IN THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH-IV

C.P. (IB)/361(MB)2021

and

IA-1798/2022 & IA-1882/2022 {*IN C.P. (IB)/361(MB)2021*}

Under Section 7 Rule 11 of NCLT, 2016

In the matter of

Cable Corporation of India

…Financial Creditor/Applicant

V/s.

State Bank of India,

…Respondent

Order Pronounced on: **18.07.2023**

Coram:

Mr. Prabhat Kumar — Hon'ble Member (Technical)

Mr. Kishore Vemulapalli — Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Applicant: Mr. Mustafa Doctor Ld. Senior Counsel a/w Mr. S. Dasgupta, Adv.

For the Applicants in IA-1882/2022: Mr. Rashmin Khandekar a/w Ms. Savani Gupte, Mr. Dinesh Kumar Seth, Ms. Warisha Parkar, Mr. Lalit Munshi & Ms. Sailee Dhayalkar, Adv.

O R D E R

Per: Prabhat Kumar, Member (Technical)

1. This application is filed by State Bank of India, the Financial Creditor/Applicant, under section 7 of Insolvency & Bankruptcy Code, 2016 (I&B Code) seeking initiation of Corporate Insolvency Resolution Process (CIRP) in the matter of Cable Corporation of India Limited (CIN: U31300MH1957PLC010964), the Corporate Debtor, on 15/03/2021.

   1.1. This Application has been filed by Mr. Ashwini Kumar, the employee of the Financial Creditor in terms of Authorization dated 09.03.2021, claiming a default of 58,44,90,194/- (INR Fifty-Eight Thousand Forty-Four Lakhs Ninety Thousand One Hundred and Ninety-Four Only) as on March 01, 2021. The date of default is stated as 06.06.2019 in Parv IV of the Application.

2. The Corporate Debtor is engaged into the business of manufacture of electric cables. Pursuant to an application made by the Corporate Debtor the Applicant {acting on behalf of itself and the Consortium of Banks ("Consortium") then comprising the United bank of India, Citibank N.A. and the State Bank of Patiala} and the Corporate Debtor executed a Working Capital Consortium Agreement dated 25 April 1990, under the terms of which the Applicant inter alia, granted credit facilities to the extent of INR 26,40,00,000 ("Initial Facility") to the Corporate Debtor. The Initial Facility was modified by seven supplemental agreements, the last of which modified the credit facilities to Rs. 183,85,00,000/-.

2.1. A Deed of Hypothecation was signed on the same date as the WC Agreement creating charge on the Inventories, Book Debts, receivable and all moveable & immoveable properties of the Corporate Debtor. The said deed of Hypothecation was modified by seven supplemental deeds, at each occasion of revision of credit limits, the latest being dated 30.7.2009 by the corporate debtor. The credit facilities were further secured by indenture of mortgage/registered mortgage executed on 09.02.2007, as last modified on 8.10.2009, and further modified via Release Deed dated 5.12.2013 & 16.10.2014. The Financial Creditors were provided the personal guarantee(s) by one of Director of the Corporate Debtor.

2.2. Revival Letters 21 April 1993, 7 December 1995, 21 January 2000, 2 August 2002, 16 January 2003, 7 December 2005, 18 November 2008, 15 November 2011, 21 October 2014, 7 July 2017, 14 May 2020 and 14 December 2020 were also issued by Corporate Debtor admitting its liability to pay the amounts due in terms of the WC Agreement issued by the Applicant from time to time.

2.3. Around early 2016, the Corporate Debtor started defaulting in its re-payment obligations under various Working Capital Loan Agreements read with various sanction letters issued from time to time. Owing to the continuous failure of the Corporate Debtor to make payment of the amounts in default for several days from the date of default, the account of the Applicant was again classified as a NPA on 4 September 2019, previously it was classified on 18.11.2016 but was subsequently upgraded upon payment of defaults amounts.

