FIT FOR INDEXING.

IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
PRINCIPAL BENCH

C.A. No. 997(PB)/2018
IN
C.P. NO. IB-190(PB)/2017

IN THE MATTER OF:

Union Bank of India .... Applicant

v.

Era Infra Engineering Private Limited................Corporate Debtor

SECTION: Under Section (60)5 of The Insolvency and Bankruptcy Code, 2016

Order delivered on 06.12.2018

Coram:

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

SHRI S.K. MOHAPATRA
Hon'ble Member (T)

PRESENTS:

For the Financial Creditor:	Mr. Krishnendu Dutta, Ms. Padmaja Kaul, Mr. Yugank Goel & Ms. Aishwarya Chaudhary, Advs. for ICICI Bank Limited
For the RP:	Mr. Abhinav Vasistha, Senior Advocate with Ms. Shivani Sinha and Mr. Raunk Singh, Advs.

M.M.KUMAR, PRESIDENT

ORDER

The instant application under Section 60 (5) of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') has been filed by the ICICI Bank Limited with a prayer for setting aside the

impugned decision of the Respondent/Resolution Professional and declare that the Corporate Debtor is liable to repay the amount granted by the ICICI Bank Limited to Era Infrastructure (India) Limited (for brevity 'EIIL') and Dehradun Highways Project Limited (for brevity 'DHPL'), as a Financial Debt as per the provisions of the Code; a further prayer has been made for issuance of direction to the Resolution Professional to admit the claim of the ICICI Bank as Financial Debt, in respect of the obligations undertaken by the Corporate Debtor under the credit facilities availed by EIIL and DHPL to the extent of INR 240.17 crores and INR 460.58 crores respectively. A consequential relief has also been claimed by seeking direction to the Resolution Professional to revise the list of financial creditors of the Corporate Debtor to include the claims of the ICICI Bank with respect to the facilities granted to EIIL and DHPL amounting to INR 700.75 crores. Thereafter credit the applicant-ICICI Bank in the CoC by adding the aforesaid claims and grant it voting share in the CoC in proportion to such claims with all consequential benefits arising therefrom.

2. Notice of the application was issued. Reply on behalf of the Corporate Debtor through the Resolution Professional has been filed. The applicant has also filed the rejoinder.

3. In order to put the controversy and issues in their proper perspective few facts may first be noticed. The Corporate Insolvency Resolution Process was initiated in respect of the Corporate Debtor on 08.05.2018 and Mr. Rajiv Chakraborty was appointed as an Interim Resolution Professional. He invited claims and the applicant lodged its claim by asserting that through various credit facilities it has granted loans to certain group/related parties of the Corporate Debtor namely Hyderabad Ring Road Project Private Limited (for brevity 'HRRPPL), Apex Buildsys Limited (for brevity 'ABL') apart from EIIL and DHPL. For the aforesaid facilities granted by the applicant the Corporate Debtor had furnished various securities and contractual comforts to the applicant. The detail of such facilities granted by the applicant along with the security and contractual comforts provided by the Corporate Debtor to secure such facilities is detailed below:-

Era Infrastructure (India) Limited (EIIL)

Pre-restructuring: RTL Facility

1. The applicant sanctioned a rupee term loan facility amounting to INR 300 crores in favour of EIIL, vide credit arrangement letter (for brevity 'CAL') dated 30.09.2010. Subsequently vide CAL dated 20.01.2011 (Annexure A-2) aforesaid sanctioned facility reduced to INR 200 crores. Further on 05.03.2011, the applicant through a rupee facility agreement (Annexure A-3) extended a loan of INR 200 crores. The aforesaid RTL facility was amended through a mandatory CAL dated 31.03.2011, modifying the terms of security created by way of mortgage as specified in the EIIL Sanction Letter which would mean to include EIIL RTL facility read with EIIL RTL Facility Amendment. Copies of the CAL dated 31.03.2011 and EIIL RTL Facility Amendment have been placed on record [Annexure A-4 (Colly)].

2. The payment made through the aforesaid RTL Facility was to be secured by the following guarantees/securities:

   (a) **Loan purchase agreement**–The applicant and the Corporate Debtor entered into a loan purchase agreement (Annexure A-5) on 05.03.2011 wherein the Corporate Debtor guaranteed payment under the EIIL RTL Facility in the event of a default by EIIL, by purchase of the entire outstanding amount of the EIIL RTL Facility. As per clause 4.2 (a) on the occurrence of any

loan purchase event, the applicant has the right but not the obligation to sell the whole or part of the outstanding EIIL RTL Facility to the Corporate Debtor at the loan purchase exercise price and the Corporate Debtor is under an obligation to purchase the outstanding EIIL RTL Facility from the applicant. Accordingly, the Corporate Debtor guaranteed the payments to be made by EIIL to the applicant.

(b) **Non-disposal arrangement** – The applicant, the Corporate Debtor and IDBI Trusteeship Service Limited (EIIL Security Trustee) entered into a non-disposal arrangement (Annexure A-6) dated 16.06.2011. According to the terms incorporated in the non-disposal arrangement the Corporate Debtor agreed not to deal with or divest 30% equity share capital of EIIL held by it (NDU Shares), and deposit such number of shares in a designated trust and retention account (NDU). In addition to that, the Corporate Debtor executed an irrevocable power of attorney in favour of the EIIL Security Trustee, authorizing it to, *inter alia*, sell, transfer, assign, dispose of or encumber the NDU Shares on the terms and conditions specified in the NDU (POA). Afterwards the applicant, the Corporate Debtor and the EIIL Security Trustee entered into a designated account agreement dated 16.06.2011 (Annexure A-7). The Corporate

Debtor through said designated account agreement agreed to open a trust and retention account with the applicant as required under the NDU for deposit of NDU shares.

