BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
COURT 1

C.P.(IB)/245/7/NCLT/AHM/2021 With IA 54 of 2021 & IA 180 of 2021

Coram: MADAN BHALCHANDRA GOSAVI, MEMBER (JUDICIAL)
VIRENDRA KUMAR GUPTA, MEMBER (TECHNICAL)

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING BEFORE THE AHMEDABAD BENCH OF THE NATIONAL COMPANY LAW TRIBUNAL ON 13.04.2021

Name of the Company: Bank of Baroda
V/s
M/s. JBF Industries Ltd.

Section: 7 of Insolvency and Bankruptcy Code, 2016

ORDER

The case is fixed for pronouncement of order.

The order is pronounced in open Court vide separate sheet.

(VIRENDRA KUMAR GUPTA)
MEMBER (TECHNICAL)
Dated this the 13th day of April, 2021

(MADAN B GOSAVI)
MEMBER (JUDICIAL)

Prakash

BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
COURT 1

CP (IB) No.245/7/NCLT/AHM/2020 with IA 54 of 2021
& IA 180 of 2021

An application filed under Section 7 of the Insolvency and Bankruptcy Code, 2016

In the matter of :

CP(IB) 245 of 2020

Bank of Baroda
Baroda House, Mandvi,
Baroda, Gujarat and acting through its
Corporate Financial Services Branch,
3rd Floor, 10/12 Mumbai Samachar Marg,
Fort, Mumbai-400001

.. Financial Creditor

Versus

M/s JBF Industries Ltd.
CIN:L99999DN1982PLC000128
Registered Office at :
Survey No.273,
Village Athola, Silvassa,
Dadra Nagar Haveli-396230 .. Corporate Debtor

In the matter of :

IA 54 of 2021

M/s JBF Industries Ltd.
Registered Office at Survey No.273,
Village Athola, Silvassa,

Dadra Nagar Haveli-396230 .. Applicant

Versus

Corporate Financial Services Branch,
3rd Floor, 10/12 Mumbai Samachar Marg,
Fort, Mumbai-400001 .. Respondent

In the matter of :

IA 180 of 2021

M/s JBF Industries Ltd.
Registered Office at :
Survey No.273,
Village Athola, Silvassa,
Dadra Nagar Haveli-396230 .. Applicant
(Org. Respondent)

Bank of Baroda
Corporate Financial Services Branch,
3rd Floor, 10/12 Mumbai Samachar Marg,
Fort, Mumbai-400001 .. Respondent
(Org. Petitioner)

Date of Hearing: 22.03.2021
Date of Pronouncement of Order 13.04.2021

Coram: MADAN B. GOSAVI, MEMBER(J)
VIRENDRA KUMAR GUPTA, MEMBER (T)

Appearance:
Learned Senior Counsel Mr. Navin Pahwa a.w Learned Counsel Mr. Bijal Chattrapati appeared for the Financial Creditor.
Learned Senior Counsel Mr. Saurabh Soparkar a.w Learned Counsel Mr. Maulik Nanavati appeared for Corporate Debtor.

ORDER

[Per: VIRENDRA KUMAR GUPTA, MEMBER (T)]

1. This application is filed under Section 7 by Bank of Baroda, Financial Creditor to initiate CIRP against the Corporate Debtor M/s. JBF Industries Ltd. The amount of debt in default has been claimed at Rs.669,43,95,436.72. The date of default has been stated as 30.06.2017 to 07.09.2017.

2. The facts, in brief, are that consortium of several banks led by the Financial Creditor granted working capital loan to the Corporate Debtor. Working capital loan was given vide documents executed on 26.09.2008. The said loan facility was revised from time to time and supplementary agreements were entered into. Corporate Loan was granted by the Financial Creditor in its individual capacity vide documents executed on 22.01.2015. The Corporate Debtor could not honour its commitments. Both these facilities were classified as NPA consequently.

3. Learned Senior Counsel Mr. Navin Pahwa appeared on behalf of Financial Creditor and submitted that in the present case, there was a debt which was due and payable and default had occurred in payment thereof, hence, this application was liable to be admitted. It was further contended that there were

acknowledgements of debt by the Corporate Debtor from time to time. It was also claimed that debt was also appearing in financial statement of the Corporate Debtor.

4. On the other hand, Learned Senior Counsel Mr. Saurabh Soparkar appeared on behalf of Corporate Debtor. He has taken various pleas as regard to technical defects / infirmities in the application filed by the Financial Creditor, hence, application being liable to be dismissed. In addition to this plea, it has also been claimed that in the present case, firstly date of NPA has been stated as in Form No.1 whereas in other documents different dates of NPA had been mentioned. Thus, there was a need to inquire into as to why different dates were given for classification of the account of the Corporate Debtor as NPA. In this regard, Learned Senior Counsel took us to various documents and on that basis, he concluded his arguments that it was a case of debt being premature and not payable and therefore, this application was liable to be dismissed. In this regard, detailed submissions have been made by the Corporate Debtor which are, for the sake of ready reference, reproduced as under:

I. **THE APPLICATION FILED UNDER SECTION 7 OF THE CODE IS INCOMPLETE AND OUGHT TO BE DISMISSED**

(a) The provisions of the Insolvency and Bankruptcy Code 2016 **('Code')** read with the Insolvency and Bankruptcy (Application to Adjudicating Authority Rules) 2016 ('**Rules**') have prescribed a distinct and detailed form with elaborate requirements for an Application to be filed under Section 7 of the Code for initiation of Corporate Insolvency Resolution Process of any company. There is a higher and stricter threshold prescribed for such applications as these proceedings are those in rem having drastic consequences and which have to be concluded under summary procedure.

