor of Edu Comp Solution.



5. The Resolution Professional –non applicant sent an email to the Applicant-ICICI on 20.07.2017 stating that since the borrower Edu Comp Solution is under CIRP and that the applicant is part of duly constituted COC for Edu Comp Solution, therefore, the amount recoverable by the applicant from ESSL-Corporate Debtor in the present case would be the balance amount after recovery, if any by the Applicant-ICICI. On that basis the RP expressed her inability to verify the claim amount from the books of account of ESSL-Corporate Debtor. A copy of the e-mail dated 20.07.2017 has been placed on record (Annexure E).
6. The Applicant-ICICI sent a reply on 26.07.2017 apprising the RP–non applicant that the liability of the guarantor ESSL-Corporate Debtor and the Edu Comp Solution - Principal debtor is co-extensive and in accordance with the terms of ESSL guarantee the corporate debtor had waived its rights of requiring the applicant to enforce any other right/security against Edu Comp Solution before enforcing the guarantee. The Applicant-ICICI asserted that in case the Edu Comp Solution goes to liquidation leading to shortfall in recovery of the loan amount the Applicant-ICICI is likely to suffer a huge loss as it would lose the valuable contractual right, therefore, its claim was required to be admitted in accordance with the terms of ESSL-guarantee. The Applicant-ICICI claimed that it has assured the RP-non applicant that the claims have been filed in good faith and in exercise of the lawful exercise of the contractual rights. The Applicant-ICICI clarified that it was not seeking any amount more than what is contractually owed by Edu Comp Solution



and guaranteed by the Corporate Debtor. The email dated 26.07.2017 is on record (Annexure F).

7. The RP-non applicant in its reply dated 28.07.2017 did not dispute the liability of the ESSL-corporate debtor towards the applicant but expressed her inability to verify the claim amount and quantum of liability from the books of the ESSL- Corporate Debtor on the pretext that the Applicant may reduce its claim proportionately against ESSL-Corporate Debtor. The allegations' made by the RP-non-applicant was that the invocation of the guarantee against ESSL-Corporate Debtor by the applicant is misplaced as it was executed between the ESSL-corporate debtor and the Security Trustee. Therefore, there was no privity of contract between the Applicant-ICICI and ESSL-Corporate Debtor (Annexure G).
8. On 03.08.2017 the applicant responded to all the quarries of the RP raised in the email dated 28.07.2017. The Applicant-ICICI states that it has informed the RP that her view was erroneous regarding the Applicant-ICICI for wrongfully invoking the ESSL-Corporate Debtor guarantee instead of invoking it against the Security Trustee. It was further pointed out that there was privity of contract between the applicant and the ESSL-Corporate Debtor. The applicant stated that the ESSL guarantee categorically provided that the lenders or the Security Trustee is authorised to demand payment from the Corporate Debtor in the event of default and any such demand by the lenders/Security Trustee was to be construed as the evidence of existence of debt. It was clarified to the RP-non applicant that the general principles of



privity of contract do not apply in a case where a beneficiary is a trust (Annexure D).

9. The applicant also claims that it has explained to the RP-non applicant various provisions of the Insolvency Code and IBB (Insolvency Resolution Process for Corporate Persons) Regulation 2016. The applicant specifically brought to her notice the provisions of Regulation 8 of the CIRP Regulation which provides that the existence of debt due to the financial creditor must be proved on the basis of record available with information utility or otherwise by relevant documents. The applicant has asserted that the duties of the RP-non applicant under section 18 of the Code read with Regulation 8 and 14 of the CIR Regulation is that once necessary documents evidencing the debt have been furnished by the applicant, then she was bound to admit the claimed amount of the applicant. However, the RP-non applicant without applying her mind rejected the claim of the applicant.
10. On 07.08.2017 the RP intimated the applicant through an email that its claim was provisionally taken on record with the right of representation in the COC of the ESSL-Corporate Debtor. It was reported that the first meeting of COC was held on 31.07.2017 and the COC had directed the RP-non applicant to seek necessary direction from the NCLT with regard to the admissibility of the claimed amount. The Applicant-ICICI was not granted the voting right in the COC meeting and the RP stated that it would be decided in accordance with the order from NCLT. The applicant questioned RP as to under which provision of law the claim was admitted provisionally. Another email was



