IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH, HYDERABAD

IA No. 436 of 2018

CP(IB) No. 294/07/HDB/2017

Between:

Canara Bank,

Head Office situated at

112, JC Road, Bengaluru- 560002.

Prime Corporate Branch situated at,

TSR Complex, 2nd Floor, 1-7-1,

S.P Road, Secunderabad – 500003.

Rep. by its AGM, Shri K. Anil Muthyalu. **...Applicant**

Versus

IVRCL Limited

Rep by. Shri Sutanu Sinha, Resolution Professional

Having its registered office at,

M-22/3RT, Vijayanagar Colony,

Hyderabad – 500 082.

...Respondent

date of Order: 01.02.2019

<u>Counsels/Parties Present:</u>

For the Applicant	:	Mr. Deepak Bhattacharjee, Senior Counsel along with Mr. Dishit Bhattacharjee, Adv.
For the Respondent	:	Mr. Nirav Shah and Mr. Alay Razvi, Adv.

ORDER

Per: K. Anantha Padmanabha Swamy, Member Judicial

1. The Present Application is filed by M/s Canara Bank, seeking to direct the RP to consider contingent liability of Rs. 3,04,15,01,474/- and debt converted into equity to Rs. 1,37,32,82,199/-.
2. The Learned Counsel for Petitioner submitted that M/s IVRCL Limited was sanctioned with Open Cash Credit facility of Rs. 224.00 Crores and Bank Guarantee facility of Rs. 987.23 Crores on 11.06.2013. The Corporate Debtor is into civil engineering works, and are contractors undertaking infrastructure works and other Projects. The Corporate Debtor is having several Subsidiaries (including Step down Subsidiaries) as on 31.03.2012. Besides, the Corporate Debtor also has Associate Companies and a number of JVs to execute various projects. Total exposure for the Corporate Debtor during June 2014 prior to restructuring was Rs.1211.23 Crores (Rs. 987.23 Crores of Bank guarantee and Rs.224.00 Crores of open cash credit loans). Thereafter the account was restructured as per the scheme of the CDR to facilitate the Corporate Debtor to survive.
3. It is submitted that the Companies facilities were Restructured with overall exposure of Rs.1264.86 Crores (i.e., Working Capital Term loan – I (WCTL – I) of Rs.172.10 Crores, Working Capital Term loan – II (WCTL-II) of Rs.10.75 Crores, Funded interest Term Loan (FITL) of Rs.66.29 Crores, Rupee Term Loan (RTL) of Rs.20.44 Crores, Open Cash Credit limit (OCC) of Rs.229.88 Crores, Bank Guarantee limit of Rs.723.95 Crores and Letter of Credit limit of Rs.41.45 Crores under CDR Scheme vide orders dated 14.06.2014. Funded interest Term loan of Rs.66.29 Crores permitted as a part of CDR was converted into 'Equity of the

Corporate Debtor at each calendar quarter under the Corporate Debtor Restructuring scheme. Accordingly FITL Accrued to the tune of Rs.61.02 Crores was converted into Equity. The Matter of Restructuring Agreement dated 30.06.2014 (MRA) was executed by the Corporate Debtor for availing the said restructured facilities under CDR scheme.

4. Subsequent to introduction of Strategic Debt Restructuring scheme by June 2015. JLF at its meeting held on 26.11.2015, decided to invoke SDR for change in management by acquiring more than 51% holding in the Corporate Debtor. As per strategic Debt Restructuring scheme, Corporate Debtor's accounts were again restructured vide orders dated 11.02.2016 which facilitated the Corporate Debtor to survive and debts to the extent of Rs.26.53 Crores were again converted into equity of the Corporate Debtor. Total debt that was converted into equity stands at Rs.87.55 Crores including the debt converted in to equity under CDR scheme earlier. Since SDR invoked by lenders for the Corporate Debtor with reference date 26.11.2015, standstill period is available for 18 months i.e., till 25.05.2017. The SDR could not be implemented within the timeline of 18 months from 26.11.2015 for want of investors which was beyond the control of lenders/company, therefore, it was necessitated exit of SDR by the lenders. Hence, on JLF meeting held on 25.05.2017, JLF recorded the case as a failed CDR and SDR unanimously. Consequently all the concessions granted under the SDR stood withdrawn, except the equity position.

