IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH-VI

IA (I.B.C.) No. 3926/MB/2022

in

CP (IB) No.1111/MB/2022

[Under Section 60(5) of the Insolvency and Bankruptcy Code, 2016]

Future Corporate Resources Private Limited
[CIN: U74140MH200TPTC175603]
Registered Office: Knowledge House, Shyam Nagar
Off Jogeshwari – Vikharoli Link Road, Jogeshwari (East)
Mumbai – 400060.

…Applicant/Corporate Debtor

V/s

Central Bank of India
[PAN NO.-AAACC2498P]
Registered Office: Central Bank of India Corporate Finance Branch
1st Floor, MMO Building, M.G. Road, Fort
Mumbai – 400001.

...Respondent/Financial Creditor

IN THE MATTER OF:

Central Bank of India … Financial Creditor

V/s

Future Corporate Resources Private Limited … Corporate Debtor

Pronounced: 05.09.2024

CORAM:
HON'BLE SHRI K. R. SAJI KUMAR, MEMBER (JUDICIAL)
HON'BLE SHRI SANJIV DUTT, MEMBER (TECHNICAL)

Appearances: Hybrid

Applicant: Sr. Adv. Gaurav Joshi, a/w. Adv. Ankit Lohia, Tanisha Chaudhary, Adv. Petrushka Dasgupta, Adv. Krishna Baruah, Adv. Devdatta Uchil, Adv. Ankita Yadav, and Adv. Harsh Moorjani i/b Link Legal.

Respondent: Adv. Amir Arsiwala a/w. Adv. Abdullah Qureshi, Adv. Shradha Patil i/b India Law LLP.

ORDER

IA (I.B.C.) No. 3926/MB/2022

[PER: K. R. SAJI KUMAR, MEMBER (JUDICIAL)]

1. BACKGROUND

1.1 This Interlocutory Application bearing IA (I.B.C.) No. 3926/MB/2022 was filed on 29.12.2022 by Future Corporate Resources Private Limited, the Applicant/Corporate Debtor (CD) under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 (IBC). This Applicant/CD is the corporate guarantor to Iskrupa Mall Management Company Private Limited., which is the Principal Borrower to a loan granted by the Respondent/Financial Creditor (FC). This IA challenges maintainability of CP (IB) No. 1111/MB/2022 (Main Application), filed under Section 7 of the IBC read with Rule 4 of Application to Adjudicating Authority Rules (AAA Rules) by the Respondent/FC, on the ground, *inter alia,* that it is barred under Section 10A of IBC and that there are parallel proceedings arising out of the same debt. The alleged amount of financial debt claimed to be in default is Rs. 72,32,17,258.14/- (Seventy-Two Crores Thirty-Two Lakhs Seventeen Thousand Two Hundred and Fifty-Eight

Rupees and Fourteen Paise only) as on 29.05.2022, along with interest and other charges and the date of default is stated to be 31.03.2022 under One-Time Restructuring (OTR).

1.2 The Principal Borrower had approached the Respondent/FC and requested financial facilities. Consequently, the Respondent/FC granted credit facility to the Principal Borrower by Sanction Letter dated 19.09.2015. Pursuant to this, the Applicant/CD entered into Term Loan Agreement dated 24.09.2015 with the Principal Borrower. The said facility was duly guaranteed by the Applicant/CD by Deed of Guarantee executed on the same date.

1.3 Thereafter, a default was committed by the Principal Borrower on 30.09.2020 and it requested the Respondent/FC for an OTR under the 'Resolution Framework for COVID-19 Related Stress' announced by the Reserve Bank of India (RBI) *vide* its Circular dated 06.08.2020 (RBI COVID-19 Circular). The OTR was approved on 19.06.2021, pursuant to which the Principal Borrower entered into a Restructuring Agreement with the Respondent/FC on 21.06.2021. Simultaneously, the Applicant/CD executed Deed of Guarantee dated 21.06.2021. However, the Principal Borrower failed to honour its obligation to repay the principal and interest due on 31.03.2022 under the OTR and its loan account was classified as Non-Performing Asset (NPA) on 30.04.2022. Subsequently, the Respondent/FC sent demand notices dated 04.05.2022 and 06.06.2022 to the Principal Borrower and its Guarantors, including the Applicant/CD, to which the Principal Borrower

replied on 07.06.2022 seeking time to repay the dues. This led to the Respondent/FC filing the Main Application under Section 7 of the IBC before this Tribunal, against the Applicant/CD. The Main Application which was pending before Bench-V of this Tribunal got transferred to this Bench on 19.01.2024 in TA(IBC)-55(PB)/2023, as per orders of the Hon'ble President, NCLT. The Main CP and this IA were first listed before us on 16.02.2024.