(b) As per Section 7 of the Code read with Rule 4 of the Rules, the Applicant is mandated to make an application under Section 7 for initiating the 'Corporate Insolvency Resolution Process' in Form 1 with accurate details/ particulars and accompanied with 'documents and records' required for the purpose. **Section 7(3)** of the Code clearly stipulates that financial creditor shall **ALONG WITH** the Application file all documents including record of default, evidence of default, and any other information as may be specified.

(c) As per Form 1, the Applicant is *inter alia* mandated to provide:
   i. Latest and complete copies of the Financial Contracts;
   ii. Copies of entries in a banker's book in accordance with the Bankers Book Evidence Act, 1891;
   iii. Certificates of charge in respect of securities created as required to be furnished under Part V – Form 1;
   iv. Certificate of eligibility of the proposed IRP required to be furnished as per Rule 9(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority Rules) 2016.
   v. Record of information utility.

(d) The aforesaid mandatory documents which were or ought to be in the possession of the Applicant, were not annexed to the Application for reasons best known, thus making the Application incomplete.

(e) The Respondent highlighted the incompleteness of the Application in its Reply. It is at this juncture that the Applicant sought to annex additional documents in an attempt to complete its incomplete application and attempted to cure some fundamental defects in the application. The following documents were annexed to the Rejoinder :
   i. Complete copy of Original Working Capital Consortium Agreement dated 26th September 2008;
   ii. Certificate of eligibility of IRP;
   iii. Certificate of registration of charge;
   iv. Letter showing that Manis Das is Chief Manager Grade IV;
   v. Corrected / modified computation of debt amount;
   vi. Modification in date of default.

(f) It is submitted that the Applicant cannot fill up the lacuna in the Application by supplying additional documents at any later stage akin a civil suit. Rule 42 of the National Company Law Tribunal, Rules 2016 permits filing of Rejoinder to the limited extent of countering additional facts stated by the Respondent in the Reply. There is no provision enabling the Applicant to supply or furnish additional documents in rejoinder, and that too without obtaining leave of the Hon'ble Tribunal.

(g) In addition to the aforesaid, the Applicant once again took the liberty (without the permission of the Hon'ble Tribunal) to file additional documents with its written submissions filed on 21st January 2021:

i. Annual Report of Respondent for FY 2019-2020;
ii. National E Governance Services Limited – Bye Laws
iii. Judgment of the Hon'ble NCLT, Mumbai – *Standard Chartered Bank & Anr. V. Ruchi Soya Industries Ltd., 2017 SCC Online NCLT 12689*
iv. Certificate under the Banker's Books Evidence Act, 1891 dated 16th January 2021 (**THIS CERTIFICATE WAS NOT IN EXISTENCE WHEN THE APPLICATION WAS FILED**);

(h) The following are the fundamental deficiencies found in the Application, which warrants dismissal at the very threshold:

(i) **INCOMPLETE AUTHORIZATION** – As per Serial No. 5 – Part 1 of Form 1 (Page T), the Application ought to furnish details of 'person authorized to submit application' along with the documents proving such authorization. Similarly, Rule 23(2) read with Rule 26 of the National Company Law Tribunal Rules, 2016 requires an Application to be filed and signed/ verified by an 'Authorized Representative' of the Applicant. In case where the financial creditor is a company, such an 'Authorization' would necessarily mean a specific authorization by the Board of Directors of such financial creditor to initiate corporate insolvency resolution process of a corporate debtor.

In the present case, the Application has been filed on the basis of a Board Circular Resolution dated 14th July 2017 and Board Resolution dated 14th November 2017. Notably, Board Resolution dated 14th November 2017 authorizes the following class of personnel to take all actions as set out therein: (a) General Managers in Grade – VII (b) Deputy General Managers in Grade – VI (c) Assistant General Managers in Grade – V (d) Chief Managers in Grade – IV.

The present Application is signed by Mr. Manis Das purporting to be the Chief Manager (Grade IV) of the Applicant. Though the aforesaid Board Resolution authorizes Chief Managers to initiate legal action on behalf of the Applicant, however, there is no document in support of the Application evincing that Mr. Manis Das was infact the Chief Manager of the Applicant and authorized to file the Application. It was only when the Respondent pointed out the error, the Applicant sought to rectify this error by annexing a letter authorizing Mr. Manis Das with the Rejoinder (Page 3 – para 20 read with Annexure D - Page 47), without any permission from this Hon'ble Tribunal. This letter filed at page 47 of the Rejoinder cannot be considered as the same does not form part of the Application.

Notably, this Hon'ble Tribunal **only** permitted the Applicant to file its Rejoinder on 19th August 2020 of not more than 5 pages. However, Applicant has filed a Rejoinder running into 61 pages.

(ii) **INCOMPLETE CERTIFICATES OF REGISTRATION OF CHARGE** – Serial No. 1 – Part 5 of Form 1 (Page X) mandates the Applicant to file along with the Application, all certificates of registration of charge issued by the Registrar of companies. Notably, at page 3, paragraph 17 of the Rejoinder, the Applicant has admitted **that it has failed to produce all documents, more particularly the certificates of registration of charge**. Relevant portion of the Rejoinder is reproduced herein below *"I say that at the time of filing the Petition the Applicant had produced the documents which were available with the applicant at that time. I say that the Applicant has subsequently been able to procure the other Certificates of charges, which the Applicant could not produce at the time of filing the present Petition"*. These certificates annexed by the Applicant at Annexure C - page 39 to 46 of its Rejoinder cannot be taken into consideration as the same do not form part of the Application.