sent on 16.08.2017 alleging that ESSL-Corporate Debtor guarantee constituted a Financial debt according to section 5(8)(i) of the Code. It was further claimed that in accordance with the provisions of section 24(6) of the Code the applicant has the right to vote in COC meeting in accordance with its voting share. Various emails were sent to the RP with the request to furnish the information and the steps taken from time to time (Annexure L and M). However, no information was furnished with regard to filing of application which was disposed of on 21.08.2017 being C.A. No. 257(PB)/2017. The Tribunal had clarified that the issue concerning the claim of the guarantee were within the domain of the RP (Annexure N). The applicant also sought information with regard to the detail of COC meeting alongwith all the communications shared with COC Members vide email 28.08.2017 (Annexure O) and further email dated 30.08.2017 for sharing of information (Annexure P).

11. It was on 06.09.2017 that the Resolution Professional intimated to the applicant that its claim has been examined which could not be accepted/entertained in the facts and circumstances of the case. The aforesaid decision has been styled as arbitrary, lacking application of mind and against the law. Many other grounds have also been raised by the applicant by asserting that its claim is valid as per the agreement and law. The applicant claims to have complied with every provision of the Code and it has also been asserted that the RP has in fact admitted its claim. The denial



of the voting right of the applicant is absolutely arbitrary and is not sustainable in the eyes of the law.

12. The RP has opposed the application by filing a detailed reply raising many preliminary objections. It has been pleaded that the application is abuse of the process of law and the filing of the claim by the applicant on the basis of the corporate guarantee is a mala fide attempt to create hurdle in the CIRP. It has been highlighted that the principal borrower namely Edu Comp Solution for whom the ESSL-corporate debtor had furnished corporate guarantee is also undergoing Insolvency process. The Edu Comp Solution filed C.P. No. (IB) No.101(PB)/2017 under section 10 of the Code which was admitted on 26.7.2017. The Applicant-ICICI is one of the financial creditor of Edu Comp Solution Pvt. Ltd. The Applicant has also filed its claim against Edu Comp Solution in that process. The Committee of Creditor in its first meeting held on 31.07.2017 had requested the IRP/RP not to issue any payment till the time the matter was settled (A-I) in the other process initiated under section 10 in C.P. (IB) No.101(PB)/2017. On the application filed by the IRP/RP this Tribunal passed an order on 21.08.2017 holding that the RP-non applicant must exercise her wisdom particularly when her work is facilitated by moratorium envisaged by Section 14 of the Code (A-2).

13. The RP has raised the plea that the applicant cannot simultaneously raise its claim against principal borrower and corporate guarantor which are under their respective CIRP because it would create anomalies. According to the stand taken in para 8 & 9 the principle of Co-existence liability has been relied



upon and therefore, it has been urged that claim against the principal borrower and corporate guarantor cannot be raised simultaneously. Placing reliance on the observation made by NCLAT in the case of Prowess International Pvt. Ltd. v. Parker Hannifin India Pvt. Ltd. It has been argued that the basic object of the Code is to consolidate and amend the laws relating to reorganisation of the Corporate Person and to balance the claims of all the stakeholders. While deciding whether the claim is to be admitted against a guarantor which has already filed its claims and in fact admitted by the RP in the CIRP of the principal borrower, it has to be kept in mind that the proceedings under the Code are not recovery proceedings. It has also been pointed out that under section 128 of the Indian Contract Act, 1872, a claim made by the applicant would be admissible against the guarantor only if the CIRP of the principal borrower is over and no claim can be filed simultaneously. It has not been disputed that the applicant has already filed a claim against the principal borrower in its CIRP. It has also been so stated in Form C filed by the Applicant under regulation 8 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulation 2016. If the applicant is permitted to raise the claim then the recovery amount may far exceed its total claim which may result in prejudice to others. A reference has also been made to Regulation 18 and 28 of the IBBI (Liquidation Process) Regulation. On the basis of the aforesaid Regulation it has been pleaded that the legislature in its wisdom has made a provision wherein a claim can be

admitted even later on if such claim were not due on the insolvency commencement date.

