NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 460 of 2023

[Arising out of order dated 24th March, 2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Court III in C.P. No. (IB)560/MD-III/2022]

IN THE MATTER OF:

HARISH RAGHAVJI PATEL
SUSPENDED DIRECTOR OF
RAJESH ESTATES AND NIRMAN PRIVATE LIMITED,
HAVING HIS OFFICE AT 139, SEKSARIA CHAMBERS,
2ND FLOOR, N.M. ROAD FORT, MUMBAI-400023

...Appellant

Versus

1. **CLEARWATER CAPITAL PARTNERS SINGAPORE FUND IV PRIVATE LIMITED**
FINANCIAL CREDITOR 1
A PRIVATE LIMITED BY COMPANY SHARES
INCORPORATED IN SINGAPORE, HAYING ITS
OFFICE AT 6 TEMASEK BOULEYARD #38-03 SUNTEC
TOWER FOUR, SINGAPORE 03898

2. **CLEARWATER CAPITAL PARTNERS SINGAPORE FUND V PRIVATE LIMITED**
FINANCIAL CREDITOR 2
A PRIVATE LIMITED BY INCORPORATED COMPANY
SHARES IN SINGAPORE, HA YING ITS
OFFICE AT 6 TEMASEK BOULEYARD #38-03 SUNTEC
TOWER FOUR, SINGAPORE 03898

3. **RAJESH ESTATES AND NIRMAN PRIVATE LIMITED**
THE CORPORATE DEBTOR A COMPANY
INCORPORATED UNDER THE COMPANIES ACT, 2013,
HAVING ITS REGISTERED OFFICE AT 139, SEKSARIA
CHAMBERS, 2ND FLOOR N.M. ROAD FORT, MUMBAI-400023

4. **DIVYESH DESAI**
INTERIM PROFESSIONAL
FLOOR, N.M. ROAD FORT, HAVING HIS REGISTERED

OFFICE AT B2, 402B MARATHON INNOVA, OFF GANPATRAO KADAM MARG, LOWER PAREL (W), MUMBAI - 400013 **...Respondents**

Present:

For Appellant:	**Mr. Arun Kathpalia, Sr. Advocate, Mr. Samarth Chowdhary, Mr. Rohan P., Mr. Mustafa Nulwala, Ms. Diksha Gupta, Advocates.**
For Respondents:	**Mr. Ramji Srinivasan, Sr. Advocate, Mr. Samar Kachwaha, Ms. Ekta Bhasin, Mr. R. Sudhinder, Ms. Aastha Trivedi, Ms. Namrata Saraogi, Mr. Kartik Pandey, Advocates for R-1 and R-2.**
	Mr. Tishampati Sen, Ms. Riddhi Sancheti, Mr. Anurag Anand, Mr. Himanshu Kaushal, Mr. Mukul Kulhari, Advocates for R-4.

J U D G M E N T

ASHOK BHUSHAN, J:

1. This Appeal by a Suspended Director of the Corporate Debtor, Rajesh Estates and Nirman Pvt. Ltd. has been filed against the Order dated 24th March, 2023 passed by National Company Law Tribunal, Court-III, Mumbai Bench (hereinafter referred to as "The Adjudicating Authority") by which Section 7 Application under Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "The Code") filed by the Financial Creditors (Respondent No. 1 and 2 herein) has been admitted.

2. Brief facts of the case necessary to be noticed for deciding this Appeal are:-

I. Debenture Trust Deed (DTD in short) was entered between Vistara ITCL Limited (Debenture Trustee) and the Corporate Debtor. The Corporate Debtor issued Non-Convertible Debentures (NCDs in short) of Rs. 432 Crores of which Financial Creditors (Respondent No. 1 and 2 herein) subscribes to NCDs of Rs. 129 Crores i.e. 29.8% of the total issued capital. As per Debenture Trust Deed, payment of principal amount under the DTD was to be made on 31st December, 2020. Corporate Debtor could not make the payment of principal amount and the interest. Financial Creditor issued a notice dated 30th May, 2021 (Facility Acceleration Notice). Notice mentioned that there being total overdue amount of Rs.10,68,37,203/- (with regard to Respondent No. 1) event of default has occurred hence facility is accelerated for entire outstanding in respect of facility as on 30th May, 2021 becomes due and be paid. Similarly notice dated 31st May, 2021 was issued by Respondent No. 2 mentioning that total overdue being Rs.58,45,30,759/- facility is accelerated and entire amount be paid within one business day.