1.4 While so, the Applicant/CD approached the Hon'ble High Court of Bombay in Writ Petition (L) Nos. 25350/2023 & 27363/2023 and obtained a common order dated 15.02.2024, stating that this Tribunal may adjudicate, at the first instance, the IA filed by the Applicant/CD challenging maintainability of CP(IB) No. 1111/2022 (Main Application) on the ground of Section 10A of the IBC. We, therefore, took up this IA for consideration and disposal before passing final orders in the Main Application.

2. CONTENTIONS OF APPLICANT/CD

2.1 The Applicant/CD has filed this IA challenging the maintainability and seeking dismissal of the Main Application, *inter alia*, on the ground that as a secured creditor, the Respondent/FC cannot be allowed to file proceedings for the insolvency of the Principal Borrower, the purported Corporate Guarantors and Personal Guarantors. The Respondent/FC cannot be permitted to pursue the Main Application since it has also filed applications against the Principal Borrower and another Corporate Guarantor, viz., Ojas Tradelease & Mall Management Private Limited under Section 7 as well as the Personal

Guarantors under Section 95 of the IBC for enforcement of the same debt. The Respondent/FC is admittedly a secured creditor and the debt is fully secured by outsized securities and the Principal Borrower is fully capable of repaying the debt upon monetizing its assets. In fact, without prejudice, One-Time Settlement (OTS) was also submitted to the Respondent/FC by the Principal Borrower thrice on 29.06.2022; 18.11.2022; and 23.11.2022.

2.2 Further, pursuant to the RBI COVID-19 Circular, the Respondent/FC claims to have sanctioned the OTR Plan by its letter dated 19.06.2021. The Applicant/CD submits that the RBI COVID-19 Circular provides for all the norms applicable to the implementation of a resolution plan, including the mandatory requirement of Inter-Creditor Agreements (ICA) and specific implementation conditions as laid out in earlier directions of the RBI, *viz*, RBI (Prudential Framework for Resolution of Stressed Assets) Directions, 2019 dated 07.06.2019. However, in terms of Clause 48 of the RBI COVID-19 Circular, if the Principal Borrower was in default at the end of review period under the OTR, the only effect was that the asset classification of the Principal Borrower would be downgraded to NPA from the date from which the Applicant was initially classified as NPA. Further, as per Clause 22 of RBI COVID-19 Circular, where any of the timelines are breached at any point, the resolution process would cease to apply immediately in respect of the concerned borrower and, hence, it should be regarded as if the Restructuring Agreement was never invoked. According to the Applicant/CD, the OTR failed on 31.03.2022 as the Principal Borrower failed to repay the first installment

covered under the OTR. Hence, the date of default should not change in the event of failure of the resolution plan under the above clauses of the RBI COVID-19 Circular. Since the OTR has failed, the actual date of default should be taken only as 29.12.2020, when its account was actually declared NPA which falls under Section 10A period.

2.3 Moreover, the Information Utility's (IU) record of default also records the date of default as 29.12.2020. Hence, the default date, i.e., 31.03.2022, as claimed by the Respondent/FC in the Main Application is incorrect.

2.4 The claim of the Respondent/FC is hit by Section 10A of IBC. The date of default includes and accounts for the default during the period from 25.03.2020 to 25.03.2021. The transactions shown are all of the period covered under Section 10A of IBC and the claim includes penal interest from the insolvency prohibited period. The Main Application is, therefore, filed for default arising during the said period. In view of the admitted pleadings of the Respondent/FC itself, the first date of default in the Applicant's case was on 30.09.2020, which is within the prohibited period in terms of Section 10A. According to the Applicant/CD, the Respondent/FC itself has admitted that the first default in repayment of the debt occurred on 30.09.2020 and hence the default amount squarely fell under Section 10A period.

2.5 It is the Applicant's case that the Respondent/FC in the Main Application disingenuously stated the date of default as 31.03.2022 to escape the restrictions imposed by Section 10A of IBC. For a default covered under Section 10A period, no application to initiate CIRP could ever be filed. Hence,

the Respondent/FC could avail of other remedies for realisation of default. It is submitted that as per the terms of the Deed of Guarantee dated 24.09.2015 executed by the Applicant/CD for the facility sanctioned to the Principal Borrower, the liability of the Guarantor is co-extensive. Therefore, in case of default by the Principal Borrower, the Guarantor will be liable from the same date. Consequently, given the Respondent/FC's case that the Principal Borrower defaulted on 30.09.2020, the Applicant/CD's date of default would also be 30.09.2020, which is covered under Section 10A of IBC.

