

Export Import Bank Of India vs Resolution Professional Jekpl Private ... on 14 August, 2018

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 304 of 2017,

[Arising out of Order dated 27th November, 2017 passed by the Adjudicating Authority (National Company Law Tribunal), Allahabad Bench in CA No. 159/2017 in CP No.24/ALD/2017]

IN THE MATTER OF:

Export Import Bank of India
Centre One Building, Floor 21,
World Trade Centre,
Cuffe Parade,
Mumbai - 400 005.

...Appellant

Vs

Resolution Professional
JEKPL Private Limited
Plot No. 51, Knowledge Park II,
Greater Noida,
Gautam Buddha Nagar - 201306
Uttar Pradesh, India.

....Respondent

Present:

For Appellant: Mr. Pallav Shishodia, Senior Advocate with Mr. Ashish Rana, Advocate.

For Respondent: Mr. Rohit Chaudhary, Advocate. Mr. Nesar Ahmad, PCS.

Mr. A. S. Chandhiok, Senior Advocate with Mr. Dhiraj Nair, Mr. Mohit Bakshi and Mr. Kumar Kislay, Advocates for Resolution Applicant.

With

Company Appeal (AT) (Insolvency) No. 16 of 2018

[Arising out of Order dated 15th December, 2017 passed by the Adjudicating Authority (National Company Law Tribunal), Allahabad Bench in CA No. 223/2017 in CP No.24/ALD/2017]

IN THE MATTER OF:

Export Import Bank of India
Centre One Building, Floor 21,
World Trade Centre,
Cuffe Parade,
Mumbai - 400 005.

...Appellant

Vs

Resolution Professional
JEKPL Private Limited
Plot No. 51, Knowledge Park II,
Greater Noida,
Gautam Buddha Nagar - 201306
Uttar Pradesh, India.

....Respondent

Present:

For Appellant: Mr. Pallav Shishodia, Senior Advocate with Mr. Ashish Rana, Advocate.
For Respondent: Mr. Rohit Chaudhary, Advocate. Mr. Nesar Ahmad, PCS.

Mr. A. S. Chandhiok, Senior Advocate with Mr. Dhiraj Nair, Mr. Mohit Bakshi and Mr. Kumar Kislay, Advocates for Resolution Applicant.

And

Company Appeal (AT) (Insolvency) No. 302 of 2017

[Arising out of Order dated 27th August, 2017 passed by the Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi in CP IB-102(PB)/2017]

IN THE MATTER OF:

Axis Bank Limited,
Having its registered Office at:
Trishul, 3rd Floor, Opposite Samartheshwar Temple,

Company Appeal (AT) (Insolvency) No. 304 of 2017, 16 of 2018 & 302 of 2017

Law Garden, Ellisbridge,
Ahmedabad - 380006,
Gujarat and Stressed Assets Department (North)
At Plot No.114, Tower 1, IV Floor,
Sector 128, Noida
And acting through its Corporate Banking Branch-Delhi,
Red Fort Capital Parsvnath Tower, 2nd Floor,
Gole Market, New Delhi - 110001
Through its Assistant Vice President.

...Appellant

Vs

Edu Smart Services Private Limited
Having its registered Office at
L-74, Mahipalpur Extension,
New Delhi - 110037
Through its Resolution Professional

....Respondent

DBS Bank Limited
Having its Head Office at
12 Marina Boulevard,
Marina Bay Financial Centre, Tower III,
Singapore - 018982 and
Registered address at
Ground Floor, Express Towers,
Nariman Point, Mumbai - 400021 and
Its Branch Office at
Capital Point, Baba Khark Singh Marg,
Connaught Place, New Delhi - 110001.

....Proforma
Respondent

Present:

For Appellant: Mr. Amit Sibal, Senior Advocate with Mr. Shantanu Chaturvedi, Mr. Rajeev Khatana, Advocates and Mr. Jogendra, Legal Manager, Axis Bank.

For Respondents: Dr. U. K. Choudhary, Senior Advocate with Mr. Ajay Jain, Mr. Himanshu Vij, Advocates for CoC.

Ms. Vatsala Kak, Ms. Charu Sharma and Ms. Ritu Rastogi, Advocates for Resolution Professional.

