NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Ins.) No. 1046 of 2023

(Arising against the impugned order dated 16.06.2023 passed by the Hon'ble National Company Law Tribunal, Mumbai Bench in CP (IB) No. 144/MB/2023)

IN THE MATTER OF:

IDBI Bank Ltd.

Registered Office at:

IDBI Tower, WTC Complex, Cuffe Parade,
Mumbai-400005.

Branch Office:

7th Floor, NMG, IDBI Tower, **...Appellant**
WTC Complex, Cuffe Parade,
Mumbai-400005.

Through its Authorised Signatory,
Mr. O.T. Tolani, General Manager
E-mail: ot.tolani@idbi.co.in

Versus

ARM Infra & Utilities Pvt. Ltd.

18th Floor, A Wing, Marathon Futurex,
N.M. Joshi Marg, Lower Parel,
Mumbai-400013. **...Respondent**

E-mail: rohan.kabra@esselgroup.in
secretarial@esselgroup.in

Present:

For Appellant:	**Mr. Sudhir Makkar, Sr. Advocate, Mr. Sidhartha Barua, Mr. Praful Jindal, Mr. Akash Mohan, Ms. Aadhya, Advocates.**
For Respondents:	**Mr. Krishnendu Datta, Sr. Advocate, Ms. Smriti Churiwal, Mr. Jaiveer Kant, Advocates.**

Cont'd..../

J U D G M E N T

(3rd July, 2025)

INDEVAR PANDEY, MEMBER (T)

The present appeal arises out of the judgment and final order dated **16.06.2023** passed by the National Company Law Tribunal, **(Adjudicating Authority)** Mumbai Bench in CP (IB) No. 144/MB/2023, whereby the Section 7 petition under Insolvency and Bankruptcy Code, 2016 ('**Code**') filed by the **IDBI Bank Ltd./**(**Appellant**), against **ARM Infra & Utilities Pvt. Ltd.** the **Corporate Guarantor/(Respondent)**, was dismissed. The Appellant had sought initiation of Corporate Insolvency Resolution Process (CIRP) under the Code, on account of a default of Rs.193.82 crore by the Principal Borrower **Siti Networks Ltd.,** whose liabilities were secured by unconditional and irrevocable corporate guarantees executed by the Respondent.

2. The Adjudicating Authority vide the impugned judgement held that the date of default fell within the "prohibited period" (i.e., between 25.03.2020 and 25.03.2021) under **Section 10A** of the Code, and therefore rejected the petition as non-maintainable. Aggrieved by the said dismissal, the Appellant has preferred the instant appeal under Section 61 of the code, challenging the erroneous interpretation of the default date and the applicability of Section 10A to the facts of the case.

Brief Facts of the Case

3. The brief facts of the case are given below:

i. On 24.11.2008, IDBI Bank Ltd. (Appellant) sanctioned a Cash Credit facility of Rs.25 crore in favour of Wire and Wireless (India) Ltd., which was later renamed as *Siti Networks Ltd.*, (the Principal Borrower. The purpose of the facility was to meet working capital requirements, secured by a first pari-passu charge on movable and immovable assets, and a corporate guarantee from Zee Entertainment Enterprises Ltd.

ii. Subsequently, on 09.12.2009, two separate facilities were extended—(a) a renewed Working Capital Facility (Rs.50 crore limit, including CC/STL and LC components), and (b) a Rupee Term Loan (RTL) of Rs.75 crore—for capital expenditure and working capital augmentation. Security was provided by Zee Entertainment Enterprises Ltd., with Board Resolutions supporting the transactions. The working capital facility was further renewed and enhanced, including a CMS limit of Rs.2 crore, under an overall credit exposure of Rs.62 crore on 09.03.2011.

iii. On 29.05.2012, the Appellant sanctioned enhanced credit facilities of Rs.150 crore (Rs.50 crore Fund-Based and Rs.100 crore Non-Fund-Based), along with a Letter of Exchange Risk (LER) limit of Rs.5 crore and continued CMS limits of Rs.2 crore. A fresh Board Resolution was passed by the Principal Borrower confirming acceptance of terms.

iv. The facility structure was further renewed and raised by the appellant on 26.12.2014 on 26.12.2014. the Respondent, ARM Infra & Utilities

Pvt. Ltd., executed a Corporate Guarantee dated 31.12.2014 in favour of the Appellant, covering the entire facility obligations of the Principal Borrower. This was supported by resolutions from the Respondent's Board of Directors.

v. On 11.02.2016, the Appellant further renewed the sanction facilities including enhanced term loans and working capital exposure. In relation thereto, the Respondent executed another Corporate Guarantee dated 29.02.2016, reinforcing its undertaking to repay the dues of the Principal Borrower in case of default. These facilities were further revised and continued on 19.07.2017 and 19.12.2018.

vi. On 31.12.2018, a joint Revival Letter was executed by both the Principal Borrower and the Respondent, reaffirming their liability under the respective financial arrangements, thereby extending limitation under the corporate guarantee.

vii. The account of the Principal Borrower was declared as Non-Performing Asset (NPA) on 31.01.2020 by the Appellant due to non-payment of interest and principal dues. As per records, the default amount was Rs.193,82,66,336.74 as on that date. Appellant continuously engaged with principal borrower to make the account regular, however the efforts of the bank did not succeed.

