

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

COMPANY APPEAL (AT) (INSOLVENCY) NO. 304 of 2021

(Arising out of the Order dated 02nd March, 2021 passed by National Company Law Tribunal, Mumbai Bench, Court I, in I.A. No. 1960/MB/2019, in C.P. (IB) No. 1385/MB/2017)

IN THE MATTER OF:

State Bank of India

Tulsiani Chamber, 1st Floor,
Free Press Journal Marg,
Nariman Point, Mumbai - 21

...Appellant

Versus

1. Doha Bank Q.P.S.C

Sakhar Bhavan, Ground Floor,
Plot No. 230, Block No. III,
Nariman Point, Mumbai – 400021.

...Respondent No. 1

2. Mr. Anish Nanavaty

Deloitte Touche Tohmatsu India LLP
27th Floor, Tower 3, One International Centre,
Elphinstone, Mumbai.

...Respondent No. 2

3. Bank of India

Mumbai Large Corporate Branch
BoI Building 4th Floor,
MG Road, Mumbai – 400001.

...Respondent No. 3

4. UCO Bank

Flagship Corporate Branch
Mafatlal Centre, 1st Floor,
Nariman Point, Mumbai – 400001.

...Respondent No. 4

5. Syndicate Bank

SAMB, Maker Tower “F”, 2nd Floor,
Cuffe Parade, Mumbai – 400005.

...Respondent No. 5

6. Oriental Bank of Commerce

Large Corporate Branch
F-14, Maker Towers, Cuffe Parade,
Mumbai – 400005.

...Respondent No. 6

7. Indian Overseas Bank

Nariman Point Branch, 229, Ground Floor,
Bhatavar Building, Nariman Point,
Mumbai – 400021.

...Respondent No. 7

Present

For Appellant: Mr. Ramji Srinivasan, Sr. Advocate with
Mr. Jash Shah, Ms. Rajshree Chaudari, Ms.
Shruti Pandey, Ms. Megha Dugar & Mr. Ryan
D'souza, Advocates.

For Respondent No. 1: Ms. Sharmistha Ghosh, Advocate for R-1.

**For Respondent No. 2/
RP:** Mr. Sumesh Dhawan, Mr. Rishabh Jaisani &
Mr. Shaurya Shyam, Advocates for R-2/RP.

(J U D G E M E N T)

[Per; Shreesh Merla, Member (T)]

1. The present Appeal is preferred by M/s. State Bank of India under Section 61 of the Insolvency and Bankruptcy Code, 2016, (hereinafter referred to as 'The Code') against the Impugned Order dated 02.03.2021 passed by Learned Adjudicating Authority (National Company Law Tribunal, Mumbai Bench, Court-I) in IA1960/2019, in C.P. (IB) No. 1385/MB/2017, by which Order, the Adjudicating Authority has partly allowed the IA filed by 'M/s. Doha Bank QPSC'/the first Respondent seeking to delete the Appellant and Respondents 3 to 7 as 'Financial Creditors' of Reliance Infratel Limited ('RITL'), hereinafter referred to as the 'Corporate Debtor'.

2. Facts in brief, are that vide Order dated 15.05.2018, CIRP was initiated against the 'Corporate Debtor' and Mr. Manish Dhirajlal Kaneria was appointed

as the IRP on 18.05.2018. Subsequent to the withdrawal of the Appeals before this Tribunal, a fresh Public Announcement was issued on 07.05.2019, inviting claims and the CoC was constituted on 24.05.2019, with the following 'Financial Creditors' as Members:

Sr. No.	Name of Creditors	Amount Claimed	Amount Admitted (Provisional)	Amount under Verification	Voting share
1.	State Bank of India	3628.68	3516.37	112.31	36%
2.	Bank of India	1064.82	979.17	85.65	10%
3.	UCO Bank	952.81	952.81	-	10%
4.	Standard Chartered Bank	753.14	753.14	-	8%
5.	Syndicate Bank	1225.18	611.03	614.15	6%
6.	Mahima Mercantile	514.34	514.34	-	5%
7.	VTB Capital	511.91	511.91		5%
8.	Doha Bank	408.81	408.81	-	4%
9.	Union Bank of India	1009.35	353.30	656.05	4%
10.	Emirates NBD	324.33	324.33	-	3%
11.	Industrial and Commercial Bank of China	1832.91	278.48	1554.43	3%
12.	Oriental Bank of Commerce	276.68	276.68	-	3%
13.	Indian Overseas Bank	184.70	184.70	-	2%
Total		12,687.65	9,665.07	3,022.58	100%

3. The first Respondent M/s. Doha Bank is a part of the Consortium of Banks/financial institutions which had extended a Foreign Currency Loan of 250 million USD to the 'Corporate Debtor' vide Loan Agreement dated 19.03.2020 and a reinstatement Agreement dated 05.09.2016, extending the repayment date up to 03.12.2016. It is stated that the 'Corporate Debtor' could not pay the loan and by another reinstatement Agreement dated 04.12.2016, the repayment date extended till 05.06.2017.

