

Through Videoconference

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT No. - I

M. A. NO. 3055 OF 2019
in
CP (IB) NO. 1385/(MB)/2017

(An Application under Section 60(5) of the IBC, 2016)

Doha Bank Q.P.S.C ... *Applicant*

Versus

1. Anish Nanavaty
(RP of Reliance Infratel Limited)
 2. Assets Care & Re Construction Enterprises
Limited (in its capacity as Trustee of ACRE-41-
Trust)
 3. Shubh Holdings Pte Ltd
 4. China Development Bank
 5. Export Import Bank of China
- ... *Respondents*

IN THE MATTER OF:

Ericsson India Private Limited
... Petitioner
V/s
Reliance Infratel Limited
... Corporate Debtor

Order Dated: 02.03.2021

Coram:

Hon'ble Member (Judicial), Janab Mohammed Ajmal

Hon'ble Member (Technical), Shri V. Nallasenapathy

Appearance:

For the Applicant : Mr. Prateek Seksaria, Counsel i/b Juris Corp.

For the Respondents : Mr. Ravi Kadam, Sr. Counsel and Mr. Gaurav Joshi,
Sr. Counsel for R1 (RP)
Mr. Janak Dwarkadas, Sr. Counsel for R2
Mr. Rohan Rajadhyaksha, Counsel for R3
Mr. Chetan Kapadia, Counsel for R4 and R5

Per: V. Nallasenapathy, Member (Technical)

ORDER

1. The Applicant, a Financial Creditor of the Reliance Infratel Limited (RITL), the Corporate Debtor, filed this Application under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 (the Code) seeking the following prayers against the Respondent/Resolution Professional and certain other Financial Creditors of the Corporate Debtor:

- a. To declare the decision of the resolution professional of the Corporate Debtor for recognizing the Indirect Lenders as the Financial Creditors of the Corporate Debtor as null and void;*
- b. To de-recognize / declassify / delete the Indirect Lenders as Financial Creditors of the Corporate Debtor;*
- c. To prepare a reconstituted committee of creditors comprising of Financial Creditors of the Corporate Debtor as mandated under Section 21 of the IB Code, 2016;*
- d. To perform his duties in accordance with the relevant provisions and regulation of the IB Code, 2016;*
- e. To defer any meeting of committee of creditors of the Corporate Debtor till the exercise as set out in terms of prayer(s) c) and d) above is accomplished;*
- f. In the event, any meeting of committee of creditors of the Corporate Debtor is held, to keep the resolutions passed in the said meeting, in abeyance till the outcome of the present application;*
- g. Pending final hearing and disposal of the application, ad-interim relief(s) in terms of prayer (e) and (f) above;*

2. The Corporate Debtor was put under Corporate Insolvency Resolution Process (CIRP) on a Petition filed under Section 9 of the Code by an order dated

15.05.2018 of this Tribunal and this Bench had appointed Mr. Manish Dhirajlal Kaneria as Interim Resolution Professional (IRP) by order dated 18.05.2018. On an Appeal filed against this order, the Hon'ble NCLAT by order dated 30.05.2018 stayed the CIRP against the Corporate Debtor. Subsequently, the Hon'ble NCLAT *vide* order dated 30.04.2019 vacated the stay order with a direction to proceed with the matter in accordance with law. This Bench by an order dated 21.06.2019 replaced the IRP and appointed Respondent No. 1 (R1) as Resolution Professional (RP) of the Corporate Debtor. Respondent No. 2 to Respondent No. 5 (R2 to R5) were impleaded in this Application by orders of this Bench dated 11/08/2020 in IA Nos. 86 of 2020, 134 of 2020 & 637 of 2020 and dated 17/08/2020 in IA 109 of 2020. R2 to R5 were the lenders of Reliance Communications Limited (RCOM) and Reliance Telecom Limited (RTL).

3. The Applicant is a part of a Syndicate along with other External Commercial Borrowing (ECB) Lenders who have extended foreign currency loan to the Corporate Debtor to the extent of USD 250,000,000 pursuant to a Loan Agreement dated 19.03.2010 as amended and restated on 05.09.2016 and further amended and restated on 04.12.2016 (Facility Agreements). The current outstanding to the Syndicate is USD 199,000,000 by the Corporate Debtor since 05.06.2017.
4. The Applicant has called in question the conclusion of R1 in recognizing R2 to R5, who were the lenders of RCOM, Corporate Debtor's holding Company and one of its subsidiaries *viz.* RTL, as Financial Creditors of the Corporate Debtor, on the basis of a purported Deed of Hypothecation (DoH).
5. The following are the submissions of the Applicant in support of the Application:
 - i. Consequent to the public announcement, inviting claims from the creditors, this Applicant preferred a claim before the IRP and the same was admitted.

- ii. The first meeting of the Committee of Creditors (CoC) was held on 30th May 2019 wherein a list of Creditors was circulated by the IRP. The Applicant along with other ECB Lenders namely Industrial and Commercial Bank of China, Emirates NBD Bank PJSC and VTB Capital PLC, who are the direct lenders and Financial Creditors of the Corporate Debtor under the Facility Agreements, challenged the classification of certain lenders, who are purportedly claiming to be the Financial Creditors of the Corporate Debtor on the basis of a purported Deed of Hypothecation. The Respondents have not produced the Deed of Hypothecation.
- iii. The RP convened the second meeting of the CoC on 09.07.2019, wherein, in the agenda notes, the list of Financial Creditors was placed, which did not contain the names of the Indirect Lenders and the same is enclosed as 'Exhibit C' to the Application.
- iv. R1 *vide* email dated 31.07.2019, while circulating agenda notes of 3rd meeting of the CoC, revised the list of Financial Creditors containing the names of indirect lenders who were the creditors of RCOM and RTL. The agenda did not provide any basis for admitting the indirect lenders as Financial Creditors of the Corporate Debtor. A copy of the agenda is enclosed as 'Exhibit D' to the Application.
- v. In the 3rd meeting of the CoC held on 02.08.2019, the Applicant asked R1 to explain the basis for admitting the indirect lenders as the Financial Creditors of the Corporate Debtor. R1 responded by saying that *"these claims were under verification before RP took charge – the decision to proceed with further verification was done basis review of multiple documents, including Deed of Hypothecation"*. R1 further stated that, *"that the admission was made on the basis of covenant to pay and undertaking to pay for any deficiency or shortfall in meeting the outstanding dues by way of enforcement of secured assets."*

- vi. On a further query made by the Applicant, whether there was any Deed of Guarantee in addition to the security and charge documents submitted by the Indirect Lenders, R1 replied that there was no Deed of Guarantee in favour of the Indirect Lenders in addition to the security and charge documents and stated that *“there was a covenant to pay by the Corporate Debtor, in the Deed of Hypothecation, along with undertaking to pay for any deficiency or shortfall in meeting the outstanding dues by way of enforcement of secured assets.”* A copy of the minutes of the third meeting of the CoC is enclosed with the Application as ‘Exhibit E’.
- vii. The Applicant along with other ECB lenders through their advocate issued an email/letter dated 14.08.2019 to R1 requesting him to share the relevant covenant/clause(s) of Deed of Hypothecation relied on by R1, for treating the indirect lenders as Financial Creditors. A copy of the said email/letter is enclosed with the Application as ‘Exhibit F’.
- viii. Since there was no reply to the above email/letter dated 14.08.2019, the Applicant along with other ECB Lenders through their advocates issued a follow up email/letter dated 27.08.2019, (Exhibit G).
- ix. R1’s response to above letter is as below:
“the resolution professional has verified the claims submitted by the relevant creditors in accordance with the provisions of the Insolvency and Bankruptcy Code, 2016 and the rules and regulations framed thereunder. Based on the review of the documents, since the claim submitted by the said creditors constitutes financial debt, the same has been admitted by the resolution professional. As the claims and supporting documents submitted by each creditor are confidential in nature, the resolution professional shall not be in a position to share the same without the consent of the relevant creditors”.
A copy of the response is enclosed as ‘Exhibit H’ to the Application.
- x. R1 has not disclosed the documents (including but not limited to the purported Deed of Hypothecation), on which he has relied upon for

admitting the Indirect Lenders as the Financial Creditors of the Corporate Debtor. It is submitted that the understanding of R1 in admitting the Indirect Lenders as the Financial Creditors of the Corporate Debtor is erroneous and unsustainable, for the reason that the Corporate Debtor had executed the Deed of Hypothecation merely to secure the loans disbursed by the lenders of RCOM, RTL and Reliance Communications Infrastructure Limited (together as “RCOM Entities”).