5. That the Canara Bank has preferred its claim in Form C on 15.03.2018. The RP has not considered the claim of Canara Bank made on the date of commencement of CIRP i.e., 23.02.2018 to the extent of Rs.3,04,15,01,474/- towards un invoked Bank Guarantees and also

Debts Converted into Equity to an extent of Rs.1,37,32,82,199/-. It was deliberated during the 1st CoC held on 29.03.2018. wherein the Bankers sought the Chairman i.e., Resolution Professional to explain reasons for non-acceptance of the said claims, the Chairman responded to the members that as per the Code read with the Judgments passed by the NCLT Bench and NCLAT the Non-fund based limits, if not invoked are not to be considered for the purposes of determining the voting share. He also clarified that until and unless the Bank Guarantees are invoked, they cannot be considered for the purpose of determining the voting share. Also stated that claim of Equity made under Insolvency and Bankruptcy Code are not allowed.

6. That the revised claim in Form 'C' dated 15.05.2018 to an amount of Rs.7.46 Crores towards Bank Guarantees invoked during the Corporate Insolvency Resolution Process. However, the Resolution Professional maintained the stand that Non Fund Based Bank Guarantees & Equity are not permitted to be included as claim.

7. That the seventh CoC meeting held on 30.08.2018 which discussed about accepting un-invoked Bank Guarantee as part of claim was discussed in detail, Resolution Professional has taken note of the request and concluded that Resolution Professional shall further examine on the request for accepting the un invoked Bank Guarantees as a part of claim, in view of the Order of the Hon'ble NCLAT, (Company Appeal No.61/2018) in the matter of Andhra Bank Vs. M/s.F.M.Hammerle Textile Ltd dated 13.07.2018. However Resolution Professional is yet to act upon the request of the CoC. During the Seventh CoC meeting again discussed about debt converted equity was discussed and Canara Bank requested to consider the value of Equity

Shares received by it under the Strategic Debt Restructuring ('SDR') and Corporate Debt Restructuring ('CDR') as a Financial Claim. The Resolution Professional responded and expressed that the equity cannot be admitted as claim.

8. It is submitted that the conversion of debt into equity as envisaged under SDR is intended only for the revival of the Debt and does not tantamount to acquisition of shares by the Banks aimed at the taking-over of the Corporate Debtor. The Banks are mandatorily required to acquire 51% of the equity under the SDR mechanism; to take over the management of the Corporate Debtor for revival and for divesting it to the new promoter on the successful completion of the SDR. Therefore, it follows as a natural corollary that when such revival has not happened, the lenders shall be reverted to their position of being lenders as acquisition of Corporate Debtor was never intended by lenders otherwise than for its revival. Clause 9 of Strategic Debt Restructuring is clearly exempting Lenders from reporting requirements under Accounting Standard 23; accounting for investments in associates in Consolidated Financial Statements, in respect of such acquisition of shares. This clearly signifies that such acquisition of shares is not absolute and not in ordinary and routine course. This connotes that such acquisition under Strategic Debt Restructuring or Corporate Debt Restructuring is not a routine investment, but a special initiative aimed at revival and upon failure of revival, such acquisition must also fail.

9. That regarding the investment Equity, when the Corporate Debtor was under stress the lenders considered conversion of debt into equity under Corporate Debtor Restructuring and Strategic Debt Restructuring to enable the Corporate Debtor to survive. Though the nomenclature of

the Debt converted into Equity is Equity, the same is not to be treated as Equity investment and it is only converted Debt. If the Equity under SDR and CDR is not considered as claim of the financial creditor, it will suffer irrevocable Loss.

10. Any indemnity obligation in respect of a guarantee also come within the meaning of Financial Debt. No doubt the Bank falls under the definition of Financial Creditor as defined under Section 5 (7) read with Section 8 of Insolvency and Bankruptcy Code 2016 but the amount covered by the uninvoked Bank Guarantee or the contingent liability and the debt converted equity shall also fall under the definition of Financial Debt as provided under Section 5(8) of insolvency and Bankruptcy code 2016. A clear ratio to that extent was also laid down by the Hon'ble NCLAT in CA No.61/2018 in Andhra Bank Vs.M/s.F.M.Hammerle Textile Ltd. and also laid down by the Hon'ble Supreme Court of India in Chitra Sharma Vs. Union of India, WP (Civil) no.744/2017, reported in 2018 SCC on Line SC-874.

11. Resolution Professional filed Counter. Learned counsel for the Resolution Professional submitted that the RP has failed to examine and accept the BG claims in lieu of the order passed by Hon'ble National Company Law Appellant Tribunal ("NCLAT") in Andhra Bank Vs. F.H.Hammerle Textiles Limited dated 13.07.2018. However, on a close examination of the order, the RP made following observation and has concluded that BG claims pertaining to uninvoked bank guarantees cannot be admitted as a claim of the Corporate Debtor.

   a) At the outset, the RP clarifies that the Company Appeal filed by Andhra Bank before NCLAT was with respect to the enforcement of a corporate guarantee dated 24.04.2013 executed by the

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Corporate Debtor, i.e., F.H Hammerle Textiles Limited (Respondent) provided by the respondents in respect of the borrowing availed by Vardhaman Polytex Limted (Borrower) from Andhra Bank and not any bank guarantee as obligation by Andhra Bank or any counter indemnity obligations by the Respondent. The RP submits that the order doesn't contain the said facts in detail. The respondent provided the corporate guarantee being a subsidiary company of the Borrower. Therefore, the reliance on the aforesaid order passed is misconceived in context of admitting the BG Claims pertaining to uninvoked bank guarantees of the banks against which counter guarantee/indemnities provided by the Borrower, in the present CIRP period of the Corporate Debtor.

b) Meaning of the word 'Collate'.

