

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
ALLAHABAD BENCH,
ALLAHABAD**

CA NO.159/2017

(UNDER SECTION 60(5) OF THE
INSOLVENCY & BANKRUPTCY
CODE, 2016)

In

CP NO.24/ALD/2017

IN THE MATTER OF

EXPORT-IMPORT BANK OF INDIA

Having its Registered Office:
Centre One Building, Floor 21,
World Trade Centre Complex,
Cuffe Parade, Mumbai-400 005

..... APPLICANT

MEMO OF PARTIES:

JEKPL Private Limited,
Plot No.15, Knowledge Park II,
Greater Noida -201 306,
Gautam Budh Nagar, Uttar Pradesh.

.....CORPORATE DEBTOR/APPLICANT

JUDGMENT/ORDER DELIVERED ON 27.11.2017

CORAM: SH. HARIHAR PRAKASH CHATURVEDI, MEMBER (J)



For the Applicant

: Sh. Anurag Khanna, Sr. Advocate.
Alongwith,
Ms. Gunjan Jadwani, Advocate.

For the Corporate Applicant :

Sh. Nesar Ahmad, PCS.
Alongwith,
Sh. Anil Kumar, PCS.

PER: SH. HARIHAR PRAKASH CHATURVEDI, MEMBER (J)

JUDGMENT/ORDER

- The present case is fixed for pronouncement of order in CA NO.159/2017 (in CP No.24/ALD/2017) and the present application is filed by the applicant

Export Import Bank of India Limited (EXIM Bank) under Section 60(5) of the I & B Code read with rule 11 of the NCLT rule before this Tribunal seeking for relief in form of a direction to be issued to the Resolution Professional of the Corporate Debtor Company, which is now under the CIRP (Corporate Insolvency Resolution Process) to treat its claim as a valid claim as a 'Financial Debt' under the provision of the I & B Code and to include the applicant in the Committee of Creditors (COC) of present Corporate Debtor Company (JEKPL) with a voting share proportionate to its amount of claims. It is also alleged that the Resolution Professional through email communicated the impugned order/decision dated 04.08.2017 to the present applicant by rejecting its claim as a Financial Creditors and without calling for any explanation or inviting objections/comments from it on such legal opinion which formed the basis for taking impugned action/decision. Hence, such order being in contravention of the principle of natural justice, needs to be set aside.

2. It has also been submitted by the EXIM Bank, the present applicant, that its claim comes around to Rs.625 Crores as an amount due under Counter Corporate Guarantee for which the JEKPL (the present Corporate Debtor Company) has executed to secure the loan disbursed in form of dollar loan (to the value US dollar 50 million) to the principal borrower which is a Netherlands based company known as Jubilant Energy NV (JENV). Such dollar loan was granted by the present applicant Bank vide its sanction letter dated 30.04.2011 and was further modified by another letter dated 18.05.2011 for which a Counter Corporate Guarantee was executed on 01.08.2011 by the JEPL (the Jubilant Enfro Pvt. Ltd.) in favour of the present applicant. Such contractual obligation of JEPL (Corporate Guarantor) was further secured by



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the execution of Counter Corporate Guarantee on 01.08.2011 by the JEKPL the present Corporate Debtor Company in favour of the lender EXIM Bank (the present applicant).

3. It is stated that the applicant has invoked its Counter Corporate Guarantee on 30th March, 2017 which lead to present dispute and is the subject matter of the present application. The applicant has furnished detailed particulars about the terms & condition of loan advanced to the principal borrower and also about the terms of the Counter Corporate Guarantee which is executed by the present Corporate Debtor Company to secure such dollar loan advanced to the JENV the principal borrower, which are described in para 17 of the present application.
4. It is further stated that the applicant has declared the amount of loan advanced to principal borrower JENV as NPA (non-performing assets) on 17.05.2017. Therefore, the applicant bank recalled the loan facilities advanced to the JENV by its recall letter dated 30th March, 2017. Consequently, it has invoked its Corporate Guarantee as well as the Counter Corporate Guarantee against the JEPL and JEKPL respectively by its letter dated 30th March, 2017. Thus, as per applicant's contention the debt has now been defaulted by the principal borrower, therefore, the liability for making repayment of present counter corporate guarantor being joint and co-extensive with that of the principal borrower. Therefore, the applicant stands as good as of Financial Creditor to the JEKPL (the present Corporate Debtor Company) as per the definition of Financial Creditor given under Section 5(7) of the I & B Code. Further, the amount of loan as advanced by the applicant comes within ambit and scope of Financial Debt as defined under Section 5(8)(h) of the Code, for the sake convenience may be reproduce here asunder:



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Section 5(8) of the Code, defines "financial debt" to mean "a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes-

...