viii. Due to the continuing default, the Appellant issued a Recall Notice dated 18.02.2021 to the Principal Borrower, demanding immediate repayment of the entire outstanding amount of Rs.193.82 crore.

ix. The Appellant served formal Demand Notice on 05.03.2021, upon the Respondent (Corporate Guarantor) invoking the corporate guarantees

dated 31.12.2014 and 29.02.2016, calling upon the Respondent to pay the defaulted sum of Rs. 60.87 crore towards Working capital facility (fund based) and Rs.16.98 Crore towards Rupee Term Loan (RTL). There was no response or payment from the Respondent.

x. the Appellant issued a Second Notice to the respondent invoking the corporate guarantee on 09.12.2022, in view of further default by the principal borrower and asking the respondent to deposit Rs. 166.78 crores within seven days from the receipt of the notice. This amount related to working capital and Term-loan. Despite ample opportunity, the Respondent failed to comply.

xi. The Appellant filed a Section 7 Petition under Code on 11.01.2023, before the Adjudicating Authority seeking initiation of Corporate Insolvency Resolution Process (CIRP) against the Respondent as a Corporate Guarantor. The Appellant filed an Additional Affidavit in support of its petition on 28.02.2023, further affirming the enforceability of the corporate guarantees and continuing nature of default.

xii. The Adjudicating Authority vide its order dated 16.06.2023 dismissed the Section 7 Petition, holding that the date of default fell within the barred period under Section 10A of IBC.

xiii. Aggrieved by the said dismissal, the Appellant has filed the present appeal under Section 61 of the IBC, assailing the findings in the impugned order dated 16.06.2023 and seeking admission of the Section 7 petition against the Respondent.

Submissions of the Appellant

4. The Learned Counsel appearing for the Appellant submits that the impugned order dated 16.06.2023 passed by the Hon'ble National Company Law Tribunal, Mumbai Bench in CP (IB) No. 144/2023, is liable to be set aside as the Adjudicating Authority failed to appreciate that the present application under Section 7 of the IBC was not premised on the guarantee invocation dated 05.03.2021, which admittedly fell within the scope of the Section 10A exclusion period, but rather on a fresh and independent invocation dated 09.12.2022, which occurred well after the expiry of the 10A bar. It is submitted that the said invocation was based on continuing contractual obligations under two corporate guarantees executed by the Respondent—Corporate Guarantee I dated 31.12.2014 and Corporate Guarantee II dated 29.02.2016; each of which were explicitly continuing, irrevocable, unconditional, and on-demand in nature. The invocation dated 09.12.2022, along with the computation dated 08.12.2022, formed the foundational basis of the debt and default as reflected in Entry 2 and Entry 8 of Part IV of the Form-1 application filed before the Hon'ble Tribunal.

5. The Appellant's counsel submits that the financial facilities were granted to the Principal Borrower, Siti Networks Ltd., under a Rupee Term Loan sanctioned on 26.12.2014 amounting to Rs.125 Crores, and further working capital facilities were sanctioned on 29.02.2016. These facilities were duly secured by the aforementioned corporate guarantees executed by the Respondent. It is pertinent to note that the Respondent's obligations under these guarantees were co-extensive with those of the Principal Borrower, and expressly permitted multiple and successive invocations until full and final

repayment of all dues. In particular, Clause 15 of Guarantee I and Clause 7 of Guarantee II unambiguously provide that the guarantor shall be liable to pay the outstanding amounts "on demand" and that the guarantee shall not be exhausted by partial payments or earlier demands. These clauses, coupled with Clause 18 of CG-I describing the guarantee as a "continuing guarantee," render the Appellant's right to issue a fresh demand both lawful and enforceable.

6. Ld. Counsel further submitted that the first invocation of the corporate guarantees was made on 05.03.2021, for Rs. 60.87 Crore towards Working Capital Facility and Rs. 16.98 Crores towards Rupee Term Loan (RTL) facility shortly after the issuance of the Recall Notice dated 18.02.2021. However, this invocation was made during the Section 10A exclusion period, which lasted from 25.03.2020 to 25.03.2021. Though the invocation was valid, any default arising therefrom could not form the basis of a Section 7 application, in view of the statutory bar.

7. The Ld. Counsel submits that subsequent to this invocation, and despite partial payments made by the Principal Borrower (including Rs.24 Lakhs on 29.05.2021 and Rs.6.14 Crores on 12.04.2022), the Respondent continued to remain in default, leading to a fresh and independent invocation on 09.12.2022.

8. The learned counsel for the Appellant emphasizes that the second invocation dated 09.12.2022 was issued pursuant to the continuing contractual liability of the Respondent to maintain a Debt Service Reserve Account (DSRA) of Rs.166.78 Crores, as computed on 08.12.2022. This demand, made under the terms of the loan documents and guarantees, was

clear and unconditional, and called upon the Respondent to deposit the said amount within seven days. This invocation, being distinct in its nature, time frame, and substance, gave rise to a new cause of action, post the expiry of the Section 10A bar, and therefore cannot be dismissed merely because of the existence of a prior invocation.