(iii) **INCOMPLETE FINANCIAL CONTRACTS** – Serial No. 5 – Part 5 of Form 1 (Page YY) mandates the Applicant to file the latest and complete copy of the financial contract reflecting all amendments and waivers, along with the Application. The Applicant has admitted that it failed to produce the complete copy of the Working Capital Consortium Agreement dated 26th September 2008 **("Original WCCA")** with the Application (page 2 – paragraph 9 of its Rejoinder). Relevant portion of the Rejoinder is reproduced herein below:

"Copies of all the agreements are produced by way of Annexure K in the Petition, however, since the Original WCCA as produced in the Petition is incomplete, the same is being reproduced hereto as Annexure-A.". The Applicant has sought to complete its otherwise incomplete Application by filing the complete copy of the Original WCCA in its

Rejoinder and that too without the permission of this Hon'ble Tribunal. It is humbly submitted that such inclusion should not considered.

(iv) **<u>NO CERTIFICATE UNDER BANKER'S BOOKS EVIDENCE ACT, 1891</u>** – Serial No. 7 – Part 5 of Form 1 (Page HHH) requires that the Applicant must annex copies of entries in a banker's book in accordance with the Banker's Books Evidence Act, 1891 **("BBE Act")**. The Applicant has produced old accounts of 2017-2018, 2018-2019 and 2019-2020. Neither was the latest certified copy of statement of account produced with the Application nor was the certificate under BBE Act produced by the Applicant. The Certificate was produced for the first time only with the Written Submissions dated 21st January 2021 (Annexure D – Page 139), and that too without any permission from this Hon'ble Tribunal. Notably, this certificate was not even in existence at the time of filing the Application.

(v) **<u>NO CERTIFICATE OF ELIGIBILITY OF IRP</u>** – The Certificate of eligibility of the proposed IRP is required to be furnished along with the Application as per Rule 9(2) of the Rules. However, the Applicant has failed to produce the same with the Application and has merely produced it with its Rejoinder at Annexure B – page 35, when the same was pointed out by the Respondent in its Reply.

(vi) **<u>MODIFIED DATE AND COMPUTATION OF DEFAULT</u>** – Serial No. 1 - Part 4 of Form 1 (Page W) mandates the Applicant to furnish the Date of default based on which such Applicant seeks to initiate corporate insolvency resolution process of a Corporate Debtor along with computation of its debt. The Applicant has, vide its Rejoinder, sought to alter the date of default and computation of debt as recorded in the Application, in an attempt to overcome the valid objections raised by the Respondent. It is submitted that such alteration made by the Rejoinder is impermissible as it changes the very basis of the Application – **Gurjant Singh Vs. Krishan Chander & Ors (AIR 2001 Raj 211)**.

<u>SUBMISSIONS</u>

(i) As per the provisions of the Code, only Form 1 and all documents filed **<u>ALONG WITH IT</u>**, has to be taken into consideration for adjudicating debt and default. It is submitted that the date of default of the computation of debt as stated in the Application cannot be modified or amended by way of a Rejoinder. The documents annexed to the Rejoinder do not form part of the Application and therefore cannot be taken into consideration.

(ii) As is apparent from perusal of pleadings and orders of the Hon'ble Tribunal, the Applicant has time and again sought to (i) amend/cure the Application by filing additional documents and (ii) alter the date of default and computation of debt, in an attempt to complete the incomplete application, and each time has produced documents without obtaining any order from the Hon'ble Tribunal.

(iii)The aforesaid documents clearly change the substance and scope of the Application and could not have been added even under Section 7(5) of the Code.

(iv)It is submitted that the Applicant has failed to give any just cause and/ or reasons as to why the aforesaid additional documents were not filed along with the Application, despite the fact that the same were in the power, possession and custody of the Applicant at the time of filing such Application. The Applicant cannot conveniently contend *"at the time of filing the Petition the Applicant had produced the documents which were available with the applicant at that time"* **(Para 17 – Pg. 3 of Rejoinder)**. The Applicant was under a statutory obligation to produce ALL documents along with the Application at the inception.

(v) Since the Applicant had sought to supplement the Application by way of filing additional documents which were substantial in nature, the Respondent was constrained to file Interlocutory Application No. 180 of 2021 for striking off all the additional documents annexed filed by the Applicant vide its Rejoinder and Written Submissions. It is submitted that the documents annexed to the Rejoinder and Written Submissions ought to be struck off the record and cannot be considered for adjudicating the Application.

(vi)It is well settled that Application filed as per Form 1 must be complete in all respects for enabling the Tribunal to pass an Order in rem upon such an application – ***Swiss Ribbons – (2019 SCC 17 – Para 43 and 82)***. The Applicant is therefore obliged to produce all documents to prove debt and default based on solid documentary evidence ***(Swiss Ribbons (Supra) – Para 64.)*** Admittedly, Application does not disclose all documents necessary to meet the test of Section 7 of the Code.

(vii) Moreover, Adjudicating Authority is only required to ensure whether there is a debt and default on the basis of record (Form 1). It cannot take into consideration any other facts. The 'Corporate Insolvency Resolution Process' not being a litigation much less adversarial litigation or a recovery proceeding or a money suit - ***Shobhnath & Ors. Vs. Prism Industrial Complex Ltd. [NCLAT – Comp Appeal No. 557/2018 – Para 12]***

II. THE DATE OF DEFAULT PLEADED BY THE APPLICANT IS INCONSISTENT AND ERRONEOUS

Discrepancies in Date of default pleaded by Applicant

(a) There are several inconsistencies in the date of default specified by the Applicant. A chart reflecting various dates of default as pleaded by the Applicant is reproduced herein below for ease and reference:

S.N.	Pleading	Page/ Para
1.	**Synopsis** NPA – 20/10/2017	J/ 36
2.	**Synopsis** Working Capital Consortium Agreement – 7/7/2017 Corporate Loan Agreement – 30/6/2017	Q/ 40
3.	**Application** Cash Credit – 7/9/2017 Corporate loan – 30/6/2017	Pg. X
4.	**Annexure N – Letter dated 19th September 2017** Cash Credit – 11/7/2017 Corporate Loan –31/7/2017	Pg. 1955
5.	**Annexure N – Letter dated 1st September 2017** Cash Credit – 11/7/2017 Corporate Loan –22/7/2017	Pg. 1959
6.	**Rejoinder** NPA on 31/2/2018 with retrospective date i.e. 20/10/2017	3/ 13
7.	**Written Submissions** NPA on 31/2/2018 with retrospective date i.e. 20/10/2017	B/ 8

(b) It is the case of the Applicant that the account of the Respondent was in default on 20th October 2017 or prior thereto (the date of 20th October 2017 is stated in the Rejoinder, which is disputed by the Respondent). However, Applicant has deliberately concealed that the account of the Respondent was cured and regularized in August 2018, more particularly as shown below.