Company Appeal (AT) (Insolvency) No. 304 of 2017, 16 of 2018 & 302 of 2017

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J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

Two appeals preferred by 'Export Import Bank of India' (hereinafter referred to as 'EXIM Bank') relates to Corporate Insolvency Resolution Process initiated against 'JEKPL Private Limited', whereas appeal preferred by 'Axis Bank Limited' relates to Corporate Insolvency Resolution Process against 'Edu Smart Services Private Limited'. However, as the question of law is common, they were heard together and are decided by this common judgment. EXIM Bank Vs. Resolution Professional, JEKPL Private Limited:

2. The JEKPL Pvt. Ltd. filed an application under Section 10 of Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I&B Code') for initiation of Corporate Insolvency Resolution Process against itself. It was admitted by the Adjudicating Authority (National Company Law Tribunal), Allahabad Bench and one Mr. Mukesh Mohan was appointed as Resolution Professional replacing one Mr. Dinkar T. Venkatasubramanian.

3. Pursuant to the advertisement, the creditors including 'Financial Creditors' and 'Operational Creditors' filed their respective claim including EXIM Bank. However, the EXIM Bank was not treated to be the 'Financial Creditor'.

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4. EXIM Bank filed an application under Section 60 (5), before the Adjudicating Authority for direction to the Resolution Professional to treat its claim as 'Financial Debt' and to include the EXIM Bank in the 'Committee of Creditors' with voting share proportionate to its amount of claim. It was alleged that the Resolution Professional through its email communicated decision dated 04.08.2017 rejecting claim of EXIM Bank as a 'Financial Creditor' without calling for any explanation including the objections/comments from it.

5. Case of the EXIM Bank is that it disbursed Dollar Loan to the tune of US\$ 50 Million to a Netherland based company, namely, Jubilant Energy N.V., ('JENV' for short) (Principal Borrower) by its Letter dated 13.04.2011 as modified by letter dated 18.05.2011 for which 'Corporate Guarantee' was executed by the Jubilant Enpro Private Limited ('JEPL' for short) on 01.08.2011 in favour of the EXIM Bank. Contractual obligation of 'JEPL' (Corporate Guarantor) was further secured by the execution of 'Corporate Guarantor Guarantee' with 'Counter Corporate Guarantee' by JEKPL (Corporate Debtor) on 01.08.2011 in favour of the EXIM Bank.

6. The EXIM Bank invoked its 'Counter Corporate Guarantee' on 30.03.2017 which led to the present dispute and its claim to treat it as a 'Financial Creditor' has not been accepted by the Resolution Professional.

7. The EXIM Bank declared the amount of loan advanced to Principal Borrower (JENV, Netherlands) as Non-Performing Asset (NPA) on 17.05.2016. Company Appeal (AT) (Insolvency) No. 304 of 2017, 16 of 2018 & 302 of 2017 Therefore, the EXIM Bank recalled the loan facilities advanced to JENV by letter dated 30.03.2017. Consequently, it had invoked its 'Corporate Guarantee' as well as the 'Counter Corporate Guarantee' against the JEPL and JEKPL by its letters dated 30.03.2017. Thus, according to EXIM Bank Principal Borrower having defaulted and the liability of Corporate Guarantee as 'Counter Corporate Guarantee' being joint and co-extensive with Principal Borrower, the EXIM Bank comes within the meaning of 'Financial Creditor' of JEKPL (Corporate Debtor), in terms of Section 5(7) r/w Section 5(8)(h) of I&B Code.

8. The Adjudicating Authority by the impugned order dated 27.11.2017 taking into consideration the objection raised by the 'Resolution Professional' and the 'Committee of Creditors', affirmed the decision of the Resolution Professional and rejected the claim of EXIM Bank.

9. The question arises for consideration is as to whether the EXIM Bank, which has been provided with 'Counter Corporate Guarantee' by JEKPL (Corporate Debtor) comes within the meaning of 'Financial Creditor'? Stand of EXIM Bank :-

10. Mr. Pallav Shishodia, learned senior counsel for EXIM Bank referred to loan agreement dated 01.08.2011 entered by the parties with the EXIM Bank and submitted that the Dollar Loan in question was granted to 'Jubilant Energy N.V., Netherlands' (JENV). There is inter-relationship between 'Jubilant Energy N.V., Netherlands' (JENV) with 'Jubilant Energy (Holding) Company Appeal (AT) (Insolvency) No. 304 of 2017, 16 of 2018 & 302 of 2017 B.V.' (JEHBV), 'Jubilant Enpro Private Limited' (JEPL), 'Jubilant Energy (Kharsang) Private Limited' (JEKPL) and 'Jubilant Offshore Drilling Private Limited' (JODPL) who are members of group entities and overall corporate structure of the said Jubilant Group. According to the learned senior counsel, in terms of the agreements dated 01.08.2011, the Counter Guarantee granted in favour of EXIM Bank on behalf of Principal Borrower jointly and severally by the Corporate Guarantor and Counter Corporate Guarantor, the EXIM Bank comes within the meaning of 'Financial Creditor' as defined in Section 5(7) r/w Section 5(8)(h) of I&B Code.