4. The 'Corporate Debtor' was one of the subsidiaries of Reliance Communication Limited ('RCOM'), the holding/parent Company. RCOM and another group entity namely Reliance Telecom Ltd, ('RTL') availed Rupee Loan Facilities to the tune of Rs.6015,00,00,000/- and Rs.735,00,00,000/- under Facility Agreement dated 20.02.2015, from a Consortium of Banks of which Respondents 3 to 7 were Members. It is stated that the 'Corporate Debtor' on 03.03.2017, executed Deeds of Guarantee in favour of the Consortium of Lenders securing the Rupee Loan Facility granted to RCOM and RTL. The Axis Trustee Services Ltd. was appointed as the Security Trustee in respect of the Deeds of Guarantee. Around 2017, RCOM and RTL started committing defaults in making payments of the Loan Facilities and their accounts were declared as an NPA. On 01.02.2019, the Security Trustee under two separate letters invoked the Corporate Guarantees and called upon the 'Corporate Debtor' to make the payments in respect of the RCOM and RTL facilities. By email dated 08.02.2019, the 'Corporate Debtor' informed M/s. Doha Bank of the letters dated 01.02.2019 and the invocation of the Corporate Guarantee. It is averred that M/s. Doha Bank vide

letters dated 28.02.2019 and 08.03.2019, objected to the invocation of Guarantees and intimated the Consortium of Lenders through the Security Trustee that the Corporate Guarantees were created in breach of the terms of the Facility Agreement dated 19.03.2010 and despite repeated requests neither the Appellant, Respondents 3 to 7 nor the 'Corporate Debtor' provided copies of the said Guarantees to M/s. Doha Bank.

5. M/s. Doha Bank preferred I.A. 1960/2019 under Section 60(5) of the Code, seeking a direction to the RP to reconstitute the CoC by deleting the Appellant and Respondents 3 to 7 who were claiming to be the 'Financial Creditors' of the 'Corporate Debtor' on the basis of the Guarantees.

6. **Submissions of the Learned Sr. Counsel appearing on behalf of the Appellant:-**

- It is submitted that as per the Code, a Creditor is entitled to make its claim against the 'Corporate Debtor', only on the basis of Guarantee extended by such 'Corporate Debtor'. Hence, SBI Consortium is entitled to make its claim against the 'Corporate Debtor' (RITL) on the basis of the Corporate Guarantees issued by RITL and which has already been invoked by SBI Consortium. Even though SBI has not disbursed any money to RITL, it is entitled to make its claims against the RITL on the basis of the Guarantees executed. RITL has provided Corporate Guarantees on his own volition and for any alleged violation of the Doha Bank facility by RITL. The Doha Bank Consortium can pursue his own remedies under applicable law.

- It was only on the basis of the directions received from RBI that SBI has declared the account of RITL as an NPA on 22.12.2017 with retrospective effect from 26.08.2016. On 03.03.2017, when RITL executed the Corporate Guarantees, there was no declaration of RITL's Account as NPA by SBI Consortium. It is contended that the entire argument of the first Respondent that there was a fraud perpetrated by the Reliance Group and SBI Consortium, is erroneous and misplaced.
- It is submitted that this Tribunal in '*Avantha Holdings Ltd. & Anr.*' Vs. '*Mr. Abhilash Lal & Ors.*'¹, has clearly held that the date of declaration of NPA has to be the date on which it was declared and not the date of which it is retrospectively deemed to have been declared.
- It is submitted that the Corporate Guarantees have been executed as per the applicable stamp laws of New Delhi and it was only to avoid payment of unnecessary stamp duty charges and spending good money, the State Bank Consortium requested the RP of RITL to verify the Corporate Guarantees in New Delhi. Thereafter the RP submitted the claims of the SBI Consortium based on the Corporate Guarantees. The SBI Consortium also produced a letter dated 06.03.2019 issued by the Security Trustee on behalf of the SBI Consortium, wherein it was confirmed that the Corporate Guarantees were duly stamped in New Delhi.