(c) In the present case, the Applicant had, vide the Working Capital Consortium Agreement dated 26th September 2008 advanced cash credit facilities to the Respondent. It was agreed between parties that the credit facilities would be governed by the terms and conditions set out in the sanction letters (Annexure K/ page 882 para 2) **("cash credit contract")**. In 2015, the Applicant advanced a corporate term loan repayable in 18 quarterly instalments starting after moratorium of 6 months from date of disbursement i.e. 22nd January 2015 **("corporate loan agreement")**.

(d) On 25th October 2017, the Applicant offered to review and restructure the facilities under the cash credit contract and corporate loan agreement for a period of 6 months i.e. till 9th April 2018 (Annexure N/page 1938) **("Review Sanction Letter").**

(e) Accordingly, on 8th November 2017, the Respondent accepted the offer made by the Applicant and complied with the terms of acceptance by (i) returning a duplicate signed copy of the said letter (Annexure N/ page 1937 read with page 1940) and (ii) depositing an amount of Rs. 66,03,605/- from its cash credit account on 31st October 2017 (Annexure M/ page 1706)

(f) As the parties accepted the Review Sanction Letter and acted in pursuance thereto, the cash credit contract and corporate loan agreement stood **"substituted"** by the Review Sanction Letter (Annexure N/ page 1938 – columns 1-7 & 9 read with page 1941-1949 and Annexure N/ page 1938 – column 8 read with page 1949);

(g) Admittedly, the Review Sanction Letter amounts to a novation w.e.f. on 25th October 2017 between the parties. It is pertinent to note that the novation date i.e. 25th October 2017 is **after** the claimed date of default.

(h) Assuming whilst denying that the account of the Respondent was in default on 20th October 2017, Respondent has made payments in the year 2018, by virtue of which the account stood regularized and the default, if any, was cured. Therefore, Applicant cannot plead that the Respondent defaulted on 20th October 2017 or any date prior thereto, for the purpose of Form 1.

Corporate Term Loan was regularized by the Respondent:

(i) As per corporate loan agreement, repayment was to be made in 18 quarterly instalments starting after moratorium of 6 months from date of disbursement (Page 1282).

(j) A chart evidencing that all amounts under the corporate loan agreement were cleared and account was regularized in August 2018 is reproduced herein below for ease in reference:

Date	**Amount**	**Disbursement/ Instalment**	**Page No.**
22/01/2015	50,00,00,000	Disbursement by Applicant	1815
23/10/2015	2,78,00,000	Instalment paid by Respondent	1816
22/01/2016	2,78,00,000	Instalment paid by	1817

		Respondent	
22/04/2016	2,78,00,000	Instalment paid by Respondent	1818
22/07/2016	2,78,00,000	Instalment paid by Respondent	1818
24/10/2016	2,78,00,000	Instalment paid by Respondent	1819
23/01/2017	2,78,00,000	Instalment paid by Respondent	1819
24/04/2017	2,78,00,000	Instalment paid by Respondent	1820
31/08/2018	13,12,85,920 (July 2017 to July 2018)	Account regularized and all past instalments paid by Respondent	1823
04/09/2018	2,99,69,878.60	Account regularized and all outstanding and current interest paid by Respondent	1824

SUBMISSIONS:

(k) It is submitted that since the account of the Respondent was regularized on 31st August 2018 and 4th September 2018, the account ought to have been reclassified by the Applicant and converted from "NPA" to "standard".

(l) As per the Master Circular dated 1st July 2015 issued by the Reserve Bank of India on *Prudential norms on Income Recognition, Asset Classification and Provisioning pertaining to Advances*, if arrears of interest and principal are paid by the borrower in the case of loan accounts classified as NPAs, **the account should no longer be treated as NPA and may be classified as 'standard' accounts**.

(m) Considering that all dues were cleared on 31st August 2018 and 4th September 2018, the date of default 20th October 2017 as pleaded by the Applicant is erroneous.

(n) As per Section 62 of the Indian Contract Act, 1872, if the parties to a contract agree to **substitute** a new contract for it, or to rescind or alter it, the original contract, need not be performed.

(o) It is stated that the present case satisfies all the requisite elements of novation in as much as:
- The Review Letter completely substituted the cash credit contract and corporate loan agreement;
- Considering that the review was offered by the Applicant and accepted by the Respondent, such substitution took place with the consent of both parties;
- The existing cash credit contract and corporate loan agreement was substituted by the Review Letter by the same parties with a mutual consideration of discharge of the former contracts;

(p) Evidently, there was a novation of contract between parties, as the repayment obligations under the former contracts came to an end, and the parties stood governed by the Review Letter with effect 25th October 2017.

(q) The Hon'ble Supreme Court in the matter of of ***Chrisomar Corporation vs. MJR Steels Private Limited and Ors. [(2018) 16 SCC 117 – Para 39]*** further held that for novation to take effect, modification to the contract must go to the root of the original contract and change its essential character, so that the modified contract must be read as doing away with the original contract.