- (h) *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;*
- (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) of this clause;"*

5. It is further contended that as per deed of Counter Corporate Guarantee, the present Corporate Debtor Company JEKPL is under contractual obligations to pay entire amount of debts alongwith interests, which has now been defaulted by the principal borrower as it is jointly and severally liable for making such repayment alongwith the principal borrower and other Corporate Guarantors. As per the terms of the agreement of the Counter Corporate Guarantee, the respondent can be treated well as principal borrower for recovery of such loan amount and the applicant is entitled to proceed against the respondent alone as being Counter Guarantor as if it were the principal borrower. Therefore, there is no necessity to exhaust its remedy first from the principal borrower. Therefore, the Corporate Debtor Company is under contractual obligation to ensure the payment of entire sum of debt i.e. (principal + interest) which is defaulted by the principal borrower JEHBV as it failed to repay. The applicant in Para 30 of its application made some effort to establish this fact the debt become due and is payable *vis-à-vis* the Counter Corporate Guarantee against the Corporate Debtor Company has been invoked. Therefore, the applicant's claim as a Financial Creditor is valid. Hence, such claim cannot legally be denied by the present RP through its



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impugned decision/order dated 04.08.2017, which is the subject matter of the present petition.

6. The applicant in support of its claim has further submitted that the Corporate Debtor Company itself through its application filed before this Court under Section 10 of the I & B Code duly recognized and categories the status of the applicant Bank as a Financial Creditor and on the basis of such averment made, had sought relief U/s 10 of the Code from this Court, wherein this Tribunal by its order dated 17th March, 2017 pleased to admit the petition of the Applicant-Corporate Company and declared the moratorium under Section 14 of the Code and by appointing an Interim Resolution Professional (IRP) Mr. Dinkar T. Venkatasubramanian. The IRP initially received and admitted the claim of the present applicant as financial debts for the amount due under the Counter Corporate Guarantee and recognized it as Financial Creditor in the Committee of Creditors duly constituted by him. He further proceeded for making value of enforceable assets and receivables of the Companies as per its valuation report, hence, the value of its debts also comes to around to Rs.893.64 crores. Therefore, the amount due under the Corporate Counter Guarantee as executed by the JEKPL would be the same (e.g. 893.64 crores) as per the terms of Corporate Counter Guarantee and as being value of enforceable assets receivables of the Corporate Debtor Company. Therefore, it is submitted that the then IRP Mr. Dinkar T. Venkatasubramanian had rightly accepted the applicant's claim as a Financial Creditor by including it in the Committee of Creditors, now the same has been turned down by the present RP Mr. Mukesh Mohan by his communication (through email) dated 04.08.2017 which was sent even without prior notice and opportunity of hearing to the applicant. As it is in complete violation of the I & B Code,



hence, needs to be set aside and the position of the present applicant to be restored back as Financial Creditors in the Committee of Creditors. Further, necessary direction be issued to the RP to accept the applicant's claim towards Counter Corporate Guarantee as a Financial Debts.

7. However, the present application is seriously opposed by the present RP on behalf of the COC of the present Corporate Debtor Company on many counts including the maintainability of the present application. It is contended that this Tribunal passed an order 17.03.2017 admitting the I & B petition by declaring moratorium in respect of the Corporate Applicant/Corporate Debtor Company with certain directions issued under Section 14 of the Code and prohibited the institution of suit, continuation of pending suit, proceedings against the Corporate Debtor Company which include execution of any judgment, decree or order in a Court of Law, Tribunal, Arbitration Panel or other Authorities. Further, the provision of this Section restrains any action to foreclose or to recover or enforce the security interest as created by Corporate Debtor in respect of it, property including any action under the SARFAESI Act. Thus, the RP in its reply has objected the present claim of the applicant Bank before the COC as it was not legally due as on 17.03.2017. Because, the applicant invoked its Counter Corporate Guarantee only on 30th March, 2017.