2.6 The Respondent/FC has further stated that since the Applicant/CD failed to comply with the OTR Plan, the concessions pertaining to the OTR scheme have been withdrawn. It is also admitted that the dues have been reversed to the amount due prior to the sanction of OTR. In other words, the dates of default are as per the pre-OTR period. Before the filing of the Main Application, the Respondent/FC, *vide* notice dated 06.06.2022, sought repayment of loans. Even in that notice, the Respondent/FC stated that the Applicant/CD's account had been classified as an NPA on 30.04.2022 (on account of continuous default for 30 days of the cure period from the date of the first default).

2.7 According to the Applicant/CD, in the event there is a default under the Restructuring Agreement, the resolution plan will cease to apply, and the resolution plan will not be applicable, as if the same was never invoked under Clauses 22 and 48 of the RBI COVID-19 Circular. It is contended that the execution of OTR/Restructuring Agreement does not novate the earlier loan

agreements and hence, the Applicant/CD has a right to be protected under Section 10A of the IBC.

2.8 The RBI Circular is, in fact, a beneficial measure introduced by the Central Government to facilitate businesses suffering from the effect of COVID-19 and it cannot be said to have an overriding effect over Section 10A, which is a statute. In view of the above, the Main Application deserves only dismissal.

3. CONTENTIONS OF RESPONDENT/FC

3.1 The Respondent/FC states that law permits it, being a Creditor, to pursue simultaneous proceedings against the principal borrower and its guarantors. Section 128 of the Indian Contract Act, 1872, stipulates that liability of guarantor shall be co-extensive with that of the principal debtor. As per Clause 1 of the Deed of Guarantee dated 21.06.2021 executed between the Applicant/CD and the Respondent/FC, the Applicant/CD's liability is defined as that of the Principal Debtor. Further, the Report of the Insolvency Law Committee, February 2020, under Chapter 7, also recommended that a creditor is at liberty to proceed against either the debtor, the surety, or both. Hence, it is justifiable for the Respondent/FC to initiate action against both the Principal Borrower and the Applicant/CD under Section 7 of the IBC.

3.2 The Respondent/FC has no intention to suppress any material information from the Tribunal. There is no provision under IBC or specific column in Form-1 of the AAA Rules requiring a financial creditor to disclose list of all proceedings initiated against the Principal Borrower or guarantors for the same debt. Similarly, the OTS Proposals were given by the Applicant/CD

after the Main Application had already been filed, and, accordingly, the same could not be brought to the notice of the Tribunal. Therefore, the Applicant/CD's allegation that the Respondent/FC suppressed material facts by not informing the Tribunal about the other four proceedings lacks merit.

3.3 The Main Application is not hit by Section 10A of the IBC as liability of the Applicant/CD arises from the Deed of Guarantee dated 21.06.2021, which was executed well after the period of prohibition under Section 10A of the IBC came to an end. The default date is to be determined as 31.03.2022, the date on which the terms of the OTR were breached by the Applicant/CD. Their claim that the NPA date i.e., 29.12.2020 should be taken as the date of default, i.e., three months after the first default committed by them on 30.09.2020, is incorrect as the Respondent/FC has not taken the NPA date (29.12.2020) as date of default. Instead, they have taken 31.03.2022 as the date of default when the Applicant/CD failed to make payment of the first tranche of the Structured Quarterly Instalment (SQI) under the OTR requested by them and as allowed by the Respondent/FC in terms of the RBI COVID-19 Circular. According to the Respondent/FC, Clause 48 of the Annex to the RBI COVID-19 Circular, does not alter the date of default when the Applicant/CD failed to make payment of the first SQI.

3.4 The liability of the Applicant/CD, being a guarantor, arises only from the date of invocation of guarantee which is the “date of default” in the instant matter. Even in the case of the Principal Borrower, Section 10A does not apply, as the default date is determined to be 31.03.2022, the date on which the terms

of the OTR were breached. The Principal Borrower's default occurred under the restructuring done pursuant to the OTR proposed by the Principal Borrower. The Restructuring Agreement was entered into on 21.06.2021, by the Respondent/FC, the Principal Borrower and the Axis Bank Ltd. This resulted in the novation of the transaction/agreement between the parties. The Applicant/CD executed a fresh Deed of Guarantee on 21.06.2021, agreeing to act as surety and to be liable for payment under the OTR by the Principal Borrower. The Principal Borrower failed to pay the first instalment due and payable under the OTR on 31.03.2022, which constituted a "default". The Respondent/FC issued letter dated 06.06.2022 to the Applicant/CD invoking the guarantee provided by it under the Deed of Guarantee dated 21.06.2021.