- xi. At no stage, money was lent / disbursed by the Indirect Lenders to the Corporate Debtor. Hence, the Indirect Lenders cannot be classified as Financial Creditors of the Corporate Debtor. It is not the case that the Indirect Lenders have disbursed the debt along with interest to the Corporate Debtor against the consideration for time value of money or the Corporate Debtor has borrowed any amount from the Indirect Lenders under any other transaction having the commercial effect of borrowing.
- xii. No counter indemnity obligation in respect of a guarantee, indemnity, bond, documentary, letter of credit has been issued by the Corporate Debtor in favor of the Indirect Lenders. R1 has failed to observe that the transaction does not fall under any of the provision(s) of the Code to constitute a ‘financial debt’ and hence the Indirect Lenders have been erroneously classified as the Financial Creditors of the Corporate Debtor.
- xiii. R1 in the minutes of the third meeting of the CoC of the Corporate Debtor has admitted that there was no deed of guarantee in addition to the security and charge documents. It is submitted that no indemnity bond exists in the present case and the transaction is not a guarantee or an indemnity.
- xiv. The action of the R1 in relying upon a clause in the Deed of Hypothecation which states that *“there shall be a covenant to pay*

along with undertaking to pay for any deficiency or shortfall in meeting the outstanding dues by way of enforcement of secured assets” is also untenable in law. The Deed of Hypothecation is only a collateral security which the Corporate Debtor has created to secure the loans provided by the lenders of the RCOM Entities, without disbursement of money by the Indirect Lenders to the Corporate Debtor against the consideration for time value of money.

- xv. A conjoint reading of the provision(s) of the Code and Regulations 13 and 14 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (the Regulations), casts a duty on the R1 to verify the claims and admit only such creditors as the Financial Creditors of the Corporate Debtor who fall within the definition of ‘Financial Creditor’ under the Code. Due to the erroneous classification by R1 in recognizing the Indirect Lenders as the Financial Creditors of the Corporate Debtor, the voting share of the Applicant (and the other ECB Lenders) has been drastically reduced which has severely affected the ability of the Applicant (and the other ECB Lenders) to participate in the CIRP of the Corporate Debtor.
- xvi. The only basis stated by R1 for admission of the claims of R2 to R5 is DoH which contains a “covenant to pay” in Clause 2 and “undertaking to pay for any deficiency or shortfall in meeting of the dues by way of enforcement of security interest”. Pertinently, the question of such enforcement, sale, and realisation does not arise in proceedings under the Code in as much as the same is alien either during CIRP or in case of liquidation. It is expressly admitted by the RP that *“there was no covenant of guarantee”*. Clearly these claims were neither made nor admitted on any assertion of the DoH containing any covenant of guarantee.
- xvii. Form – C filed by R2 to R5 clearly establishes the following:

- (i) RCOM Lenders never construed 'Clause 5(iii)' of the DoH to be in the nature of a guarantee but only as an undertaking to pay the amount of RCOM by taking steps to realise and sell security hypothecated.
 - (ii) Claims filed by R4 and R5 describe RITL as being one of the obligors for repayment of the total outstanding amount under the Facility Agreements, by enforcing the security interest and liquidating the hypothecated assets to ensure repayment. This right to call upon RITL (through the Security Trustee) to liquidate the hypothecated assets, was understood by R4 and R5 to comprise of the 'claim against RITL' in their capacity as Financial Creditors of RITL.
 - (iii) Similarly, R2 and R3 have, in the claims filed with the IRP, stated that RITL has undertaken to merely ensure repayment of outstanding amounts under the facility. It is further stated that RITL is under an obligation to take steps to liquidate the hypothecated assets in order to ensure repayment of the outstanding amounts.
- xviii. DoH does not contain any covenant whereunder RITL agreed to discharge the liability of RCOM upon default or that any co-extensive liability is fastened on RITL as alleged. Clause 5(iii) of DoH does not and cannot be read to satisfy the requirement of Section 126 of the Indian Contract Act.
- xix. Under the DoH, the Borrower i.e., RCOM is defined as 'Obligor', the Lender is defined as the 'Secured Party', the charge holder who holds security for the benefit of the Secured Party viz. Axis Trustee Services Limited is defined as the 'Security Trustee' and the entity (RITL) which has hypothecated its properties is defined as 'Chargor'. None of the aforesaid are interchangeable or capable of any other interpretation except as defined in the DoH. The only parties to the

DoH are the Chargor and the Security Trustee and the one and only purposes of the document is to create a charge. The Chargor is not and cannot be treated as a Guarantor within the meaning of Section 126 of the Contract Act. The DoH being a biparty document and does not meet the requirements of a guarantee which necessitates the need of three parties to the document i.e. Surety, Principal Debtor and Creditor.

- xx. As an afterthought, the Respondents/RP have sought to justify the classification as Financial Creditors and the admission of their claim by contending that 'Clause 5(iii)' of the DoH is a contract of guarantee. Pertinently, during the course of hearing the reliance placed on Clause 2 of the DoH has been abandoned.
- xxi. It is strange that lenders of RCOM who are not even parties to the DoH claiming that the said document creates a guarantee in their favor and thereby entitles them to be recognized as Financial Creditors of RITL. The contention is contrary to the express provisions contained in Clause 4 & 16(iv) which clearly states that the Secured Lenders (non-parties) shall not have any right, title and interest under the DoH in relation to enforcement of security or otherwise.
- xxii. Clause 2 of the DoH - 'Covenant to Pay' expressly records and states that it is the OBLIGOR who shall repay the facilities availed by it as stipulated in the facility documents and in the manner set out in the facility documents. Thus, under Clause 2, RITL has not covenanted that it shall repay/discharge the liability of the Obligor upon its default and hence the question of construing the same as a contract of guarantee does not arise. In any event, as stated above, reliance on Clause 2 has been given up by the Respondents during the course of hearing though pleaded in the application/reply.