9. The Appellant further relies upon the decision of this Hon'ble Tribunal in '*NuFuture Digital (India) Ltd. v. Axis Trustee Services Ltd.*, Co.' [Company Appeal (AT) (Ins.) No. 444/2023], wherein at para 20 it was held that even if the original invocation fell within the 10A bar period, a fresh invocation post 10A with subsisting default is legally permissible. Similarly, in '*SIDBI v. Sambandh Finserve Pvt. Ltd.*, Co.' [Company Appeal (AT) (Ins.) No. 784/2023], at paras 28-29, it was held that continuing obligations under a guarantee allow multiple invocations, and default arising after the 10A period can sustain a Section 7 petition. The Appellant also relies on '*Manmohan Singh Jain v. State Bank of India'*, [2021 SCC OnLine NCLAT 5983], where at para 47 this Tribunal held that even if the date of default is not explicitly stated in Form-1, the application is not defective if sufficient documentary evidence is placed on record establishing default.

10. The Appellant's counsel further distinguishes the ruling in '*IDBI Bank Ltd. v. Zee Entertainment Enterprises Ltd.*, Co.' [Company Appeal (AT) (Ins.) No. 939/2023], where the only invocation was dated 05.03.2021 and there was no subsequent demand or invocation. In contrast, the present application is squarely based on the 09.12.2022 invocation, which is a distinct and new default supported by contractual documents, and clearly falls outside the

Section 10A shield. Moreover, the Respondent has not placed any material to rebut this fresh invocation or the computation dated 08.12.2022.

11. Lastly, the Appellant submits that the law as laid down by the Hon'ble Supreme Court in '*Dena Bank v. C. Shivakumar Reddy'* [(2021) 10 SCC 330], para 144, and '*Kotak Mahindra Bank Ltd. v. Anuj Kumar'*, [MANU/DE/4116/2015 (Del HC)], supports the proposition that each default gives rise to a fresh cause of action, and where guarantees are continuing, repeated demands can be raised lawfully. In the present case, the Appellant's second invocation stands on firm legal footing, and the denial of admission solely on the basis of the earlier invocation is an error apparent on the face of the record.

12. Therefore, in light of the facts, contractual terms, repeated defaults, and settled jurisprudence, the Appellant humbly prays that the present appeal be allowed, the impugned order dated 16.06.2023 be set aside, and the application under Section 7 of the IBC against the Respondent be admitted to initiate CIRP.

Submissions of the Respondent

13. The Learned counsel appearing for the Respondent submits that the impugned order passed by the Hon'ble NCLT on 16.06.2023 does not suffer from any infirmity and deserves to be upheld. It is submitted that the application under Section 7 filed by the Appellant is wholly barred by the express mandate of Section 10A of the IBC, as the only valid invocation of the corporate guarantees executed by the Respondent was made on 05.03.2021, which squarely falls within the statutory bar period of 25.03.2020 to 25.03.2021. The invocation notices served on that date demanded Rs.16.98

Crores and Rs.60.87 Crores under the RTL and WCF respectively. These were full and final invocations, and no reservation was made in the said letters regarding future or repeated invocation.

14. The Respondent further submits that the so-called second invocation dated 09.12.2022 was not an invocation of the guarantee in law or in substance. The said letter was not issued under any express provision of the corporate guarantees and merely directed the Respondent to maintain a DSRA amount of Rs.166.78 Crores. However, there is no clause under either CG-I or CG-II which imposes such a DSRA obligation on the Respondent. Moreover, once the facilities were recalled on 18.02.2021 and the guarantees were invoked on 05.03.2021, the entire outstanding amount under the loan stood accelerated and became due. Thereafter, the concept of maintaining a DSRA—meant to be a reserve for servicing future instalments—ceased to have any contractual or practical relevance.

15. It is also submitted that the invocation made on 05.03.2021 was the only valid invocation pleaded by the Appellant before the Hon'ble NCLT. In Part IV of Form-1, the Appellant mentioned the date of default as **29.12.2019**, i.e., the NPA date, and further referred only to the 05.03.2021 letters as the basis of default. The invocation dated 09.12.2022 was never pleaded as the foundation of default in the original application. It is settled law that an applicant cannot improve its case at the appellate stage. In this regard, reliance is placed on the judgment of the Hon'ble Supreme Court in '*Bachhaj Nahar v. Nilima Mandal*' [(2008) 17 SCC 491], paras 12–13, and '*Arikala Narasa Reddy v. Venkata Ram Reddy*' [(2014) 5 SCC 312], para 15.

16. The Respondent strongly relies on IDBI Bank Ltd. v. Zee Entertainment Enterprises Ltd., (supra), where this Hon'ble Tribunal, on identical facts, held that invocation dated 05.03.2021 being within the Section 10A bar period, could not sustain a Section 7 application. There, as here, the invocation was under the same facilities, against the same borrower, and involved identical language. This authoritative ruling covers the present case squarely.

17. The Respondent also submits that the invocation of a guarantee is a one-time cause of action unless expressly permitted otherwise. There is no contractual provision permitting second invocation once full liability has been demanded. In this respect, the Respondent places reliance on '*Syndicate Bank v. Channaveerappa Beleri*' [(2006) 11 SCC 506], paras 9-13, wherein the Hon'ble Supreme Court held that the right to sue a guarantor accrues only upon invocation, and not on the date of borrower's NPA.