3.5 Regarding the contention that the debt owed by the Principal Borrower is fully secured by outsized securities executed in favour of the Respondent/FC, it is submitted that the primary security is a first charge *vide* Deed of Hypothecation dated 21.06.2021, covering all tangible assets created from the term loan and all receivables of the Principal Borrower, excluding Lease Rental Discounting (LRD) receivables, for which the Principal Borrower has obtained a loan from the Axis Bank Ltd. The tangible assets were valued at Rs. 70.29 Crore and the receivables at Rs. 56.04 Crore as per the Audited Balance Sheet of the Principal Borrower as of 31.03.2020. According to the Audited Balance Sheet for FY 2020-2021, the value of tangible assets has reduced from Rs. 70.29 Crore to Rs. 69.97 Crore

(including capital work in progress of Rs.69.49 Crore), and the value of receivables from Rs. 56.04 Crore to a mere Rs. 2.26 Crore. Therefore, the primary security may prove insufficient to meet the dues owed to the Respondent/FC.

3.6 There is only one collateral security in the form of a mortgage on the immovable property located at “Acropolis Mall”, Thatlej, Ahmedabad owned by the Principal Borrower. The Respondent/FC holds a second charge over the said mortgaged property while the first charge is held by IDBI Trusteeship Services Limited (ITSL). ITSL has filed Commercial Suit (L) No.18692 of 2022 against the Applicant/CD before the Hon’ble Bombay High Court on 14.06.2022 for its outstanding dues. The dues of ITSL are around Rs.401 Crores, whereas the value of the mortgaged property is only around Rs.248 Crore. Therefore, the value of the mortgaged property is not sufficient to cover the very dues of ITSL, the first charge holder.

3.7 It is submitted that the Respondent/FC in its commercial wisdom has chosen not to proceed with the OTS proposal because the Applicant has not deposited the required amount stipulated in the settlement proposal as a commitment towards the OTS proposal up to the date of filing the Affidavit in Reply. Further, the Respondent notified the Applicant *via* Letter dated 05.01.2023 to deposit token amount of 10% of the total outstanding debt, amounting to Rs. 5.63 Crore. However, the Applicant has only deposited a sum of Rs. 1 Crore out of the total upfront payment of Rs. 5.63 Crore as committed. Consequently, the Respondent informed the Applicant *vide*

Letter dated 13.01.2023 that the OTS proposal could not be proceeded with due to non-compliance with the agreed terms. The Principal Borrower and its Guarantors including the Applicant are part of the Future Group of Companies which are currently facing severe financial stress. The Respondent/FC in its commercial wisdom has only enforced its rights under IBC and done nothing against the legislative intent of IBC.

3.8 Clause 22 of the Regulation Framework, as brought to attention by the Applicant/CD, states that the failure of the OTR results in the account being dealt with under the original Prudential Framework dated 07.06.2019 instead of the RBI COVID-19 Circular as if the restructuring was never undertaken. Nothing in Clause 22 can be said to render the OTR void in case of its default. It is absurd to contend that the Principal Borrower can take advantage of its default on repayment under the OTR and then plead that its own act of default renders the OTR void.

4. ANALYSIS AND FINDINGS

4.1 At the outset, we note that the Hon'ble Bombay High Court *vide* common order dated 15.02.2024 passed in Writ Petitions (L) Nos. 25350/2023 & 27363/2023, stated that this Tribunal may adjudicate, at the first instance, the IAs filed challenging maintainability of CP(IB) No. 865/2022 and CP(IB) No. 1111/2022 on the ground of Section 10A of the IBC. The Writ Petitions were filed, among others, by Future Corporate Resources Private Limited, the Corporate Guarantor, (Applicant/CD herein), which is also corporate guarantor to another Principal Borrower, viz., Syntex Trading & Agency

Private Limited. We heard the Ld. Counsel for the Applicant/CD and the Respondent/FC and also carefully perused the documents and materials available on record including written submissions by both parties.

4.2 Section 128 of the Indian Contract Act, 1872, stipulates that liability of the surety is co-extensive with that of the principal debtor, unless otherwise provided by the contract. It is also settled that parallel proceedings under Section 7 of IBC can be initiated by a financial creditor against the principal borrower as well as the guarantors. Section 60(2) of the IBC also provides for simultaneous proceedings against both the Principal Borrower and the Corporate/Personal Guarantors before the same NCLT. A creditor is not bound to first exhaust remedy against the principal debtor before initiating proceedings against the surety. The Hon'ble Supreme Court in *Laxmi Pat Surana Vs. Union Bank of India & Anr.* [(2021) 8 SCC 481] reiterated that CIRP can be initiated simultaneously against the principal borrower and the corporate guarantors. Therefore, the contention of the Applicant/CD that the Respondent/FC has no right to initiate action against the Principal Borrower and the Applicant/CD is legally unsustainable and is accordingly rejected.