- xxiii. Clause 5 is titled as 'Chargor's Covenants, Representations and Warranties'. The same pertains to the procedure and obligation for creation of charge, preservation of charged assets, and enforcement, sale and realization thereof and the right of the Security Trustee or the Receiver to recover the expenses incurred for any of the above purposes. It is not and cannot be construed as a covenant to pay or discharge the liability of RCOM on default or that it creates a co-extensive liability on RITL for the dues of RCOM. This is more so since such an interpretation would be in the teeth of an express covenant to pay under Clause 2, whereby RITL has not agreed to discharge any liability of RCOM.
- xxiv. Clause 5(iii) contains the process for enforcement of security by the security trustee or the Receiver.
- (i) The first part of Clause 5(iii) gives a right to the trustee in the event of default and a receipt of instructions from the lender to take possession of and realize the hypothecated property.
 - (ii) The second part obligates the RITL to handover possession of the charged asset to the Security Trustee or the Receiver.
 - (iii) The last part of Clause 5(iii) stipulates that in the event upon sale or realisation of the charged assets, the accounts of the security trustee reveal that there has been a shortfall and/or deficiency in the charged assets or their value thereof *[relatable to the obligation of the chargor to preserve, keep the security marketable and insured under Clauses 5 (i) & (ii)]* then in such an event, the security trustee or the receiver appointed by him *[again sole purpose being to preserve, protect and sell and realise property]* can make a demand for such shortfall / deficiency in assets on the Chargor. It is this shortfall that the Chargor has agreed to pay. Strictly, in the alternative it is submitted that the only other interpretation possible to the last

part is that the security trustee or the receiver appointed by him may demand the expenses incurred by them to preserve, protect and sell and realise the hypothecated property which otherwise is the obligation of the chargor. Interpretation sought to be given by the respondents leads to an absurdity. An illustration of such absurdity being that if the last sentence of Clause 5(iii) is considered as a guarantee then in such an event such guarantee is not only created in favour of the security trustee but also his appointed receiver whose sole duty and power is to maintain the hypothecated property.

xxv. The contention that the last sentence of Clause 5(iii) constitutes a contract of guarantee is misconceived, baseless and contrary to law for the following reasons:

- (i) There is no express or unequivocal promise to discharge the liability of the principal borrower in case of the principal borrower's default under the relevant facility agreements, which is a *sine qua non* for any document to constitute a contract of guarantee;
- (ii) There is no co-extensive liability of RITL under the DoH as alleged by the Respondents;
- (iii) The events as contemplated in the latter part of Clause 5(iii) are an impossibility in view of the express prohibition contained in section 14(1)(c) of the Code which prohibits any enforcement of security interest during the period of moratorium. Since the claim for shortfall under the DoH is consequent upon enforcement of security interest thereunder, at present, there is no shortfall and there cannot in any event arise a shortfall upon sale of hypothecated property as moratorium has been declared under section 14 of the IB Code; and

(iv) Clause 5(iii) being a clause in relation to enforcement of security, is alien to the Code and therefore cannot be construed to give rise to any liability or debt in any event whatsoever.

xxvi. Without prejudice to the aforesaid, a reading of the above also establishes that these lenders of RCOM have failed to satisfy the conditions which are *sine qua non* to classify them as Financial Creditors of RITL. Regulation 8 of the Regulations requires a person who claims to be a Financial Creditor to submit such a claim with proof in Form-C of the Schedule to the Regulations. Regulation 8 and Form-C both necessitate such a person to submit proof and evidence to establish the following:

(i) Status as a Financial Creditor [Section 5(7) of the Code]: This necessarily requires that a financial debt is owed to such person. A financial debt under Section 5(8) means that there is a debt and secondly, such debt has been disbursed against consideration for time value of money. Debt is not a claim but an obligation or liability in respect of a claim due. Thus, the financial debt must firstly be a 'DEBT' i.e., (liability in respect of a 'CLAIM' which is 'DUE' from any person) and secondly such debt should have been disbursed against the consideration for time value of money;

(ii) the existence of a debt due; and

(iii) that such debt is unpaid i.e., is in default. [Section 3(12)]- that debt has not been paid when it has become 'due and payable'.

xxvii. Relying on Para 21 of the Judgment of the Hon'ble Supreme Court in the case of *B.K. Educational Services Pvt Ltd. ...V/s... Parag Gupta & Associates (MANU/SC/1160/2018)*, wherein it was held that, it is submitted that debt due under the Code means the debt which is due and payable in law. A person claiming to be a Financial Creditor

must establish the existence of debt due and the same should also be payable.

- xxviii. The contention of R2 to R5 to substantiate R1's decision in treating them as Financial Creditor is based on the reliance of the definition of word the "Claim" and the same is wholly irrelevant to Regulation 8, Form C and the scheme of the Code in the context.
- xxix. A 'debt' as defined in Section 3(11) of the Code is clearly different from the expression 'claim' as defined under Section 3(6) thereof. Whilst a claim is a right to payment which may be reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured, or unsecured; a debt means a liability in respect of a 'claim' which is 'due' from any person. The expressions 'claim' and 'debt' are separate, distinct, independent and not interchangeable/ substitutable in their usage under the Code. To buttress this point, the Applicant relied on the decision of the Hon'ble Supreme Court in the case of *Swiss Ribbons Pvt Ltd. & Ors. ...Vs... Union of India & Ors. ((2019) 4 Supreme Court Cases 17)*, [paragraphs 63 to 65].
- xxx. Merely having a claim is not sufficient compliance of Regulation 8 of the Regulations to classify a person as a Financial Creditor.
- xxxi. Next criteria for classification as Financial Creditor is not only the 'debt due' but it must be 'in default'. The default should be proved either by showing records available with information utility or from financial statements or from the order of Court or Tribunal that has adjudicated upon the non-payment of debt, under Regulation 8(2) of the Regulations. Therefore, it is submitted that for a claim of creditor to be accepted under Regulation 8(2), he is required to satisfy the mandatory criteria as specified therein as a proof of claim, failing which the claim cannot be accepted by the RP. In the present case the lenders of RCOM have not satisfied this requirement.

- xxxii. It is submitted that the scheme of the Code is not to satisfy the 'existence of claim' but the 'existence of the debt due and payable' and the same has remained unpaid. This criterion has also not been satisfied.
- xxxiii. Neither the lenders of RCOM nor the RP have shown that the monies claimed by the charge-holders i.e., the lenders of RCOM under the DoH is a 'debt' within the meaning of Section 3(11) of the Code and thus, they cannot be classified as Financial Creditors of RITL.
- xxxiv. The nature of transactions with Lenders of RCOM based on the DoH which are documents creating a security interest, in any event do not satisfy the requirements and criteria as prescribed in the definition of a 'financial debt' under Section 5(8) of the Code.
- xxxv. The Respondents as individual lenders are not entitled to file claim with the RP. Since as per the Clause 4 read with Clause 16(iv) of DoH, the secured parties i.e. the lenders of RCOM in the present case do not have legal title to the security under DoH, but only have a beneficial interest in relation thereto. The legal rights having been vested with the Trustee as per Clause 5(iii) they are not entitled to file the claim. The Trustee is entitled to recover the amount of shortfall / deficiency only upon enforcement of security, if there is shortfall as contemplated in Clause 5(iii) of the DoH.

6. Reply of R1

R1 filed reply to the Application and submitted as below:

- a. The challenge of the Applicant is essentially based on the ground that the:
 - (i) Claims of the Lenders cannot be admitted as financial debt since no monies have been lent/disbursed to the Corporate Debtor and there is no counter indemnity in respect of the guarantee, indemnity etc.
 - (ii) Claims of the lenders have not been admitted in accordance with the provisions of the Code.