¹ Comp. App. (AT) (Ins.) No. 304 of 2022

- The letter dated 06.03.2019 was produced before the Adjudicating Authority, but the same was not considered. It is submitted that the propriety of submission of Form-‘C’ by the SBI Consortium was not even an issue before the Adjudicating Authority and thus there was no occasion for SBI to produce the same. The Code does not provide that the Resolution Professional ought to verify the claim related documents only in its offices in a particular place. The RP is at liberty to verify the Corporate Guarantees in New Delhi in view of the letter dated 06.03.2019 issued by the Security Trustee.
- Despite making elaborate submissions regarding the non-stamping of the Corporate Guarantees, Respondent 1 failed to produce the signed and the executed version of the Doha Bank Facility which is the basis of its entire claim against the RITL.
- Section 186 of the Companies Act, 2013 (hereinafter referred to as ‘The Act’), carves out an exception for Companies providing ‘Infrastructure Facilities’. In Schedule VI to the Act ‘Infrastructure Facilities’ is defined to include Companies engaged in telecommunications projects and activities, which are exempted from the provisions of Section 186 of the Act. As RITL is a Telecommunication Service provider, it is not bound by the provisions of Section 186 of the Act and therefore the Corporate Guarantees provided by RITL or not in violation of this Section. Further RITL has provided a Certificate dated 26.04.2017 to SBI and confirmed that RITL is in compliance of Sections 185 and 186 of the Act.

- It is submitted that the Adjudicating Authority has failed to recognise that the SBI Consortium have in their favour, a ‘Deed of Hypothecation’. Keeping in view the Order passed in IA3055/2019 and that the ‘Deed of Hypothecation’ is similar to the one considered by the Adjudicating Authority in I.A.3055/2019, the SBI Consortium ought to have been permitted to continue to be recognised as ‘Financial Creditors’ of RITL.
- It is vehemently contended by the Learned Sr. Counsel that the Adjudicating Authority rejected Prayer A but proceeded to grant the consequential reliefs under Prayer C & D, being declassification of the Consortium Members which are party to the IA1960/2019 as ‘Financial Creditors’ of RITL and reconstitution of the CoC respectively. The natural consequence of rejection of Prayer A ought to have been the dismissal of IA 1960/2019. It is an admitted fact that the first Respondent did not press Prayer A, despite this, the Adjudicating Authority has granted Prayer C & D in vacuum. Hence, the Impugned Order deserves to be set aside.
- Learned Counsel placed reliance on the following Judgements in support of his case that consequential relief was granted while rejecting the primary relief:
 - *‘Sahu Madan Mohan’ Vs. ‘Tejram George Coronation Hindu School Association’*².
 - *‘V. Rajeshwar Rao’ Vs. ‘N. Yadagiri Reddym’*³.

² 1948 SCC OnLine All 93

³ 2000 SCC OnLine AP 348

○ *'Babu Puri and Ors.' Vs. 'Kalu & Ors.'*⁴.

- The Learned Counsel also relied on the following Judgements to buttress his argument that non-compliance of CIRP Regulations was not a question to be adjudicated and further the Appellant has complied with the necessary procedure including Regulation 8 of the CIRP Regulations with respect to submission of its proof of its claim:

○ *'Bacchaj Nahar' Vs. 'Nilima Mandal'*⁵.

○ *Major (Retd.) Inder Singh Rekhi' Vs. 'Delhi Development Authority'*⁶.

7. Submissions of the Learned Sr. Counsel appearing on behalf of the first Respondent/Doha Bank:

- It is strenuously submitted that both RCOM and RTL, along with the 'Corporate Debtor', are undergoing CIRP. The Appellant and Respondents 3 to 7 claimed to be the 'Financial Creditors' of the 'Corporate Debtor', based on two purported Deeds of Guarantee dated 03.03.2017 which were executed by the 'Corporate Debtor' to secure the repayment of certain antecedent loans extended by SBI and Respondents 3 to 7 to RCOM, the parent Company.
- The Guarantees were created in breach of covenants and undertakings given by the 'Corporate Debtor' to R1 under the terms of the Facility Agreement. No waiver was sought from the first Respondent prior to the

⁴ MANU/RH/0389/2004

⁵ (2008) 17 SCC 491

⁶ (1988) 2 SCC 338

issuance of the purported Guarantees as per the terms of the Facility Agreement. Clauses 20.2 read with Clause 19.2.6 read with a definition of 'Financial Indebtedness' as defined in the Facility Agreement, creates a bar on the 'Corporate Debtor' to issue any such purported Guarantees, which are in contravention with Section 186(2) read with Section 186(3) of the Act.