(r) In view of the aforesaid, the Applicant cannot seek to rely upon the cash credit contract and the corporate loan agreement executed in the year 2008 and 2015 respectively.

(s) It is submitted that the Applicant is not entitled to initiate the present proceedings based on any default committed by the Respondent **prior to 9th April 2018 (moratorium under the Review Letter)**, as such prior default (if any) stood waived by the Applicant under the Review Letter.

(t) During the final hearing, it was submitted by the Applicant that - since the Review Letter was issued in terms of the Scheme for Sustainable Structuring of Stressed Assets **("S4A")**, the same stood withdrawn in light of the Circular of the Reserve Bank of India dated 12th February 2018 and the account of the Respondent was classified as NPA w.e.f. 20th October 2017.

(u) The above contention of the Applicant is preposterous as the Hon'ble Supreme Court of India, in the matter of ***Dharani Sugars and Chemicals Ltd. v. Union of India & Ors. [(2019) 5 SCC 480]*** declared that the Circular dated 12th February 2018 issued by the Reserve Bank of India is **ultra vires** and accordingly struck down the said Circular. In view of the decision of the Hon'ble Supreme Court of India, the Applicant ought to have recalled such wrongful NPA classification;

(v) In any case, merely because the Circular dated 12th February 2018 withdrew the S4A, that did not negate/ terminate/ invalidate the novated contract entered into between parties on 25th October 2017, as the Review letter clearly stipulated that in the event the S4A is not invoked within the stipulated time frame then, it is only the **concessions** thereunder which will stand withdrawn. Thus, the restructuring under the Review letter was independent of the S4A;

(w) Thus, in view of the (i) novation of contract on 25th October 2017 and (ii) regularization of accounts as on August 2018 which cured the default if any as on 20th October 2017, the Applicant is not entitled to initiate the present proceedings basis the pleaded date of default i.e. 20th October 2017, especially when the Applicant granted moratorium until 9th April 2018 under the Review Sanction Letter.

(x) It is clear from the above that the date of default as pleaded by the Applicant is erroneous and the present Application is not maintainable and sustainable. Such an error is not a defect of "form" but a defect of "substance" which goes to the root of the Application and cannot be rectified even under Section 7(5).

(y) In the aforesaid circumstances, the present Application filed on the basis of an incorrect date of default is not maintainable and ought to be dismissed.

III. REJOINDER CANNOT EXPAND THE SCOPE OF THE APPLICATION

(a) In the Application, the Applicant has stated that the Date of Default under the Working Capital Consortium Agreement dated 26th September 2008 was 7th September 2017 and under the Corporate Loan Agreement dated 22nd January 2015 was 30th June 2017 (Serial No. 2 - Part 4 of Application). Subsequently, the Applicant sought to modify the Date of Default to 20th October 2017 by way of the Rejoinder (Para 14 – Pg. 3 of Rejoinder).

(b) It is settled that a party cannot be permitted to raise a new plea under the garb of filing rejoinder- affidavit, or take a plea inconsistent to the pleas taken by him in the petition. The modification and amendment to the 'Date of Default' by way of Rejoinder is not permitted under the provisions of the Code and therefore should be struck off at the very outset - **Gurjant Singh Vs. Krishan Chander & Ors (AIR 2001 Raj 211)**

(c) Assuming whilst denying that the date of default can be modified, the Applicant was obligated to seek specific leave of the Hon'ble Tribunal prior to any such modification. Moreover, it is clear that the Applicant has sought to improve its case by extending the date of default only to overcome the objection raised by the Respondent.

IV. **<u>THE APPLICANT HAS FAILED TO FURNISH ANY RECORD EVIDENCING DEBT OR DEFAULT</u>**

(a) Admittedly, in the present case, the documents annexed to the Application do not establish the basis of arriving at the 'Date of Default' and in no way evidence debt or default.

(b) In fact, even in the Written Submissions filed by the Applicant, the Applicant has failed to rely upon any documentary proof to show date of default and has merely relied on its "Synopsis", which cannot in any manner be treated as a record of default.

(c) The Applicant has produced bank statement to prove default. However, neither is the bank statement at page 1579, certified under the Banker's Books Evidence Act, 1891 nor has the Applicant furnished the requisite certificates along with the Application under the Banker's Books Evidence Act, 1891 confirming that there is no payment of an unpaid debt which is a sine qua non for proving default. Special provisions have been made in the Banker's Books Evidence Act for Banker's Book whereby certified copy of an entry in such a book is admissible in evidence. But mere entries in bank's books of account or mere copies thereof are not sufficient to charge a person with liability – ***Deepakk Kumar v. Phoenix ARC Pvt. Ltd. & Anr. (2020 SCC OnLine NCLAT 397 – Para 36); Chandradhar Goswami & Ors. v. Guhati Bank Ltd. (AIR 1967 SC 1058 – Para 6)***

(d) Moreover, the bank statement produced by the Applicant is incomplete as the same is only for the period April 2017 till March 2020 whereas the present Application has been filed basis facilities allegedly advanced in 2008 and 2015. Therefore, the bank statement cannot be taken into evidence or be treated as proof to establish any debt/default.

(e) It is submitted that the Applicant has failed to (i) prove any valid debt or default based on solid documentary proof and (ii) demonstrate and prove beyond doubt the date of the alleged default. The documents on record are insufficient and do not fulfill the test of solid documentary proof.

(f) It is further submitted that the threshold of proof is much higher in proceedings under Section 7 of the Code in as much as Form 1 must be complete in all respects for enabling this Hon'ble Tribunal to pass an Admission Order in rem based on such an Application (***Swiss Ribbons (Supra) – Para 43 and 82)***. The Applicant is therefore obliged to prove debt and default based on solid documentary evidence ***(Swiss Ribbons (Supra) – Para 64)***.