2.4. Being left with no other choice, and in light of the continuous defaults of Corporate Debtor, the Applicant was constrained to address a legal notice dated 15.10.2020 through its lawyer, to, inter-alia, to the Corporate Debtor calling upon to pay the outstanding amounts due within 15 days of the date of the notice, which as on 15.10.2020 was Rs. 52,26,28,477.88 alongwith interest, costs and other expenses due. The Corporate Debtor responded to the notice, however, no further payments was made by the Corporate Debtor till date.

2.5. The Corporate Debtor has failed to honour its obligation under the Facility and continued to remain in default of its payment / repayment obligations under the Facility. The total outstanding amount under the Facility INR 58,44,90,194 (Rupees Fifty Eight Crore Forty-Fow· Lakhs Ninety Thousand One Hundred Ninety Four) as on 10 March 2021.

2.6. It manifests from a perusal of the aforesaid facts that this is a clear case of an admitted default in payment of financial debt by the Corporate Debtor. All necessary pre-requisites of Section 7 are fulfilled, being existence of financial debt and an admitted default in payment by the Corporate Debtor of over INR 1 crore. The Financial Creditor, therefore, submits that this is a fit case for admission and commencement of corporate insolvency resolution process against the Corporate Debtor.

3. The Corporate Debtor submits that, during the pendency of the aforesaid Petition, the Parties amicably settled all the pending disputes. The terms of the said settlement came to be recorded in the Sanction Letter dated 27th September 2021. Essentially, the Sanction

Letter contemplated that the Corporate Debtor shall pay to the Applicant Financial Creditor a sum of INR 47.47 Crore towards full and final settlement of its claims, including those that are a subject matter of the present Petition. The Sanction Letter also required the Corporate Debtor to de-risk the live performance bank guarantees ("PBGs") aggregating to INR 30.40 Crore, provided by the Applicant to the Corporate Debtor's customers, by either providing counter bank guarantees or replacing the PBGs or providing 100% cash margin for the live PBGs. The Settlement Amount was arrived at, based on Applicant's calculation of the alleged principal outstanding under the original facilities. The PBGs had not been invoked, hence the amounts against the same had not become due. The outstanding PBGs as on date stands reduced to INR 8.63 Crore.

3.1. Despite compliance with the terms of the Sanction Letter, in as much as payment of the Settlement Amount along with additional interest of INR 64 Lakh, the Financial Creditor in a complete abuse of process, created impediments and tried to engineer a breach on the part of the Corporate Debtor by refusing to accept the counter bank guarantees which were being furnished by it. The relevant dates, on which the entire payment of the Settlement Amount was made to the Financial Creditor, are set out below :

Sr. No.	Date	Particulars	Amount paid by CCIL (INR)
1.	17.08.2021	Corporate Debtor paid an amount of INR 5 Crore to Financial Creditor to show its *bona fides*, in support of its proposal.	**5 Crore**
2.	27.10.2021	INR 7 Crore paid by Corporate Debtor.	**7 Crore**
3.	17.02.2022	***Extension by Applicant*** Applicant extended the time to comply with the Settlement to **28.02.2022**.	
4.	24.02.2022	***1st extension by NCLT*** NCLT granted time till **31.03.2022** to pay the balance settlement amount and to de-risk the PBGs; and further amount of INR 5 Crore paid .	**5 Crore**
5.	31.03.2022	***2nd extension by NCLT*** NCLT recorded that INR 7 Crore would be paid on 31.03.2022 and granted time till **15.05.2022** to pay the balance Settlement	**7 Crore**

Sr. No.	Date	Particulars	Amount paid by CCIL (INR)
		Amount of INR 23.47 Crore along with de-risking of the PBGs.	
6.	13.05.2022	INR 16 Crore paid towards balance settlement amount.	**16 Crore**
7.	26.05.2022	***3rd extension by NCLT*** NCLT granted CCIL time till **31.05.2022** to pay balance Settlement Amount of INR 7.47 Crore with applicable interest. Time to de-risk the PBGs was extended to **30.06.2022.**	
8.	27.05.2022	INR 7.47 Crore paid by CCIL. With this payment, the entire Settlement Amount of INR 47.47 Crore was paid to Applicant.	**7.47 Crore**