- By creating these Guarantees, the 'Corporate Debtor' has sought to create a preference in favour of the Pre-Existing Lenders of his holding/parent Companies, eclipsing the *bona fide* rights and interest of the direct Lenders of the 'Corporate Debtor'.
- At the time of creation of these purported Guarantees, the 'Corporate Debtor' was itself in default to repay the outstanding loans to Doha Bank under the terms of the Facility Agreement entered into between the Doha Bank and the 'Corporate Debtor'. It is strenuously contended by the Learned Sr. Counsel that these Guarantees were created when the 'Corporate Debtor' was under severe financial losses. Accounts of RCOM, RTL and 'Corporate Debtor' were classified as an NPA by RBI on 26.08.2016, which indicates that all the three were in default for 90 days prior to 26.08.2016. It is only after the intervention of RBI and the subsequent Audit that SBI declared the account of RCOM, RTL and 'Corporate Debtor' as an NPA with effect from 26.08.2016, and the consequences of NPA would apply from that date and not from 22.12.2017.

- There is no disclosure of the Guarantee in the Financial Statements of the ‘Corporate Debtor’ for the Financial Year 2016–17 & 2017–18. Even in the Arbitration Agreement signed between the Lenders of the ‘Corporate Debtor’ and its ‘related parties’, there was no disclosure of these purported Guarantees.
- It is argued that when these Guarantees were created, the ‘Corporate Debtor’ was cognizant of the fragile financial condition of RCOM, and was also aware of the fact that RCOM was nowhere in the position to repay the ‘Corporate Debtor’, should the purported Guarantees be invoked and the ‘Corporate Debtor’ has to pay under these Guarantees. The IRP overlooked the pertinent facts and mechanically admitted the claims of the Appellant and Respondents 3 to 7 and included them in the CoC.
- During the hearing of IA1960/2019 despite repeated requests, the Appellant and Respondents 3 to 7 deliberately neglected to produce the Guarantees and the claim forms.
- It is submitted that the pleadings regarding the ‘verification of the Guarantees’ at New Delhi by the then IRP, is absent in the evidence and in any other document filed by the Appellant.

Assessment:

8. The Corporate Guarantees dated 03.03.2017 was executed by the ‘Corporate Debtor’ in favour of the Appellant and Respondents 3 to 7. It is significant to mention that the accounts of RCOM, RTL and the ‘Corporate Debtor’ (RITL) were classified as NPA with effect from 26.08.2016. It is the case

of the Appellant that it was only on the basis of the directions received from RBI that SBI had to declare the account of RITL as NPA on 22.12.2017 with retrospective effect from 26.08.2016 and therefore as on 03.03.2017, when RITL executed the Corporate Guarantees, there was no declaration of RITL's account as NPA. It is apparent from the material on record that the 'Corporate Debtor' was in default of its obligations and was suffering from severe financial constraints prior to 03.03.2017. There is no documentary evidence on record in support of the Appellant that indeed there was disclosure regarding these Guarantees by the beneficiary Lenders of the 'related party' of the 'Corporate Debtor' during Restructuring Plan of the debt of the 'Corporate Debtor'. Though these Guarantees have been filed here at appellate stage, the fact remains, that these Guarantees were not reflected in the Financial Statements of the 'Corporate Debtor' for the FY 2016-17 & 2017-18 or produced before the Adjudicating Authority.

9. The second Respondent/RP Mr. Anish Nanavaty filed Reply Affidavit stating that the admission of the claims of the Appellant and the other banks recognising them as Members of the CoC was undertaken by Mr. Manish Dhirajlal Kaneria, the erstwhile IRP; that the issue regarding the existence and submission of the two Corporate Guarantees before the Adjudicating Authority has now become redundant as the same has been produced before this Tribunal. Apart from this brief Reply, there is no pleading on record to establish that the Guarantees were verified at New Delhi by the IRP/RP.

10. The contention of the Learned Sr. Counsel for the Appellant that 20.12.2017 has to be taken as the date of NPA and not 22.08.2016 is unsustainable as the Appellant themselves have declared the 'Corporate Debtor' as an NPA, with effect from 26.08.2016, which indicates that the 'Corporate Debtor' was in default for at least 90 days *prior* to 26.08.2016. This Tribunal in '*Avantha Holdings Ltd.*' (*Supra*) is not applicable to the facts of this case as the observation relied upon was in terms of the 'related party' transaction and consequence submission of Resolution Plan by such a 'related party'.