II. After Facility Acceleration Notice, the Respondent Nos. 1 and 2 the Financial Creditors (Debenture Holders) filed Section 7 Application before the Adjudicating Authority claiming total amount as on 31st March, 2022 is Rs.77,59,57,957/- and date of default was mentioned as 01st June, 2021. Along with Section 7 Application working for computation of amount and days of default in tabular form was also annexed as Exhibit K. Reply was filed to Section 7 Application by the

Corporate Debtor. Corporate Debtor in its Reply has taken the plea that the application is barred by Section 10A and further Debenture Holders the Respondent Nos. 1 and 2 had no right to file Section 7 Application. It was pleaded that it is only Debenture Trustee who can file the Section 7 Application after receiving the approved instructions from Debentures Holders. The Respondent Nos. 1 and 2 being minority debenture holders could not themselves have initiated Section 7 Proceedings.

III. The Adjudicating Authority after hearing the parties, by impugned order, admitted Section 7 Application. The Adjudicating Authority repelled the submission of the Corporate Debtor that Application is barred by Section 10A holding that date of default in the Section 7 Application being 1st June, 2021 i.e. due date for payment of outstanding amount demanded by Acceleration Notice dated 31st May, 2021 the Application is not barred by Section 10A. It was held that apart from first default in the redemption schedule i.e. 31st December, 2020 which was for payment of only 10% of total outstanding that dates in the redemption schedule are beyond the Section 10A period. The Adjudicating Authority held that as there is a default even after Section 10A period claim should not be held to be barred under Section 10A. The Adjudicating Authority after returning a finding of debt and default admitted Section 7 Application.

3. We have heard Mr. Arun Kathpalia, Sr. Advocate appearing for the Appellant and Mr. Ramji Srinivasan, Sr. Advocate appearing for Financial Creditors.

4. Learned counsel for the Appellant submits that the entire basis of the Financial Creditors' case for existence of default is the Facility Acceleration Notice dated 30th May, 2021/31st May, 202, however as Acceleration Notice is illegal, contrary to the provisions of the Debenture Trust Deed, there is no default on the part of the Corporate Debtor. It is submitted that Facility Acceleration Notice has been issued by the Debenture Holders whereas under the Debenture Trust Deed it is Debenture Trustee who along is entitled to declare event of default and issue a Facility Acceleration Notice after approved instructions received from Debenture Holders. Mr. Kathpalia has referred to Clause 9.2 of the Debenture Trust Deed. It is submitted that approved instruction has to be approved by 50% of the Debenture Holders by value. The Financial Creditors i.e. Respondent Nos. 1 and 2 hold only 29.8% of the non-convertible debentures hence they were not eligible to initiate proceedings under Section 7 of the Code. When the Debenture Trust Deed require something to be done in particular manner it has to be done only in that manner. Facility Acceleration Notice issued by financial Creditors is non-est. Facility Acceleration Notice was designed with the ulterior objective of disguising the fact that debt claim has fallen due not within Section 10A period, hence, no application could have been filed for such default. The Facility Acceleration Notice could never be the date of default.

The Facility Acceleration Notice itself mentioned that default interest has been levied and is unpaid. Obviously, the date of default is prior to May, 2021. Referring to the table of computation filed by the Financial Creditors along with Section 7 Application it is submitted that date of default is actually October, 2020 to December, 2020 i.e. during 10 A period. The right of Debenture Holders to initiate Section 7 Proceedings is not in doubt but the question is whether minority Debenture Holders could have issued a Facility Acceleration Notice contrary to the Debenture Trust Deed and make it basis for default claimed in the petition. The Financial Creditors reliance on Clause 9.8 of Debenture Trust Deed is misplaced.

5. Mr. Ramji Srinivasan, Learned Sr. Counsel refuting the submissions of Learned Sr. Counsel for the Appellant submits that Debenture Holders have rightly proceeded to initiate Section 7 Proceeding. He has referred to Clause 9.8 of Debenture Trust Deed to support his submissions. It is submitted that Debenture Holders have unqualified right to independently and separately take action under applicable law. It is submitted that company petition filed by Financial Creditors is not hit by Section 10A. It is submitted that even if 31st December, 2020 is the date of default, it was default of 10% of total outstanding and 90% default of outstanding amount happened beyond 10A period, when the default has been committed within 10A period and subsequent to 10A period application can very well be filed for default subsequent to 10A period. It is submitted that Acceleration Notice itself mentions that there was existing default of more than