18. In conclusion, the Respondent humbly submits that the present appeal is wholly devoid of merit, and that the Appellant, having invoked the guarantee within the Section 10A bar period, cannot resuscitate its cause of action through an unrelated demand letter issued 20 months later. The invocation of 09.12.2022 cannot be construed as a fresh default under the guarantees. Therefore, the impugned order does not warrant any interference and the appeal may be dismissed with costs.

Analysis and Findings

19. We have gone through the records of the case and heard the Learned Counsels in detail.

20. There are three basic issues to be decided in the present case.

(i) Whether the second invocation dated 09.12.2022 reflects a fresh default with fresh cause of action beyond Section 10A exemption period?

(ii) Whether multiple invocations to continuing guarantees is permissible?

21. In the present case the loan account of principal borrower (Siti Networks Ltd.) was classified as Non-performing Asset (NPA) by the appellant on 29.12.2019. The amount outstanding on that date was Rs. 193.82 Crores. This date is significant as it is prior to commencement of Section 10 A period which begun on 25.03.2020. Prior to the classification as loan as NPA, the principal borrower consistently acknowledged the liability through various communications including a revival letter dated 31.12.2018 and further emails during February and March 2020 which affirmed the continuity of debt obligation and reflected a liability that pre-dated the Section 10A period.

22. The Respondent had executed two guarantees, the first on 31.12.2014 and the second on 29.02.2016. The first invocation of these guarantees by IDBI Bank occurred on 05.03.2021 during the prohibited period under the Section 10A. The Adjudicating Authority treated this as the only date of default and held that the Section 7 petition was not maintainable.

23. The Adjudicating Authority in para 4.6 of the impugned order has given the following findings:

> *4.6 This Bench finds that the Financial Creditor has contended that the default is established by multiple documents including (a) emails dated 31.12.2018, 16.01.2019, 02.02.2019, 04.02.2019, 28.02.2020, 02.03.2020 (all before the Covid*

Period); and (b) 18.02.2021, 05.03.2021 and 09.12.2022. On perusal of email dated 31.12.2018, this Bench finds that the said email pertains to intimation to the principal borrower regarding devolvement of a bank guarantee on 28.02.2018 with request to principal borrower to regularize CC account. The email dated 16.01.2019 for also requires the principal borrower to regularize the account. The email dated 02.02.2019 informs the avoiding possession in account as on 02.02.2019 with request to principal borrower to regularize CC account. The email dated 04.02.2019 is response from the Corporate Debtor assuring the Financial Creditor that the principal borrower's internal accruals and cash flow is enough to take care all the future debts service obligation requirement and sought removal of lien from the cash credit account. Further, email dated 28.02.2020, a copy of which is marked to Mr. Chetan Sharma of the Corporate Debtor, is a communication from the principal borrower seeking suitable restructuring to help the principal borrower to overcome the liquidate issue and requested not to take any legal action against the principal borrower. The email dated 02.03.2020 is an email response from the Financial Creditor to the email dated 28.02.2020 seeking clarity on the restructuring request and informing the avoiding position as on 02.03.2020. The said email communicated that Financial Creditor will be forced to initiate action against the borrower and guarantor company. Communication dated 18.02.2021 and 05.03.2021 is a notice of recall of facilities and notice of invocation of guarantee respectively. <u>This Bench does not find</u>

any demand having been made upon the Corporate Debtor asking it to pay the amount outstanding against the principal borrower in these communications except notice dated 05.03.2021."

(Emphasis supplied)

24. In paragraph 4.11 of the impugned order the Adjudicating Authority gave the following findings:

"4.11. In the present case, it is undisputed facts that the first demand notice was addressed to the Corporate Debtor on 05.03.2021 to pay an amount of Rs. 60,67,89,718/-, being outstanding in working facility capital account and another amount of Rs.16,98,45,076.61/- upon receipt of the notice. accordingly, the default qua Corporate Debtor took place on the date when the demand notice dated 05.03.2021 was served upon it. The Financial Creditor has not claimed that the service of the demand notice was complete on after 24.03.2021. Accordingly, this Bench is of the considered view that the Corporate Debtor committed the default in in discharge of its obligation under guarantee agreement dated 31.12.2014 and 29.02.2016 during the period specified in Section 10A of the Code. As per the provisions of Section 10A of the Code, no application for initiation of corporate insolvency resolution process can be filed in respect of a default that has occurred on or after 25th March, 2020 till 24th September, 2020. By a notification dated 24th September 2020 the applicability of Section 10A was extended for a further period of three months till 25th December, 2020. Thereafter, by a notification dated

22nd December, 2022 the applicability of section 10A was further extended by a period of three months till 25th March, 2021. Thus, Section 10A bars absolutely and forever, the filing of any application under Sections 7, 9 and 10 of the Code, for defaults committed on or after 25th March, 2020 upto 25th March, 2021."

25. It is seen from the findings in the paragraph 4.6 and 4.11 that the Adjudicating Authority did not find any demand having been made on the Corporate Debtor asking it to pay the outstanding amount against the Principal Borrower except for notice dated 05.03.2021. The Tribunal mentions the email dated 09.12.2022 but does not examine it or discuss it and relies totally on notice dated 05.03.2021. Whereas it is seen from the records that the letter dated 09.12.2022 is the second demand placed upon the Corporate Debtor based on the continuing default by the Principal Borrower.