- b. These contentions of the Applicant are incorrect, based on incorrect interpretation of financial contracts executed by the Corporate Debtor and are against the settled principles of law. The facilities were sanctioned by R2 to R5, to RCOM entities on the condition that the facilities together with all interest, charges, etc., shall be secured by RCOM entities by creating a first *pari passu* charge over the hypothecated property (as defined under the respective DoH).
- c. Various Deeds of Hypothecation (DoH) were entered into with respect to various facilities availed by RCOM entities in favour of the security trustee acting on behalf of the relevant lenders. The DoH which are similar in contents have been executed by RCOM entities including the Corporate Debtor to create charge over its property in order to secure the repayment and discharge of the facilities.
- d. The claims of the indirect lenders were based on the DoH. The following are the important provisions of the DoH:

“2. Covenant to pay

In pursuance of the Secured Facilities and the Facility Documents and in consideration of the Secured Lenders having made available the Secured Facilities to the Obligors for the purpose and subject to the terms and conditions set out in the Facility Documents and/or the other Security Document, each of the Chargors does hereby covenant with the Security Trustee that each Obligor shall repay the Security Facilities availed by it together with interest, liquidated damages, premia on prepayment, financing charges, remuneration payable to the Security Trustee, fees payable to any Secured Party, costs, charges, expenses and all other monies stipulated in the relevant Facility Documents in the manner set out therein and shall duly observe and perform all the terms and conditions of the relevant Facility Documents and/or the other Security Documents.”

3. Charge

In pursuance of the aforesaid, each of the Chargors does hereby hypothecates as and by way of a first ranking pari passu charge to the Security Trustee, acting in trust for and for the benefit of the Secured Parties, for the purpose of securing the due discharge by the Obligors of all their obligations in connection with the Secured Facilities, all of its following assets:

.....”

Section 5(iii) of the DoH provides:

“(iii) in the event that an Event of Default has occurred under a Facility Document, the Security Trustee or its nominees shall, on receiving instructions from the Secured Lender/s, in accordance with Section 4 of the Security Trustee Agreement and after providing 7 (seven) Business Days’ notice to any of the Chargor and without assigning any reasons and at the risk and expense of the Chargers and if necessary as attorney for and in the name of the Chargers, be entitled to take charge and/or possession of, seize, recover, receive and remove them and/or sell by public auction or by private contract, dispatch or consign for realisation or otherwise dispose of or deal with all or any part of the Hypothecated Property (including by way or through the exercise of its powers and rights specified in Section 6 hereof) and to enforce, realise, settle, compromise and deal with any rights or claims relating thereto, without being bound to exercise any of these powers or be liable for any losses in the exercise or non-exercise thereof and without prejudice to the Security Trustee’s rights and remedies of suit or otherwise. Notwithstanding any pending suit or other proceeding, each of the Chargers undertakes to give possession to the Security Trustee or its nominees or the Receiver within 7 (seven) Business Days of a notice of demand from the Security Trustee and/or the Receiver all the Charged Property and to transfer and to deliver to Security Trustee and/ or the Receiver all related bills, contracts and securities. Each of the Chargers further agrees to accept the Security Trustee’s account of sales and realisations as sufficient proof of amounts realised and relative expenses and to pay on demand by the Security Trustee and/or the Receiver any shortfall or deficiency thereby shown.”

- e. In terms of Section 5(8) of the Code, financial debt includes amount of any liability in respect of any guarantee or indemnity for any of the items referred to in sub-clause (a) to (h) of Section 5(8). Accordingly, on the basis of the covenant as undertaken by the Corporate Debtor under the DoH, especially under Clause 2 and 5(iii), the Corporate Debtor has covenanted that each obligor shall repay the Secured Facilities (as defined in the DoH) together with interest, liquidated damages and all other amounts payable to any secured party as well as undertaking to make good any shortfall in realisation

of proceeds from enforcement/disposal of security. These obligations are in the nature of guarantee.

- f. A guarantee has been defined under Section 126 of the Indian Contract Act, 1872 as “*a contract to perform the promise, or discharge the liability, of a third person in case of his default.*” Since the obligations undertaken by the Corporate Debtor under DoH constitutes a contract to perform or discharge liability of a third party in case of default by the borrowers, it constitutes a guarantee and has been admitted as a financial debt under Section 5(8)(i) of the Code. It is submitted that the Code does not distinguish between direct and indirect lending and any such classification is not envisaged under the provisions of the Code. Hence these transactions will fall under the ambit of financial debt and accordingly the Respondents’ claims were rightly admitted.
- g. Relying on the judgement of the Bombay High Court in the case of *Intesa Sanpaola S.P.A. ...Vs... Videocon Industries (2013 SCC OnLine Bom 1910)*, it is submitted that undertaking to pay is a guarantee. Therefore, the claims of the Respondents have rightly been admitted as Financial Creditors. For initiation of CIRP, under Section 7/9/10 of the Code, debt and default is a must, however, for filing a claim before the RP in CIRP proceedings, default is not a requirement, the existence of debt is enough. As per Section 3(6) of the Code, the definition of claim is a very wide term and even uncrystallised and unmatured claims can be admitted in the CIRP.
- h. Applicant’s reliance on the judgement of *Swiss Ribbons Pvt Ltd* and *BK Educational Service Pvt Ltd* supra, for the proposition that the claim requires to be in default for the same to be admitted in the CIRP is incorrect. The B.K. Educational Services Pvt Ltd case is in the context of time barred debt and nothing to do with admission of claim by RP.
- i. In the case of *Export Import Bank of India ...Vs... Resolution Professional JEKPL Pvt Ltd (2018 SCC OnLine NCLAT 465)* it was held that default of debt is not a requirement while considering a claim of a creditor in CIRP.

- j. The Code is a complete Code with respect to insolvency irrespective of the fact whether the debt is defaulted or not, a claim has to be filed in CIRP so that all the issues of the creditors are settled in one go. For this proposition, RP relied on the judgement of Hon'ble Supreme Court in the case of *Innoventive Industries Ltd ...Vs... ICICI Bank (2017 SCC OnLine NCLAT 70)*. It is further submitted that when the approved resolution plan is binding on all the creditors and stakeholders of Corporate Debtor as held in the case of *CoC of Essar Steels India ...Vs... Satish Kumar Gupta (2019 SCC OnLine SC 1478)*, the affected lenders to whom the debt is due from the Corporate Debtor whether it is defaulted or not, has to file the claim in the CIRP so that everything is settled on the approval of the resolution plan which is binding on all the stakeholders.
- k. Referring to the contention of the Applicant that RP was bound by the clarification given in the 3rd meeting of the CoC with respect to admission of the claims, it is submitted that when one of the Financial Creditors in the said meeting raised a query – “*was there any Deed of Guarantee in addition to the security and charged document?*”, the answer given was “*No, there was a covenant to pay by the Corporate Debtor in the DoH, along with an undertaking to pay for any deficiency or shortfall in meeting the outstanding dues.*” The Applicant misunderstood the query and the answer.
- l. The RP merely collates the claims, vets, verifies the same and prepares the list of creditors. The admission of a claim is only an administrative process for which the RP does not require to give reason for admission/rejection of the claim. By referring to the judgement of Hon'ble Supreme Court in the case of *Swiss Ribbon Pvt Ltd ...Vs... Union of India & Ors supra* it is submitted that the RP has only verified the claim and he has not discharged any adjudicatory role.
- m. It is submitted that even though the Security Trustee has the right to enforce security under the DoH, the DoH does not take away the right of the

Respondents to file claim before the RP that too in the CIRP proceedings.
Filing of claim before the RP is not enforcement of security.

- n. The judgement of Hon'ble Supreme Court in *Anuj Jain ...Vs... Axis Bank Ltd (2020 SCC OnLine SC 237)* is not applicable to the facts of the present case. Succinctly put, the DoH contains an undertaking/liability to pay on behalf of the Corporate Debtor, which was not the case in *Anuj Jain supra*.