Sr. No.	Date	Particulars	Amount paid by CCIL (INR)
9.	31.05.2022	INR 40.90 Lakh paid towards interest, however, INR 64 Lakh claimed by Applicant	**40.90 Lakh**
10.	01.06.2022	Remaining INR 22.69 Lakh paid; NCLT recorded the entire amount of INR 47.47 Crore along with interest amount of INR 64 Lakh made by CCIL and reiterated that the time granted for de-risking the PBGs was extended till 30 June 2022.	**22.69 Lakh**

3.2. Even more importantly, with a view to show its bona fides, and in compliance with Clause IV(a) of the Sanction Letter, the Corporate Debtor even offered to the Financial Creditor a full 100% cash margin towards outstanding/ live PBGs. This aspect was highlighted to the Hon'ble Tribunal during the final hearing on 28th June 2023. Since these letters were exchanged between the parties recently, and have not been placed on record by an affidavit, the Corporate Debtor seeks to rely upon the same hereto. Copies of the letters dated 15th June 2023 and 27th June 2023 of the Corporate Debtor offering 100% cash margin to the Applicant, and their respective

replies dated 16th June 2023 and 27th June 2023 rejecting the said offer, are placed before us by the Corporate Debtor.

3.3. In view of the aforementioned, the Corporate Debtor submitted that the circumstances do not warrant the initiation of CIRP against the Corporate Debtor under the Code. The present Petition must necessarily fail as

(a) the entire financial obligation under the Sanction Letter of INR 47.47 Crore along with additional interest of INR 64 Lakh, have been duly paid to SBI within the timelines, as extended by this Hon'ble Tribunal;

(b) outstanding live PBGs do not amount to a "debt" under the Code;

(c) assuming whilst denying that there is a default under the Settlement, the same cannot be treated as a "financial debt" as per the Code and thus the said Petition must necessarily fail; and

(d) despite the Corporate Debtor's constant and persistent efforts to offer the counter bank guarantees time and again and alternatively, the 100% cash margin instead of the said counter bank guarantees, as per the Sanction Letter, the Applicant Financial Creditor has deliberately attempted to engineer a breach by constantly refusing to accept the counter bank guarantees (on pretext of either the same not being in format and thereafter on the alleged ground of the failure of Settlement) and also the 100% cash margin instead thereof, solely with an intent to abuse the process under the Code and use it as a tool for further recovery.

3.4. It was further submitted that the alleged debt in relation to which the said Petition was filed has been duly discharged and the Corporate Debtor is evidently a solvent company. It is also clear that the Financial Creditor is attempting to abuse the machinery of this Hon'ble Tribunal and the process under the Code by using it as a tool for recovery. Evidently, the Petition has been filed for a purpose other than resolution under the Code, and ought to be dismissed. It is submitted that grave harm and prejudice will be caused to the Corporate Debtor if the said Petition is admitted and considering the present circumstances, admitting the said Petition will be contrary to the spirit and object of the Code. Therefore, the Corporate Debtor prays that the instant Company Petition be dismissed and accordingly, the Applicant be directed to release all charges, withdraw coercive actions, release guarantees, give a no dues certificate etc. in adherence to the terms of the Sanction Letter.

3.5. The Corporate Debtor has sought alternate relief, in the event the Hon'ble Tribunal is not inclined to dismiss the Petition, this Hon'ble Tribunal ought to exercise its inherent powers under Rule 11 read with Rule 153 of the NCLT Rules and enlarge the time to submit the counter bank guarantees or replace the live PBGs with bank guarantees or give 100% cash margin towards the live PBGs, by appropriately moulding the reliefs as sought in the IA-1798/2022 filed on 2.7.2022 by the Corporate Debtor.

3.5.1. In this IA, the Corporate Debtor has sought further extension beyond 30th June, 2022 on the ground that Corporate Debtor's efforts to replace PBGs are being

obstructed/prevented by the Financial Creditor's unreasonableness and lack of cooperation.