26. It is important to note that the Section 7 application filed on 11.01.2023 was not based solely on 05.03.2021 invocation. The first invocation of 05.03.2021 was only made for funds based working capital facilities for an amount of Rs. 60.87 Crores under Working Capital Facility and Rs. 16.98 Crores towards Rupee Term Loan (RTL). A second invocation was made on 09.12.2022, after a detailed computation as on 08.12.2022, which reaffirmed the continuing default and the failure of Corporate Guarantor to discharge its obligations. These were placed on record before the Adjudicating Authority.

27. To obtain the correct picture we have a look at the relevant portions of Form-1 are extracted below:

"***Part (iv)- Particulars of financial debt***

Amount claimed to be in default and the date on which the default occurred (attach the workings for computation of amount and days of default in tabular form)	*The total amount of default under the Working Capital Facility of Rs 150 crore and term loan of Rs. 125 crore is Rs. 168,45,83,258/- (Rupees One Hundred Sixty Eight Crore Forty Five Lakh Eighty Three Thousand Two Hundred and Fifty Eight Only) as on 08 December 2022 together with the applicable interest, penal interest, premia, charges etc. thereon at the contractual rates upon the footing of compound interest until payment/realization to the satisfaction of Financial Creditor.* *The Borrower defaulted in payment of its obligations under the Working Capital Facility on 30 September 2019 and under the 125 Cr. Term Loan Facility on 30 September 2019 and the account of the Corporate Debtor was classified as a Non-Performing Asset on 29 December 2019 in accordance with the existing guidelines of Reserve Bank of India.* *A tabular computation of amount in default and days of default is annexed herewith as "Annexure AE".*

Part -V -Particulars of Financial Debt (Documents, Records and Evidence of default)

8. List of other documents attached to this application in order to prove the existence of financial debt, the amount and date of default

(C). On 05 March 2021, the Financial Creditor invoked the guarantee provided by the Corporate debtor under deed of guarantee dated 29 February 2016 and called upon the Corporate debtor to pay Rs 60,87,89,718.00 together with

further interest from 18 February 2021. The Financial Creditor has not received any response to the invocation letter dated 05 March 2021. A copy of the demand notice dated 5 March 2021 is annexed hereto and marked as Annexure-O.

(D). By way of separate letter dated 5 March 2021, the Financial Creditor invoked the guarantee provided by the Corporate debtor under deed of guarantee dated 31 December 2014 and called upon the Corporate debtor to pay Rs 16,98,45,076.61 together with further interest from 18 February 2021. The Financial Creditor has not received any response to the invocation letter dated 05 March 2021. A copy of the demand notice dated 5 March 2021 is annexed hereto and marked as "Annexure-P".

(G). The Financial Creditor issued notice dated 21 November 2022 to the Borrower calling upon the Borrower to maintain the DSRA balance. A copy of the notice dated 21 November 2022 is annexed and marked as "Annexure R".

(H). Subsequent to the failure on the part of the Borrower to maintain the DSRA balance, Financial Creditor issued notice dated 09 December 2022 to the Corporate Debtor demanding Corporate Debtor to maintain the DSRA balance. A copy of the notice dated 09 December 2022 is annexed hereto and marked as "Annexure-S".

28. It can be seen from the Part (iv) of Form-1 that the appellant has calculated the amount in default by Principal Borrower from 29.12.2019 which was the date of NPA in accordance with the existing guidelines of

Reserve Bank of India. In Part(V) of the Form-1 the appellant has given the sequence of events with regard to existence of Financial Debt, the amount and date of default. It can be seen from description in Para (C) and (D) that the first invocation was made on 05.03.2021 for Rs. 60.87 Crores towards Working Capital Facility (fund based) and by a separate letter of the same date for Rs. 16.98 Crores as rupee term loan.

29. From Para (G) and (H) of Part (V) we see that on 09.12.2022 a separate notice was issued to Corporate Debtor. This notice is also invocation of the Corporate Guarantee for Rs.166.78 Crores. This invocation was for both fund based and non-fund based Working Capital Facility, Rupee Term Loan and other dues.

30. We also have a look at the relevant Clauses 6 & 7 of the letter dated 09.12.2022 which is extracted below:

> *"6. In view of the defaults committed by Borrower towards maintenance of DSRA, we in terms of aforementioned clauses of guarantee agreement, call upon you to immediately to maintain a balance of Rs. 166,78,34,329/- (Rupees One Hundred Sixty Six Crore Seventy Eight Lakh Thirty Four Thousand Three Hundred Twenty Nine Only) as on November 14, 2022 in DSRA within seven days from the date of receipt of this letter.*
>
> *7. In case of your failure to comply as aforesaid, IDBI Bank shall be constrained to take such steps as may be necessary for enforcing its rights at your own risk, as to the costs and consequences thereof."*

31. This is similar to the language of notice dated 05.03.2021, the relevant para 6 is extracted below:

> *"6. In the premises, we hereby call upon you and demand from you to pay forthwith to IDBI Bank at IDBI Tower, 8th floor, "D" Wing, WTC Complex, Cuffe Parade, Mumbai 400 005 sums aggregating Rs.60,87,89,718/- (Rupees Sixty crore, eighty seven lakh, eighty nine thousand seven hundred and eighteen only), as per details given in Annexure II of this letter, together with further interest thereon with effect from 18.02.2021 at the given contractual rates, upon the footing of compound interest until payment/realisation. In case, you fail to make the payments as aforesaid, IDBI Bank, shall be constrained to take such steps against you as may be necessary for enforcing the guarantees and realising the dues at your own risk as to the costs and consequences thereof."*