7. Submissions of R2 to R5.

- a. RCOM group entities have availed several financial facilities from various lenders and all the assets of all RCOM group entities were charged in favour of various lenders who have advanced these facilities. A Master Security Trustee Agreement (MSTA) dated 04.03.2011 was entered into between RCOM group entities and Axis Trustees Services Limited (ATSL) (Security Trustee) pursuant to which the Security Trustee was appointed as Common Security Trustee with respect to the security created over the assets of RCOM group entities. The MSTA provided that the lenders advancing facilities to RCOM group who wish to have *pari passu* benefit of the same security could accede to the MSTA by signing a Deed of Hypothecation. Accordingly, all lenders have acceded to the MSTA. Pursuant to the Facility Agreement and the MSTA, the lenders Deed of Accession was executed by Respondents/Assignor in favour of ATSL.
- b. Further, in terms of Facility Agreement and MSTA, RCOM Group entities (in their capacity as "Chargors") executed Deeds of Hypothecation in favour of Security Trustee on the following dates:
- (i) DoH dated 08.11.2016 in respect of – R2.
 - (ii) DoH dated 07.05.2015 in respect of – R3.
 - (iii) DoHs dated 04.03.2011, 09.03.2011, 22.02.2012 in respect of – R4.
 - (iv) DoHs dated 04.03.2011, 09.03.2011, 22.02.2012 in respect of – R5.
- c. Subsequently by an Assignment Agreement dated 28.03.2018, the loan was assigned by DBS Bank Limited to R2 and thus R2 is claiming this amount.

Likewise, R3 got assignment of the loans from Deutsche Bank Singapore. R3 got the assignment of the loan transferred and assigned by Deutsche Bank Singapore in favour of Bank of America NA in terms of transfer certificate dated 09.07.2018 and Bank of America NA further assigned the advances having aggregated principal amount of USD 30,000,000 (USD 30 Million) to R3 in terms of transfer certificate dated 28.06.2019. Thus, R3 become the creditor of the Corporate Debtor. R4 and R5 are also indirect lenders like R2 and R3.

- d. The Respondents filed their proof of claim with the IRP. The provisions of DoH (Specifically Clauses 2, 3 and 5(iii) of DoH) evidence that the Corporate Debtor has undertaken the obligation to pay all the outstanding debt of RCOM entities following their default as Principal Obligor.
- e. Relying on Section 18 of the Code and on judgement of *Export Import Bank of India ...Vs... Resolution Professional of JKEPL* supra, it is submitted that RP has to collate the claim based on the public announcement made under Section 13 of the Code. The claim should be as on the date of initiation of CIRP and any person having a right to claim the payment under Section 3(6) of the Code is “*supposed to file the claim whether matured or unmatured. The question as to whether there is a default or not is not to be seen.*”
 - a) The definitions of ‘claim’, ‘creditor’, ‘debt’, ‘financial debt’ and ‘Financial Creditor’ under the Code are as follows:
 - i) Section 3(6): “*claim*” means—
 - i. *a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;*
 - ii. *right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured.*”
 - ii) Section 3(10): “*creditor*” means *any person to whom a debt is owed and includes a Financial Creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree holder*”;

- iii) Section 3(11): *“debt” means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt”;*
 - iv) Section 5(8): *“financial debt” means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes—*
 - (a) ...;
 - ...
 - (b) *any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;*
 - (c) *the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;*
 - v) Section 5(7): *“Financial Creditor” means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to”*
- f. Clause 2, 3 and 4 of DoH, the Corporate Debtor in addition to hypothecating its properties undertaken to pay the indirect lenders the amount due under the relevant Facility Agreement.
- g. Under the DoH, apart from creating a first-ranking *pari passu* charge and hypothecation over all assets of all the Chargors (including the Corporate Debtor (RITL)), each of the Chargors also expressly covenanted to pay to the Security Trustee (for the benefit of acceding lenders) any shortfall or deficiency due to the acceding lenders upon sale of the Chargors’ hypothecated assets. The assets of all Chargors which are hypothecated are collectively defined as ‘*Hypothecated Property/ies*’ and the assets of each individual Chargor are defined as ‘*Charged Property/ies*’. Therefore, in the context of Corporate Debtor, the DoH applies to the Charged Property of the Corporate Debtor.
- h. The DoH amounts to guarantee in favour of the Respondents and the Corporate Debtor is obliged to discharge the entire default by RCOM entities under the facilities. It is submitted that Section 5(8)(i) of the Code provides that the liability of Corporate Debtor under the guarantee of indemnity

expressly provide for as a Financial Debt. Therefore, the claim made by the Respondents are in order.

- i. Referring to Clause 5(iii) of DoH *supra*, R2 to R5 submit that the same amounts to guarantee by the Corporate Debtor. The Respondents submitted the following analysis in support of their above contention:

- i) As per the first sentence of Clause 5(iii) beginning with “*in the event that an Event of Default...*”, in the event of an Event of Default i.e., in this case, RCOM’s default in making payment of the outstanding amounts under the Facility and the amount in default thereby being known, the Security Trustee is entitled to enforce the security against any of the Chargors (including the Corporate Debtor) and take steps to dispose of the Hypothecated Property (which includes the Charged Property of the Corporate Debtor).
- ii) as per the second sentence of Clause 5(iii) beginning with “*Notwithstanding any pending suit or other proceeding each of the Chargor undertakes.....*”, notwithstanding any suit or proceeding, each of the Chargors (including the Corporate Debtor) who have provided security, are obligated to hand over possession of the Charged Property to the Security Trustee in the manner provided therein.
- iii) as per the third sentence of Clause 5(iii) beginning with “*Each of the Chargors further agrees to...*”, every Chargor (including the Corporate Debtor) has agreed to accept the Security Trustee’s account of the expenses, sales and realizations and “*to pay on demand by the Security Trustee and/or the Receiver any shortfall or deficiency thereby shown.*” It is submitted that “*shortfall*” or “*deficiency*” clearly refers to a shortfall or deficiency in realizing the amount in default from RCOM under the Facility Agreement.

- j. Under Clause 5(iii) of the DoH, the Corporate Debtor as the Chargor, has

covenanted to pay the entire amount in default from RCOM from: (i) sale proceeds of the Charged Property of the Corporate Debtor; and (ii) in case of any deficit or shortfall in recovery of the entire amounts in default from RCOM, from the sale of the Charged Property, as a covenant by the Corporate Debtor itself to pay. From the aforesaid Clause, it is clear that the Corporate Debtor has not merely provided security for RCOM's dues but has also undertaken to itself to pay any shortfall or deficiency that may arise in the recovery of the amounts in default from RCOM upon the realization from the sale of the security. A mere security provider would never undertake to pay such shortfall or deficit.

k. It is settled law that the nomenclature given to a document or a clause can never be determinative of the legal nature of the obligations undertaken thereunder. In other words, a document or clause would not, in law, necessarily be a guarantee only because the word "*guarantee*" is used therein and equally, would not, in law necessarily be precluded from being a guarantee only because the word "*guarantee*" is not used therein. In other words, what is determinative, in law, is the nature of the obligations under the document/clause and not the nomenclature.

l. Section 126 of the Indian Contract Act, 1872 (Contract Act) which deals with '*Contract of guarantee*' reads as follows:

"126. '*Contract of guarantee*', '*surety*', '*principal debtor*' and '*creditor*'—A '*contract of guarantee*' is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the '*surety*'; the person in respect of whose default the guarantee is given is called the '*principal debtor*', and the person to whom the guarantee is given is called the '*creditor*'. A guarantee may be either oral or written."

m. On a bare reading of Section 126 of the Contract Act, it is clear that under Clause 5(iii) of the DoH, the Corporate Debtor has undertaken to discharge the entire liability of a third person (in this case, RCOM) in case of its default, by a combination of a sale of the Charged Property and by a personal

covenant to make payment of any shortfall or deficiency. Accordingly, there can be no doubt that Clause 5(iii) of the DoH satisfies the ingredients of a contract of guarantee under Section 126 of the Contract Act.