3.5.2. The Corporate Debtor submits in the application that, as on 10.6.2022, the outstanding PBGs, to be de-risked, amounted to Rs. 23.68 crores, and the Financial Creditor was asked to clarify the outstanding amount of PBGs, however, no response was received. Thereafter, on 16.6.2022, it offered to get counter-guarantee(s) from another Bank subject to release of all securities held by the Financial Creditor, in alternate. The Corporate Debtor had approached another Banker to replace PBGs issued by the Financial Creditor and asked the Applicant to allow it to open current account with said the said Bank, so as to carry forward the process with said Bank. It is pertinent to note that the Financial Creditor confirmed that, as on 24.6.2022, the PBGs of Rs. 17.38 Crores remains outstanding. Around same time, the Corporate Debtor asked the Financial Creditor to issue a letter that it shall release all securities after receipt of original counter guarantees from another Bank, however, it was not issued. It is further stated that counter PBGs were provided to the Financial Creditor for a value of Rs. 7.26 Crores on 29.6.2022, however, there remained certain difference(s) over the format of such PBGs. The Corporate Debtor has attributed its failure to de-risk outstanding PBGs to the callous attitude of the financial creditor.

4. The Financial Creditor has argued vehemently that the settlement terms were breached by the Corporate Debtor, accordingly, it can not plead that the payment of whole of settlement amount discharges its liability under the Working Capital Facility. It was pleaded that,

even the extensions granted by this Tribunal for de-risking of PBG expired on 30.6.2022, and failure of the Corporate Debtor to comply with the stipulation in relation to such PBG in the settlement agreement must be construed as breach of the terms of settlement, thus disentitling the Corporate Debtor to plead that it stands discharged from the debts after payment of settlement amount in full. Accordingly, the applicant Financial Creditor claimed that the Corporate Debtor still owes about INR 20.47 Crore as outstanding in the Cash Credit facility, and accordingly insisted that the present application deserves to be allowed in view of existence of undisputed debt and default in repayment thereof, and the Corporate Debtor be admitted to CIRP.

4.1. The Financial Creditor submitted that de-risking of outstanding PBGs, by way of Counter Bank Guarantees issued by a 1st Class Bank acceptable to the Applicant or 100% cash margin as deposit with the Applicant, was a mandatory requirement under the Settlement Agreement, and it was expressly agreed that should there be a failure of either of the aforesaid obligations under the Settlement Agreement, then the same would result in a failure of the settlement. The definition of "Compromise Amount", as detailed in the Sanction Letter, included the sum of INR 47.47 crores along with de-risking of entire outstanding live Bank guarantees amounting to INR 30.40 crores as on 31.08.2021.

4.2. It was also contended that this Tribunal vide its order dated 31.3.2022 ordered the Corporate Debtor to pay the balance of the compromise amount, along with interest, to the Applicant Financial Creditor on or before 15 May 2022, and also de-risk / replace the bank guarantees by the said date. It was specifically recorded in the order

that this was obligatory on the part of the Corporate Debtor, failing which, this Bench would not have any option but to admit the Petition into CIRP. It was also recorded that the claim of the Financial Creditor was an admitted claim on the part of the Corporate Debtor. This period of 15.5.2022 was further extended to 30.6.2022 vide order dated 26.5.2022, however, this Order also recorded that should the Corporate Debtor fail to do the above, the Bench would be left with no option but to admit the matter into CIRP.

4.3. Through the month of June 2022, despite substantial correspondence having been exchanged between the parties on the subject-matter, and despite multiple meetings having taken place between the Corporate Debtor and the Financial Creditor clarifying the queries on the format and clauses of the counter bank guarantees, the Corporate Debtor failed to issue the bank guarantees in a format acceptable to the Financial Creditor (which was a pre-requisite for settlement in terms of the Settlement Agreement).