32. It is clear from the language of both the letters that both involved invocation of corporate guarantee by the financial creditor. The first invocation made in March 2021 was limited in scope. It was based only on a part of the total liability- specifically, the fund-based Working Capital Facility and the Rupee Term Loan. In particular, IDBI Bank demanded a sum of Rs.16.98 crore under the RTL and Rs.60.87 crore under the fund-based working capital. This demand was issued shortly after the bank recalled the facilities on 18.02.2021. It did not include several other components of the sanctioned credit facilities such as the non-fund-based exposures (including letters of credit and bank guarantees), treasury transactions, or DSRA (Debt Service Reserve Account) obligations, which were also covered under the credit agreements. The Principal Borrower accepted this liability but expressed its inability to make payment of the outstanding amount.

Consequently, the Appellant invoked the Corporate Guarantee covering these items vide the letter dated 09.12.2022.

33. The default date mentioned by the appellant in Part (iv) of Section 7 Petition relates to the Principal Borrower and the same is stated as 29.12.2019 which is the NPA date of Principal Borrowers account. However, in Part (v) of the Section 7 Petition which has the particulars of Financial Debt documents, records and evidence of default, has details of notices dated 05.03.2021 and 09.12.2022. It is the settled position that in case the date of default is not specifically mentioned in the Section 7 Petition but the same can be ascertained from documents in Part (v) the same would be admissible.

34. The relevant findings in this regard relates to this Tribunal Judgment in Manmohan Singh Jain v. State Bank of India (supra) wherein it was held that:

> *"47) This 'Tribunal' deal with the issues as raised by the Learned Counsel for the Appellant, the facts of the present case and law applicable to it. In the present Appeal, though the first date of NPA is with respect to Axis Bank i.e. 10.02.2017. However, the RBI circulars/Directives provides filing of independent application by the Financial Creditor i.e. the SBI before the Adjudicating Authority (NCLT) under Section 7 of the IBC. Accordingly, the Applicant the 1st Respondent herein filed application under Section 7 of the IBC for initiating the CIRP against the Corporate Debtor independently taking into the date of NPA/default and the amount of debt and default. There is no dispute with regard to the existence of debt and default committed by the Corporate Debtor. However, there is only an*

objection raised with respect to omission to mention the date of default in Part IV of Form 1 filed before the Adjudicating Authority. It is evident from the records that the date of NPA of the SBI is 27.11.2018 and the application filed by the Financial Creditor on 19.12.2019 even if the 90 days period prior to NPA is taken into consideration for the purpose of deciding default as per the Judgment of the Hon'ble Supreme Court in Re Laxmi Pat Surana, the application is within the period of limitation. Further, this 'Tribunal' hold that omission to mention date of default in Col. 2 Part IV in Form 1 is not fatal to the application. As we are of the view that as per Col. 8 of Part V in Form 1 regarding particulars of Financial Debt documents, records and evidence of default to be attached, the Financial Creditor has shown sufficient documentary evidence to establish the date of NPA i.e. 27.11.2018 and the Adjudicating Authority has taken note of the same and admitted the application. This 'Tribunal' do not find any illegality in admitting the application."

35. The second invocation referred to continuing unpaid dues under the guarantees and demanded immediate payment of Rs.166.78 crore from the Corporate Guarantor. The invocation was not merely a request to maintain a DSRA (Debt Service Reserve Account), as claimed by the Respondent. Rather, it was a formal invocation of liability based on the original guarantees and the underlying loan documents. The Appellant annexed both the computation and invocation to its Form-1 filed before the NCLT, and also submitted an additional affidavit explaining that the application was based on this second

invocation, which occurred after the Section 10A exclusion period. The documents were properly placed on record and pleaded.

36. The second invocation made on 09.12.2022 was based on a comprehensive and updated computation of the borrower's total dues as of 08.12.2022. The total liability computed by IDBI Bank at that time stood at Rs.166.78 crore. This amount included not only the unpaid dues under the RTL and working capital facilities but also several additional heads of liability, making the second invocation materially different from the first. A breakup of the total dues as per the 8 December 2022 computation is as follows:

- Rupee Term Loan outstanding (principal and interest): Rs.16.98 crore
- Fund-Based Working Capital Facility dues: Rs.60.87 crore
- Non-Fund-Based exposure devolved: Rs.44.34 crore
- DSRA (Debt Service Reserve Account) shortfall: Rs.39.90 crore
- Treasury and other unadjusted items: Rs.4.69 crore
- Total: Rs.166.78 crore

37. The DSRA obligation, in particular, arose under the financial covenants of the sanction letter, requiring the borrower to maintain a dedicated reserve for timely servicing of debt. Its breach gave rise to a specific contractual event of default, which is separate from the borrower's failure to repay the principal or interest. The inclusion of devolved non-fund-based facilities and treasury exposures also reflects defaults under other components of the credit package that were not part of the earlier invocation.