Stand of Successful Resolution Applicant:-

11. According to learned senior counsel for the Resolution Applicant, EXIM Bank is not covered within the definition of 'Financial Creditor' under Section 5(7) r/w Section 5(8) of the I&B Code. It was submitted that 'Financial Debt' defined under Section 5(8) means a debt which is disbursed against the consideration for time value of the money. The EXIM Bank has not disbursed any amount (including interest) against the consideration for time value of money to the 'Corporate Guarantor' i.e. JEPL or the 'Counter Corporate Guarantor' i.e. JEKPL. The Corporate Debtor (JEKPL) has only furnished 'Counter Corporate Guarantee' for due performance and discharge of

JEPL's obligations and liabilities in respect of Corporate Guarantee furnished by it.

12. Further, according to learned senior counsel the 'Counter Guarantee' do not fall in the ambit of Section 5(8) (a) to (h) of the I&B Code. Section Company Appeal (AT) (Insolvency) No. 304 of 2017, 16 of 2018 & 302 of 2017 5(8)(h) deals with counter indemnity obligation in respect of a guarantee, provided the same was issued by a bank or financial institution, and not by a company incorporated under the Companies Act.

13. According to the learned senior counsel, JEKPL is neither regulated by the Reserve Bank of India nor governed or licensed under the Banking Regulation Act. For the purposes of Section 5(8)(h), JEKPL can neither be considered as a bank nor as a financial institution. Therefore, both the requirements of Section 5(8) are not met.

14. It was further submitted that 'Counter Corporate Guarantee' is not liable for any 'Financial Debt' owed to EXIM Bank. As a matter of fact the liability, if any, of JEKPL, in its capacity as a Counter Guarantor, would come into effect only when the Corporate Guarantor (JEPL) has defaulted in its obligations under the Corporate Guarantee. The further plea has been taken that debts under 'Counter Corporate Guarantee' become due only on valid invocation and are limited as per the provisions of 'Counter Corporate Guarantee'.

Analysis of Case of EXIM Bank

15. It is not in dispute that the term loan of US\$ 50 million was granted by 'EXIM Bank' to 'Jubilant Energy N.V., Netherlands' (JENV) under Appellant's 'Overseas Investment Finance Program' by Sanction Letter dated 13.04.2011 as modified by subsequent letter dated 11.04.2011.

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16. The said term loan was secured by a 'Corporate Guarantee' executed by JEPL in favour of Appellant - EXIM Bank on 01.08.2011. The liability of JEPL under its 'Corporate Guarantee' is limited to the amount which could be realized from investments held by its subsidiaries such as 'Jubilant Energy (Kharsang) Private Limited' (JEKPL), 'Jubilant Offshore Drilling Private Limited' (JODPL), 'Jubilant Oil & Gas Private Limited' and 'Jubilant Energy (NELP-V) Private Limited'.

17. The obligation of JEPL was further secured by execution of 'Counter Corporate Guarantee' by JEKPL in favour of the Appellant on 01.08.2011. The JEKPL executed the 'Counter Corporate Guarantee' to ensure the fulfillment of JEPL's obligation wherein JEPL has guaranteed the term loan facility availed by JENV and JEBHV. Therefore, as per terms of 'Counter Corporate Guarantee', JEKPL's obligation also is limited to the amount of the value of investments, assets and receivables therefrom from JEHBV, JENV, JODPL, Jubilant Oil & Gas Pvt. Ltd., Jubilant Energy (NELP-V) Pvt. Ltd. and itself.

18. The 'Deed of Guarantee' dated 01.08.2011 was executed between the 'Principal Borrower' - 'JENV, Netherlands' and Appellant - 'EXIM Bank' by sanction of Dollar Loan to the tune of US\$ 50

Million.