In paragraph 11 of the Order, NCLAT has stated that, "once the CIRP process against the Corporate Debtor is initiated, order of moratorium is passed and the advertisement is issued, all claimants whether his claims is matured or not are supposes to file the claim before the Resolution Professional. The Resolution Professional cannot reject one or other claim on the ground that only the person whose claim has been matured can be looked into and other claim not matured cannot be entertained.

12. The RP has repeatedly emphasized the difference between the order passed by the NCLAT and the facts elucidated in the captioned Application by the Applicant.

13. The RP submits that from the analysis of the legal provisions of IBC, Indian Contract Act, 1872, it is clear that for any amount to

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qualify as a 'debt' for the purposes of IBC, the same must be due from the relevant person. Furthermore, in light of the aforesaid legal precedents, unless bank guarantees are invoked and the indemnified person incurs a loss, the BG claims in respect of such uninvoked bank guarantees do not arise and thus invocation of counter indemnities provided by the indemnifier in respect of such bank guarantees doesn't get triggered at all.

14. The admission of claims by the RP in respect of the BG Claims pertaining to uninvoked bank Guarantee, will not only be against the aforesaid legal provisions, intent of IBC and judicial precedents, but it shall also increase the liabilities on the Corporate Debtor thereby prejudicing the interests of the lenders whose claims has been admitted as such acceptance of such BG claims in respect to uninvoked bank guarantees would increase the overall liability position of the Corporate Debtor and this would negate the efforts of RP who is actively trying to arrive at a meaningful resolution plan from handful of interested resolution applicants which can provide some value to all the creditors including the financial creditors of the Corporate Debtor.

15. The RP states that the admissions of BG Claims would lead to a situation where in case of invocation post resolution instead of recovering the entire amount, the bank would be recovering only the amount agreed to be provided as part of the resolution plan. Thereby prejudicing the right of such banks in case of resolution of the Corporate Debtor. Hence, in light of the views expressed above, the BG claims in respect to uninvoked bank guarantees pursuant

to counter indemnities provided by the Corporate Debtor should not be admitted.

16. Further the provisions of IBC are abundantly clear for the non-exclusion of the claims which have the colour of equity. The provisions of IBC do not specify that the debt which is converted into equity is required to be admitted as a claim and will be classified under the definition of 'debt' which is due or payable. Therefore, the RP submits that as per provisions of the Code, Equity Claims should not be admitted as a claim of the Corporate Debtor as the same is *de hors* the provisions of Code.

17. The RP states that once debt has been converted into equity, it does not continue as debt either in the books of the lender or in the books of the corporate debtor and upon conversion of such debt, the lenders is then reflected a shareholder of the Corporate Debtor and the indebtness of the lender in the books of Corporate Debtor stands reduced to the extent of debt that is converted into equity. The RP states, this action of conversion of debt into equity is irreversible and once having chosen to convert its debt into equity, the Applicant cannot now ask the RP to admit its claims for the debt which is converted into equity. The RP states that to the extent the debt is converted into equity, that portion of debt stands extinguished and hence there is no debt for the RP to admit.

18. Accordingly, the RP submits that the present Application of the Applicant is liable to dismissed with costs.

19. Heard both the sides and perused the record.

20. The present Application relates to uninvoked Bank Guarantee to the extent of 3,04,15,01,474/- and towards debt converted in to

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equity to the tune of Rs. 137,32,82,199/-. It is not disputed that there is a claim towards uninvoked Bank Guarantees and there is a claim on account of debt converted into equity. The Resolution Professional does not dispute the fact of existence of such a claim. however, he is objecting to the claim on the ground that the claims have not been crystallized into debt in order to be admitted as a claim during the CIRP in Section 2(6) of Insolvency and Bankruptcy Code, 2016 (I&B Code), claim means:-

21. "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, immature, disputed, undisputed, secured or unsecured;

22. The explanation to the term claim assumes significance in view of the definition of the word debt under section 3(11) of I&B Code which categorically says 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;

23. Therefore, without finding out whether the claim in the instant Application falls within the definition of claim under section 3(6) of I&B Code, it will not be possible to decide on the prayers of the present Applications.