4.4. Accordingly, on 1 July 2022, because the Corporate Debtor had been unable to adhere to the obligations under the Settlement Agreement and the extended deadline for the same had elapsed, the Applicant Financial Creditor addressed a letter to the Corporate Debtor stating, inter alia, that the compromise had failed. On the next hearing dated 4 July 2022, the Tribunal adjourned the matter to 18 July 2022 for final hearing. However, the Tribunal orally directed the parties to try and amicably settle the matter before the next date of hearing.

4.5. It is pertinent to note that even by 18 July 2022, the Corporate Debtor had failed to issue the counter bank guarantees in a format acceptable to the Applicant Financial Creditor. In any case, since the settlement had already failed, and the original debt (i.e. the debt prior to compromise talks) had become due (after adjusting for payments already received), the Corporate Debtor was now required to clear the outstanding dues of INR 20.47 crores (inclusive of accrued and penal interest as on 15 July 2022) being the fund based facility, as well as the non-fund based Bank Guarantees outstanding of INR15.63 crores as on the said date. The Corporate Debtor was informed of the same vide the Applicant Financials' letter dated 16th July 2022. The outstanding dues on account of fund based credit facilities are claimed on the basis of original outstanding amount as reduced by the amounts paid under settlement. In view of this, the Financial Creditor opposed the further extension of the time to de-risk the PBGs, and sought admission into CIRP.

4.6. It further submitted that, given the fact that the Financial Creditor is a public sector undertaking, it would not be possible for it to easily write off its debts (which had become due after the failure of the settlement process). Nonetheless, in deference to the suggestion made by this Hon'ble Tribunal, meeting were held by the Financial Creditor's officers with the representatives of the Applicant and its investor, Ravin Infraproject Private Limited.

5. Ravin Infraproject Private Limited filed an IA 1882/2022 on 3.7.2022, amongst others, to intervene in the matter and directions to the Financial Creditor to withdraw its letter dated 1.7.2022 on the ground that it has funded the Corporate Debtor and has provided counter-

guarantees from ICICI Bank to de-risk the PBGs issued by the Financial Creditor. It came in support of the Corporate Debtor on the issue of de-risking of outstanding PBGs.

Discussion & Findings

6. This bench heard the counsel and perused the material available on record in relation to present application and connected matters.

6.1. After going through the records, this bench finds, that there is no dispute that

(a) whole of settlement amount of Rs. 47.47 crores, within the extended settlement period, has been paid by the Corporate Debtor;

(b) De-risking of Bank Guarantee(s) as contemplated in the settlement agreement is still pending;

(c) the value of outstanding PBGs is Rs. 8.63 Crores as on date; and

(d) the Corporate debtor has offered 100% cash margin against such outstanding PBGs.

6.2. This Bench finds that the Sanction letter dated 27.09.2021 sanctioning the Settlement of Financial Creditor's dues provided at Clause XII that "*If for any reasons, the compromise amount, or any instalment, or de-risking of bank Guarantee, also agreed, is not received within scheduled period i.e., within 90 days from the date of acceptance of sanction letter, the Bank reserves the right to cancel the compromise settlement and entire dues of the Bank/Consortium as claimed in DRT/Court in the original application with interest and costs will become due for payment*."

Accordingly, the Financial Creditor issued a notice dated 01.07.2022 treating the compromises failed in terms of said clause. This bench finds that the clause IX further provides that "*No interest will be charged, if the Balance Compromise amount, after meeting off upfront of Rs. 1200 Crores, is paid within 90 days from the date of acceptance of sanction letter as per terms and conditions stated herein. In case Compromise failed/cancelled, the Bank will be at liberty to continue the legal action or other recovery remedies against us, for recovery of total dues with interest and incidental charges whatsoever. However, for future claims, interest rate applicable to CA (Current Account)/OD (Overdraft) will be charged in the account after 90 days i.e. from 31.12.2021 on the balance amount till payment of full compromise amount*." This bench is of the view that the terms of settlements itself had taken into account the future extensions, subject to payment of the interest as stipulated in clause XI.