Rs.10,68,37,203/- and Rs.58,45,30,759/-, respectively and on account of default, event of default had occurred and on basis of which Facility Acceleration Notice was issued recalling the entire amount. It is submitted that there being default even after subsequent to 10A period application under Section 7 is fully maintainable. It is submitted that Altico Capital who is a majority Debenture Holder has already initiated Section 7 Application against the Corporate Debtor which makes it clear that majority debenture holder has proceeded to initiate proceedings under Section 7 against the Corporate Debtor. No payments have been made by Corporate Debtor even after 10 A period. Present is a case for initiation of CIRP against the Corporate Debtor.

6. From the submissions of Learned Counsel for the parties and materials on record, following are the questions which arise for consideration in this Appeal:-

i. Whether the Application filed by the Financial Creditors under Section 7 of the Code was hit by Section 10A of the Code?

ii. Whether the Debenture Holders have right to initiate proceedings under Section 7 of the Code?

iii. Whether the Facility Acceleration Notice dated 30th May, 2021/31st May, 2021 was incompetent and not in accordance with Debenture Trust Deed dated 19th March, 2018?

iv. In event, Facility Acceleration Notice dated 30th May, 2021/31st May, 2021 is held to be not in accordance with Debenture Trust Deed, whether the Application under Section 7 deserves to be dismissed?

v. Whether the Order passed by the Adjudicating Authority admitting Section 7 Application needs interference in this Appeal?

Question No. i

7. We may first notice the Part-IV of Section 7 Application where amount claimed to be in default and date of default was mentioned. Part-IV of the Application, Sr. No. 2 of the Application is as follows:

"

2.	*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)*	***AMOUNT CLAIMED TO BE IN DEFAULT*** *The total amount claimed to be in default as on March 31, 2022 is Rs. 30,90,63,124/- (Rupees thirty crores ninety lakhs sixty three thousand one hundred and twenty four) for Clearwater Capital Partners Singapore Fund IV Private Limited.* *The total amount claimed to be in default as on March 31, 2022 is Rs. 1,77,59,51,957/- (Rupees one hundred and seventy seven crores fifty nine lakhs fifty one thousand nine hundred and fifty seven) for Clearwater Capital Partners Singapore Fund V Private Limited.*

		DATE OF DEFAULT *The date of default is considered as June 1, 2021 i.e. the due date for payment of outstanding amount demanded vide the Acceleration Notices dated May 31, 2021, whereunder the entire outstanding amount was repayable within 1 (one) day from date of the notice. The notice was emailed and couriered to the Corporate Debtor on June 1, 2021 as evidenced in Exhibit H&J.* *The working for computation of amount and days of default in tabular form is annexed to the present application as* ***Exhibit-K.***

8. In part-IV, in addition to mentioning of default as 1st June, 2021, the Financial Creditors have also annexed the computation of amount and days of default in tabular form as exhibit K. In the Appeal, the Appellant has himself brought the said table as Annexure A-3 to the Appeal at Page 194 to 199. When we look into the table annexed along with the Appeal, it is clear that under the Debenture Trust Deed, principal amount was due on 31st December, 2020 whereas interest accrued month to month after issuance of Debenture Trust Deed. The table indicates that default of principal and interest accrued both during 10A period and subsequent to 10A period. The Application was filed by the Financial Creditors after issuance of Facility Acceleration Notice and date of default was mentioned as 01st June, 2021 when according to the Financial Creditors entire amount became due to be paid by the Corporate Debtor.

9. The Law is well settled that no application for initiating proceedings under Section 7 can be initiated for default which is committed during Section 10A period. In this context, we refer to the Judgment of Hon'ble Supreme Court in ***Ramesh Kymal Vs. Siemens Gamesha Renewable Power Pvt. Ltd., (2021) 3 SCC 224***, but the question which is up for consideration is as to whether application under Section 7 which was filed on basis of default as on 1st June, 2021 is hit by Section 10A.