- n. Section 128 of the Contract Act provides that the liability of the surety is co-extensive with that of the principal debtor unless otherwise provided by the contract. Clause 5(iii) of the DoH also satisfies this ingredient. As a result of Clause 16(viii) of the DoH, in the event of a default from RCOM, the Security Trustee can take steps against the Corporate Debtor for recovery of the amounts in default from RCOM, without having any obligation to first proceed against RCOM. Accordingly, there can be no doubt that the liability on the Corporate Debtor under the DoH to make payment of the amounts in default from RCOM is co-extensive with RCOM, absolute and immediate upon RCOM's default.
- o. In the present case, it is an admitted position that RCOM has defaulted in repayment of amounts under the Facility Agreement. Accordingly, the amounts in default from RCOM are crystallized for the purposes of the first sentence of Clause 5(iii) of the DoH. Under the DoH, this liability is to be discharged by the Corporate Debtor by sale of the Charged Property and by a personal covenant to make payment of any shortfall or deficiency. It is also an admitted position that there can be no sale of the Charged Property on account of the moratorium imposed under Section 14 of the Code. However, this cannot mean that the Corporate Debtor entirely escapes its liability to make payment. On the contrary, settled principles of law require a contract to be interpreted to give it 'business efficacy' rather than to render it redundant and unworkable. Accordingly, in a scenario where there are no recoveries from any sale of the Charged Property, the entire amount in default from RCOM to the Respondents would undoubtedly be rendered a "shortfall" or "deficiency" and form part of the Corporate Debtor's liability to pay under the last sentence of Clause 5(iii) of the DoH.
- p. The contention of the Applicant that the Respondents are mere beneficiaries

under DoH and the obligation of the Corporate Debtor under DoH are in favour of Security Trustee and hence the Respondents cannot file claim before the IRP, is a hyper technical argument, devoid of any pleadings, the same should be rejected at the outset. The said contention of the Applicant is misconceived when the Applicant does not dispute the Respondents as beneficiary under the DoH. It is a settled law that beneficiary of payment obligation under an agreement can make a claim itself without approaching the trustee appointed under the Agreement. To buttress the point, Respondents relied on the judgement of *Essar Steel ...Vs... Gramercy Emerging Market Fund (2002 SCC OnLine Guj 319)* where a Division Bench of the Hon'ble Gujarat High Court held that "*third parties' interests specifically protected by the contract between the issuer company and the trustee in form of the Trust Deed, would be impaired if these creditor beneficiaries were not accorded right to obtain relief against the promisor*", and on this basis allowed noteholders (in that case) to file a winding up petition against the borrower directly by the creditor beneficiary despite their being a security trustee, notwithstanding an express restriction under the transaction documents.

- q. In view of this ruling, it is submitted that the respondents are entitled to file claim before the IRP as the Financial Creditors directly. Further, the rights of security trustee under the DoH are only for the purpose of enforcement of security and this is not a case of enforcement of security.
- r. Under Section 14(1) of the Code, only the right to enforce the security, if any, is suspended and not the "liability to pay". In view of this, it is submitted that moratorium will not kick in or affect the liability of the Corporate Debtor to pay under the DoH.
- s. Reliance is placed on the judgement of Hon'ble Supreme Court in the case of *Committee of Creditors of Essar Steel India Ltd* supra, to say that the successful Resolution Applicant starts running of the business of the Corporate Debtor on a fresh slate, and in view of this, all the creditors of the

Corporate Debtor have to submit their claims before RP, so that the claims and pay out can be decided by the CoC of the Company under CIRP, so that the Successful Resolution Applicant can start the business on fresh slate on approval of the resolution plan by the Adjudicating Authority.

- t. The fact that moratorium precludes the sale of the charged assets cannot mean that the Corporate Debtor, can entirely escape its liability for payment when there are no recovery from the sale of the charged asset, the entirety of the amount in default from the RCOM entities to the Respondents would undoubtedly be rendered a shortfall or deficiency and it is the liability of the Corporate Debtor to make the payment under DoH. The fact that the liability cannot be enforced against the Corporate Debtor during moratorium can never preclude the filing of the claim in CIRP. The Respondents relies on the observation in *Gramercy (supra)* where it was observed at Para 37 and the same is extracted below:

“37. ...Existence of a person's right as a creditor will not necessarily depend upon his remedy to enforce it which may be hedged or eclipsed for the time being. It is not unknown to law that creditors remedies are often suspended as a relief to an undertaking or to nourish a sick one to health. The creditors' rights, however, do not get extinguished...”

- u. It is submitted that “financial debt” is not required to be in “default”, for status of “Financial Creditor” in the CIRP. The Applicant relying on certain observation in para 65 of *Swiss Ribbons Pvt. Ltd & Ors. supra* contended that IRP cannot admit any debt unless the same is in default. On a bare reading of the definitions of ‘claim’, ‘debt’, ‘financial debt’ or ‘Financial Creditor’ set out hereinabove, it becomes clear that none of the said definitions provide for the ingredient of ‘default’. In fact, the definition of a Financial Creditor only requires that a ‘financial debt’ is “owed” by the corporate debtor. On the other hand, ‘default’ has been separately defined under Section 3(12) of the Code. The relevance of ‘default’ becomes clear on a bare reading of Section 7 of the Code, which provides that a ‘Financial Creditor’ can file an

application under Section 7 of the Code “for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred”. In other words, it is only a Financial Creditor whose debt is in default who can file proceedings under Section 7 of the Code for CIRP to be initiated. This itself is clearly indicative that the term ‘Financial Creditor’ is not necessarily synonymous with default. If it were necessarily synonymous, there was no question of Section 7 of the Code requiring a ‘Financial Creditor’ to also prove a ‘default’ for initiation of CIRP. It is a patently misconceived contention that after the CIRP is initiated at the instance of a Financial Creditor whose financial debt was in default, only such other persons whose financial debts are in default are entitled to file claims with the IRP/RP for the status of Financial Creditors in the CIRP. This also becomes clear from Section 21(2) of the Code which provides that the “[t]he committee of creditors shall comprise all Financial Creditors of the corporate debtor” without any requirement of the Financial Creditor’s debt being in default. It is submitted that the Applicant’s contention does significant violence to the definition of “Financial Creditor” and “financial debt” under the Sections 5(7) and 5(8) of the Code and also Section 21(2) of the Code, none of which provide for the element of ‘default’.

- v. The reliance of the Applicant on the decision of the case in *Swiss Ribbon* supra, is completely misplaced, since it is relating to existence of default of a debt for admission of Section 7 petition and not for admission of claim by IRP.
- w. Relying on the judgement of Hon’ble NCLAT in *Export Import Bank of India* (supra), it is submitted that any person who has right to claim payment as defined under Section 3(6) is supposed to file the claim whether matured or unmatured. The question as to whether there is a default or not is not to be seen. Further it was held that maturity of claim or default of claim or invocation of guarantee for claiming the amount has no nexus with filing of

claim pursuant to public announcement made under Section 13(1)(d) read with Section 15(1)(c) or for collating the claim under Section 18(1)(b) or for updating claim under Section 25(2)(e) of the Code.