14. Another argument raised is that the applicant cannot act as a 'Financial Creditor' claim the same amount in two different CIRP with voting right in two CIRP as it would result in unjust enrichment. It is highlighted that anomalous situation would be created because such a financial creditor would also take part in the proceedings of both COC and would also exercise voting right in two different CIRP for the same debt, which would be against the spirit of the code.
15. In para wise reply it has been stated that the Applicant-ICICI has itself accepted that if any amount is received from the principal borrower EDU Comp Solution in its CIRP then it would reduce its claim proportionately to that of the Corporate Debtor. In terms of Regulation 14 of IBBI (Insolvency Resolution Process of Corporate Persons) Regulation 2016 there was no material to access how much amount it would be able to recover from the principal borrower.
16. A rejoinder has also been filed by the applicant reiterating the stand taken in the application and controverting the submission made by the Resolution Professional in her reply. It is reiterated that the liability of the guarantor is coextensive with that of the principal borrower in the sense that the applicant could proceed against both simultaneously. Reliance has been placed on the provision Section 5(8) of the Code and Regulation 36 of the CIRP Regulations.

The case of the applicant appears to be that the applicant can be part of COC

AA

in the CIRP of the Principal borrower-Edu Comp Solution for the same amount claimed and reliance has been placed on the observation made by the Supreme Court Industrial Investment Bank Ltd. v. Bishwanath Jhunjunwala (2009) 3 SCC 478. Reliance has also been placed on the observations made in the order of this Tribunal dated 27.10.2017 rendered by this Bench in the case of Axix Bank Ltd. v. Edu Smart Services Pvt. Ltd. (IV-102(PB)/2017) and State Bank of India v. Saksaria Sugar Mills Ltd. It has also been pleaded that ESSL guarantee was invoked prior to 26.07.2017 i.e. the date of commencement of the CIRP. The applicant has also placed reliance on clauses 12, 19 and 33 of the Guarantee Deed to argue that the ESSL-Corporate Debtor is bound to pay in terms of guarantee agreement.

17. We have heard at length Mr. Krishnendu Dutta learned counsel for the applicant, Mr. U.K. Chaudhary learned senior counsel for the Respondent and Mr. Ajay K. Jain, for the Intervener.

18. Having heard the learned counsel we find that it would be first necessary to determine the status of the applicant ICICI Bank and the nature of debt owed to it by the Corporate Debtor 'ESSL'. In that regard definition of 'Financial Creditor' and 'Financial Debt' are required to be read as given in Section 5(7) and (8) of the Code which are as under:

Section (1) to (6)

(7). financial Creditors means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred

to;



(8) "financial debt means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes –

- (a) money borrowed against the payment of interest ;
- (b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent ;
- (c) any amount raised by pursuant to any note purchase facility or the issue of bonds, notes, debenture, loan stock or any similar instrument.
- (d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed ;
- (e) receivables sold or discounted other than any receivables sold on non-recourse basis;
- (f) Any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing
- (g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;
- (h) any counter- indemnity obligation in respect of a guarantee or indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;



(i) 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) this clause;

A perusal of the aforesaid provisions would show that the expression 'Financial Creditor' it means any person to whom inter-alia the Financial Debt is owed. The expression 'Financial Debt' has been defined to mean a debt along with interest disbursed against the consideration for the time value of money and includes ,inter-alia, the money borrowed against the payment of interest and many other transaction listed in sub-section 8(a) to 8(i) of section 5. It is relevant to point out that any amount of liability in respect of a guarantor for any of the items referred to (a) to (h) is also to be regarded as Financial Debt.