10. It is well settled that when default is committed during Section 10A period and subsequent to Section 10A period, application is fully maintainable for any default subsequent to Section 10A period. Learned Counsel for the Respondents has relied on Judgment of this Tribunal in ***Mr. T. Prabhakar Vs. Mr. S Krishnan***, ***C.A.(AT) (CH) Ins. No. 217 of 2021***. Reliance has also been placed on the Judgment of this Tribunal in ***Dharmesh S Jain Vs. SREI Equipment Finance Pvt Ltd, 2023 SCC OnLine NCLAT 6*** where default was both during 10A period and subsequent to Section 10A period. In paragraph 12, following was noticed:

> *"12. Now we come to the question of debt and default. The Adjudicating Authority in the impugned order in paragraph 8 of the judgment has held that default on or after 05.04.2020 was for an amount of Rs.1,12,73,387/-. The learned counsel for the financial creditor submitted that even after the period covered by Section 10A came to an end, no payments are yet been made to the Financial Creditor by the Corporate Debtor. It is submitted by Financial Creditor that huge dues have been accumulated against the corporate debtor as on date. In the 3rdstatus report,*

the IRP has stated that in pursuance of the Public Announcement claims of Financial Creditors have been received of Rs. 1930 crores in addition to claims of homebuyers of Rs. 29,43,69,469/- . There is no material brought on record except to the letter of the Swamih Investment Fund dated 03.06.2021, which provided for approval of fund subject to several conditions. The Financial Creditor submits that one o the condition was that NOC of Financial Creditor was required to be obtained, whereas no NOC have been obtained from Financial Creditor for the said fund."

11. The Application under Section 7 being filed for default which was on basis of default occurred subsequent to Section 10A period, we are of the view that application was not hit by Section 10A.

Question No. ii

12. In the present case, it is Debenture Holders who have filed Section 7 Application. Learned Counsel for the Respondents has relied on Clause 9.8 to support his submission that Debenture Holders are fully entitled to avail remedies available to them. Learned Counsel for the Respondent has relied on clause 9.8 of the Debenture Trust Deed which is as follows:

> *"**9.8 Other Remedies under Applicable Law***
> *Notwithstanding anything to the contrary contained in this Deed, the Issuer acknowledges the Debenture Trustee's and Debenture Holders' unqualified right, to take all such actions as may be available to them under various policies and schemes promulgated by the RBI from time to time (including but not limited to such actions in accordance with*

> *the RBI's Strategic Debt Restructuring Scheme under the RBI's Distressed Assets Framework to convert the Secured Obligations into paid-up equity share capital of the Issuer and other measures available (therein) and other remedies available to lenders in general in accordance with the provisions of the Applicable Laws, at any time until the Final Settlement Date"*

13. Learned Counsel for the Appellant tried to distinguish clause 9.8 on the submission that Debenture Holders unqualified right to take all such action as may be available to them with reference to various policies and schemes promulgated by the RBI hence clause 9.8 is not attracted in the present case. When we look into the last sentence of the clause which begins with words "other remedies available to lenders in general in accordance with the provisions of the applicable law, at any time until the Final Settlement Date". The above clause in addition to Debenture Holders unqualified right as mentioned in first part of the clause thus remedies available in general are very much available to the Debenture Holders and one of the remedies available to Debenture Holders is to take proceeding under Section 7. Debenture Holders are the financial creditors which is undisputed fact.

14. Learned Counsel for the Respondent has relied on Judgment of this Tribunal in Mr. T. Prabhakar Vs. Mr. S Krishnan, C.A.(AT) (CH) Ins. No. 217 of 2021. In paragraph 48 of the Judgment, following has been stated:

> *"48. It cannot be gainsaid that the Debenture Holders even in the absence of Debenture Trustees' is entitled to file*

an Application under the I&B Code seeking necessary relief. In short, the right of the 2nd and 3rd Respondent is very much saved in the 'Debenture Trust Deed'. It is to be remembered that in the present case the Section 7 Application under the Code was filedby the 100% Debenture Holders and they are the Financial Creditors under the I&B Code. As such, this Tribunal holds that they do have a valid and legal right to file the Section 7 Application under the I&B Code, 2016."