3. Restructuring of EIIL RTL Facility: Restructured RTL Facility and FITL Facility

1. EIIL started defaulting in making payment towards the interest and principal amounts of the EIIL RTL Facility. As a consequence, and in light of the RBI guidelines, a Joint Lenders Forum was formed on 30.04.2014, comprising of the applicant and Yes Bank Limited. Accordingly, the applicant pursuant to the CAL dated 26.06.2015 (Annexure A-8), restructured the EIIL RTL Facility to a rupee term loan facility amounting to INR 150 crores through a restructuring agreement dated 26.06.2015 (Annexure A-9). The interest payable by the Corporate Debtor on the Restructured RTL Facility for 24 months, i.e. from 1 January 2015 (cut-off date) till 31 December, 2016 was funded to EIIL as a funded interest term loan. Accordingly, the funded interest term loan facility of INR 42 crores was extended to EIIL.

2. Clause 8 of the Restructuring Agreement provides for continuation of existing securities/contractual comforts provided by EIIL or third party in favour of the applicant

and/or the Security Trustee, post restructuring. In this way the Corporate Debtor vide letters dated 26.06.2015 & 27.06.2015 [Annexure A-10 (Colly)], confirmed that all rights under the Loan Purchase Agreement and Non-Disposal Arrangement, respectively, shall continue to secure the Restructured facilities.

Breach of Restructured Agreement

1. Pursuant to the Non-Disposal Agreement, the Corporate Debtor was required to provide a minimum of 30% of equity share capital of EIIL for securing the EIIL RTL Facility and the Restructured Facilities. However, the Corporate Debtor failed to fulfil the aforesaid terms and had only deposited 15,242,070 shares in the trust and retention account. The shares deposited in the trust and retention account constituted only 12.70% of the equity share capital of EIIL. Accordingly, the applicant vide letters dated 08.07.2016, 30.06.2017 & 24.08.2017 [Annexure A-11 & A-12 (Colly)], requested the Corporate Debtor, along with EIIL, to arrange for the balance shares (20,759,116 shares). However, the Corporate Debtor did not pay any heed to the aforesaid request.
2. Due to consecutive defaults on its payment obligations under the Restructured Facilities particularly in payment of interest, demand notices dated 20.03.2017 and 13.04.2017 were issued by

the applicant to *inter alia* EIIL and the Corporate Debtor demanding payment under the EIIL RTI Facility and Restructured Facilities (Annexure A-13 & A-14). Despite receipt of aforesaid demand notices, EIIL and/or the Corporate Debtor failed to repay the outstanding amounts to the applicant. On account of persistent defaults, the account of EIIL was classified as an NPA on 28.09.2017 w.e.f. 30.06.2015 by the applicant.

3. Subsequently the applicant exercised its option/right under the Loan Purchase Agreement to sell the Restructured Facilities at a purchase price of INR 199.5 crores to the Corporate Debtor, vide a loan purchase notice dated 15.11.2017 (Annexure A-15) on the diverse grounds firstly not to maintain the debt service reserve requirements of INR 6.43 crores by the EIIL including others; secondly not to provide 30% of the equity share capital of EIIL, as security by the Corporate Debtor and lastly not to adhere to the payment schedule under the Restructured facilities. In view of the above, the applicant called upon the Corporate Debtor to purchase the Restructured facilities and pay the loan purchase exercise price within 10 days from the date of the Loan Purchase Notice.

4. Upon failure of the Corporate Debtor to purchase the Restructured facilities and pay the aforementioned amounts, the

applicant was compelled to issue a recall cum invocation of guarantee notice dated 27.11.2017 (Annexure A-16) to *inter alia* EIIL and the Corporate Debtor whereby called upon them to pay the entire outstanding amount under the Restructured facilities as on 31.10.2017 totalling to INR 198.8 crores together with further interest and other charges thereon until payment. Response from the Corporate Debtor vide letter dated 04.12.2017 (Annexure A-17) was received requesting the applicant for providing statement of accounts and to not initiate any adverse action against it.

5. Despite the aforesaid Recall cum Invocation Notice, EIIL and/or the Corporate Debtor failed to repay the outstanding dues under the Restructured facilities to the applicant. In view of that, applicant issue a letter dated 24.05.2018 to *inter alia* EIIL and the Corporate Debtor, revoking the Restructuring Agreement with immediate effect, thereby restored the liability of EIIL and the Corporate Debtor under the EIIL RTL Facility (Revocation Letter) (Annexure A-18). It is stated that in terms of clause 5 (11) read with clause 12 of the Restructuring Agreement, the original facility agreement i.e., the EIIL RTL Facility existing prior to restructuring stands re-instated. Therefore, it is highlighted that the payment obligations and the securities against the same would be as per

the terms of the EIIL RTL Facility. Pursuant to the Revocation letter, the applicant directed EIIL and the Corporate Debtor to pay the reinstated liabilities to the applicant. However, no amount has been paid to the applicant towards the aforesaid facilities granted to EIIL.