4.3 Now, let us consider the issue as to whether the Respondent/FC, being a secured creditor, is barred from filing proceedings for insolvency of the Principal Borrower or the Applicant/CD, so long as it satisfies the pre-requisite of Section 7 of IBC. We find that there is no provision in the IBC barring a creditor from initiating insolvency proceedings against the Principal Borrower solely on the ground that it is a secured creditor. There is no legal

compulsion or prohibition that a secured creditor must first enforce the securities in its favour before taking recourse to the legal remedies available under the IBC. Therefore, the contention of the Applicant/CD on this count is misconceived and, accordingly, dismissed.

4.4 Further, we do not find any merit in the Applicant/CD's contention that the Respondent/FC should not invoke provisions under Section 7 of the IBC, when the security is sufficient to realise the outstanding debt. As already settled, the twin requirements of Section 7 of IBC are existence of financial debt exceeding the prescribed monetary threshold coupled with default in repayment thereof. We notice that the first charge holder of the mortgaged property given as security by the Principal Borrower is IDBI Trusteeship Services Ltd. (ITSL), while the Respondent/FC is the second charge holder and the value of the mortgaged property does not appear to be sufficient to cover the dues of even the former so that nothing would be left to be distributed to the latter. In any case, the present proceedings before this Tribunal is for initiating CIRP under IBC and not for recovery. Hence, we are not inclined to deal with this as an issue as raised by the Applicant/CD.

4.5 Finally, it is proposed to examine whether the claim of the Respondent/FC in the main Application qua the Applicant/CD is hit by the provisions of Section 10A of IBC, as strongly pleaded and argued on behalf of the Applicant/CD. It is considered imperative to reiterate the relevant facts pertaining to this issue. It is undisputed and indisputable that the Principal Borrower, (Iskrupa Mall Management Company Private Limited) had availed of Term Loan

Facility from the Respondent/FC *vide* Sanction Letter dated 19.09.2015, with the Applicant/CD standing as surety; and is in default of more than One Crore Rupees, making it liable to undergo CIRP under Section 7 of the IBC, as has been brought out in evidence from the pleadings in the Main Application as well as in this IA.

4.6 However, the Principal Borrower committed default in repayment of the loan on 30.09.2020 and its loan account was classified as NPA on 29.12.2020. The Principal Borrower approached the Respondent/FC for OTR under the RBI COVID-19 Circular dated 06.08.2020. The OTR proposal was approved by the Respondent/FC *vide* Sanction Letter dated 19.06.2021. Thereafter, the Restructuring Agreement dated 21.06.2021 was executed by the Principal Borrower with its two Lenders, viz., the Respondent/FC and Axis Bank Ltd. Pursuant thereto, the Applicant/CD in its capacity as Corporate Guarantor executed a Deed of Guarantee dated 21.06.2021, i.e., much later than the prohibition period under Section 10A came to an end on 25.03.2021. However, the Principal Borrower failed to honour the debt obligations even under the OTR and defaulted in repayment of principal and interest which fell due and payable on 31.03.2022. On account of continuous default for 30 days therefrom, the loan account of the Principal Borrower slipped to NPA on 30.04.2022. The Respondent/FC sent default notice dated 04.05.2022 to the Principal Borrower and its guarantors and called upon the Principal Borrower to clear all outstanding dues immediately together with applicable interest, etc. Further, demand notice dated 06.06.2022 was addressed to

both the Corporate Guarantors including the Applicant/CD calling upon them to unconditionally pay the unpaid debt in default in full within 14 days from the date of receipt of the said letter failing which CIRP under the Code would be initiated against them.

4.7 It emerges from the facts of the matter that the Principal Borrower committed its first default on 30.09.2020. The Applicant/CD contends that since its liability is co-extensive with that of the Principal Borrower, as per the terms of the Deed of Guarantee dated 24.09.2015, the date of default in case of the Applicant/CD would also be 30.09.2020, which is covered under Section 10A, and hence, the Main Application is not maintainable. There is no doubt that a corporate guarantor's liability is co-extensive with that of the primary borrower but whether the date of occurrence of default in case of the primary borrower as well as the corporate guarantor would be the same depends on the terms of guarantee. It is well settled that the loan agreement between Respondent/FC and Principal Borrower and Deed of Guarantee between Respondent/FC and Applicant/CD are two different transactions/contracts and Applicant/CD’s liability has to be read from the Deed of Guarantee. The liability of the primary borrower arises in terms of the loan documents whereas the liability of the corporate guarantor arises under the terms of the deed of guarantee which is a separate contract. There is nothing in law that suggests that default of the corporate guarantor would arise on the same date on which the principal borrower commits default irrespective of the terms of the relevant loan agreement and guarantee deed. It is well-settled