- x. The Applicant has contended that the judgment of the Hon'ble NCLAT in *Export Import Bank of India (supra)* ought not to be followed by this Tribunal since the same is no longer good law in view of the judgment of the Hon'ble Supreme Court in *Swiss Ribbons (supra)*. It is submitted that the above said contention is patently misconceived for the reason that Swiss Ribbons case *supra* deals with default which triggers the admission of Section 7 petition and does not relate to filing of claim/admission of claim etc. by the RP and hence, the decision of Hon'ble NCLAT in *Export Import Bank of India supra* relating to admission of the claim by RP holds the field.
- y. The Applicant's reliance on the judgement of *Anuj Jain supra* to contend that the Corporate Debtor's payment obligation under the DoH do not constitute "financial debt". However, the facts underlying the judgement in *Anuj Jain (supra)* stand on a totally different footing from the present case. In *Anuj Jain* case, the issue dealt was with simple mortgage which involved only security interest created in the property of Jaypee Infrastructure Ltd (JIL) and did not involve a covenant to pay or a guarantee by JIL. This is the fundamental distinction between the facts in *Anuj Jain (supra)* and the present case. This case involves an undertaking by the Corporate Debtor by virtue of Clauses 2, 3 and 5(iii) of DoH to pay the entirety of the amounts of RCOM's default which fulfills the ingredients of a guarantee and renders the same a 'financial debt' under Section 5(8)(i) of the Code. It is submitted that the fundamental distinction between the facts of the present case and *Anuj Jain (supra)* is apparent from para 36.3, 43, 47.2 of the judgment in *Anuj Jain (supra)*.
- z. The Applicant placed reliance upon certain legal commentaries containing sample drafts/specimens of deeds of hypothecation to contend that words similar to clause 5(iii) of the DoH are also to be found in such sample drafts/specimens. On this basis, the Applicant contended that if words similar

to clause 5(iii) of the DoH are being provided by a borrower then upholding Respondents' contention that the said words constitute a guarantee, in law, would result in the conclusion that borrowers are guaranteeing their own debts under the sample drafts/specimens of deeds of hypothecation, which can never be the case. However, this contention is merely a red-herring and is entirely misconceived. The DoH is a document in writing between the parties and has to be interpreted on its own terms and not otherwise.

aa. Without prejudice to the aforesaid, it is submitted that even otherwise the Applicant's contention based on the so-called sample drafts/specimens of deeds of hypothecation is totally misconceived. It is submitted that in a deed of hypothecation provided by a borrower where the language is consistent with Clause 5(iii) of the DoH, it is axiomatic that the borrower can never be said to be providing a *guarantee* since perforce a guarantee can only be provided by a third person and not by the borrower himself. However, this would not detract from the position that even in the context of the borrower, language consistent with Clause 5(iii) of the DoH would *ex facie* constitute an undertaking by the borrower to pay the entire debt by sale of the hypothecated property and by a personal covenant to make payment of any shortfall or deficiency. The Applicant has totally failed to appreciate that such an undertaking when provided by a third party for the debts of a borrower amounts to the third party undertaking to pay the entire debt of the borrower by sale of the hypothecated property and by a personal covenant to make payment of any shortfall or deficiency. Accordingly, in the context of such a third party, the undertaking would satisfy the requirements of Section 126 of the Contract Act and constitute a contract of guarantee.

bb. It is submitted that on the request of the Applicant, the proof of claims submitted by the Respondents submitted before the RP was filed in a compilation before this Tribunal and they irrefutably demonstrates that the claim filed by the Respondents were accepted by the RP and the arguments advanced before the Tribunal was squarely on the same basis of filing the

claims and the acceptance by the RP. Before the admission of the claims, the RP sought certain clarification which were provided to him and subsequently the claims of the Respondents were admitted by the RP as Financial Creditors.

8. On perusal of the pleadings and on hearing the Counsels for the Applicant and Respondents, following are the observations of this Bench:

- i. It is an admitted position that the Corporate Debtor hypothecated its assets in favor of R2 to R5 under the DoH to secure the loans disbursed by them to the RCOM entities.
- ii. It is also an admitted position that R2 to R5 have not disbursed money to the Corporate Debtor.
- iii. The Master Security Trustee Agreement dated 04.03.2011 was entered between RCOM group entities and ATSL pursuant to which ATSL was appointed as Common Security Trustee with respect to the security created on the assets of RCOM entities including the Corporate Debtor.
- iv. The Lenders who have advanced facilities to RCOM entities and who wish to have *pari passu* benefit of the same security could accede to the MSTA while signing the Deed of Accession. All the lenders of RCOM entities including the Applicant have acceded to MSTA, which means that all the lenders have *pari passu* sharing of security amongst the secured lenders.
- v. In terms of the Loan Agreement, Facility Agreement and the MSTA, the RCOM group entities in their capacity as Chargors executed the Deed of Hypothecation in favour of ATSL.
- vi. Even though the DoH is named as such, it is categorically stated in Section 5(iii) thereof that if the Event of Default has occurred, the security trustee or its nominees on receiving instructions from secured lenders would be entitled to take charge or/and possession

etc. or otherwise dispose of or deal with the hypothecated properties. The Security Trustee or its nominee is also entitled to enforce, realize, settle and compromise, etc.

- vii. Another important clause is that “each of the chargors” further agrees to accept the security trustees account of sales and realization, as sufficient amount of proof realized and relative expenses and to pay on demand by the Security Trustee or the receiver any shortfall or deficiency thereby shown.
- viii. From the above, it is clear that when the amount realized by disposing or dealing with the hypothecated assets, if there is any shortfall or deficiency, to meet the claim of the lenders such shortfall is undertaken to be paid or guaranteed to be paid by the Chargors.
- ix. As per Section 126 of the Contract Act, a contract of guarantee is a contract to perform the promise or discharge the liability of a third person in case of default. Here, the Corporate Debtor has undertaken to pay the deficit/deficiency in the claim amount after appropriating the proceeds of the sale of hypothecated assets. The DoH not only hypothecated the properties in favour of the Respondents but there is also an undertaking by the Corporate Debtor to pay the claim of the Respondents after appropriating the proceeds of the sale of the hypothecated assets towards the amount claimed. Hence, the submission of the Respondents that Corporate Debtor has guaranteed the payment of the claim of the Respondent has to be accepted and we hold that the last sentence in Clause 5(iii) of DoH which reads as “*Each of the Chargors further agrees to accept the Security Trustee's account of sales and realisations as sufficient proof of amounts realised and relative expenses and to pay on demand by the Security Trustee and/or the Receiver any shortfall or deficiency thereby shown*” is

a guarantee as defined in Section 126 of the Indian Contract At, 1872.

- x. Section 5(8) of the Code provides that financial debt means the debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes –

“(a) money borrowed against the payment of interest;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to sub-clauses (a) to (h) of this clause;”

Since we have held that the undertaking by the Chargors in the DoH is a guarantee, the said guarantee clearly falls within the four corners of Section 5(8)(a) and 5(8)(i) of the Code and the debt is undoubtedly a financial debt as provided under the Code.

- xi. The contention of the Applicant that there is no disbursement of any amount or loan to the Corporate Debtor and hence there is no financial debt is untenable. Here the loans were disbursed to RCOM entities and the Corporate Debtor had given guarantee in favour of the Respondents.
- xii. When there is a Financial Debt due, irrespective of the fact that the same is defaulted or not, a claim can be made in the CIRP proceedings. For making a claim under CIRP, it is not required that the said debt should have been defaulted. We accept the contention of the Respondents that they were within their rights in filing the claim before the IRP as Financial Creditors. In this regard, the reliance of the Applicant on the judgement of Swiss Ribbons supra is totally misplaced since Swiss Ribbons deals with the debt and default for triggering CIRP process and the issue of limitation. In this respect, it is beneficial to refer Section 18 of the Code wherein it is provided that:

“(1) the IRP shall perform the following duties namely:

(a)...

(b) receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made under section 13 and 15

(c) constitute a Committee of Creditors;

.....”