Dehradun Highways Project Limited

(i) National Highways Authority of India (NHAI) granted DHPL a concession for construction, operation, maintenance and management of the existing road of a specified section of NH-58 & 72 on Haridwar-Dehradun route, Uttarkhand for four-laning on build, operate and transfer on annuity basis. The aforesaid work was assigned to DHPL as per the terms and conditions incorporated in the concession agreement dated 24.02.2010 (Annexure A-19).

Facilities provided to DHPL : ECB Facility Agreement and DHPL RTL-1

(ii) The applicant sanctioned a rupee term loan facility amounting to INR 270 Crores with a sub-limit of USD 60 million as an external commercial borrowing (ECB Facility), in favour of DHPL to part finance the cost of the aforesaid Project, vide *CAL* dated 29.03.2011 (DHPL Sanction Letter)

(Annexure A-20). Said sanction letter was amended vide an amendatory CAL dated 02.12.2011 (Annexure A-21).

(iii) Thereafter the applicant and DHPL entered into an ECB Facility agreement on 07.06.2011 (Annexure A-22). According to the terms incorporated in the aforesaid agreement the applicant undertook to extend a foreign currency loan facility up to USD 60 million (ECB Facility Agreement) to partly finance implementation of the aforesaid Project undertaken by the DHPL. Subsequently terms and conditions of the ECB Facility Agreement was modified through amendment agreements [Annexure A-23 (Colly)] on three tranches.

(iv) Thereafter on the request of DHPL term loans aggregating to INR 528,45,00,000 was cumulatively extended by various Banks to it vide a common loan agreement dated 23.07.2010 (Common Loan Agreement I). Under the said agreement undrawn commitment to extent the INR 270 crores was also made. In the wake of aforesaid commitment, DHPL requested the applicant for extending a rupee term loan totalling to INR 270 crores which was agreed by the applicant on the terms and conditions set out in the amended and restated common loan agreement dated

08.12.2011 entered into by and between DHPL and applicant including various other Banks (Common Loan Agreement II). It is pertinent to mention that the terms incorporated in the Common Loan Agreement II superseded the Common Loan Agreement I. Subsequently on the directions of NHAI, lenders and DHPL executed an Addendum No. 1 to the Common Loan Agreement on 30.01.2013 (Annexure A-25).

(v) To secure payment under the abovementioned facilities to DHPL, the following guarantees/securities were executed by the Corporate Debtor:

a. **Promoter's Undertaking:** The Corporate Debtor executed an undertaking on 08.12.2011 (First Promoter Undertaking) in favour of the applicant to secure the amounts under the DHPL RTL-1 and ECB Facility. The Corporate Debtor agreed to fund and arrange for any shortfall in payment to the applicant by DHPL, arising on account of termination of the Concession Agreement. Subsequently through supplemental sponsor's undertaking dated 11.10.2012 and addendum no. 1 to the First Promoter Undertaking dated 30.01.2013 [Annexure A-26 (Colly)], certain terms and conditions to the First Promoter Undertaking were modified.

b. **Deed of pledge:** The Corporate Debtor, as a pledgor, executed an amended and restated deed of pledge dated 08.12.2011 with DHPL and IL&FS Trust Company Limited, as a security trustee, to secure the loan amounts in DHPL RTL-1 and ECB Facility, by pledging 51% of the shares held by it in DHPL. Afterwards through three addendums [Annexure A-28(Colly)] executed on different dates certain terms and conditions of the Deed of Pledge were modified.

Facilities provided to DHPL: DHPL RTL-2

1. Due to mounting cost overruns, the applicant, vide two CALs, both dated 04.09.2014 [Annexure A-29 (Colly)], sanctioned a rupee term loan aggregating to INR 31.34 crores and INR 70.61 crores respectively in favour of DHPL. Further an amended and restated common loan agreement dated 27.03.2015 (Common Loan Agreement III) (Annexure A-30), was entered into between DHPL and the consortium of lenders, comprising various Banks including the applicant whereby the applicant agreed to extend the DHPL RTL-2 Facility to DHPL. The terms of the RTL-2 Sanction Letters were modified vide two amendatory CALs dated 27.03.2015 [Annexure A-31 (Colly)].

2. To secure payment under the abovementioned facilities to DHPL, the following guarantees/securities were executed by the Corporate Debtor:

a. The Deed of Pledge was modified by way of an addendum dated 27.03.2015 to also secure amounts extended under the DHPL RTL-2 Facility.

b. The Corporate Debtor executed an undertaking dated 27.03.2015 (Second Promoter Undertaking) (Annexure A-32) as an additional contractual comfort. Through said additional contractual comfort, the Corporate Debtor undertook to *inter alia* arrange for funding any cost overrun in the Project and shortfall in payment to lenders in the event of termination of the Concession Agreement.

3. Due to failure by the DHPL's to adhere to timelines and milestones, NHAI issued an intention to terminate the Concession Agreement on 23.05.2016. Due to which, the Senior Lenders agreed that DHPL would avail bridge-financing from NHAI to complete the balance work of the Project. NHAI granted approval for one-time fund infusion to the extent of INR 279.88 crores subject to signing of a tripartite agreement between DHPL, NHAI and Bank of India being a lead bank of the Senior Lenders.