V. **AGREEMENTS FORMING PART OF 'FINANCIAL CONTRACT' ARE (I) INSUFFICIENT STAMPED (II) UNSTAMPED AND (III) UNREGISTERED.**

(a) The present Application has been filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 **("Code")**. In order to substantiate the alleged debt and default, the Applicant has sought to rely upon the following documents as 'Financial Contracts' :
   (i) Working Capital Consortium Agreement dated 26th September 2008;
   (ii) Supplemental Agreements (from 2009-2015) and
   (iii) Corporate Loan Agreement dated 22nd January 2015 as being the financial contracts.

(b) As seen from the documents on record, the aforesaid agreements are not duly stamped as set out by the Respondent in its Reply (V at para 22). List of documents which are insufficiently stamped/ unstamped is annexed at **Schedule 1** hereto.

(c) Since the aforesaid Agreements, forming part of the Financial Contracts, are insufficiently stamped, they cannot be relied upon nor can it be acted upon nor taken into account for **ANY COLLATERAL PURPOSE**, by virtue of Sec. 35 of the Indian Stamp Act and Sec. 34 of the Gujarat Stamp Act, (the pari materia provision under the Gujarat Stamp Act) – ***Avinash Kumar Chauhan v. Vijay Krishna Mishra ((2009) 2 SCC 532 – Para 17,23,25 and Smt. Srikanta Sarda v. M/s. Transway Marketing Pvt. Ltd. – NCLT – Kolkata – CP No. 400 / 2017 dated 4th December 2017 Para 19-21)***

(d) It is settled law that a document which is insufficiently stamped is not a contract and is unenforceable in law. – ***SMS Tea Estates ((2011) 14 SCC 66 – Para 22); Garware Wall Ropes ((2019) 9 SCC 209 – Para 22) and COC of Essar vs Santosh Gupta (2019 SCC OnLine SC 1478 – Para 131)***

(e) Therefore, the Agreements forming part of the Financial Contract are unenforceable in law, which makes the Application, under Section 7 of the Code, untenable in its present form and must be rejected at the very threshold;

(f) In addition to the aforesaid, the Agreements are not only unstamped but also not registered. List of agreements which are unregistered despite being compulsorily registrable under Section 17 of the Registration Act annexed at **Schedule 2** hereto

(g) It is settled law that non-testamentary instruments which acknowledge receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest **are to be compulsorily registered under the provisions of the Registration Act**, failing which such documents shall not be received as evidence of any transaction affecting such property or conferring such power – ***Mst. Sanjya v. Chathumal (AIR 1963 Raj 129 – Para 15);***

(h) It is the Applicant's case that the documents sought to be relied upon by the Applicant are merely "photocopies" of the original and thus no stamp duty is applicable under the Gujarat Stamp Act.

(i) It is submitted that the Hon'ble Gujarat High Court in the matter of ***The Chief Controlling Revenue Authority, Ahmedabad Vs. The Nutan Mills Ltd., Ahmedabad (1976 SCC OnLine Guj 31)*** and the Hon'ble Bombay High Court in the matter of ***The Indian Hume Pipe Co. Ltd & Ors. Vs. State Of Maharashtra & Anr (Writ Petition No. 2519 of 1988 – 9th January 2018)***, have clarified that differential stamp duty is liable to be paid even on photocopies of instruments.

(j) Therefore, the Agreements which are sought to be relied upon by the Applicant to prove the alleged debt and alleged default on the part of the Respondent, cannot be relied upon for the aforesaid reasons. The Applicant has filed an Interlocutory Application No.

54 of 2020 challenging admissibility of these insufficiently stamped and unregistered documents, as proof of debt.

5. In rejoinder, Learned Senior Counsel for the Financial Creditor has counter claim made by the Corporate Debtor by making following submission Adjudicating Authority under:

The Financial Creditor has an outstanding of over Rs. 660 Crores from the Corporate Debtor, which debt is not disputed, as evident from, *inter alia*:

(i) The Annual Report for the year 2019-2020 of the Corporate Debtor (@ page 39- Annexure-A to the Reply of the Petitioner dated 24.02.2021) which acknowledges the outstanding to the Financial Creditor;

(ii) The Corporate Debtor's letter(s) dated 19.12.2017 which acknowledge the debt due to the Financial Creditor @ page 1963 to 1978 -Annexure-I(N) of the Petition) and

(iii) The Corporate Debtor did not dispute the debt to the Information Utility though had the opportunity, in view of which the debt of the Corporate Debtor has been "deemed to be authenticated" in the Information Utility Report/ certificate @ pages 878A to 878AB- Annexure-I(J) of the Petition; @ pages 2009 to 2026- Annexure-B of the Affidavit of the Petitioner dated 10.09.2020.

Considering that the present case is of admitted debt which the Corporate Debtor has been unable to discharge, it has simply raised some frivolous technical objections to avoid initiation of insolvency proceedings, all of which are misplaced.

1. Re: The submission of the Corporate Debtor that the Petition is filed without authority.

This is incorrect. For reply on merits, please see para 19 @ page 3and Annexure-D @ Page 47 of the Rejoinder filed on behalf of the Petitioner.

The Corporate Debtor has itself acknowledged that the Board Resolution of the Petitioner does authorize its Chief Managers to initiate legal actions. It is only the document that shows that the signatory Mr. Das is a Chief Manager, which was produced along with the Rejoinder of the Petitioner, to support the assertion made in the Petition as to Mr. Das being a Chief Manager.