that the liability of the guarantor depends on the terms of his contract, as held by the Hon'ble Supreme Court in *Syndicate Bank Vs. Channaveerappa Beleri & Ors.* [(2006) 11 SCC 506]. A perusal of the Deed of Corporate Guarantee dated 24.09.2015, executed between Applicant/CD and the Respondent/FC reveals that the said guarantee was *payable on demand* (Clause 1) and any such demand made by the Respondent/FC *on the guarantor* was to be *final, conclusive and binding* (Clause 2). In order to give effect to the guarantee, the Respondent/FC was entitled to act *as if the guarantor were Principal Debtor* to the Respondent/FC for all payments guaranteed by it (Clause 8). The Guarantee was a *continuing* one and was *irrevocable* (Clauses 10 and 13). Similarly, the Deed of Guarantee dated 21.06.2021 executed pursuant to the OTR is also an *unconditional*, irrevocable and continuing guarantee from the guarantor in favour of the Respondent/FC. The Respondent/FC has relied on the judgments of the Hon'ble NCLAT in *Pooja Ramesh Singh Vs. State Bank of India & Anr.* [Company Appeal (AT)(Ins.) No.329 of 2023] and *IDBI Trusteeship Services Ltd. Vs. Direct Media Distribution Ventures Pvt. Ltd.* [Company Appeal (AT)(Ins) No.850 of 2023], wherein it has been held that in case of on-demand guarantee deed, the default of the guarantor shall arise only when demand notice is issued as contemplated in the deed of guarantee. In view of the above, it follows that the liability of the Applicant/CD did not arise when the Principal Borrower defaulted in repayment of outstanding debt but only when the Respondent/FC invoked the guarantee and demanded full

payment of the unpaid debt in default. In other words, default by Applicant/CD cannot be said to have occurred on 30.09.2020, when the Principal Borrower committed default. Nor can the default at the end of the Applicant/CD be said to have been committed on 29.12.2020 when the loan account of the Principal Borrower was declared as NPA.

4.8 We hold that having accepted the OTR and acted upon the same, the Principal Borrower cannot now go back and say that the resolution plan did not materialise under the RBI COVID-19 Circular and that the OTR failed due to their own default in payment of the very first SQI. The Applicant/CD is estopped from taking such a stand and is barred under the doctrine of estoppel.

4.9 As regards the contentions raised by the Applicant/CD based on Clauses 22 and 48 of the RBI COVID-19 Circular dated 06.08.2020, it is pertinent to mention that the Applicant/CD has referred to aforesaid Clauses only in its written submissions/oral arguments and the same were not pleaded in the IA. Moreover, Clause 22 says that any resolution plan implemented in breach of stipulated timelines shall be fully governed by the Prudential Framework dated 07.06.2019 rather than the RBI COVID-19 Circular. In other words, it makes no mention of any “default under the Restructuring Agreement” as contended by the Applicant/CD and thus the Applicant/CD’s reliance on Clause 22 is misplaced and misconstrued and its plea based thereon is accordingly dismissed.

4.10 Regarding the Applicant/CD's contentions based on Clause 48 of the RBI COVID-19 Circular, it is observed that it was considered by the Hon'ble NCLAT in *Pradeep Madhukar More, Suspended Director of Syntex Trading & Agency Pvt. Ltd. Vs. Central Bank of India* [Company Appeal (AT) (Ins) No.837 of 2023] that Clause 48 is only to be read with regard to downgrading of asset classification of borrower to NPA for the relevant date and is not relevant to find out the event of default, which occurred under the OTR/Restructuring Agreement and which is the foundation of Section 7 Application. Clause 48 is intended to effect the downgrade of asset classification of the borrower to NPA pursuant to default so that the reliefs and concessions granted to the borrower under the OTR can be withdrawn. It is apparent that this clause has no applicability in the Applicant/CD's case and is instead applicable in the case of the Principal Borrower which committed the default under the OTR. It needs to be borne in mind that the RBI Covid Circular cannot override the provisions of the Code. Further, Clause 48 deals only with the consequence of default by a borrower under OTR for the limited purpose of asset classification of such borrower in the records of all lenders. We find that there is nothing in Clause 48 to even remotely suggest that in the event of default under the OTR, the Restructuring Agreement itself will cease to apply or will become invalid or void.