15. Another Judgment relied by Learned Counsel for the Respondent is Mayur Suchak Vs. Catalyst Trusteeship Limited &Anr. C.A.(AT) Ins. No. 448 of 2023 in which case Debenture Holders have assigned their rights in favour of Catalyst Trusteeship Limited who filed the Application under Section 7 where this Tribunal had occasion to consider similar clause like clause 9.8. In the above case, it is also relevant to notice that acceleration notice given by Financial Creditor was also held to be justified noticing all other creditor i.e. Clearwater Capital Partner Singapore Fund V Pvt Ltd have also initiated proceeding under Section 7. We may notice paragraph 14 of the Judgment which is to the following effect:

"14. After looking into the different clauses of the Debenture Trust Document and Inter-Creditor Agreement, it is clear that the Financial Creditor was fully entitled to issue Acceleration Notice issued on 26.07.2022. The Debenture Trustee having already issued Notice of Demand on 13.07.2022, the argument of the Appellant that action has to be taken by Debenture Trustee loses its significance. As noted above, other creditor i.e. Clearwater Capital Singapore Fund V Pvt. having already initiated action under

> *Section7, both the creditors are unanimous in taking action against the Corporate Debtor. The submission of the Appellant that there is no majority opinion of the Financial Creditor to take action under Debenture Trust Document against the Corporate Debtor loses its significance. Furthermore, Clause 9.8 begins with the words "Notwithstanding anything to the contrary contained in this Deed….". Clause 9.8, thus has overriding effect which reserves rights in lender to take all action and seek remedy as available. We, thus, do not find any substance in submission of learned counsel for the Appellant that the Financial Creditor was not entitled to issue Acceleration Notice dated 26.07.2022. We do not find any infirmity in the initiating proceeding against the Corporate Debtor under Section 7, there being debt and default undisputed and clearly proved by the fact as noted above. The Financial Creditor stepped in the shoes of the Debenture Holder on the basis of Assignment Deed dated 04.03.2021. In view of the foregoing consideration, we do not find any substance in grounds raised by the Appellant to interfere with the impugned order. There is no merit in the Appeal. Appeal is dismissed."*

16. We have already noticed that Altico i.e. majority Debenture Holder has already initiated Section 7 proceeding hence all Debenture Holders were unanimous in their view to proceed against the Corporate Debtor and this Tribunal upheld the initiation of proceeding against the Corporate Debtor by the Financial Creditors.

Question No. iii, iv & v

17. The submission which has been much pressed by the Appellant is that Facility Acceleration Notice dated 30th May, 2021 and 31st May, 2021 was not in accordance with Debenture Trust Deed.

18. We may first notice the certain provisions of the Debenture Trust Deed. The Debenture Trust Deed dated 09th March, 2018 defines certain terms under the heading of Definition in Clause 1.1 of approved instruction has been defined as following:

> *"approved instruction shall mean the prior written instructions of the Debenture Holders to the Debenture Trustee which has been approved pursuant to provisions has to be in Schedule III"*

19. Clause 9 of the Debenture Trust Deed defines events of default. Clause 9.1(a) which is relevant for present case is as follows:

> ***"9.1 Events of Default***
> *The occurrence of any of the events specified below shall constitute an Event of Default:*
> *(a) Non Payment*
> *Failure of the Issuer or any other Obligor or any Land Owner to make payments of the Secure Obligations on any Due Date or otherwise, when due, of any amounts in relation to the Debentures or under any of the Transaction Documents in accordance with the terms thereof on the relevant due date at the place and in the currency in which it is expressed to be payable."*

20. Clause 9.2 deals with consequence of default which is as follows:

*"**9.2 Consequences of Default***

On and at any time after the occurrence of a Default, in addition to the levy of Default Interest in accordance with Clause 9.6 (Default Interest), the Debenture Trustee may upon the delivery of 1 (one) Business Days' Notice, which notice the Issuer acknowledges herein as being reasonable, take any or all of the following actions:

(a) declare that: (i) the Debentures shall automatically and without any further action, become due for redemption at the outstanding Redemption Amount and the accrued Interest for each Debenture; and (ii) all other Secured Obligations under the Debenture Documents to be immediately due and payable, whereupon they shall become immediately due and payable and/or

(b) enforce all or any Security; and/or

(c) enforce all rights of the Debenture Trustee under the Transaction Documents; and/or

(d) invoke the Guarantee; and/or

(e) notwithstanding any other provision of any Transaction Document, the Debenture Trustee shall be entitled to enforce/present/endorse and demand payment under the Demand Promissory Note; and/or

(f) encash any and all instruments which are in the favour of or in the custody of the Debenture Trustee; and/or

(g) convert, at the option of each Debenture Holder, all or part of the Secured Obligations (proportional to the Debentures held by such Debenture Holder) into fully paid up equity shares of the Issuer in accordance with Clause 9.3

(Conversion of outstanding debentures into shares) below and the Issuer shall forthwith take all necessary action to ensure that such conversion is in compliance with the Applicable Law; and/or