Therefore, such claim is premature and cannot be found due on 17th March, 2017, nor such Counter Corporate Guarantee could have been legally invoked against the Corporate Debtor Company, during continuance of moratorium period as declared by this Court. Therefore, the applicant Bank cannot be legally filed such claim nor it could be allowed to continue as Financial Creditor in the Committee of Creditors of the Corporate Debtor Company.

8. In support of such contention the RP has placed reliance on a decision of the Single Bench of the Hon'ble Allahabad High Court in the matter of Sanjeev Shreya vs. State Bank of India (Writ-C No.30285/2017) wherein the Hon'ble High Court has held that during a moratorium period, the recovery against the guarantor also cannot be enforced. Further, the Hon'ble Principal Bench, New Delhi in the matter of Vertex Chemicals and Mahaan Proteins Ltd. in CA No.283(PB)/2017 in CP No.(IB)103/2017 has held that question as to whether a particular Bank to be treated as a Financial Creditor or otherwise would fall within the domain of RP and he himself to decide such issue. Thus, the Hon'ble Principal Bench disposed of concern CA No.7/2017 without expressing its view on merits. Thus, it may be seen that the Principal Bench duly recognized the jurisdiction of a RP to consider and examine such issue which includes the status/claim of a claimant party. The respondent through its reply/written submission further drew our attention to the observation made by the Hon'ble NCLAT, New Delhi in the matter of the JEKPL vs Export and Import Bank while disposing of an appeal which was preferred against the impugned order of this Bench, wherein their Lordship was pleased to observe as such that, **"Resolution Professional has right to object induction of a third party as a Creditor"** thus, they have also impliedly confirmed the jurisdiction of Resolution Professional to consider and determine such issue relating to a particular claim and induction of a third party as a creditor.



9. It is also pointed out by drawing our attention to previous order of this Bench in the matter of Axis Bank vs. JEKPL wherein a liberty was granted to the petitioner Axis Bank to place the issue of rejection of its claim before the RP for his reconsideration in accordance with law. Thus, this vindicate the decision of the RP to review/revisit such claim of a party filed as a Financial

Creditor and this fall within the ambit and scope of jurisdiction and power under the provision of the Code given to the RP. It is further clarified that before passing the impugned decision/issuing communication to the applicant, he duly considered the claims of applicant as a Financial Creditors but it could not be legally made or submitted before the IRP/RP because applicant Bank invoked its Counter Corporate Guarantee only after the declaration of moratorium in respect of Corporate Debtor Company, which is legally not permissible as to invocation of guarantee after declaration of moratorium is contrary to the provision of Section 14 of the I & B Code.

10. The RP further drew our attention and pointed out such was not his unilateral decision, in fact, the secured creditors had initially objected the applicant's claim in the meeting of Joint Lender's Forum held on 03.04.2017, wherein the applicant Bank was participating as invitee member of such JLF. Thereafter, initiation of CIRP, the COC further advised to the then IRP Mr. Dinkar T. Venkatasubramanian to take legal opinion on the subject of applicant's claim as Financial Creditor and to discuss this issue same in the meeting of the COC. Therefore, in follow up thereof the present RP took further step and proceeded with to take legal opinion of a Professional expert on the reference issue/subject from Mr. Vinod Kothari, the same was also shared with the present applicant vide its email dated 19th July, 2017, thereafter, only he took the impugned decision on 04.08.2017. In addition to the above and in order to substantiate its action and to ascertain the proper legal position on the issue, the RP proceeded further to obtained legal opinion also from other expert Advocates/Company Secretaries, they have also concurred the view as taken by the RP. Therefore, there is no illegality or irregularity in the action/decision taken. Because, such decision is taken



within the ambit and scope of the I & B Code which falls within the domain of the RP. Hence, it does not warrant inference from this Court.