4. Due to the default in payment of interest under the DHPL facilities, the applicant issued a demand notice dated 27.03.2017

(Annexure A-33) to *inter alia* DHPL and the Corporate Debtor demanding total outstanding of INR 18.77 crores. However, applicant did not receive any payment under the aforesaid facilities.

Breach of Concession Agreement

1. Due to persistent lapses in performance by DHPL, NHAI issued a notice for intention to terminate the Concession Agreement on 13.04.2018. Bank of India being a lead bank, issued a response to NHAI to withdraw aforesaid notice, in view of the signing of Tripartite Agreement. Copy of notice as well as response has been placed on record Annexure A-34 (Colly).
2. Thereafter on 25.05.2018, NHAI issued a termination notice (Annexure A-35) to DHPL. Through said notice NHAI terminated the Concession Agreement with immediate effect. The said notice was challenged by DHPL including Bank of India, by filing two different Writ Petitions before the Hon'ble High Court of Delhi. During the course of hearing the Hon'ble High Court in its order dated 02.08.2018 observed that settlement between the parties is not possible. Subsequently during the course of hearing on 10.08.2018 Bank of India expressed its inclination to explore NHAI's proposal of payment of INR 306.62 crores as a full and final settlement with all parties i.e. lenders and DHPL. Afterwards

said writ petition withdrawn by DHPL with a view to avail alternate remedies and the Hon'ble High Court while passing the order of withdrawal directed the NHAI to keep its settlement offer open for a period of 45 days i.e. 25 September 2018. Copy of the orders dated 02.08.2018 & 10.08.2018 have been placed on record [Annexure A-36 (Colly)].

3. Subsequently, DHPL has addressed a letter to Bank of India on 06.09.2018 seeking its approval to NHAI's settlement proposal with certain conditions including DHPL reviewing the terms of settlement agreement prior to giving its final consent and Senior Lenders giving up their balance claims against *inter alia* DHPL and the Corporate Debtor. Accordingly, Bank of India issued a letter dated 12.09.2018 to NHAI, annexing DHPL's acceptance to review the settlement proposal, expressing its willingness to negotiate and enter into a full and final settlement. Despite that, till date no settlement has been arrived at between the parties. Copies of the letters dated 06.09.2018 & 12.09.2018 have been placed on record [Annexure A-37 (Colly)].

4. The Resolution Professional made a public announcement on 15.05.2018 inviting the claims from all and sundry creditors against the Corporate Debtor. Accordingly, the applicant placing reliance on the securities and contractual comforts provided by the

Corporate Debtor towards the facilities disbursed by the applicant to the entities/group related to the Corporate Debtor along with proof claiming that the applicant is a Financial Creditor. The claims were duly filed on 28.05.2018 on the proforma, Form-C (Annexure A-38) prescribed under the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process to Corporate Persons) Regulations, 2016. Pursuant to the filing of the claims the Resolution Professional sought clarifications with respect to the claims and responses were entered by the Resolution Professional. It is asserted by the applicant that initially the Resolution Professional admitted the claims pertaining to the facilities availed by HRRPPL, ABL and EIIL which is evident from a bare perusal of e-mail dated 11.06.2018, sent by the Resolution Professional to the applicant. Thereafter the claims were rejected. It is pertinent to mention that the applicant is a Member of the CoC but it enjoys only 5.75% of voting share which is far less than its entitlement. The applicant has asserted that by accepting the claim made by the applicant its voting share would be significant and it would have vital say in the decision making in the CIR Process. The claim of the applicant has been rejected vide order dated 13.09.2018 (Annexure A/1). The aforesaid rejection has been recorded by the

Link Legal on behalf of the Resolution Professional-Corporate Debtor. The reason for rejecting the claims are as under:-

a. According to the Resolution Professional the claim of the ICICI does not fall under the category of Financial Debt as defined by the Code in terms of its email dated August 4, 2018, conveyed that claim made by ICICI basis the loan purchase agreement dated March 5, 2011 executed by EIEL in favour of ICICI (the 'Loan Purchase Agreement') (pursuant to which notice dated November 15, 2017 (the 'Put Notice') was also sent by ICICI exercising the put option), may be admitted through Form F as the ICICI seems to have the right to remedy for breach of contract as the Put Notice was not honoured by EIEL.

b. From a perusal of the Loan Purchase Agreement dated 15.11.2017 it is understood that it was entered into by EIEL with a view to incur a contractual liability to purchase the facility availed by EIIL from ICICI upon exercise of the put option by ICICI and upon failure to do so, shall be liable to pay liquidated damages for an

amount equal to the unpaid amount on demand. In regard to the same, the relevant clause of the Loan Purchase Agreement has been reproduced below for a ready reference. It is to be noted that Purchasing Party has been defined in the Loan Purchase Agreement to mean EIEL.