19. On the same date i.e. 01.08.2011 a 'Deed of Guarantee' was executed at Noida by JEPL in favour of Appellant EXIM Bank. In Schedule II, JENV, Netherlands has been shown to be the borrower in whose favour loan has Company Appeal (AT) (Insolvency) No. 304 of 2017, 16 of 2018 & 302 of 2017 been sanctioned by the EXIM Bank. In the said Deed of Guarantee it is mentioned that the general condition in annexure therein forms integral part of 'Counter Guarantor Agreement' and bound to all the parties therein.

20. Simultaneously, on 01.08.2011 another 'Deed of Counter Guarantee' was executed by 'Jubilant Energy (Kharsang) Pvt. Ltd' (JEKPL). In the said 'Deed of Counter Guarantee' JENV, Netherlands has been shown as the 'Principal Borrower' in Schedule II, having granted Dollar Loan by the EXIM Bank aggregating to US\$ 50 Million. It is also mentioned therein that in consideration of EXIM Bank granting the loan to the 'Principal Borrower', JEPL at the request of the 'Principal Borrower', has agreed to execute and deliver its 'Counter Guarantee' in favour of EXIM Bank for the due performance and discharge by JEPL of its obligations and liabilities to EXIM Bank in respect of the Guarantee in the manner shown therein. In Schedule I, JEKPL has been shown to be a 'Counter Guarantor'. In Schedule II, JENV has been shown to be a 'Principal Borrower' and Appellant - EXIM Bank has been shown to have been granted Dollar Loan in favour of the 'Principal Borrower'.

21. From the cross checking of the respective deeds of JEPL and JEKPL, we find that both are liable jointly and severally as 'Principal Debtor' for the EXIM Bank. Thus, the 'Corporate Counter Guarantee' in question in respect of due performance and discharge of obligations and liabilities of JEPL to EXIM Bank, essentially comes within the ambit of its 'Supplementary/Additional Guarantee'.

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22. If the General Condition No. 6 & 10 (iii)(iv) in one of the Guarantee Deed dated 01.08.2011 is seen, we find that to give effect to the Guarantee, EXIM Bank has been allowed to act and the Guarantors of the 'Principal Borrower' are jointly and severally liable with the 'Principal Borrower'.

23. There is admitted default by 'Principal Borrower' - JENV, Netherlands and JEHNV in the payment of respective Dollar Loans. The account of JEHNV has been declared NPA since 01.05.2016 and JENV since 07.05.2016. The liability under both the 'Corporate Guarantee' has been acknowledged by JEKPL in its Annual Report for the year 2016-17.

24. Therefore, for all purpose we find that the 'Counter Corporate Guarantee' given by Corporate Debtor (JEKPL) amounts to 'Guarantee'. Axis Bank Limited vs. Edu Smart Services Private Limited & Anr:-

25. One DBS Bank Limited filed an application under Section 7 against Edu Smart Services Private Limited (Corporate Debtor) which was admitted. Pursuant to the public announcement, the claims invited on 27.06.2017. Appellant - 'Axis Bank Ltd.' submitted its claim in prescribed Form C

alongwith supporting documents before the Resolution Professional for amount aggregating to Rs.396,76,07,676.68/-.

26. On 22.07.2017, the Resolution Professional rejected the claim of the Appellant on the ground that the 'Corporate Guarantee' cannot be invoked Company Appeal (AT) (Insolvency) No. 304 of 2017, 16 of 2018 & 302 of 2017 during ongoing Corporate Insolvency Resolution Process and order of moratorium.

27. The Axis Bank Ltd. submitted updated claim on 11.08.2017 in Form C explaining the position of law to the Resolution Professional, which was rejected by Resolution Professional by email dated 06.09.2017 stating that the 'so-called claim' of the Appellant cannot be accepted/ estimated/ entertained in accordance with the provisions of law and facts. The Appellant

- 'Axis Bank Ltd.', thereafter, filed an application under Section 60(5) before the Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi to set aside the decision of the Resolution Professional.

28. The Adjudicating Authority by impugned order dated 27.12.2017 rejected the claim holding that the claim of Appellant - 'Axis Bank Ltd.' was contingent on the date of commencement of Corporate Insolvency Resolution Process in respect to the Corporate Debtor, therefore, the same cannot be accepted as 'Financial Debt' of the Corporate Debtor. The Adjudicating Authority further held that moratorium imposed under Section 14 in respect of Corporate Debtor applies at time of invocation of the Corporate Guarantee.