(h) stipulate such other conditions or amend any terms of the Transaction Documents as the Debenture Trustee considers necessary; and/or

(i) the Debenture Trustee may (but shall not be obliged to), at its sole discretion and option enter into, on behalf of the Obligors/Security Providers such third party arrangements with such parties as the Debenture Trustee deems fit, for the purposes including but not limited to: (A) completing the construction and development of the Project Embassy; (B) sale/disposal of units or plots in the Project Embassy; or (C) any other measures to ensure the servicing and repayment of the Secured Obligations; and/or

(j) exercise such other rights as may be available to the Debenture Trust under the Debenture Documents or under Applicable Law;

in accordance with the Approved Instructions. The Issuer further …and shall ensure that the other Obligors agree) that the Debenture Trustee has the right to exercise any or more than one or all of the rights stated in this Clause 9.2 simultaneously or in any order of priority at the sole discretion of the Debenture Trustee. The Issuer agrees that all costs and expenses in relation to the foregoing shall be to the account of the Issuer."

21. The submission of Learned Counsel for the Appellant is that the Debenture Trust Deed can initiate proceeding only on the basis of approved

instructions which approved instructions has to be issued by majority of Debenture Holders. Provisions of meeting the Debenture Holders is provided in Schedule III and as per Part-B of the Schedule III "provision of written consent of the Debenture Holders" following is provided:

> *"PART B*
>
> *PROVISIONS FOR THE WRITTEN CONSENT*
>
> *OF THE DEBENTURE HOLDERS*
>
> *For any written consent of the Debenture Holders, the Debenture Trustee (or as applicable the Issuer or a Debenture Holder) shall provide a notice in writing to the last available address of each Debenture Holder at least 10 (ten) calendar days prior to the date on which any decision is required to be made or consent to be provided, or such shorter time period if consent is accorded thereto by the holder(s) of not less than 50% (fifty percent) of the outstanding face value of the Debentures."*

22. Mr. Arun Kathpalia, Learned Sr. Counsel for the Appellant has also placed reliance on Judgment of this Tribunal in ***C.A.(AT) Ins. No. 658 of 2022, Rakshit Dhirajlal Doshi Vs. IDBI Bank Ltd.*** decided on 15th November, 2022 in support of his submission that financial Creditors i.e. minority debenture holders were not entitled to issue Facility Acceleration Notice. It is submitted that in *Rakshit Dheerajlal case* the Corporate Debtor was extended loan facility from consortium of banks led by Bank of Baroda consisting of three other banks i.e. Union Bank of India, Standard Chartered Bank and IDBI Bank, there were *inter se* agreement between the banks which provided that if there is default the Lender has to act through the security

trustee in order to take enforcement order in the said case. Section 7 Application was filed by the IDBI Bank which was questioned. Learned Counsel for the Appellant has relied on paragraph 29 and 30 of the Judgment which is to the following effect:

> *"29. From the above discussion, it is clear that the Respondent IDBI Bank was not entitled to act independently in declaring an 'Event of Default' in respect of its individual loan and recalling the loan advanced by it to the borrower Doshion and seeking repayment of the said loan from the guarantor FIPL. We are, therefore, of the view that the locus standi of the Respondent IDBI Bank in taking unilateral action for declaring an 'Event of Default' in the repayment of the loan advanced by it is not established as the IDBI Bank being a participating bank of the Bank of Baroda consortium was bound to act under the clauses/provisions of the Inter-se Agreement and the Security Trustee Agreement.*
>
> *30. We also consider the argument of the Appellant that Article 7.6 (e) of the Security Trustee Agreement stipulates that any lender which proposes to opt out of the consortium or reduce its share of facilities, shall be entitled to opt out and reduce its facilities only after the said lender has arranged with the borrower and ensure the substitution of the said lender, replenishment of facilities to the extent of the proposed reduction. We find strength in the argument of the Appellant that Standard Chartered Bank, a participant of the Bank of Baroda consortium, did not honour its promise for restructuring of the loan and therefore, the restructured loan package did not materialise. We are of the opinion that this issue is not relevant in the adjudication of*

> *section 7 application and would like to leave this issue at this stage only. We also feel that the arguments of the Learned Counsel for Appellant regarding the applicability of sections 129 and 133 of the Indian Contract Act in the present case would not be relevant in so far as adjudication of application 7 is concerned.*

23. From the facts and sequence of events as noticed above it is clear that the facility acceleration notice issued by the Debenture Holders cannot be said to be in accordance with the Debenture Trust Deed. The notice was not issued by Debenture Trustee and issued by Debenture Holders.