Clause 6(c) states that the "if the Purchasing Parties fail to pay any amount due under any Transaction Document (other than the Loan Purchase Exercise Price) on its due date, the Purchasing Parties shall on demand, pay to the Lender as Liquidated damages an amount equal to that unpaid amount."

c. That, the intention of the Purchasing Party-EIEL was to enter into a contract of guarantee and that the parties have entered into the Loan Purchase Agreement whereas they could have entered into deed of guarantee/corporate guarantee as was done in other similar matters of EIEL and ICICI and as is a common practice with the banks to get a corporate guarantee executed. The fact that parties chose to enter into Loan Purchase Agreement instead of a deed of

guarantee/corporate guarantee makes the intention of parties clear that the same was not to be construed as a guarantee *per se* and should be treated as contractual obligation of EIEL as set out in terms of the Loan Purchase Agreement.

d. The judgment of the Hon'ble Bombay High Court rendered in the case of ***IL&FS Financial Services Limited v. Vandana Global Limited (2018) 207 CompCas 668(Bom)***,has been distinguished on the ground that there the purchasing party had admitted its liability as the guarantor in its reply affidavit, clarifying its intention to be bound by the terms of the option agreement in the capacity of a guarantor which is a major deviation from the facts of the case in hand as the EIEL being a purchasing party has never expressed its intention to be treated as guarantor and therefore, the claim cannot be treated as a Financial Debt since it is not covered by the provisions of Section 5 (8) of the Code.

e. The non-disposal undertaking cannot be firstly treated as security interest and even otherwise it was not

possible to conclude that every form of security interest can be construed as akin to guarantee, hence, we are not in a position to conclude that non-disposal arrangement may be treated as guarantee and included within the purview of the financial debt.

5. In view of the aforesaid reasons listed on behalf of the Resolution Professional the applicant was advised to seek remedy for the breach of contract as the Put Notice was not honoured by EIEL.

6. In respect of the claim made by DHPL on behalf of the Resolution Professional, further following reasons have been recorded for rejecting the claim:-

a. As per the terms of the Undertakings, EIEL had undertaken to arrange for funding to meet the shortfall in payments to the Senior Lenders arising out of termination of the Concession Agreement. We therefore understand that the obligation to make payment under the Undertakings is not triggered upon default in payment by DHPL or upon termination of the Concession Agreement ipso facto. The obligation of EIEL

in terms of the Undertakings is to meet the shortfall in payments arising out of termination of the Concession Agreement.

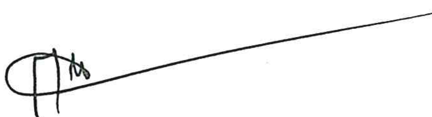
b. While we note that the termination notice dated May 25, 2018 in respect of the Concession Agreement has already been issued by National Highways Authority of India ('NHAI'), we also note the settlement proposal offered by NHAI (as set out in the orders of Hon'ble Delhi High Court dated August 2, 2018 and August 10, 2018) in terms whereof there is a possibility of payment of Rs. 306.62 Crores to the Senior Lenders including ICICI.

c. On behalf of the Resolution Professional it was then stated that it was possible to arrive at the shortfall that EIEL is obliged to meet by arranging for funds in terms of the undertakings since it's not clear as to how much the shortfall in payment towards the dues of the Senior Lenders arising out of the termination of the Concession Agreement would come to. The Resolution Professional has no document to arrive at the figures of shortfall in the payments to the Senior Lenders and therefore, it is not possible to admit the claim in respect of the DHPL

by anticipating any such amount. Such an approach would be wholly premature for the Resolution Professional to admit the claim and upon submission of documents/letter from NHAI indicating the termination payments to DHPL and consequently, indicating the shortfall in payments arising to the Senior Lenders therefore, the RP, would be happy to reconsider the claim.

d. The pledge agreement cannot be construed as akin to guarantee as every form of security interest cannot fall within the expression 'guarantee'.

e. The question concerning the percentage of voting right would be determined after admission of the claim of DHPL and it would be premature to deliberate upon such an issue at this stage. The allocation of voting rights to ICICI would also have bearing on the voting rights of the financial creditors of EIEL and therefore, the voting rights to the applicant cannot be allocated pre-maturely.



7. We have heard learned counsel for the parties at considerable length and have perused various clauses of Loan Purchase Agreement, Non-Disposal Arrangement and the Pre-Restructuring RTL Facilities provided by the Credit Arrangement Letter (for brevity 'CAL') and also similar clauses in Facility Agreement provided to DHPL RTL-1, Promoter's Undertaking, Deed of pledge and facilities provided to DHPL RTL-2 coupled with other facts. It would therefore be apposite to record findings on the basis of various clauses in the aforesaid agreements in respect of EIIL and DHPL.

8. In respect of EIIL, Loan Purchase Agreement was executed on 05.03.2011 and the Corporate Debtor guaranteed payment under the guaranteed payment under the EIIL RTL Facility in the case of a default. As per clause 2 loan purchase rights and conditions have been provided and the aforesaid clause reads as under:-

> "2. Loan Purchase Right and Conditions
>
> 2.1 Loan Purchase Right
>
> a. The Purchasing Parties grant to the Lender the Loan Purchase Right in accordance with Clauses 2.1 (b) and 5.2 below.

b. On the occurrence of a Loan Purchase Event, at any time during the term of the Facility, the Lender shall have the right but not an obligation to sell the whole or part of the outstanding Facility, to any/all of the Purchasing Parties at the Loan Purchase Exercise Price and the Purchasing Parties shall be under an obligation to purchase such Facility from the Lender ("Loan Purchase Right").

c. The Purchasing Parties must, on the date of execution of this Agreement, deliver to the Lender a blank executed Loan Transfer Certificate in the form set out in Schedule III *(Form of Loan Transfer Certificate).*

9. From a perusal of the aforesaid clause it is evident that the applicant is entitled to sell the whole or part of the outstanding Facility at the loan purchase exercise price to any or all of the purchasing parties. The Purchasing Party is under an obligation to purchase such Facility from the Lender i.e. the applicant.