29. The questions arises in the present case are:-

(i) Whether the 'Axis Bank Ltd.' was also 'Counter Corporate Guarantor', comes within the meaning of 'Financial Creditor' as defined under Section 5(7) & (8) of I&B Code? and Company Appeal (AT) (Insolvency) No. 304 of 2017, 16 of 2018 & 302 of 2017

(ii) Whether invocation of Corporate Guarantee has any relationship with claim of a Financial Creditor?

30. Learned senior counsel for Axis Bank Ltd., referring to Master Restructuring Agreement and the Corporate Guarantee, submitted that the terms and conditions shown therein show that the Appellant 'Axis Bank Ltd.' come within the definition of 'Financial Creditor' of 'Edu Smart Services Pvt. Ltd.' (Corporate Debtor).

31. A Master Restructuring Agreement was executed by one 'Educomp Solutions Limited' on 25.03.2014 with the Axis Bank Ltd. for restructuring and reconstitution of the existing loans and working capital facilities given to it by consortium of lenders. Thereafter, three addendums dated 03.09.2014, 29.09.2014 and 31.03.2015 were signed between the 'Educomp Solutions Limited' and 'Axis Bank Ltd'.

32. A Security Trustee Agreement was executed on 03.06.2015 between Axis Bank Ltd. and the Principal Borrower pursuant to Master Restructuring Agreement appointing SBICAP and lenders under Master Restructuring Agreement and the SBICAP Loan Agreement.

33. The Corporate Guarantee dated 03.06.2015, by the Appellant - Axis Bank Ltd. reached between 'Edu Smart Services Pvt. Ltd.' (Corporate Debtor) in favour of SBICAP Trustee Ltd., therein it stipulated as follows:-

Company Appeal (AT) (Insolvency) No. 304 of 2017, 16 of 2018 & 302 of 2017 "CORPORATE GRARANTEE THIS CORPORATE GUARANTEE executed at New Delhi this 3rd day of June 2015 ("this Guarantee") by EDU SMART SERVICES PRIVATE LIMITED, a company registered under the Companies Act, 1956 (1 of 1956) having its Corporate Identity Number U80902DL2009PTC191840 and having its Registered Office at L-74, Mahipal Pur Extension, New Delhi-110037, India (hereinafter referred to as the "Guarantor", which expression shall, unless it be repugnant to the subject or context thereof, include its successors in title and permitted assigns).

IN FAVOUR OF

SBICAP TRUSTEE COMPANY LIMITED, a company

incorporated under the company Act, 1956 (1 of 1956) and having its Registered Office at 202, Maker Tower "E" Cuffe Parade, Mumbai-400005, in the state of Maharashtra, India and its corporate office at Appeejay House, 6th Floor, West Wing, 3 Dinshaw Wachha Road, Churchgate, Mumbai-400 020, in the state of Maharashtra, India and its branch office at 424-425, 4th Floor, World Trade Centre, Babar Lane, New Delhi-110 001, India (hereinafter referred to as the "Security Trustee", which expression shall, unless it be repugnant to the subject or context thereof, include its successors, assigns, substitutes and replacements) in its capacity as the Security Trustee acting for the benefit of the CDR Lenders and Standard Chartered Bank as the Non CDR Lender, as detailed in Schedule I."

34. The terms of the guarantee show that in the event of any default on the part of the Principal Borrower in payment or repayment and reimbursement of any of the monies referred to in the same or in the event of any default on the part of the Borrower to comply with or perform any of the terms, conditions and covenants contained in the Restructuring Documents, the Guarantor (Edu Smart Services Pvt. Ltd.) shall, upon demand from the Security Trustee/Lenders, forthwith pay to the Security Trustee/Lenders without demur all the amounts payable by the 'Principal Borrower' under the Restructuring Documents. In clause 12 of the Terms of Guarantee for giving effect to the

Guarantee, the Security Trustee/Lenders have been allowed to act as if the Guarantor (Edu Smart Services Pvt. Ltd.) was the 'Principal Debtor' to the Lenders. As per clause 21 of Terms of Guarantee, the Guarantee shall be a continuing one and shall remain in full force and effect till such time the 'Principal Borrower' repays in full the Loans together with all interest, liquidated damages, costs, charges and all other monies that may be payable.