11. Further, the respondent RP on behalf of the Corporate Debtor Company has also raised some objection on validity and enforceability of the present Counter Corporate Guarantee which allegedly has not been executed in conformity with the provision of the FEMA Act and without obtaining necessary approval from the Reserve Bank of India. In this regard also the RP obtained some legal opinion from the Professional expert and as per them also the liability of JEKPL (Corporate Guarantor) is still to be crystallized. Therefore, question of payment of the amount due under the Counter Corporate Guarantee and to discharge the liability of JEKPL of its obligation does not arise at all. As there was no debt due by the JEKPL to the EXIM Bank as on 17.03.2017 nor it can be treated as a Financial Creditor.
12. In addition to the above stated objection respondent also challenge the authority of the Authorization Signatory of the EXIM Bank for filing the present application which as per the respondent is not in conformity with the existing practice of the I & B Code as it is not supported by Specific Power of Attorney and Special Board Resolutions of the Bank passed in favour of its Authorized Signatory for filing the present application. As per the applicant Bank one Mr. Ashok Kumar Vartia, Assistant General Manager has been authorized to delegates such power by the resolution of Board of Director of the applicant Bank dated 18.02.2016, while the present Code came into force w.e.f December, 2016 and the present application was filed on 18th August, 2017. Therefore, in the light of a full Bench's decision of the Hon'ble NCLT, Kolkata in the matter of ICICI Bank Ltd. versus Palogix Infrastructure Pvt. Ltd. in CP No.37/2017. The present petition is not maintainable and liable to



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be rejected on this ground alone for want of proper and specific Power of Attorney/Authorization.

13. Thus, the respondent has prayed for that the present application is liable to be rejected with heavy cost.

14. We have gone through the averment made in the pleadings of the application, reply of the respondent to the application, further rejoinder of the applicant to such reply of the respondent. We also carefully perused the document annexed therewith to understand the nature of the controversy involved in the present matter. Further we also gone through the written submission as submitted by the learned counsel/PCS for both the parties annexing with a copy of the judicial precedents for placing reliance in support of their respective claim/stand.

15. The point of issue that arises for consideration of this Tribunal in the present matter may be crystallized as under:-

- a. *As to whether under the provision of I & B Code the Resolution Professional can revisit/review and revised the claim of a claimant creditors.*
- b. *As to whether, the claim of the applicant falls within the category of Financial Creditor and amount due, if any, under Counter Corporate Guarantee can be treated as Financial Debt. If so, such guarantee could be legally invoked by the applicant after declaration of moratorium under Section 14 of the Code in respect of the Corporate Debtor Company and if it is so, then it is enforceable.*
- c. *As to whether, the applicant has been denied and deprive of opportunity of being heard or prevented to raise its objection/contention before the RP and COC on such action impugned action and as to whether it is in denial of principle of natural justice or otherwise.*
- d. *As to whether, the present application is filed by a properly authorized person on behalf of the Bank being not whether such petition is maintainable or otherwise.*



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16. As the above mentioned point of issue based on same facts and is mixed question of law. Hence, are being discussed and decided commonly.
17. Notwithstanding with the above stated rival contention made before us by the both the parties in respect of the present application, there are certain undisputed/admitted facts on record which are also pertinent to be mentioned here for proper disposal of the present application. The present applicant as per its own pleadings (para 15) admittedly invoked Corporate Counter Guarantee only on 30th March, 2017. In fact the applicant Bank also recalled its loans from the principal borrower by writing a letter on 30th March, 2017, while the moratorium U/s 13 & 14 of the I & B Code has already been declared in respect of the Corporate Debtor Company (Corporate Counter Guarantee) and on the notified date of moratorium came into effect the loan advanced by the applicant Bank was not crystalized. Because the Bank had issued a letter for recalling the loan (loan US dollar 50 millions) to the principal borrower JEHBV (Jubilant Energy BV), Netherlands only on 30th March, 2017, (which has been annexed at page 250 of the present application). Simultaneously, it also invoked guarantee and counter guarantee furnished by the JEVP and corporate counter guarantee as given by JEKPL and JODPL by issuing a recall letter on same date i.e. 30th March, 2017 (which have also been annexed with the present application at page 250 to 265). It is pertinent to note here that the