10. A loan purchase notice is required to be issued on the occurrence of specified event including the event of default as per clause 4.2 which reads thus:-

"4.2 Loan Purchase Notice

a. At any time, on occurrence of any of the following events ("Loan Purchase Events"), the Lender may deliver to any or all of the Purchasing Parties a Loan Purchase Notice:

   i. Any Default, subject to any cure period wherever applicable as per the terms of the Facility Agreement;

   ii. Any Invocation Event;

   iii. If, in the opinion of the Lender, any of the Contractual Comforts become unenforceable or imperfect, or any of the terms therein are breached by any of the Purchasing Parties;

   iv. Any other default by the Borrower or the Purchasing Parties under the Transaction Documents.

b. Any Loan Purchase Notice shall specify:

   i. the relevant Loan Purchase Event;

   ii. Loan Purchase Exercise Price (as calculated in accordance with Clause 5 (Settlement of Loan Purchase Right);

   iii. the name of all the Purchasing Party (ies) who will, either jointly or severally, fulfil the required obligations under the Loan Purchase Right; and

   iv. the Loan Purchase Settlement Date, which shall be a business day falling not less than ten days after the delivery of that Loan Purchase Notice."

11. A perusal of the aforesaid clause would show that the applicant has the right to sell the whole or part of the outstanding EIIL RTL Facility to the Corporate Debtor at the loan purchase exercise price who is under an obligation to purchase.

12. Likewise, the clauses in the Non-Disposal Arrangement and an irrevocable power of attorney in favour of the EIIL Security Trustee, authorized the applicant to sell, transfer, assign, dispose of or encumber the NDU Shares on the terms and conditions specified in the Power of Attorney. The applicant, the Corporate Debtor and the EIIL Security Trustee entered into a designated account agreement dated 16.06.2011 wherein the Corporate Debtor agreed to open a trust and retention account with the applicant as required under the NDU for deposit of NDU shares. It is not disputed that EIIL started defaulting in making payment towards the interest and principal amounts and even after restructuring the default continue to occur. Clause 8 of the Restructuring Agreement dated 26.06.2015 provided for continuation of existing securities/contractual comforts provided by EIIL in favour of the applicant and/or the Security Trustee, post restructuring. The Corporate Debtor confirmed vide letters dated

26.06.2015 & 27.06.2015 [Annexure A-10 (Colly)], that all rights under the Loan Purchase Agreement and Non-Disposal Arrangement respectively, were to continue to secure the Restructured facilities. The Corporate Debtor failed to fulfil the terms of providing a minimum of 30% of equity share capital of EIIL for securing the EIIL RTL Facility and the Restructured Facilities and deposited only 15,242,070 shares in the trust and retention account which constituted only 12.70% of the equity share capital of EIIL. The request for arranging the balance shares was made on 08.07.2016, 30.06.2017 & 24.08.2017 [Annexure A-11 & A-12 (Colly)], but all in vain. On account of consecutive defaults under the Restructured Facilities particularly in payment of interest, demand notices dated 20.03.2017 and 13.04.2017 were issued by the applicant to *inter alia* EIIL and the Corporate Debtor demanding payment. However, both the noticees remained defaulter as they failed to pay the outstanding amount. The account was thus, classified as an NPA on 28.09.2017 w.e.f. 30.06.2015.

13. Placing reliance on clauses 2 and 4.2 of the Loan Purchase Agreement, the applicant exercise the option to sell to sell the

Restructured Facilities at a purchase price of INR 199.5 crores to the Corporate Debtor. A copy of the Loan Purchase Notice dated 15.11.2017 is already on record which discloses various grounds including non-maintenance of the debt service reserve requirements of INR 6.43 crores by the EIIL and others, failure to provide 30% of the equity share capital of EIIL, as security by the Corporate Debtor and lastly non-adherence to the payment schedule under the Restructured facilities. The applicant called upon the Corporate Debtor to purchase the Restructured facilities and pay the loan purchase exercise price within 10 days from the date of the Loan Purchase Notice. On its failure to purchase the Restructured facilities and pay the aforesaid amounts, the applicant issued a recall cum invocation of guarantee notice dated 27.11.2017 to EIIL and the Corporate Debtor calling upon them to pay the entire outstanding amount under the Restructured facilities as on 31.10.2017 which amounts to INR 198.8 crores together with interest and other charges. Despite Recall cum Invocation Notice, the Corporate Debtor failed to repay the outstanding dues under the Restructured facilities to the applicant. The applicant vide a letter dated 24.05.2018 issued to EIIL and the Corporate Debtor, revoked the Restructuring

Agreement with immediate effect, and the liability of EIIL and the Corporate Debtor under the EIIL RTL Facility stand restored. However, no amount has been paid to the applicant towards the aforesaid facilities granted to EIIL and the claim has been rejected by the Resolution Professional.