2. Re: The submission of the Corporate Debtor that the Petition is incomplete.

This is incorrect. For reply on merits, please Paras 15 to 18 @ Pg.3 of Rejoinder Affidavit r/w. documents produced at Annexure- B to C Pg. 35 to 46. (ii) Para 12 to 15, 30, 32, 39, 41 and 42 Page H to I and M and N of the Affidavit in Reply of the Financial Creditor dated 24.02.2021 document produced at Annexure-C-page 115; (iii) Para6, 17 to 20, Pages 2 and 13 of the Affidavit in Reply of the Financial Creditor on 8.3.2021.

It is submitted that the Form-I does contain essential ingredients required to maintain a Section 7 Application. The Corporate Debtor has not disputed that the debt or the default as per scheme of IB Code. The alleged incompleteness was technical. In any case, before the commencement of hearing, even such alleged incompleteness was fully rectified. The petition was maintainable. Without prejudice, it is relevant to mention that Section 7(5) of the IBC Code itself contemplates providing of an opportunity to rectify defects, if any, in the Petition. In the present case, the petitioner itself had provided/ rectified the information which even according to the Corporate Debtor was not provided. As such, the petition is complete in all respects.

3. Re: The submission of the Corporate Debtor as regards, change in the date of default.

For reply on merits, please see paragraph 46 and 47 @ page O-P of the Reply filed on behalf of the Petitioner, on 24.2.2021 and @ para 17 to 27, Page 13 to 15 of the Reply dated 08.03.2021

The Financial Creditor has modified the date of default, as there was an inadvertent error in mentioning the date of default in the Petition. It is however relevant to mention that the respondent has not disputed the date of default in its reply. The respondent has also not disputed the date on which the account of the respondent Corporate Debtor was classified as NPA in its reply. The documents on record clearly make out a default committed by the Corporate Debtor. As such, the alleged change which was purely on account of an inadvertent mistake, would have no bearing on maintainability of a petition u/s. 7 of IB Code.

Such a change in the date of default does not cause any material difference or prejudice, to the Corporate Debtor.

4. Re: The submission of the Corporate Debtor that the review of the credit facilities took place on 25.10.2017 (letter @ page 1938- Vol-V) and therefore the date of default could not be prior to this date.

It is relevant to mention that this submission on the basis of the letter dated 25.10.2017 is made for the first time in the course of oral arguments in the hearing held on 22.3.2021 by the Corporate Debtor. In the reply filed by the Corporate Debtor and so also in its two interlocutory applications and further affidavits filed subsequent thereto, this point is not pleaded.

Without prejudice, it is to mention that the submissions made on the basis of this letter are wholly misconceived.

The letter of 25.10.2017 is a letter which approves, in principle, implementation of S4A.

In order to further strengthen the lenders' ability to deal with stressed assets and to put real assets back on track by providing an avenue for reworking the financial structure of entities facing genuine financial difficulties, the Reserve Bank of India had, on 13.06.2016, issued guidelines on a 'Scheme for Sustainable Structuring of Stressed Assets'. The 'Scheme for Sustainable Structuring of Stressed Assets' (S4A) was formulated as an optional framework for the resolution of large stressed accounts. The S4A envisaged determination of the sustainable debt level for a stressed borrower, and bifurcation of the outstanding debt into sustainable debt and equity/quasi-equity instruments which was expected to provide upside to the lenders when the borrower turns around. It is however relevant to mention that the terms stipulated in this letter dated 25.10.2017 were never implemented.

The RBI's circular of 12.02.2018 withdrew certain extant instructions, including S4A. As such, the letter dated 25.10.2017 which was based on S4A, lost its efficacy. On the contrary, in view of the Reserve Bank of India Circular, it became incumbent to classify the account of the Corporate Debtor as NPA w.e.f. the actual date of default which was 20.10.2017. Upon such withdrawal, the lenders to the Corporate Debtor, at their meeting of 21.02.2018, withdrew the S4A implementation process. Significantly, the representatives of the Corporate Debtor –MD, CFO and GM were present in the said meeting dated 21.02.2018 and were privy to the discussion. A copy of the said minutes was provided to the Company. Upon the failure of implementation of S4A, on account of withdrawal of the scheme by RBI, the stand still clause (part of S4A Scheme) was revoked and asset classification is governed by ageing criterion as per Income Recognition and Asset Classification norms of RBI. It was consequent to such withdrawal that the account of the Corporate Debtor came to be classified as NPA from the date it had defaulted, which in this case was 20.10.2017. These facts would demonstrate that the account of the Corporate Debtor was classified as NPA in the quarter ending 31.3.2018 w.e.f. 20.10.2017 and the same is within complete knowledge of the Corporate Debtor.

5. Re: the submission of the Corporate Debtor that the review of credit facilities brought about by the letter of 25.10.2017 is a novation and the Financial Creditor cannot maintain action upon the earlier contract.

This submission is fundamentally flawed. Novation arises (in terms of section 62 of the Indian Contract Act, 1872) when the parties to a contract substitute a new contract for the old one or rescind or alter it, in which case the original contract need not be performed. In the instant case there is no such substitution / alteration or rescission. The Corporate Debtor has failed to perform in terms of the contract. As a result, the Financial Creditor offered certain concessions and facilities, vide its letter dated 25.10.2017approving in principal, the implementation of S4A (a scheme introduced by RBI for resolution of Stressed Assets), which concessions and facilities were to assist the Corporate Debtor to perform the original contract. The concessions and facilities do not in any manner abrogate the obligations of the Corporate Debtor, or alter the terms of the contract, in any manner whatsoever. In fact, the very letter of 25.10.2017 categorically provides that the bank reserves the right to discontinue the facilities without giving any notice and to withdraw, modify or amend the terms and conditions of the loan. Clearly, there is no intent to novate the contract which continues to be the basis of the relationship between the parties.

The S4A contemplated in the letter of 25.10.2017 was not at all implemented and came to be withdrawn by RBI Circular dated 12.02.2018.