35. Schedule I to the Corporate Guarantee dated 03.06.2015 provides the 'Particulars of Lenders'. Part I relates to 'Particulars of the CDR Lenders', while Part A under the same relates to 'Particulars of the CDR Term Loan Lenders', Company Appeal (AT) (Insolvency) No. 304 of 2017, 16 of 2018 & 302 of 2017 Part B related to 'Particulars of the CDR Working Capital Lenders' and Part C relates to 'Particulars of Corporate Lenders', which reads as follows:-

"SCHEDULE I PARTICULARS OF LENDERS PART I - PARTICULARS OF THE CDR LENDERS PART A - PARTICULARS OF THE CDR TERM LOAN LENDERS

1) CANARA BANK, a body corporate constituted by and under the Banking Companies (Acquisition & Transfer of Undertakings) Act, 1970 and having its Head Office at Canara Bank Buildings, 112 J C Road, P. B. No.-6648, Bangalore - 560002, Karnataka, India and having its Prime Corporate Branch-II, Barakhamba, World Trade Tower, 2nd Floor, New Delhi, India (hereinafter referred to as the "CB", which expression shall unless it be repugnant to the subject or context thereof include its successors and assigns);

X

X

X

X

PART B - PARTICULARS OF THE CDR WORKING CAPITAL LENDERS

1) AXIS BANK LIMITED, a company incorporated under the Companies Act, 1956 and a banking company within the meaning of Section 5(c) of the Banking Regulation Act, 1949 and having its Registered Office at Trishul, Opp.

Samartheswar Temple, Law Garden, Ellisbridge, Company Appeal (AT) (Insolvency) No. 304 of 2017, 16 of 2018 & 302 of 2017 Ahmedabad 380 006 in the State of Gujarat, India and having its Central Office at Axis House, 2nd Floor, Wadia International Centre, Pandurang Budhkar Marg, Worli, Mumbai 400025, in the State of Maharashtra, India and Mini Credit Management center at Ground Floor, Shop No 1-

6 & 8-10, Ninex Time Centre Suncity, Sector 54, Golf Course Road, Gurgaon-122002, in the State of Haryana, India (hereinafter referred to as "Axis", which expression shall unless it be repugnant to the subject or context thereof include its successors and assigns);

X X X X PART C - PARTICULARS OF THE CORPORATE LENDERS

2) AXIS BANK LIMITED, a company incorporated under the Companies Act, 1956 and a banking company within the meaning of Section 5(c) of the Banking Regulation Act, 1949 and having its Registered Office at Trishul, Opp.

Samartheswar Temple, Law Garden, Ellisbridge, Ahmedabad 380 006 in the State of Gujarat, India and having its Central Office at Axis House, 2nd Floor, Wadia International Centre, Pandurang Budhkar Marg, Worli, Mumbai 400025, in the State of Maharashtra, India and Mini Credit Management center at Ground Floor, Shop No 1- 6 & 8-10, Ninex Time Centre Suncity, Sector 54, Golf Course Company Appeal (AT) (Insolvency) No. 304 of 2017, 16 of 2018 & 302 of 2017 Road, Gurgaon-122002, in the State of Haryana, India (hereinafter referred to as "Axis", which expression shall unless it be repugnant to the subject or context thereof include its successors and assigns);"

36. From the aforesaid Particulars of the Lender it is clear that 'Axis Bank Ltd.' is lender of the Corporate Guarantor (Edu Smart Services Pvt. Ltd. - Corporate Debtor herein) and in terms of the Corporate Guarantee dated 03.06.2015, to give effect to the Guarantee, the Lenders (including Axis Bank Ltd.) may act and treat the Guarantor (Edu Smart Services Pvt. Ltd.-Corporate Debtor) as the Principal Debtor to the Lenders (Axis Bank Ltd.) (Clause 12 of the Terms of the Guarantee).

Stand taken up by Committee of Creditors in the Case of AXIS Bank

37. The Committee of Creditors have taken plea that unmatured claim at the time of insolvency commencement cannot be accepted. According to the learned senior counsel for the Committee of Creditors right to claim any debt only arises when the Creditor's debt is due and payable. In case of a Guarantee, the debt becomes due only when a Creditor invokes a Guarantee. Therefore, according to him a conjoint reading of the I&B Code shows that the amount/claims in Corporate Insolvency Resolution Process which are due and payable before the commencement of insolvency process can only be taken into consideration. The Appellant - Axis Bank Ltd. having not invoked its Corporate Guarantee given by the Corporate Debtor, no amount was due Company Appeal (AT) (Insolvency) No. 304 of 2017, 16 of 2018 & 302 of 2017 till insolvency commencement date, hence, it cannot form part of claim during the Corporate Insolvency Resolution Process.