14. In respect of Dehradun Highways Project Limited the story is no different. The facility granted by the applicant to DHPL were sought to be secured by the guarantees/securities executed by the Corporate Debtor in the form of Promoter's Undertaking executed on 08.12.2011 and subsequently modified on 11.10.2012 and 30.01.2013 [Annexure A-26 (Colly)]. The Corporate Debtor also executed an amended and restated deed of pledge dated 08.12.2011 with DHPL and IL&FS Trust Company Limited, as a security trustee, to secure the loan amounts in DHPL RTL-1 and ECB Facility, by pledging 51% of the shares held by it in DHPL. There were some modifications carried in the terms and conditions of the Deed of Pledge by three addendums [Annexure A-28(Colly)]. The facilities which were provided to DHPL were thus secured by the following guarantees/securities executed by the Corporate Debtor.

"a. The Deed of Pledge was modified by way of an addendum dated 27.03.2015 to also secure amounts extended under the DHPL RTL-2 Facility.

b. The Corporate Debtor executed an undertaking dated 27.03.2015 (Second Promoter Undertaking) (Annexure A-32) as an additional contractual comfort. Through said additional contractual comfort, the Corporate Debtor undertook to *inter alia* arrange for funding any cost overrun in the Project and shortfall in payment to lenders in the event of termination of the Concession Agreement."

15. On account of default in payment of interest under the DHPL facilities, the applicant issued a demand notice dated 27.03.2017 (Annexure A-33) to DHPL and the Corporate Debtor demanding total outstanding of INR 18.77 crores. However, no payment was received.

16. There has been breach of Concession Agreement and notices have been issued by NHAI expressing its intention to terminate the Concession Agreement on 13.04.2018 [Annexure A-34 (Colly)]. On 25.05.2018, NHAI issued a termination notice (Annexure A-35) to DHPL terminating the Concession Agreement with immediate effect. The litigation filed by DHPL in the Hon'ble Delhi High Court

has resulted in withdrawal of the writ petition by offering to avail alternate remedies. The Hon'ble Delhi High Court also directed the NHAI to keep its settlement offer open for a period of 45 days commencing from 25 September 2018 and the period stand expired. Copy of the orders dated 02.08.2018 & 10.08.2018 have been placed on record [Annexure A-36 (Colly)]. Some efforts for settlement were made but till date no settlement has been arrived at. It is in these circumstances that the claim with respect to DHPL is also sought to be raised before the Resolution Professional.

17. The question of law which arises for consideration is whether the undertaking of the Corporate Debtor to purchase the loan in part or whole in pursuance of clauses 2 and 4.2 of the Loan Purchase Agreement (Annexure A/5) amounts to guarantee within the meaning of Section 126 of the Contract Act and; whether the Corporate Debtor by executing the Promoter's undertaking, deed of pledge and undertaking dated 27.03.2015 as an additional contractual comforts providing that the Corporate Debtor undertook to arrange for funding any cost overrun in the project and shortfall in payment to lenders in the event of termination of the Concession Agreement would amount to 'Guarantee'. There is

no doubt left that Concession Agreement was terminated by the NHAI on 25.05.2018 resulting in the emergence of right provided in the Promoter's Undertaking, Deed of Pledge and the Corporate Debtor undertaking dated 27.03.2015 (Second Promoters Undertaking).

18. In order to determine whether the agreements, arrangements, undertaking etc. involved in this matter would qualify to be called 'Contract of Guarantee' we must dwell on Section 126 of the Contract Act, 1872 which reads as under:

> "**Section 126.** 'Contract of guarantee', 'surety', 'principal debtor' and 'creditor'—A 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'surety'; the person in respect of whose default the guarantee is given is called the 'principal debtor', and the person to whom the guarantee is given is called the 'creditor'. A guarantee may be either oral or written."

A bare perusal of Section 126 of the Contract Act makes it patent that it demystify a contract of guarantee to mean a contract to perform the promise, or discharge the liability of a third person in case of his default. The parties involved are known as 'surety'; 'principal debtor' and the 'creditor'. A contract of guarantee

involves three parties: creditor, surety, and principal-debtor. A contract of guarantee must, therefore, involve a contract to which all those parties are privy. A guarantee is an undertaking to indemnify, if some other person does not fulfil his promise. The liability under a contract of guarantee is conditional on the default of the principal-debtor, and hence does not amount to a 'promise to pay'.

It is evident from the facts of this case that Principal Debtor are EIIL and DHPL. The Corporate Debtor is the 'Surety' and the applicant is 'Creditor'. The essential ingredients of contract of guarantee are also fulfilled as is patent from the preceding paras. As per various clauses surety has stood guarantee for the facilities given in case of default by the Principal Debtor. The default has occurred and the amount is recoverable from the Corporate Debtor. If that be so then the Resolution Professional was not justified to decline the claim made by the applicant.

19. We also draw support from the view taken by the Division Bench of Hon'ble Bombay High Court in the case of ***IL&FS Financial Services Limited v. Vandana Global Limited*** (supra). In that case the Company Judge has admitted the Company

Petition filed under the old Section 433 (e), 434 read with 439 of the Companies Act, 1956 by accepting the event of default in somewhat similar facts and circumstances. In that case also the default has occurred and the option under the Agreement was exercised by the Lender. Placing reliance on Section 126 of the Contract Act, the Division Bench proceeded to observe as under:-

> "..............The legal position can be clearly noted from Section 126 of the Contract Act which defines a contract of guarantee to mean a contract to perform the promise, or discharge the liability, of a third person in case of his default. It is well settled that a contract of guarantee involves principally three parties namely the creditor, the surety and the principal debtor, where liability may be actual or prospective. Thus necessarily the ingredients of a contract of guarantee are clearly present in the option agreement which are reflected from the unambiguous nature of Article II the "Put Option" whereby the appellant has irrevocably, absolutely and unconditionally without demur or protest agreed to make payment of the exercise price to the respondent. It this be the case, then considering the provisions of Section 126 of the Contract Act, it is imperative to accept the 'option agreement' as a 'contract of guarantee'. There can be no other interpretation. Thus, we are of the considered opinion, the learned Single Judge

is correct in observing that the 'option agreement' is required to be considered as a guarantee."