6.2.1. Further, clause 1 under other terms and conditions provide that "*release of charges on all the mortgaged properties will be vacated and title deeds will be delivered subject to realization of the full and final payment as per the compromise agreement accordingly."*

6.2.2. This bench further notices that this bench had made it clear at para 6 of the order dated 26.05.2022, *that in the event of failure to abide by the above deadlines of payment/replacement of bank guarantees, the bench will have no option but to admit the company petition into CIRP*. It is also noted that this bench made it clear vide order dated 01.06.2022 that "*no further extension on any account will be allowed to the Corporate Debtor for replacement of the Bank*

Guarantees and in case the Corporate Debtor fails ion replacement of the Bank Guarantees to the satisfaction of the Financial Creditor, the Corporate Debtor will be admitted into CIRP".

6.3. It is the case of the Financial Creditor that the Corporate Debtor, having failed to comply with the terms of settlement, can not plead that the whole of the debt stands paid upon payment of Rs. 47.47 Crores i.e. the settlement amount alongwith interest on delayed payment in terms of this Tribunal's Order, as such settlement becomes void upon the non-compliance with the Settlement terms read with this Tribunal's earlier orders. It has further claimed the Corporate Debtor was duly informed on 1.7.2022 that it is liable to pay a sum of Rs. 20.47 crores as on that date, and whole of such amount not having being paid till, the Corporate Debtor is in default.

6.3.1. Per Contra, the Corporate Debtor has pleaded before this Bench, that whole of settlement amount of Rs. 47.47 Crores was paid within the period, extended by this Tribunal from time to time alongwith additional interest of INR 64 Lakh. Further, the non-compliance to settlement terms in the form of failure to de-risk the outstanding PBGs, which stood at INR15.63 crores as on 30.6.2022, was not attributable to the default on the part of the Corporate Debtor. Instead, the said failure occurred because of obstinate attitude of the Financial Creditor. It was also submitted that there has been no prejudice caused to the Financial Creditor due to the delay, if any, and on the contrary, the bank guarantee exposure of Financial Creditor has reduced substantially and non-release of securities, indirectly, de-risked such exposure. This is because, since the execution of the

Sanction Letter, the value of the Bank Guarantees that needed to be de-risked have reduced from INR 30.40 Crore to INR 8.63 Crore, on account of expiry/withdrawal of some of PBGs. Our attention was also drawn to one instance, where one of the Guarantee was invoked and the Corporate Debtor deposited the amount becoming payable on such invocation with the Financial Creditor within the permissible period, in accordance with the conditions of clause VII of the sanction letter.

6.3.2. The Financial Creditor drew our attention to Order dated 31.03.2022 & 26.05.2022 to contend that the said order(s) had categorically stated that, in the event of Corporate Debtor failing to de-risk the outstanding PBGs by 30.6.2022, it shall be admitted to CIRP as there exists debt, which is in default.

6.3.3. This Bench finds that, as on 30.6.2022, the whole of settlement amount was paid with the settlement period, as extended by this Tribunal from time to time, as well as the additional interest of Rs. 64 lacs in accordance with the terms of settlement sanction clause IX of the other conditions directions of this Tribunal to compensate the Financial Creditor for loss of interest because of extended period.

6.3.4. In relation to de-risking of outstanding PBGs as on 30.6.2022, which were also required to de-risked by that date to make the settlement effective, this Bench finds that the Corporate Debtor had offered to provide counter-guarantee from ICICI Bank & Kotak Mahindra Bank, subject to the Financial Creditor clarifying

whether it would release its security upon submission thereof. This Bench finds that the Financial Creditor, though dis-satisfied with the extension order(s) passed by this Bench, did not file an appeal against those orders. Accordingly, these extension orders, having attained finality at relevant point, extended the period of settlement, which any person of ordinary prudence will be made to believe. This Bench finds that the Corporate Debtor still holds the securities, and the same have not been released, thereby securing the outstanding PBGs sufficiently, which has the effect of de-risking the same.