38. We find that the second invocation dated 09.12.2022 was valid, independent, and enforceable. The Adjudicating Authority failed to take

cognizance of letter dated 09.12.2022 and did not examine its relevance to the CIRP proceedings. Accordingly, we find that the second invocation constitutes a distinct cause of action, and the Section 7 application filed by IDBI Bank on 11 January 2023 based on this default is legally maintainable.

39. The second issue to be decided in this case is whether multiple invocations of corporate guarantee is permissible in such cases. We take a look at the relevant clauses of the second guarantee dated 29.02.2016:

> *"6. In order to give effect to the Guarantee herein contained the Bank shall, upon invoking of the Guarantee, be entitled to act as if the Guarantors were principal debtors to the Bank for all payments guaranteed by them as aforesaid to the Bank.*
>
> *7.* ***The Guarantee herein contained is a continuing one*** *for all amounts advanced by the Bank to the Borrower in respect of or under the Facilities as also for all interest, costs and all other monies which may from time to time become due and remain unpaid to the Bank under the Facilities Agreement and shall not be determined or in any way be affected by any account or accounts opened or to be opened by the Bank becoming nil or coming into credits at any time or from time to time or by reason of the said account or accounts being closed and fresh account or accounts being opened in respect of fresh facilities being granted within the overall limit sanctioned to the Borrower.*
>
> *10.* ***The guarantee shall be irrevocable*** *and enforceable against the Guarantors notwithstanding any dispute between the Bank and The Borrower.*

> *11.* ***The guarantors shall forthwith on demand*** *made by the Bank deposit with the Bank such sum or security or further sum or security as the Bank may from time to time specify as securities for the due fulfillment of their obligations under this guarantee and any security deposited with the Bank any be sold by the Bank after giving to the Guarantors 7 days' notice of sale and the said sum or the proceeds of sale of the securities may be appropriated by the Bank in or towards satisfaction of the said obligation and any liability arising out of non-fulfillment thereof by the Guarantors."*
>
> *(emphasis supplied)*
>
> (Identical clauses are there in the first guarantee dated 31.12.2014).

40. A demand for payment under a corporate guarantee need not be limited to a one-time or all-inclusive invocation, unless the guarantee contract itself provides such a restriction. Here, the guarantees are described in express terms as "continuing," "irrevocable," and "on demand." Clause 18 of Guarantee-I and Clause 7 of Guarantee-II provide that the liability of the guarantor continues until full repayment of all dues, and that the obligation shall not be discharged by partial payments or earlier demands.

41. In law, a "continuing guarantee" under Section 129 of the Indian Contract Act, 1872, remains in force until revoked or until the obligation is satisfied in full. The creditor can make successive demands under such a guarantee until full payment is received. This principle is well supported by judicial precedents. In *Dena Bank v. C. Shivakumar Reddy* (2021) 10 SCC 330, the Hon'ble Supreme Court held that repeated defaults and

acknowledgments under a continuing obligation can constitute fresh causes of action.

42. In *Kotak Mahindra Bank Ltd. v. Anuj Kumar* (supra) the Delhi High Court also explained that where a financial obligation is still unpaid, and where the contract is still in force- especially in the case of continuing guarantees or loan agreements- the creditor does not have to act only at the time of the first default. The creditor can act later, based on a new or repeated failure to pay. Each time the borrower or guarantor fails to meet their responsibility under the contract, the creditor gets a new right to sue.

43. The Respondent has not produced any evidence to show that the guarantee was discharged or that the debt was fully paid. The defense that the invocation was a mere administrative request is inconsistent with the express language of the demand letter and the computation annexed to the application.

44. Now applying these principles to the present case, this Tribunal finds that the factual situation clearly supports the Appellant's argument. The guarantees issued by the Respondent were described in clear terms as continuing, irrevocable, and on-demand. This means that they were not meant to be used only once. As long as the borrower's dues remained unpaid, IDBI Bank was legally allowed to make a fresh demand at any time. The first invocation made in March 2021 was only with respect to part of the dues—specifically, the Rupee Term Loan and the fund-based working capital. That invocation did not include other unpaid components of the borrower's liabilities such as the non-fund-based exposures, unpaid treasury dues, and

the shortfall in the Debt Service Reserve Account (DSRA), which were part of the same credit facility.

45. Over time, as the Principal Borrower failed to make full repayment and as the unpaid amount increased, the Bank issued a second invocation notice in December 2022. This second invocation was not a repetition of the earlier one. It was based on a new and comprehensive computation dated 08.12.2022, showing a total outstanding of Rs.166.78 crore. This amount included new components of default- specifically, Rs.44.34 crore towards devolved non-fund-based limits, Rs.39.90 crore towards DSRA shortfall, and other treasury dues. These amounts had not been demanded earlier, and therefore the failure to pay them gave rise to a fresh default.

46. The argument raised by the Respondent that the first invocation exhausted the right of the Appellant to proceed again is not supported either by contract or law. The guarantees do not provide for single enforcement, and the conduct of parties indicates a subsisting liability. We are satisfied that the guarantees in question are continuing guarantees, and the Appellant was legally entitled to issue a second invocation on 9 December 2022.