20. In view of the aforesaid legal position we are of the view that the claim made by the applicant before the Resolution Professional warrant acceptance and the application deserves to be allowed.

21. On behalf of the Resolution Professional it was urged that the applicant has a right to claim compensation for breach of contract as put notice was not honoured by EIIL-Corporate Debtor. In support of the aforesaid argument clause 6 (c) has been cited which provides for payment of Liquidated damages equal to the unpaid amount to the Lender. However, such an argument would not require any detailed consideration as the Loan Purchase Agreement has been held to be an Agreement of guarantee within the meaning of Section 126 of the Contract Act on the exercise of 'put option' by the applicant-Lender. It would infact support the applicant's case. Therefore, we do not find any merit in the aforesaid submission. Moreover, the correspondence shows that this has not been the case put forward by any of the parties at any stage. The second submission made on behalf of the RP was that instead of entering into a Loan Purchase Agreement the parties could have executed a deed of guarantee/corporate guarantee

which is a common practice with the Banks. The argument proceeds that it shows the intention of the parties that such document was not to be construed as a guarantee per-se. We are afraid that this argument would also not cut any eye as the Loan Purchase Agreement/Undertaking answer every description of deed of guarantee which is fully covered by the judgment of the Hon'ble Bombay High Court in the case of ***IL&FS Financial Services Limited v. Vandana Global Limited*** (supra). The aforesaid judgment has been distinguished by the Resolution Professional on unwarranted ground that there was admission of its liability by the Purchasing Party as a guarantor in the reply filed by it. However, the judgment does not proceed on the assumption of admission but has discussed the legal issues whether the agreement before the Hon'ble Bombay High Court was to be construed as a deed of guarantee or not. Therefore, we are unable to accept the objection raised and hereby reject the same.

22. The last objection is in respect of facilities provided to DHPL that Non-Disposal Undertaking was not to be treated as security interest and every form of security interest was not to be construed akin to guarantee and therefore, it could not be treated as a

guarantee. Again, the argument proceeds on fallacious assumption. It may be true that every security interest would not be a guarantee but in the present case as already held that 'Non-Disposal Undertaking' coupled with other would amount to Guarantee. Therefore, we are unable to accept the submission.

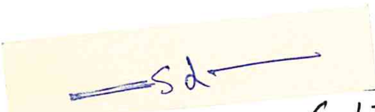
23. Another submission made by learned counsel for the Resolution Professional is that the amount due cannot be considered as 'financial debt' within the meaning of Section 5 (7) & (8) of the Code. A bare perusal of the aforesaid provision makes it patent that a 'financial creditor' is a person to whom financial debt is owed and the financial debt means a debt along with interest which is disbursed against consideration for the time value of money. The financial debt in the present case is the amount of liability in respect of any of the guarantee as referred in clauses (a) to (h) of Section 5 (7) of the Code. Therefore, any amount raised under any other transaction which has the commercial effect of a borrowing would be considered as financial debt as is specified by Section 5 (8) (f) of the Code. Therefore, we have no doubt that the amount due is a financial debt and the applicant is a financial creditor.

24. As a sequel to the above discussion this application succeeds. The decision of the Resolution Professional dated 13.09.2018 (Annexure A/1) is set aside and the following directions are issued:-

1. The Corporate Debtor is liable to repay the amount granted by the ICICI Bank Limited to Era Infrastructure (India) Limited and Dehradun Highways Project Limited, as a Financial Debt as per the provisions of the Code.
2. Once it is an amount repayable then the Resolution Professional must admit the claim of the ICICI Bank as Financial Debt, in respect of the obligations undertaken by the Corporate Debtor under the credit facilities availed by Era Infrastructure (India) Limited and Dehradun Highways Project Limited to the extent of INR 240.17 crores and INR 460.58 crores respectively. Accordingly, we issue directions to Resolution Professional to do so.
3. As a consequential relief a direction is issued to the Resolution Professional to revise the list of financial creditors of the Corporate Debtor by including the claims of the applicant-ICICI Bank with respect to the facilities granted to

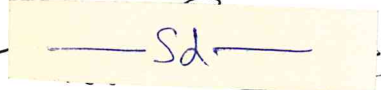
Era Infrastructure (India) Limited and Dehradun Highways Project Limited amounting to INR 700.75 crores and credit the applicant-ICICI Bank in the CoC by adding the aforesaid claims. It shall also grant the applicant its voting share in the CoC in proportion to such claims with all consequential benefits arising therefrom.

25. The application is disposed of in the above terms.



6.12.2018

(M.M. KUMAR)
PRESIDENT



S.K. MOHAPATRA
MEMBER (TECHNICAL)

06.12.2018
Vineet