38. Reliance has also been placed on definition of 'claim' - Section 3(6); 'creditor' - Section 3(10); 'debt' - Section 3(11) of the I&B Code and plea has been taken that the Resolution Professional has power to reject any claim in terms of Regulation 13 or revise the claim under Regulation 14 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulation, 2016. It was submitted that Appellant - Axis Bank Ltd. having filed the application directly, without invoking the guarantee cannot be treated to be a 'Financial Creditor'.

39. It was further submitted that the Corporate Guarantee executed between the Appellant - Axis Bank Ltd. and Corporate Debtor (Edu Smart Services Pvt. Ltd.) on 25.03.2014, 31.03.2014 and 03.06.2015 in favour of Appellant, the Axis Bank Ltd. was contractually bound to give demand notice before claiming any amount. Reliance has been placed on Section 14 to suggest that during the period of moratorium, the Corporate Guarantee cannot be invoked.

40. Further, according to learned counsel for the Committee of Creditors, the same amount cannot be claimed simultaneously against the 'Principal Borrower' and the 'Corporate Guarantor'.

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Relevant Provisions of Law:-

41. Section 3(6) defines claim as:-

"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."

42. From the aforesaid definition it is clear that a right of payment whether secured or unsecured come within the meaning of claim.

43. The debt on the other hand as defined under Section 3(11), means:

"3(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;"

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44. From the aforesaid definition it is clear that liability or obligation in respect of a claim which is due from any person includes both the 'Financial Debt' and 'Operational Debt'.

45. Whether there is a 'default' of debt required to be noticed before initiation of Corporate Insolvency Resolution Process, and the default has been defined in Section 3(12) as under:

"3(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;"

46. Thus, it is clear that default of debt has nothing to do with the claim of a person, whether secured or unsecured.

47. Section 5(7) defines 'Financial Creditor', which means a person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to.

48. 'Financial Debt', on the other hand defined under Section 5(8) means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of the money and includes the clauses (a) to (i) as quoted below:

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

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(a) money borrowed against the payment of interest;

(b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;

(c) any amount raised pursuant to any note purchase facility or the issue of bonds notes, debentures, loan stock or any similar instrument;

(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

(e) receivables sold or discounted other than any receivables sold or non-recourse basis;

(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for Company Appeal (AT) (Insolvency) No. 304 of 2017, 16 of 2018 & 302 of 2017 calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, 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;"

49. From the aforesaid provision, it is clear that Section 5(8)(h) includes any counter-indemnity obligation in respect of-

- (i) a guarantee,
- (ii) indemnity,
- (iii) bond,
- (iv) documentary letter of credit and
- (v) includes any other instrument issued by a bank or financial institution

50. From the aforesaid provision it is clear that 'Counter-Indemnity Obligation' in respect of a guarantee or indemnity or bond or documentary Company Appeal (AT) (Insolvency) No. 304 of 2017, 16 of 2018 & 302 of 2017 letter of credit is not necessarily to be issued by a bank or 'financial institution', but can be issued by any person to whom 'Financial Debt' is owed.

51. Whether claim, means the claim matured or not is one of the question raised.

52. While declaring moratorium under Section 13 in terms of 13(1)(b), the Adjudicating Authority is required to cause a public announcement for initiation of Corporate Insolvency Resolution Process and call for submission of claims under Section 15. As per Section 15 when public announcement is made, in terms of sub-section (1)(c) of Section 15, the claim as on the last date of submission is required to be shown.

53. Duties of Interim Resolution Professional have been prescribed under Section 18 and as per clause (b) therein the Interim Resolution Professional is required to receive and collate all the claims submitted by creditors to him pursuant to the public announcement made under Section 13 r/w Section

15. The claim of the parties should be as on the date of initiation of the Corporate Insolvency Resolution Process (date of order of admission and moratorium). Any person who has right to claim payment, as defined under Section 3(6), is supposed to file the claim whether matured or unmatured.

The question as to whether there is a default or not is not to be seen.

54. Therefore, stand taken by the respondents that the claim has not been matured cannot be ground to reject the claim.

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55. Section 25 provides the duties of Resolution Professional. As per Section 25(2)(e), the Resolution Professional is required to maintain an updated list of all the claims. Aforesaid fact also suggests that the maturity of a claim or default of debt are not the guiding factors to be noticed for collating or updating the claims. The matter can be looked from another angle. It is only in case of 'debt' and 'default', a 'Financial Creditor' or 'Operational Creditor', may file applications under Section 7 or 9. The 'Corporate Applicant' has also right to file application under Section 10 for initiation of Corporate Insolvency Resolution Process against itself, if it has defaulted to pay the 'debt'. It does not mean that the persons whose debt has not been matured cannot file claim. The 'Financial Creditors' or 'Operational Creditors' or 'secured or unsecured creditors' all are entitled to file claim.