11. This Tribunal is also conscious of the fact that it is obligatory under law to produce a document duly stamped in accordance with the provisions of Maharashtra Stamp Act, 1958, for it to be considered as being enforceable in law and claims were required to be submitted to the IRP i.e., the address in Maharashtra within the State of Maharashtra and it is only to evade the stamp duty, that the documents were not shared electronically with the IRP. We also find force in the contention of the Learned Sr. Counsel appearing for the first Respondent that pleadings to the effect 'that the Guarantees were stamped and that Appellant and Respondents 3 to 7 got these documents verified at New Delhi by the IRP', is conspicuously absent in the Reply Affidavit filed before the Adjudicating Authority.

12. Be that as it may, it is pertinent to mention that the 'Corporate Debtor' was declared NPA on 26.08.2016, and the Corporate Guarantees were executed on 03.03.2017. We are of the view that the 'manner' and 'timing' of these Corporate Guarantees are questionable having regard to the fact that the 'Corporate Debtor'

and the holding Company were already in default. Even otherwise, there is no documentary evidence on record to substantiate the argument of the Learned Counsel for the Appellant, that the Company *was in good financial health till 90 days prior to 22.12.2017*, and therefore 22.12.2017 only should be concluded as the date of NPA. Hence, we hold that this argument does not hold any water.

13. Having held so, we are of the view that the compliance or otherwise of Sections 186 & 187 of the Companies Act, 2013, regarding the Agreements is of no significance here.

14. This Tribunal in *'Doha Bank & Ors.' Vs. 'Anish Nanavaty & Anr.'*⁷, preferred by Doha Bank, claiming to be the direct Lender and the 'Secured Financial Creditor' of the 'Corporate Debtor', has set aside the finding of the Adjudicating Authority and remanded the matter with a direction to take all consequential actions, resulting from derecognising the relevant parties as 'Financial Creditors' on the ground that the 'Deed of Hypothecation' cannot be a basis to declare the parties as 'Financial Creditors' as the Respondents were not even party to the 'Deed of Hypothecation'. Therefore, the contention of the Learned Sr. Counsel for the Appellant that having regard to the Order passed by the Adjudicating Authority in IA3055/2019, the SBI Consortium ought to have been permitted to continue to be recognised as 'Financial Creditors' of RITL cannot be sustained, keeping in view the observations made by this Tribunal in

⁷ Comp. App. (AT) (Ins.) No. 414 of 2021

‘Doha Bank & Ors.’ (Supra) which Appeal challenged the Impugned Order in IA3055/2019.

15. Keeping in view the foregoing reasons we do not find any of the Judgements relied upon by the Appellant, applicable to the facts of the attendant case. It is relevant to mention that an Application under Section 30(6) of the Code was preferred by the Resolution Professional seeking approval of the Resolution Plan, in IA920/2020, which was allowed by the Adjudicating Authority, vide Order dated 03.12.2020. An Appeal challenging the Plan was preferred by the ‘Operational Creditors’ before this Tribunal in **‘Pratap Technocrats (P) Ltd. & Ors.’ Vs. ‘Monitoring Committee of Reliance & Anr.’**⁸, which was dismissed by a Three Member Bench, as devoid of merit, observing that the distribution mechanism adopted in that case was as per the provisions of Section 53 of the Code. On an Appeal preferred by ‘M/s. Pratap Technocrat Private Limited’, the ‘Operational Creditor’ of the ‘Corporate Debtor’, the Hon'ble Supreme Court in **‘Pratap Technocrats (P) Ltd. & Ors.’ Vs. ‘Monitoring Committee of Reliance Infratel Limited & Anr.’**⁹, dismissed the Appeal observing as follows:

“42. In the present case, the resolution plan has been duly approved by a requisite majority of the CoC in conformity with Section 30(4). Whether or not some of the financial creditors were required to be excluded from the CoC is of no consequence, once the plan is approved by a 100 per cent voting share of the CoC. The jurisdiction of the Adjudicating Authority was confined by the provisions of Section 31(1) to determining whether the requirements of Section 30(2) have been fulfilled in the plan as approved by the CoC. As such,

⁸ Comp. App. (AT) (Ins.) No. 1134 of 2020

⁹ Civil Appeal No. 676 of 2021

once the requirements of the statute have been duly fulfilled, the decisions of the Adjudicating Authority and the Appellate Authority are in conformity with law.”

16. Apart from the fact that we are of the view that this Appeal is devoid of merit, we also keep in view that the Resolution Plan has been approved all the way up to Hon'ble Supreme Court as far back as on 10.08.2021.

17. For all the aforementioned reasons, this Appeal fails and is accordingly dismissed. No Order as to costs.

[Justice Anant Bijay Singh]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

**Principal Bench,
New Delhi
14th October, 2022**

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