6.3.5. It is noted that despite full and final payment of the settlement amount having been made before 31.05.2022 as well as the interest on the remaining outstanding during extended period before the extended date, but the financial creditor had failed on their part to release the securities held by it, as the release of those securities were not dependent on de-risking of the bank guarantees as the language of the settlement sanction letter suggests. Accordingly, these securities, having been retained after the payment of settled funded portion of credit facilities, further de-risk the outstanding PBGs as on 30.6.2020 i.e. the extended timeline.

6.3.6. This Bench finds that the Corporate Debtor filed another IA-1798/2022 seeking further enlargement in the time to submit the counter bank guarantees or replace the live PBGs with bank guarantees or give 100% cash margin towards the live PBGs, contending that after payment of the settlement amount in full, which also recorded by this Tribunal also in its order dated 01.06.2022, there

exists no debt. Further, the de-risking of Bank Guarantees can take place within such extended period, as this Tribunal grants. This Bench further finds that the Corporate Debtor has offered 100% cash margin for the total outstanding live bank guarantees i.e., INR 8.63 Crore. The said cash margin has been earmarked in the form of a fixed deposit ("FD"). This was communicated to the financial creditor vide letter dated 15.6.2023. This IA is also pending as on date.

6.3.7. This bench is of the view that admission u/s 7 of the Code as contemplated in its order dated 26.05.2022 and 01.06.2022 could take place only if there exists a debt in default. It is not in dispute that the Corporate Debtor had provided 13 Counter Guarantees, issued by ICICI Bank, amounting to Rs. 7.26 crores as against total outstanding of INR15.63 crores as on 30.6.2022, whjich came to be rejected on account of certain clause(s). Further, the Corporate Debtor again intimated the Financial Creditor on 27.09.2022 that the ICICI Bank has transmitted Counter Guarantees amounting to Rs. 15,62,64,943/-, the outstanding as on that date, but the Financial Creditor refused to accept the same on the ground that the settlement has failed on 30.6.2022.

6.3.8. The Corporate Debtor, under bona-fide belief that it will get further enlargement for de-risking of outstanding PBGs, as happened on earlier occasions also, have been in continuous effort to de-risk the PBGs issued by the Financial Creditor, even though none of it came to be invoked. In these circumstances, this Bench is of considered view that, the outstanding debt of Rs. 20.47 crores as on 30.6.2022 as claimed with the financial creditor, can not be

said to be an undisputed debt, even if, it is considered for the sake of argument that the settlement came to be failed on 30.06.2022 because of failure to de-risked the outstanding PBGs. This bench feels that, it cannot adjudicate the issue, whether the termination of settlement vide letter 1.7.2022, as pleaded by financial creditor, is valid or not?. Accordingly, even on this proposition, it can not be said there exist debt, which can be said to be in default at this juncture, even if the Financial Creditor may be held to be eligible to recover later on in such adjudication process.

6.4. This Bench put a question before the Counsel "*whether a live guarantee constitute debt; and if yes, whether it can be said that a default can exist in such case*".

6.4.1. The Corporate Debtor submitted that an uninvoked bank guarantee cannot not qualify as a "debt" under the IBC, or otherwise and therefore cannot give rise to a "default". Uninvoked bank guarantees are contracts which may give rise to a future debt i.e., once invoked by a beneficiary, honoured by the bank and followed by a failure on part of the promisee to pay the amount back to the bank. It is only on the occurrence of the aforementioned that there can be a demand for repayment and a cause of action can arise against in case of a default in repayment, for recovery and other proceedings against the promisee. Therefore, even assuming that there is any failure on part of Corporate Debtor to de-risk Financial Creditor's live guarantees, such a failure is not a failure to repay a debt and does not give rise to a default within the meaning of the IBC.

6.4.2. The Financial Creditor argued that this petition deserves to be admitted because of failure of the settlement and existence of financial debt in the form of original outstanding as reduced by the settlement amount paid.