56. Therefore, we hold that maturity of claim or default of claim or invocation of guarantee for claiming the amount has no nexus with filing of claim pursuant to public announcement made under Section 13(1)(b) r/w Section 15(1)(c) or for collating the claim under Section 18(1)(b) or for updating claim under Section 25(2)(e). For the purpose of collating information relating to assets, finances and operations of Corporate Debtor or financial position of the Corporate Debtor, including the liabilities as on the date of initiation of the Resolution Process as per Section 18(1), it is the duty of the Resolution Professional to collate all the claims and to verify the same from the records of assets and liabilities maintained by the Corporate Debtor. Company Appeal (AT) (Insolvency) No. 304 of 2017, 16 of 2018 & 302 of 2017 EXIM Bank Matter:-

57. Admittedly, JEKPL has given the 'Counter-Indemnity Obligation' by way of Guarantee (Counter Guarantee) and thereby it falls within clause (h) of Section 5(8). Such 'Counter-Indemnity Obligation' in respect of Counter Guarantee has been given by JEKPL as the EXIM Bank disbursed the debt against the consideration for the time value of money in favour of the Principal Borrower (JENV).

58. In view of the said provision we hold that EXIM Bank come within the meaning of 'Financial Creditor' as defined under Section 5(7) r/w Section 5(8) of the I&B Code.

59. In view of finding aforesaid, the claim of EXIM Bank having been wrongly rejected by the Adjudicating Authority by impugned order dated 27.11.2017 in CA No. 159/2017 in CP No.24/ALD/2017, the said order is set aside.

60. So far as order dated 15.12.2017 passed in CA No. 223/2017 in CP No.24/ALD/2017 having been passed in violation of the order passed by this Appellate Tribunal on 08.12.2017 and resolution plan having been approved by the Committee of Creditors which was not competent in absence of 'Export Import Bank of India', and taking into consideration that the claim of one of the Resolution Applicant viz. Hindustan Oil Exploration Company Limited has been wrongly not considered, the judgment dated 15.12.2017 is also set aside. Company Appeal (AT) (Insolvency) No. 304 of 2017, 16

of 2018 & 302 of 2017 Axis Bank:-

61. In regard to Axis Bank Ltd., we have also noticed the 'Corporate Guarantee' dated 03.06.2015, terms of which have already been noticed and discussed above. From the terms and conditions it is clear that one of the lender - Axis Bank Ltd. is treated to be the 'Financial Creditor' of the 'Edu Smart Services Pvt. Ltd.' (Corporate Debtor). Therefore, in terms of agreement 'Edu Smart Services Pvt. Ltd.' (Corporate Debtor) also can be said to be the 'Principal Borrower'.

62. The Adjudicating Authority by impugned order/judgment dated 27.10.2017 in CP No. IB-102(PB)/2017 having failed to appreciate the case of the Axis Bank Ltd., we have no other option but to set aside the judgement dated 27.10.2017 passed in the case of 'Axis Bank Limited.

63. Having held that the 'Export Import Bank of India' is 'Financial Creditor' in relation to 'JEKPL Pvt. Ltd.' (Corporate Debtor) and 'Axis Bank Limited' is 'Financial Creditor' in relation to 'Edu Smart Services Pvt. Ltd.' (Corporate Debtor), we hold and direct respective 'Resolution Professionals' and 'Adjudicating Authorities' to treat the Appellant Banks as members of their respective Committee of Creditors, who in their turn are directed to hold meeting of Committee of Creditors in accordance with law and reconsider/consider the Resolution Plan(s) submitted in each Corporate Insolvency Resolution Process which are in accordance with Section 30(2) of the I&B Code.

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64. Both the 'Committee of Creditors' now cannot go for rebidding, the respective Resolution Plans, having already been opened.

65. All the appeals are allowed with aforesaid observations and directions. However, in the facts and circumstances there shall be no order as to costs.

[Justice S. J. Mukhopadhyaya] Chairperson [Justice Bansi Lal Bhat] Member (Judicial) NEW DELHI
14th August, 2018 AM Company Appeal (AT) (Insolvency) No. 304 of 2017, 16 of 2018 & 302 of 2017