Hon'ble Principal Bench, New Delhi in the matter of Axis Bank Vs. Edu

Smart Pvt. Ltd. came to examine an identical issue and pleased to observe and

held in relevant paras as such:-

19. *In order to substantiate the aforesaid thesis, we may also refer to the definition expression 'debt' as given in Section 3(11) of the Code which has been defined in Section 3(6), 'Corporate Debtor' as defined in Section 3(8), 'Creditor' as defined in Section 3(10) and 'Default' as defined in Section 3(12) of the*



Code. All the aforesaid clauses are set out below for facility of reference, which read as under:

3.(6) "claim" means—

- (a). a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;
- (b). right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;
- (8) "corporate debtor" means a corporate person who owes a debt to any person;
- (10) "creditor" means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree holder;
- (11) "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;
- (12) "default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be;

A co-joint reading of the aforesaid provisions would show that a claim would mean a right to payment whether reduced to any judgment etc. It also includes right to remedy for breach of contract under any law for the time being in force. The 'Corporate Debtor' has been defined to mean a corporate person, who owes a debt to any person and 'creditor' has been defined to whom a debt is owed and includes all types of creditors, like a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree holder. The emphasis appears to be on the expression 'payment and the debt, claim and the debt which is due from any person and includes financial debt and operational debt. Going by the aforesaid provisions, debt has not become due from the Corporate Debtor on the insolvency commencement date, i.e. 27.06.2017. It became due only when the corporate guarantee was invoked by the Axis Bank Ltd. the Corporate Debtor-applicant on 21.07.2017.

20. Therefore, we are unable to persuade ourselves to accept the submissions made by the Applicant-Axis Bank Ltd.
22. We are also not impressed with the arguments based on Regulations 12 & 13 of the IBBI Regulations. The aforesaid Regulation provides that a creditor must submit proof of claim on or before the last date mentioned in the public announcement. However, those who failed to submit proof of



claim have been still held entitled to do so later but before the approval of Resolution Plan by the committee. A careful perusal of Regulation 12 read with Regulation 13 would show that the Resolution Professional has to verify every claim as on the insolvency commencement date and maintain a list of creditors containing names of all such creditors alongwith the amount claim. Therefore, the Applicant-Axis Bank Ltd. would not qualify to the consideration of its claim as it has become due and payable after the insolvency commencement date. The provision of Regulations 12 & 13 would not come to the rescue of the applicant Axis Bank Ltd. An ancillary submission is that there was no intention to conceal the claim made in the CIRP initiated against the Educomp Solutions Ltd. principal borrower would also not require any detailed consideration as we are not proceeding to decide the application on the aforesaid issue

23. Another submission made by learned counsel for the Applicant-Axis Bank Ltd. is that Section 22(3) of the Sick Industrial Companies (Special Provisions) Act, 1985 has been deliberately omitted from the Scheme of the Code and therefore, it should be taken to mean that no such bar would operate against the invocation of bank guarantee by virtue of moratorium imposed under Section 14 of the Code. An ancillary argument is that in any case there is no provision in the Code declaring the insolvency commencement date as the date to determine the claims of the parties. A perusal of Section 22(3) of the SIC Act would reveal that it is not different in sum and substance than the provision of Section 14 of the Code. In our view, Section 14 would clearly cover the invocation of guarantee after the insolvency commencement date. The moratorium prohibiting a number of things has been contemplated and for the present case clause (C) of sub-section (1) of Section 14 would be suffice and the same reads as under:

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

(a)

(b)

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

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



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

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

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

18. That apart the Division Bench of the Hon'ble NCLT, Kolkata in the matter of *Bank of Baroda vs. Benani Cement Ltd. [CP No.(IB)/359/KB/2017]* by following the above stated decision of Principal Bench stated as such:-

IA No.505/KB/2017 has been filed by the RP with a prayer to clarify, declare and confirm that the claims with respect to the corporate guarantees issued by the Corporate Debtor, including those under which demands for payment have been made during the CIRP period, would be required to be verified and admitted.