4.11 It is found that the Restructuring Agreement dated 21.06.2021 constituted the entire Agreement between the parties concerning the outstanding loans

and Funded Interest Term Loan (FITL) (which was disbursed only under the OTR) and modified all previous agreements in relation thereto. Further, it was only the Restructuring Agreement which was to govern the events of default in payment of any installment of principal amount or interest under the loans and FITL and consequences thereof. Since the default in repayment of principal and interest on Term Loan and FITL due as on 31.03.2022 has taken place under the OTR, the said Restructuring Agreement will prevail with full force and the same cannot be wished away or negated nor can the OTR be said to have been rendered void, as contended by the Applicant/CD.

In the present case, the Respondent/FC does not seek change of date of default in Part-IV of the present Application but clearly states that the date of default is 31.03.2022 on the basis of a subsequent default under the OTR. The Ld. Sr. Counsel for the Applicant/CD brought to our notice Clause 22 of the RBI COVID-19 Circular which reads that:

> *"If any of the above timelines are breached at any point, the resolution process ceases to apply immediately in respect of the borrower concerned. Any Resolution Plan implemented in breach of the above stipulated timelines shall be fully governed by the Prudential Framework, or the Relevant Instructions as applicable to specific category of lending institutions where the Prudential Framework is not applicable, as if the resolution process was never invoked under this Framework."*

4.12 According to him, the expression "as if" only implies that the resolution plan under RBI COVID-19 Circular was never invoked as the plan failed. And hence, the legal proposition emerging from the cases *Rajasthan State Industrial Development and Investment Corporation and Another Vs. Diamond & Gem Development Corporation Limited and Another,* [(2013) 5 SCC 470]; *Hindustan Cooperative Housing Building Society Limited Vs. Registrar, Co-Operative Societies and Anr.,* [(2009) 14 SCC 302]; and *J.K. Cotton Spinning and Weaving Mills* Vs. Union of India, *[1987 (Supp) SCC 350]* would apply. However, Clause 22 does not make mention of any default under the Restructuring Agreement as argued by the Ld. Sr. Counsel for the Applicant/CD. It is well-settled that the phrase "*as if*" creates a legal fiction which should be deemed to be in existence only for the limited purpose for which it was created. However, this does not mean that the legal or deemed fiction can be applied in such a manner and to such an extent as to draw far-fetched and implausible inferences or conclusions like the one drawn by the Ld. Sr. Counsel, especially when the resolution plan under the RBI COVID-19 Circular failed due to the default committed by the Applicant/CD itself. Hence we respectfully disagree with this proposition.

4.13 The Applicant/CD contended that the report of IU also suggests record of default as 29.12.2020 and hence, the date of default is only to be construed as the said date. However, we hold that IU record is not the only record that establishes date of default. The date of default is to be determined by the Adjudicating Authority based on the documents available on record. There is

sufficient evidence to show that the Applicant/CD has defaulted in payment of the agreed first instalment of the SQI, under the OTR, which is more than One Crore Rupees. Moreover, the Hon'ble NCLAT, New Delhi in *Vijay Kumar Singhania Vs. Bank of Baroda & Anr.,* [Company Appeal (AT) (Insolvency) No. 1058 of 2023] held that the record of default recorded with the IU is not the only document which has to be furnished by a financial creditor and a financial creditor is at liberty to submit any other record under Section 7 of the IBC. This view has now been upheld by the Hon'ble Supreme Court in *Vijay Kumar Singhania Vs. Bank of Baroda & Anr.,* [Civil Appeal No. 9299 of 2024] *vide* order dated 14.08.2024. Here is a case where record of default is available otherwise than IU record for us to determine the existence of default by the Applicant/CD.

4.14 Now let us consider the nature and object of RBI COVID-19 Circular. It is one of the measures taken by various authorities to mitigate the ill-effects of COVID-19 Pandemic such as *Suo Motu* Writ Petition(C) 3 of 2020 by the Hon'ble Supreme Court; enhancement of the threshold of default from Rs. 1 Lakh to Rs. 1 Crore to trigger IBC *vide* notification dated 24.03.2020 by the Ministry of Corporate Affairs, Government of India; the Ordinance promulgated by the Hon'ble President to introduce Section 10A into the IBC, which later became an Act of the Parliament, etc. However, the above measures never altered or intended to alter the concept of "default" as defined under Section 3(12) of IBC. Paragraph 2 of the RBI COVID-19 Circular categorically states that the economic fallout on account of COVID-