24. We having held that Facility Acceleration Notice was not issued in accordance with the terms and conditions of Debenture Trust Deed, the next question to be considered is as to whether after the aforesaid holding whether the Section 7 Application deserves dismissal.

25. While noticing the clauses of Debenture Trust Deed, we have noticed that Debenture Trustee has to initiate proceeding after occurrence of event of default in pursuance of the approved instructions by the Debenture Holders has to be obtained in meeting with fifty percent vote share as per the clauses of Debenture Trust Deed as noticed above. The Financial Creditors who have filed Section 7 Application were minority debenture holders having only 29.8 percent. Majority Debenture Holder is the Altico Capital. In the Reply which has been filed by the Financial Creditors it has been pleaded that Altico the majority NCDs holder had already initiated proceeding under

Section 7 of the Code against the Corporate Debtor being CP(IB) 79(MB)2021. Altico has transferred its debt to Asset Care and Reconstruction Enterprise Pvt. Ltd. who has also initiated Section 7 Proceeding against the Corporate Debtor being CP(IB)-926(MB)2021. The Above facts have been pleaded in paragraph 15.13 of the Reply of the Financial Creditor which is as follows:

> *"15.13. Further, the only person who can have a grievance on this is the majority NCD holder i.e. Altico. Respondent Nos. 1 & 2/Financial Creditors are minority NCD holders (as they hold 29.8% of the NCDs by value (Rs. 129 crores of Rs. 432 crores). Altico has not challenged the issuance o the Acceleration Notice. In fact, interestingly, Altico itself initiated a Section 7 Proceeding against the Respondent No. 3/Corporate Debtor (Company Petition-CP(IB)79(MB)2021* ***for the same 432 NCDs under the same DTD.*** *Whilst the aforesaid Company Petition filed by Altico was pending before the Hon'ble NCLT Mumbai Bench, a company petition under Section 7 filed by Steel Investments Private Limited against the Respondent No. 3 was admitted on July 16, 2021. Altico filed its claim before the insolvency resolution professional ("IRP") appointed by the Hon'ble Tribunal. An appeal was filed against the admission order in this Hon'ble NCLAT and eventually consent terms were filed between the parties and the appeal was disposed off. In the meanwhile, Altico transferred its debt to Assets Care and Reconstruction Enterprise Limited ("ACRE"). Also ACRE has now initiated a Section 7 Proceeding against the Respondent No. 3/Corporate Debtor (Company Petition – CP(IB)/926(MB)/2021* ***for the same 432 NCDs under the same DTD,*** *which is pending before the Hon'ble NCLT, Mumbai Bench. This shows that the NCD holders reading of*

the DTD is also clear that an NCD holder can issue Acceleration Notice(s) and that is in fact exercised by all the NCD holders. This is what was contractually agreed between the parties. If not for this understanding/agreement, the Corporate Debtor would have immediately responded to the Acceleration Notice and contended that it is defective as is south to be now alleged. ACRE has also filed its claims before the IRP."

26. When the majority Debenture Holder has already initiated Section 7 Proceeding against the Corporate Debtor prior to filing of Section 7 Application by the present Financial Creditors Respondent No. 1 and 2 it is clear that majority Debenture Holder has decided to proceed against the Corporate Debtor in insolvency proceedings and the submission of the Appellant that notice for acceleration of facility was required to be given only by Debenture Trustee on approved instructions of Debenture Holders is only an argument of the Appellant that Majority Debenture Holder has not given approved instruction to Debenture Trustee to accelerate facility. The fact remains that majority Debenture Holder having already initiated Section 7 Proceeding, all debenture holders are unanimous in their actions to proceed against the corporate debtor for the defaults committed. We have already held while considering Question no. i that application under Section 7 was not hit by section 10A since the application under Section 7 was not confined to the default committed during Section 10A period rather the Application was filed on the basis of date of default dated 01st June, 2021 consequent to

Facility Acceleration Notice dated 30th May, 2021 and 31st May, 2021 as well as other defaults as explained in Section 7 Application.