24. The Applicant says that under the terms of loan agreements a claim to the extent of Rs. 314,15,01,147/- lies before the RP on account of uninvoked Bank Guarantees out of the said claim, it appears

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that on 15th May, 2018 a claim to the extent of Rs. 7.4 Crores has already been accepted. This shows that between 15.03.2018 & 15.05.2018 it is an admitted fact that the bank has incurred a liability to the extent of Rs. 7.46 crores which was originally uninvoked bank guarantee.

25. From the Application it appears that there have been several meetings of CoC in which the subject matter of allowing the claim of uninvoked Bank Guarantees appears to have arisen. The Applicant relies on a decision of Hon'ble Appellate Tribunal in the matter of Andhra Bank Vs Hammerie Textiles Private Limited dated 13.07.2018, in this decision it is stated that when Corporate Debtor owes counter indemnity obligation the claim of Andhra Bank would have come within the definition of Financial Creditor.

26. Therefore if in respect of any sum, the Applicant Bank would be entitled to be considered as a Financial Creditor ipso facto the basis for such consideration would necessarily come under the definition of claim. On Account of the counter indemnity obligation of the Corporate Debtor, In view of Section 5(8)(h) of the I&B Code which considers "any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution; as falling within the definition of Debt.

27. In this context if the decision of the word claim is considered it will be clear that it depends on a right to payment and in the case of uninvoked bank guarantees in view of the subsisting counter indemnity of the Corporate Debtor it is not possible to accept the contention of the RP that the claim arising from uninvoked bank

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Guarantee is not giving a right to payment and therefore, it is not a claim it is indeed a right to payment existing as a right in the Applicant Bank and therefore it is a claim.

28. The Decision of Hon'ble NCLAT in F.H. Hammerie (Supra) relied upon by the Applicant Bank is applicable in view of the similarity of the facts and the contention of the RP that although it is a Debt and yet it is not a claim is untenable. The contention of the RP is therefore not acceptable being consistence with the need for consistency in the interpretation of the words Debt and Claim.

29. The Claim that is being lodged with the RP under Rule 8 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 comes after the commencement of the CIRP Under Rule 8(2) of the said Regulations, the existence of debt due to the Financial Creditor is required to be proved as much as the uninvoked bank guarantee falls within the meaning of a Financial Debt U/s 5(8)(h) of I&B Code. It is a Debt of the Applicant Bank towards un-invoked Bank Guarantee is liable to be accepted by the RP.

30. Once the CIRP Commences, the un-invoked Bank Guarantee will no longer be tested in the point of imminence of or prospect of Insolvency upon commencement of CIRP the Insolvency has set in, it is not possible to relegate certain claims of this nature as inadmissible since the invoking of the Guarantee has become almost a fait accompli. In case, the uninvoked bank Guarantee is not admitted as a claim, it will be seriously jeopardizing the interest of the Applicant Bank. I cannot visualize a situation that the Applicant Bank will continue to lodge claims from time to time,

even after the insolvency has set in and the obligation of the Applicant Bank has become a fait accompli. Assuming a Resolution Plan is Approved U/s 31 of the I&B Code, subsequently no provision cane be made with respect to uninvoked Bank Guarantee leaving not only the Applicant Bank but also the Resolution Applicant in difficulty for unsettled claims. As a whole, there is no merit in the Contention of the RP in this regards.

31. The RP contents that the Debt arising from uninvoked Bank Guarantee cannot be admitted relaying on the proposition in Microwave Communications Ltd Vs Credit Agricole CIB and others, in which it was held that even when the actual loss has accrued, a suit brought before the actual loss must be treated as premature. This proposition is not relevant in the case of a CIRP which is not a proceeding for a recovery mechanism and the submissions that if a claim for admission of a petition for commencement of CIRP cannot be treated as a suit for recovery of money.

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

that the amount converted into equity will revert to the category of debt the moment the CDR/SDR fails.

33. At this juncture, it is not envisaged U/s 60(5) of I&B Code that this Adjudicating Authority must look at the consequence of the failure of CDR/SDR as recorded by the Joint Lenders Forum (JLF) at their meeting held on 25.05.2017 and the JLF had apparently withdrawn all the concessions except to the issue of conversion of equity to debt. In fact, the Application of the lenders in CP(IB) No. 294/7/HDB/2017 was admitted for CIRP only on 23.02.2018. this shows that between 25.05.2017 to 23.02.2018, obviously the debt converted into equity has been remaining as equity only and the JLF has not taken any decision even internally with respect to the revert prayed for. Therefore, the portion of the claim relating to Equity cannot be admitted as a claim of debt.

34. With the above observations, IA No. 436 is disposed off.

K. Anantha Padmanabha Swamy
Member Judicial