19 pandemic and the resultant stress could potentially impact the long-term viability of many firms, otherwise having good track record due to their debt burden becoming disproportionate relating to their cash-flow generation abilities. It was issued by RBI to the lending institutions to ensure that the resolution under the framework was extended only to borrowers having stress on account of COVID-19. The lending institutions were required to assess the viability of their resolution plan subject to prudential boundaries in terms of the Annex to RBI COVID-19 Circular. In view of the above, we hold that RBI COVID-19 Circular is a non-statutory, regulatory framework by RBI to support borrowers affected by COVID-19 Pandemic and to avoid more corporates slipping into insolvency, which would have otherwise created havoc in the country's economy. A plain reading of the RBI COVID-19 Circular makes it abundantly clear that it was issued for a principle-based resolution framework for addressing borrower defaults, in continuation of the earlier measures taken by the RBI. In view of the above, we are of the considered view that the regulatory RBI COVID-19 Circular cannot override or eclipse the statutory provision relating to "default" as defined in Section 3(12) of IBC. Hence, the Respondent/FC is justified in taking 31.03.2022 as the date of default which occurred due to the non-payment of the agreed first SQI by the Applicant/CD under the OTR.

4.15 It is well-settled that the provisions of the IBC must be given a purposive interpretation in order to serve the objective of the IBC. An interpretation which defeats the very purpose or objective of the IBC or renders it nugatory

and otiose has to be avoided. If the interpretation sought to be given by the Applicant/CD on the above Circular is accepted, a defaulter corporate debtor would stand to derive undue advantages – having already committed a default under the original loan documents, it once again commits default under the terms of the OTR and above all, would also manage to escape the consequences of default of financial debt seeking shelter under the provisions of Section 10A of the IBC because all such OTRs sanctioned under the RBI COVID-19 Circular would involve defaults occurring during the period covered by Section 10A. In view of the foregoing, the Respondent/Financial Creditor is justified in taking 31.03.2022 as the date of default which occurred due to the non-payment of the agreed SQI by the Applicant/CD under the OTR.

4.16 The Applicant/CD contended that they had submitted a new OTS proposal on 29.06.2022 and again on 23.11.2022 to the Respondent/FC. However, the Respondent/FC notified the Applicant/CD by letter dated 05.01.2023 that the Applicant/CD must deposit a token amount of 10% of the settlement offer, amounting to Rs.5.62 Crore. However, since the Applicant/CD has only deposited the token amount of Rs. 1 Crore out of Rs. 5.62 Crore, the Respondent/FC informed the Applicant/CD by Letter dated 13.01.2023 that the OTS proposal cannot proceed due to non-compliance with the stipulated terms. The Respondent/FC in its commercial wisdom has chosen not to proceed with the OTS proposal at this stage. Hence, we hold that this is not a ground for allowing this IA.

4.17 It is noticed from the record that the Respondent/FC issued Demand Notice to the two Corporate Guarantors including the Applicant/CD on 06.06.2022 calling upon them to unconditionally pay the total outstanding dues within 14 days from the date of receipt of the said notice, which the Applicant/CD failed to do. It is a matter of record that no such Demand Notice was sent to the Applicant/CD at the time of original default occurring on 30.09.2020. Therefore, it is crystal clear that 30.09.2020, cannot be treated as the date of default in the case of the Applicant/CD. As a matter of fact, the actual default by the Applicant/CD would arise only upon non-payment of the amount due after the expiry of 14 days from 06.06.2022, being the date of Demand Notice i.e., on 20.06.2022, which is far beyond the period during which the embargo contained in Section 10A of the IBC remained in force. The Main Application preferred by Respondent/FC under Section 7 is by no means barred under Section 10A. Thus, the plea taken up by the Applicant/CD on this count is found to be devoid of substance and is accordingly dismissed. The core issue challenging the maintainability of the Main Application is thus decided against the Applicant/CD.

ORDER

Accordingly, I.A. No.3926 of 2022 is **dismissed**.

Since this Order in the IA is adverse to the Applicant/CD, who is the Petitioner in the Writ Petition before the Hon'ble High Court of Bombay, we are desisting from giving effect to this Order until 24.09.2024 in deference to the common order dated 15.02.2024 passed by the Hon'ble High Court in WP (L) No. 25350 of 2023.

The designated Registrar is directed to forward electronic version of this Order to the Insolvency and Bankruptcy Board of India (IBBI) for information and record.

List the Main Application [CP (IB) No.1111/MB/2022] for orders on 24.09.2024.

Sd/-
SANJIV DUTT
MEMBER (TECHNICAL)

Sd/-
K. R. SAJI KUMAR
MEMBER (JUDICIAL)

(LRA-Alka Siwach)