Ld. RP has sought certain clarification in respect of claim of the financial creditor wherein corporate guarantee has not been invoked.

In view of the judgment delivered on 27.10.2017 by the Hon'ble Principal Bench, National Company Law Tribunal, New Delhi in (IB)-102(PB)/2017 (Axis Bank Limited & Anr. v/s Edu Smart Services Pvt. Ltd.) wherein it has been held that in order to qualify as a 'debt' firstly provisions of the corporate guarantee must be satisfied by raising a demand which is expressed by invoking the corporate guarantee and the date of its invocation has to be earlier than the insolvency commencement date. In the present case, the CIRP commenced on 27.06.2017 and the corporate guarantee was admittedly invoked on 21.07.2017, which is much after the insolvency commencement date. Therefore, we find that the Resolution Professional would not be in a position to verify the claim as it will not be reflected in the Books of Accounts which are supposed to be updated as on 27.06.2017. In the absence of any record to verify the claim, it will be impossible for the Resolution Professional to accept any such claim which has become a debt after 27.06.2017.

Keeping in view of the decision taken by the Principal Bench, NCLT, New Delhi it is clear that corporate guarantee, which has not been invoked before commencement of insolvency process, cannot be



considered as debt if it was invoked after the commencement of insolvency process and "moratorium" was issued. Therefore, RP is to be guided by the decision of the Hon'ble Principal Bench, NCLT, New Delhi.

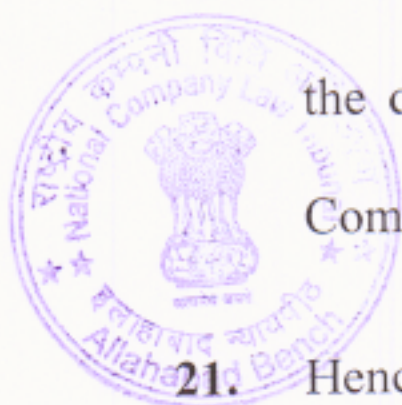
In the light of the above decision taken by the Hon'ble Principal Bench, IA No.505/KB/2017 is disposed of accordingly.

RP is further directed to decide on the issue at the earliest the claim of the corporate debtor after hearing both the parties within 10 days including the IDBI.

19. As the Principal Bench of the Hon'ble NCLT, New Delhi in the matter of Vertex Chemicals and Mahaan Proteins Ltd. in CA No.283(PB)/2017 in CP No.(IB)103/2017 dated 30.08.2017 has held that such question as to whether a particular Bank is a Financial Creditor or otherwise would fall within domain of the RP. We feel the present application can be finally disposed of on such limited ground. In the light of the aforesaid Division Bench's decision of Hon'ble Principal Bench, New Delhi and NCLT, Kolkata, we need not to express our view in respect of the other objection on maintainability of the present petition as raised by the respondent RP.

20. Hence, in the light of the above discussion the present application filed by the EXIM Bank is not found maintainable, as its claim under the Corporate Counter Guarantee was not crystalized and premature on 17th March, 2017, the date of declaration of moratorium in respect of the Corporate Debtor Company.

21. Hence, without going into the details of controversy involved in respect of financial debts and of Financial Creditor in the present matter and on the claim made by and status of the present applicant, this Court feels appropriate to be bound by the proposition as already laid down by the Hon'ble Principal Bench NCLT, New Delhi in the matter of Axis Bank Vs. Edu Smart Pvt. Ltd. [CP No.(IB)102(PB)/2017] read with another decision of the Division Bench of

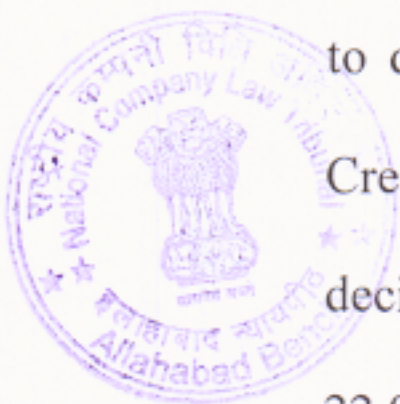


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NCLT Kolkata in the matter of *Bank of Baroda vs. Benani Cement Ltd. [CP No.(IB)/359/KB/2017]*, hence, we feel that the claim of the present applicant cannot be deemed to be lying with, or found due and payable against the Corporate Debtor Company as on 17th March, 2017 when this Court has declared a moratorium under Section 14 of the I & B Code in respect of Corporate Debtor Company. Because the applicant Bank admittedly itself invoked its Counter Corporate Guarantee against the Corporate Debtor Company only on 30th March, 2017. Thus, it is having no legal effect nor can be validly enforceable till the moratorium period of the Corporate Debtor Company is over.