- xiii. Further Chapter IV of IBBI (Insolvency Resolution Process for Corporate Persons), Regulations 2016 - Regulations 7 to 14 deals with the claims by Operational Creditors, Financial Creditors, Workmen, Employees etc. Regulations clearly provides that a person claiming to be a creditor (either financial or operational, etc.) shall submit proof of claim to the IRP.
- xiv. Neither the Section of law nor the Regulation says that the claim of a debt can be made only when there is a default. The debt and default would be a *sine qua non* for the admission of a Section 7 or Section 9 or Section 10 petition. But for filing claim before IRP, mere debt is sufficient and it would not be necessary that the debt has been defaulted. In view of this, the submission of the Counsel for the Applicant that the claimant must establish not only the existence of the financial debt but also that the same is due and unpaid which means that the debt should have been defaulted, is untenable. In this scenario, the Applicant's reliance on the judgement of *B.K. Educational case* (supra) is misplaced since the facts of that case are distinguishable from the facts of the present case.
- xv. Section 2(11) of the Code provides that debt means a liability or obligation in respect of a claim which is due from any person and includes financial debt and operational debt. Here, in this case, the Corporate Debtor by the DoH guaranteed the Respondents to pay the deficiency or shortfall, if any, towards the debt after realisation of the hypothecated assets. Admittedly, hypothecated assets were not sold in this case and hence the whole debt is due

to the Respondents and the Respondents as Financial Creditors as already indicated by us are entitled to file a claim before the IRP. The IRP has rightly admitted the claim of Respondents as Financial Creditor. The contention of the Applicant that the said debt shall be in default is not applicable as far as filing of the claim is concerned, however, in view of the fact that CIRP has been initiated against the Corporate Debtor, Corporate Debtor as a guarantor is liable to pay the debts and the Respondents are right in filing a claim as a Financial Creditor.

- xvi. If the proposition of the Applicant that no claim can be made before the IRP/RP, until the debt is defaulted is accepted, then except the petitioning creditor whose petition has been admitted for the reason that there is debt and default, the other debtors whose debts are not defaulted by the Corporate Debtor cannot file claim and that would lead to an unenviable proposition that only the defaulted debts of the creditors can be claimed and the rest will end up in a remediless situation. The said proposition of the Applicant is entirely foreign to the Code. In this regard, the reliance of the Applicant on the decision of the Hon'ble Supreme Court in the case of Swiss Ribbon (supra), Para 63 to 65 is totally misplaced since the paras referred deals with the differentiation in the triggering of the CIRP by Financial Creditors under Section 7 and Operational Creditors under Section 8 & 9 of the Code and not with the filing of claim with the RP. Para 65 of the Hon'ble Supreme Court's case in Swiss Ribbon supra is extracted below:

"65. ...Whereas a claim gives rise to a debt only when it becomes due, a default occurs only when a debt becomes due and payable and is not paid by the debtor. It is for this reason that a Financial Creditor has to prove default as opposed to an operational creditor who merely claims a right to payment of a liability or obligation in respect of a debt which may be due. When this aspect is borne in mind, the differentiation in the triggering of

insolvency resolution process by Financial Creditors under Section 7 and by operational creditors under Sections 8 and 9 of the Code becomes clear.”

The submission of the Applicant that the ratio decided in Export Import Bank of India (supra) is contrary to Swiss Ribbons’ case does not hold water.

- xvii. In respect of the contention of the Applicant that the individual lenders are not entitled to file claims with the RP on the guise that the Respondents do not have a legal title to the security under DoH but only have a beneficial interest, the legal rights having been vested with the Trustee, we are of the view that the judgement of Hon’ble Gujarat High Court in the case of *Essar Steel v. Gramercy Emerging Market Fund* supra relied on by the Respondents is a complete answer to this question and we hold that the R2 to R5 as lenders/creditors are entitled to file Form C as required under Regulation 8 of CIRP Regulations. Filing a claim in CIRP cannot be construed as enforcement of security interest. Before the enforcement of security interest by the Security Trustee, CIRP intervened and the Creditors are entitled to file Form C before the IRP. It is to be noted that in Form C also the claimant has to give the name of the Financial Creditor, amount of claim, how and when the debt incurred, etc. A Security Trustee cannot become a Financial Creditor to file a claim before the IRP and we feel that on going through the contents of Form C even in cases when a Security Trustee is appointed there is no bar for a Financial Creditor to file a claim. The contention of the Applicant that the beneficiary can enforce his right only when the Trustee has failed to discharge his duties or otherwise cannot be accepted for the reason that there is no question of enforcement of right by the Trustee since CIRP has intervened.

9. The Counsel for the Applicant referring to the last sentence of clause 5(iii) of DoH submitted that it relates to Security Trustees Account of expenses for sale of the hypothecated properties and if there is any shortfall/deficit in the expenses which the Security Trustee could not repay from the sale proceeds that shortfall/deficiency has to be collected from the Chargors and it does not relate to the deficiency/shortfall that will take place after adjusting the sale proceeds to the debt recoverable. The Ld. Counsel submitted that in view of this, there is no guarantee as provided under Section 126 of the Contract Act. Without prejudice to the above submission, it is further submitted that there is no occasion for the Security Trustee to realize the hypothecated properties in view of the fact that moratorium has triggered on admission of the CIRP petition against the Corporate Debtor as provided under Section 14(1)(c) of the Code. It is further submitted that the security interest as defined under Section 3(31) of the Code does not have any effect as long as the moratorium continues. In this case, since moratorium has already kicked in there is no question of realization of the security interest by the Security Trustee. It is further submitted that in case the resolution plan then pending for approval of the Bench is rejected, the Respondents as Creditors can either relinquish their security interest and stand in the queue as creditors or can prefer to stay outside the insolvency proceedings and realize the hypothecated security.
10. As far as the above argument is concerned, we are unable to accept the contention that the said sentence of Clause 5(iii) of DoH is only relating to the expense of sales and realizations. The proper meaning according to us is that on default, the Security Trustee is entitled to sell and realize the hypothecated assets and on such sale and realization of hypothecated assets the Security Trustee will account for each and every realization, deduct the expenses of sale and the balance amount available in his hands will be appropriated to the loan due and after such appropriation, still if any balance is pending towards the loan, then the Chargors undertakes/guarantees to pay the deficit amount of the loan. This is

what our understanding is. In view of this, we hold that the submission made by the Ld. Counsel for the Applicant is devoid of any merit and the same is rejected.

11. The Ld. Counsel for the Applicant submitted that the nomenclature given to the document i.e., Deed of Hypothecation cannot and will not create a guarantee. It is submitted that since the document itself is Deed of Hypothecation, there is no question of giving guarantee by the Corporate Debtor. In this regard, we agree with the contention of the Respondents that the nomenclature given to a document or a clause can never be determinative of the legal nature of the obligations undertaken thereunder.
12. The Applicant also relied on the judgement of Hon'ble Supreme Court in *Anuj Jain Vs. Axis Bank* (supra) to buttress the point that the Corporate Debtors liability under DoH do not constitute a financial debt. However, the said case relates to a simple mortgage wherein only security interest was created in the property of the Corporate Debtor therein and there is no execution of the guarantee by the Corporate Debtor. Here in this case, the facts are completely different and the ratio in that case is not applicable for the case in hand.
13. In view of the above discussion, we are of the view that the action of R1 in admitting the claims of R2 to R5 as Financial Creditors of the Corporate Debtor is perfectly in order and no interference is called for. Accordingly, the Application is dismissed.

Sd/-

V. NALLASENAPATHY
Member (Technical)

Sd/-

JANAB MOHAMMED AJMAL
Member (Judicial)