47. The Respondent has referred to the decision in *IDBI Bank Ltd. v. Zee Entertainment Enterprises Ltd.*, Company Appeal (AT) (Insolvency) No. 939 of 2023, to argue that since the first invocation of the corporate guarantee by IDBI Bank was made on 05.03.2021- during the one-year bar period under Section 10A of the IBC- the Appellant was permanently barred from initiating insolvency proceedings, even at a later stage. The Respondent further claimed that the second invocation made in December 2022 was not a fresh or separate demand, but merely a continuation of the earlier invocation. On this

basis, it was submitted that the present application under Section 7 is also barred.

48. This case has been cited by both the appellant and respondent in support of their case. The relevant paras 27, 34 & 35 are reproduced below:

> *"27. In any view of the matter as noted, we have already noticed the pleadings in Section 7 application which was made by the IDBI Bank. IDBI bank in his Section 7 application has clearly pleaded that "on 05.03.2021, financial creditor invoked the guarantee provided by the corporate debtor and called upon the corporate debtor to pay Rs.61,97,33,612/-". Further in Part IV Serial No. 2 again following was pleaded "financial creditor invoked the guarantee on 05.03.2021 and the corporate debtor is in continuous default in terms of the guarantee agreement dated 03.08.2012". When the appellant financial creditor has come with the categorical case that guarantee was invoked only on 05.03.2021, there cannot be any occasion to treat any other date as date for invocation of guarantee. The letter dated 05.03.2021 is also brought on the record as Annexure–31. Letter dated 05.03.2021 has been addressed to the corporate debtor. Para 6 of the notice provided as follows:*
>
> > *"6. In the premises, we hereby call upon you and demand from you to pay forthwith to IDBI Bank at IDBI Tower, 8th floor, "D" Wing, WTC Complex, Cuffe Parade, Mumbai 400 005 sums aggregating Rs. 61,97,33,612.80/- (Rupees Sixty one crore, ninety seven lakh, thirty three thousand six hundred & twelve and paisa eighty only), as per details given in Annexure*

II of this letter, together with further interest thereon with effect from 18.02.2021 at the given contractual rates, upon the footing of compound interest until payment/realisation. In case, you fail to make the payments as aforesaid, IDBI Bank, shall be constrained to take such steps against you as may be necessary for enforcing the guarantees and realising the dues at your own risk as to the costs and consequences thereof."

34. Much emphasis has been given by the learned counsel for the appellant that corporate debtor is continuing with the default even after 10A period which was also even pleaded in Part IV where it was pleaded that financial creditor invoked the guarantee of 05.03.2021 and the corporate debtor is in continuous default in terms of the guarantee agreement. As noted above, the application under Section 7 was filed on the basis of invocation of guarantee on 05.03.2021, which period fell during the 10A period. A reading of the application does not indicate that Section 7 application is founded on any default which is subsequence to the 10A period.

35. In the facts of the present case, we are of the view that although order impugned of the adjudicating authority needs to be affirmed, but liberty need to be given to the appellant, if so, advised to file a Section 7 application for default of corporate debtor subsequent to 10A period i.e., a default subsequent to 24.03.2021."

49. In *Zee Entertainment (supra)*, the Financial Creditor had made only one invocation of the guarantee, and that too during the Section 10A prohibition

period. No second invocation was issued, and no new default was pleaded after the expiry of the bar period. The Section 7 application in that case was filed entirely based on the default covered by the single invocation. Therefore, the Appellate Tribunal held that the application was not maintainable, as it was based on a default which happened during the period when filing was legally prohibited.

50. The Tribunal, however, gave liberty to the Financial Creditor IDBI Bank to file a fresh Section 7 petition if the default continues beyond the prohibition period of Section 10A.

51. The present case, however, is different from the Zee Entertainment (supra) in the sense that the IDBI Bank did issue a first invocation on 05.03.2021, but it also issued a second, separate invocation on 09.12.2022. That second invocation was based on a new and updated computation of the borrower's total dues as on 08.12.2022. The updated calculation included liabilities that were not part of the earlier invocation—such as non-fund-based limits, DSRA shortfalls, and treasury dues. This second invocation was made after the Section 10A bar period had ended and was based on a broader default that continued. The application under Section 7 was filed on 11.01.2023 - well after the Section 10A exclusion period—and was based entirely on this second invocation.

52. This Judgment clearly supports the contention of appellants in the matter of second invocation of guarantee. It is also important to note that even in the *Zee Entertainment* decision, the Appellate Tribunal never stated that a fresh application based on a later default would be barred. On the contrary, the Tribunal explained that if a new default arises after the 10A period ends,

and that default is supported by proper demand and documentation, then an application under Section 7 would be maintainable. That principle directly supports IDBI Bank's case in the present appeal.

53. We, therefore, hold that the Corporate Guarantee could be invoked successively, if the guarantee was a continuing guarantee, loan default continues post Section 10A period, and the debt obligation were not fully met by the Principal Borrower. Accordingly, this issue is also decided in affirmative.

54. Thus, both the issues are decided in favour of Appellants. The appeal is allowed. The impugned order is set aside and CP (IB) No. 144/MB/2023 is restored. The parties to approach the Ld. NCLT on 17.07.2025. There is no order as to costs. Pending I.As if any are closed.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

[Mr. Indevar Pandey]
Member (Technical)

SA/Pragya (LRA)