22. By considering the above stated Legal Proposition, the status of the present applicant cannot be categorized as a Financial Creditor in the Committee of Creditors. Therefore, we see no infirmity in such impugned action/decision of the RP dated 04.08.2017 which is communicated through e-mail by rejecting the claim of applicant as Financial Creditor.

23. Further, in the light of the Principal Bench's decision in the matter of *Vertex Chemicals and Mahaan Proteins Ltd. in CA No.283(PB)/2017 in CP No.(IB)103/2017* dated 30.08.2017, wherein it has been held that such subject to decide the status of a particular claimant/class of creditor as Financial Creditor or otherwise falls within the domain of the RP for taking appropriate decision thereon. Further, we would reiterate this Bench's earlier order dated 22.08.2017 in this matter on an application of the *Axis Bank* by directing to the concern applicant (e.g. Axis Bank) to agitate its claim and to agitate its issue to be treated as Financial Creditor before the RP for reconsideration and to take an appropriate decision in accordance with law. Hence, we are of the considered view that RP possess necessary jurisdiction to consider such claim



of a particular class of creditors and further to update or revise the same in accordance with law. Hence, there is no legal infirmity in the impugned order/decision dated 04.08.2017 as passed by the RP.

24. It is also matter of record that during the course of hearing and in order to provide substantial justice to the party concern by following the principle of natural justice, which is equally applicable to the present nature of proceedings which is a quasi-legal proceeding, in the light of the decision of the **Hon'ble Supreme Court in the matter of Mohinder Singh Gill Vs. Chief Election Commissioner and others Reported in 1978 (1) SSC 405**, this Court earlier referred back the issue to the RP for reconsideration of his decisions in consultation with Committee of Creditors and for taking a conscious decision on impugned action by affording an opportunity to the present applicant for hearing and for expressing its views. Till then the impugned order dated 04.08.2017 as being interim measure was kept in abeyance. It is now a matter of record that the RP in follow up of the direction of this Court dated 27.10.2017 duly convened a meeting of the COC and having discussed the issue in the COC took a fresh decision by retreating its earlier stand.



25. Since, we feel that in the present matter the principle of natural justice appears to have been followed, hence, we see no illegality in the impugned action/decision as taken by the RP to exclude the applicant as a Financial Creditor from the COC.

26. Consequently, our earlier order dated 27.10.2017 for keeping the impugned order in abeyance is hereby recalled by restoring the same (e.g. order dated 04.08.2017). Notwithstanding the above, we affirm the impugned order/decision of the RP with such direction that the present applicant shall be

allowed to participate as permanent invitee in the COC, (as the applicant was earlier being allowed to participate in the meetings of Joint Lender's Forum), but without having voting rights for the purpose of CIRP.

27. Such direction is being issued considering the peculiar circumstances of the present case of the applicant that in an identical matter, the application being treated as a Financial Creditor and Member of the Committee of Creditors by the concern RP/COC, almost on the basis of similar terms & conditions of guarantee executed by another Corporate Debtor Company (M/s JODPL in CP No.25/ALD/2017), which also come within the territorial jurisdiction of this Bench. Since, this Court in its normal course is not expected to substitute its view against a commercial wisdom of a statutory body and to consider the paramount interest of a Corporate Debtor Company. Hence, in order to avoid inconsistency of practice in this Bench, such directions are being issued.

28. With the aforesaid observation, the present application is partly allowed and stands disposed of.

No order as to cost.



Dated: 27.11.2017

Typed by:
Md. Zaid
(Stenographer)

**H.P. Chaturvedi,
Member (Judicial)**