27. From the Section 7 Application Part-IV of the Application as noticed above it is clear that in addition to mentioning 1st June, 2021 as date of default, financial creditors have given working for computation of the amount and days of default in tabular form which was annexed as Exhibit-K. Appellant has filed that exhibit K along with the Appeal which contains the default in tabular form for both the financial creditors. Respondent No. 1 has disbursed 90 Crores on 28th March, 2018 and Respondent No. 2 has disbursed 110 Crores on 28th March, 2018. Debenture Trust Deed indicates that payment of the interest on the Facility accrued on day to day basis. Clause 4.3 of the Debenture Trust Deed provides for interest and first interest period for the Debenture shall start from relevant deemed date of allotment and shall end on June 30, 2018 and subsequent interest after first interest period shall start from first date of calendar quarter and end on the last day of the calendar quarter. Clause 4.3 is as follows:

*"**4.3 Interest***

4.3.1 Rate of Interest

(a) Interest shall accrue at the Interest Rate on the entire outstanding Debenture Amount from the relevant Deemed Date of Allotment.

(b) Interest, Default Interest and other charges shall accrue from day to day and shall be computed on the basis of a 365 (three hundred and sixty five) or 366 (three hundred

and sixty six) days' year, as the case may be, and the actual number of days elapsed.

4.3.2 Interest Periods

(a) First Interest Period: The first Interest Period for the Debentures shall start from the relevant deemed date of allotment and shall end on June 30, 2018.

(b) Subsequent Interest Periods: All subsequent Interest Periods, after the first Interest Period, shall start on the first day of the calendar quarter and shall end on the last day of that calendar quarter.

(c) Last Interest Period: The last interest period for the Debentures shall start from the first day of the calendar quarter and shall end on the final settlement date."

28. For sake of argument if we do not take 1st June, 2021 as date of default, the default on the payment of interest after end of the 10A period i.e. after 24th March, 2021 there is clear default on the payment of interest and payment of default in the interest of both the Financial Creditors is more than Rs. 1 Crore which is threshold amount for filing of the Application under Section 7. The tabular chart given in Exhibit K contains the details of interest accrued interest paid and interest outstanding even if we take period after 10A period i.e. period from 31st March, 2021 as mentioned in the tabular chart total overdue interest after 10A period is much more than threshold amount of Rs.1 Crore. Details of overdue interest has been captured in the tabular form in exhibit K. For example, with regard to Respondent No. 1 overdue interest on 31st March, 2021 was Rs.4,17,36,492/- and overdue interest on 30th June, 2021 was Rs.5,45,41,732/- thus the defaulted

amount during this quarter was itself more than Rs. 1 Crore. Similarly, with regard to Respondent No. 2 overdue interest on 31st March, 2021 was Rs.29,47,74,305/- and overdue interest on 30th June, 2021 was Rs.42,01,93,862/-. The date of default in payment of interest after there are several date of default in payment of interest after Section 10A period which is captured in the tabular form filed as Exhibit K in Part-IV of the Application, Financial Creditors have also filed the working for computation of the amount and days of default in tabular form thus the date of default cannot be confined only to date 1st June, 2021 as mentioned in Part-IV. The date of default which is mentioned in the tabular form cannot be ignored it is clear that there was default of more than Rs.1 Crore i.e. threshold period in payment of default by the Corporate Debtor after Section 10A period.

29. The above default is very much there even if we ignore the default on the basis of Facility Acceleration Notice dated 30th May, 2021/31st May, 2021. We thus are of the view that even after Section 10A period there being default in payment of interest which was more than threshold amount, the Application under Section 7 deserves to be admitted.

30. For the aforesaid reasons, we are of the view that order of the Adjudicating Authority admitting Section 7 Application need no interference in this Appeal.

31. In view of the foregoing discussions, we arrive at following conclusions:

i. Application filed by Financial Creditors was not barred by Section 10A period.

ii. The Debenture Holders have right to initiate proceeding under Section 7 of the Code.

iii. Facility Acceleration Notice dated 30th May, 2021 and 31st May, 2021 was not issued in accordance with Debenture Trust Deed dated 19th March, 2018.

iv. Even if 01st June, 2021 which is date of default as per Facility Acceleration Notice is ignored as per the computation of default filed as Exhibit K along with Section 7 Application, there was default of payment of interest after Section 10A period which is more than threshold amount of Rs. 1 Crore committed by the Corporate Debtor, on the basis of which default no infirmity is found in admission of Section 7 Application.

In view of the above conclusions, we do not find any merit in the Appeal, the Appeal is dismissed.

[Justice Ashok Bhushan]
Chairperson

[BarunMitra]
Member (Technical)

<u>New Delhi</u>
21st December, 2023

Basant B.