6.4.3. This Bench finds that it was held in the matter of ***Ghanshyam Misra v. Edelweiss Asset Reconstruction Company Limited & Ors. [(2021) 9 SCC 657*** that "*since the corporate guarantee had not been invoked, the same could not have been accepted as a claim by the RP, thereby confirming the RP's rejection of a claim based on an uninvoked guarantee*." Further, the Hon'ble NCLAT in the case of ***IDBI Trusteeship Services Ltd. v. Abhinav Mukherjee [2022 SCC OnLine NCLAT 267]*** observed that an uninvoked Corporate Guarantee cannot be considered as a 'Matured Claim'.

6.4.4. This Bench further finds that during the pendency of IA-1798/2022, the Financial Creditor was holding all the securities and the amount of outstanding guarantees came down to Rs. INR 8.63 Crore. Further, these guarantees have been proposed to be de-risked by deposit of 100% cash margin in the form of a fixed deposit ("FD"), subject to release of securities by the Financial Creditor. This Bench also feels that the Corporate Debtor have been in continuous efforts to keep the Corporate Debtor going and honouring its financial commitments to the Applicant.

6.4.5. In the case of ***Swiss Ribbons Pvt. Ltd. & Anr vs. Union of India & Ors. {Writ Petition (Civil) No. 99 OF 2018},*** it was held that "*It can thus be seen that the*

primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors".

6.4.6. In the case of ***Anita Jindal Vs. M/s Jindal Buildtech Pvt. Ltd. through The IRP (2022) ibclaw.in 564 NCLAT 14***, it was held that **"***The Preamble of IBC is carefully worded to describe the spirit and objective of the Code to be 'Reorganisation' and 'Insolvency Resolution', specifically omitting the word 'Recovery'. The Parliament has made a conscious effort to ensure that there is a significant difference between 'Resolution' and 'Recovery'. The Hon'ble Supreme Court has time and again observed that the fundamental intent of IBC is 'maximising the value of assets' in the process of 'Resolution'. In* ***'Mobilox Innovations Private Limited' Vs. 'Kirusa Software Private Limited', (2018) 1 SCC 353****, the Hon'ble Apex Court has examined in detail the United Nations Legislative Guide on Insolvency, in which the IBC finds its roots. Any Application to commence CIRP can be denied when the Creditor is using Insolvency as an inappropriate substitute for Debt Recovery Procedures. If IBC is purely used for the purpose of Debt Recovery, particularly when the amounts due are small, and the Company is a solvent entity and is a going concern, the question of 'Reorganising' or 'Resolution of the Company' does not arise. This Tribunal in* ***'Binani Industries Limited' Vs. 'Bank of Baroda & Anr.',***

***Company Appeal (AT) (Ins.) No. 82 of 2018**, has differentiated between 'Recovery' and 'Resolution' and has observed that IBC is not a Recovery Proceeding. 'Recovery' dispossesses the 'Corporate Debtor' of its assets while a Resolution is an effort to keep it afloat*".

6.5. In view of the above, this Bench feels that the original outstanding, as claimed to be due and payable on failure of settlement, cannot be said to be an undisputed liability at this juncture. Further, the offer of 100% cash margin demonstrates the bona fide on the part of Corporate Debtor.

6.6. In view of the forgoing, this Bench feels that the insistence of the Financial Creditor for admission of Corporate Debtor into CIRP at this juncture is not in accordance with the spirit and intent of the Code. Accordingly, present application deserves to be **dismissed**.

6.7. In view of this petition having been dismissed, IA-1798/2022 & IA-1882/2022 IN C.P. (IB)/361(MB)2021 are rendered **infructuous**. We clarify that the discussion and findings in the present order shall not be construed our observations on the prayer for further enlargement of time period in IA-1798/2022, as the issue of enlargement is not dealt by us in view of disposal of present petition at its own merits on the facts and circumstances of the case.

Sd/- Sd/-

Prabhat Kumar **Kishore Vemulapalli**
Member (Technical) **Member (Judicial)**
18.07.2023