19. In the present case Edu Comp Solution – Principal Borrower has enjoyed the loan facility advanced by the Applicant - ICICI Bank Ltd. The ESSL – Corporate Debtor has furnished Guarantee. Therefore, it follows that the applicant – ICICI Bank has to be regarded as 'Financial Creditor'.

20. The ideal situation would have been if one consolidated Corporate Insolvency Resolution Process had been initiated against the Edu Com Solution by impleading all the Financial Creditor and guarantor like ESSL – Corporate Debtor as a party respondent. However, Edu Comp Solution has invoked section 10 of the Code inviting Insolvency Process and it is now facing the same. It creates an unenviable and paradoxical situation because there are two Resolution Professionals and two Committee of Creditors. In the



situation in hand the best course could have been that both the Resolution Professional could co-ordinate and as far as possible could have held the meetings of the Committee of Creditor together. However even that is not possible because the members of COC in both processes are different although some of the members are common. Therefore that course also does not commend itself to us.

21. The objection raised on behalf of the Resolution Professional that the applicant - ICICI Bank has no privity of contract would not be acceptable for the simple reason that the Corporate Guarantee dated 03.06.2015 (Annexure - A) clearly shows that SBI in its capacity as Surety trustee was acting for the benefit of CDR Lenders as detailed in Schedule - I. In Schedule - I the name of ICICI Bank figures at No. 2. It is further evident from the perusal of clause 19 that the liability of the guarantor was not to be affected and in accordance with clause 12 the lender is entitled to act as if the guarantor was the principle debtor of the lender. A reference to clause 33 of the Corporate Guarantee, list the waiver of defences and the same reads as under:

"33. The liability of the guarantor under this guarantee shall not be prejudiced, affected or diminished by any act, omission, circumstance, matter or thing which but for this provision might operate to reduce, release, prejudice or otherwise exonerate the guarantor from any of its obligations hereunder in whole or in part including, without limitation and whether or not known to the guarantor:



- (a) Any time or waiver granted to the borrower or any other person;
- (b) The taking variation, compromise , renewal or release refusal neglect to perfect or enforce any right, remedy or security against the borrower or any other person, to the extent as permitted under this guarantee ;
- (c) Any legal limitation, disability ,incapacity, lack of power authority or legal personality of any person or other circumstances relating to the Borrower or the death, bankruptcy, insolvency, liquidation or similar proceedings or change in the name, ownership, constitution, members or status of the borrower, another guarantor or any other person;
- (d) An irregularity with respect to or enforceability, or of obligations of any other person or security, to the intended that the guarantor obligation hereunder shall remain in full force and this guarantee be construed accordingly as if there were no such irregularity, unenforceability, illegality, or frustration.

22. In view of the above the objections raised by the RP would not merit any detailed consideration and the same are hereby rejected. The aforesaid detailed facts would further show that the parties have provided for the course to be adopted in the guarantee agreement in case of default by the principal borrower in relation to guarantee. It is well settled , that the right of the parties under section 128 of the Indian Contract Act 1872 are subject to the terms of the

agreement between the parties and hence the guarantor or the Resolution Professional are not entitled to raise an objection which goes against the express terms of guarantee agreement duly executed between the Financial Creditor and the ESSL Corporate Debtor. Therefore on that count also the objection raised by the RP are liable to be rejected.

23. As a sequel to the above discussion we dispose of this application as per the following directions:

- (a) The applicant being a financial creditor has to be given its due place in the Committee of Creditor by permitting it to join the Corporate Insolvency Resolution Process initiated in the matter of ESSL – Corporate Debtor.
- (b) The applicant shall be entitled to have its voting rights determined as per its proportion.

24. The application stands disposed of.

Sd/-

(M.M. KUMAR)
PRESIDENT

Sd/-

(DEEPA KRISHAN)
MEMBER (TECHNICAL)

23.1.2018
(vs)