Upon withdrawal of S4A by RBI, the concessions and facilities provided thereunder, automatically lapsed and the account of the Corporate Debtor was classified as NPA w.e.f. 20.10.2017.

6. Re: The submission of the Corporate Debtor that the instruments are inadequately stamped/ unregistered.

For reply on merits, please see paragraph 15, 31 and 51 @ pages I,M and Q of the Reply filed on behalf of the Petitioner, on 8.3.2021.

This submission is without substance for multiple reasons. Firstly, the submission of the Corporate Debtor is a theoretical and vague, in as much as there is nothing to show on record that the documents in question have been under-stamped in the sense of the stamp duty which would have arguably been payable in Gujarat, would have been more then what is paid in Maharashtra.

The Corporate Debtor's attempt is to erroneously equate an instrument (which is document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded) with a copy thereof. A copy is not an instrument which creates any rights. The judgment relied upon by the Corporate Debtor itself (The Chief Controlling Revenue Authority, Ahmedabad v The Nutan Mills Ltd.) holds that a copy is not an instrument which would attract stamp duty and that a copy cannot be impounded. The said judgment was rendered in a case where a company wished to create a charge u/s125 of the then Companies Act, 1956, on the basis of a copy of an instrument. That is to state that the company in the said case wished to enforce a copy, as if the same was an original instrument, for the purpose of section 125 of the Companies Act, 1956. The facts of the said case are therefore completely distinguishable from the facts of the present case, where there is no enforcement of the alleged insufficiently stamped documents, sought for. The position therefore is that by a deeming provision, a copy, which is not an instrument and therefore not required to be stamped, maybe required to be stamped for differential duty in Gujarat, when originally stamped outside the State, if a copy is sought to be enforced, as if it is an instrument creating a right or liability.

A later judgement of the Hon'ble Gujarat High Court in the case of Tata Teleservices Ltd (Annexure-A) clearly holds (at paragraph 5.5 thereof) "*that no instrument can be charged with stamp duty unless it is sought to be enforced by the parties to such instrument...*". It further reiterates, at paragraph 49 thereof that "*but impounding of an instrument appears to be sine qua non for the purpose of levy and collection of the duty thereon under the Act. Such impounding could be only of original instrument. Section 33, 37 clearly suggest that only original and not the photocopy could be impounded.*" The said judgment holds, even in the context of an instrument (and not a copy) that "*thus for instruments chargeable with duty and not stamped, the powers to charge them with duty are generated in the provisions of Section 33 read with Section 68 of the Act. Any instrument chargeable with duty and found not duly stamped shall be required to be impounded only when it is sought to be relied for enforcement of the rights under the instrument...*"

The correct legal position therefore is that the question as to the appropriateness or otherwise of stamping of the copies of the documents executed between the parties would only arise, if and when the Financial Creditor is seeking to enforce the documents in question, before this Hon'ble Tribunal. This is not so as the present proceedings are not enforcement proceedings.

In the alternative and without prejudice to the aforesaid contentions, assuming whilst denying that any document is not properly stamped or registered, or that any differential stamp duty is required to be paid in Gujarat, the said aspect has no relevance to the initiation of insolvency proceedings by a Financial Creditor. Section 7 of the IBC contemplates initiation of corporate insolvency resolution process by a Financial Creditor. The term Financial Creditor is defined u/s 5(7) as meaning "*...any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to*". "Financial Debt" as defined u/s 5(8) is wide enough to cover all debts and is not restricted to "a secured creditor". A Financial Creditor does not necessarily have to be a secured creditor.

It is thus submitted that while the Financial Creditor maintains that it is a "secured creditor" as well, even if it is assumed otherwise, it does not take away from the fact that the Petitioner bank would continue to be a financial creditor and be entitled as such, to initiate and maintain the subject insolvency proceedings under the IBC.

A similar question arose before the Mumbai NCLT in Standard Chartered Bank and Anr. V/s. Ruchi Soya Industries Ltd- 2017 SCC OnLine NCLT 12689 (@ Annexure C, Page 115 of the Rejoinder of the Petitioner). The Mumbai NCLT observed that the Corporate Debtor has nowhere mentioned as to how much stamp duty is to be paid and how much is not paid by the Petitioner, and thus held that the submission of Corporate Debtor was not relevant to decide the case. The Mumbai NCLT also relied upon the judgments passed by the Hon'ble Bombay High Court (@para 33(v), page 135 of Annexure-C of the Financial Creditor's Rejoinder) wherein it has been held that as the agreements had been acted upon by both the parties and the obligation to pay the requisite stamp duty was on the Respondent (who in that case objected to the admissibility of the documents), the objection on account of non-payment of stamp duty was devoid of merits. In the instant case too, not only have the parties acted upon the instruments but the obligation to pay stamp duty was also on the Corporate Debtor.

There is no requirement of registering a copy in Gujarat when the original instrument, if requiring registration, has already been registered outside Gujarat.

<u>7. Re: The submission of the Corporate Debtor on the issue of Bankers Book Evidence Act.</u>

For reply on merits, please see paragraph 25 @ K and Annexure -C @ page 115 of the Reply filed on behalf of the Petitioner, on 24.02.2021.

6. We have considered the submissions made by both sides and material on record. It is an admitted position that the consortium of lenders headed by the Applicant had given working capital loan It is also an admitted position that lead member of such consortium has also given corporate term loan. It is also not in dispute that the Corporate Debtor has defaulted in payment thereof. On behalf of Corporate Debtor, various technical pleas as regard to the

completeness and validity of application filed under Section 7 of Insolvency and Bankruptcy Code, 2016, have been made. However, we are not inclined to deal with the same at this stage though generally such issues are decided at the first instance before deciding the issues on merit. In this case, this is being an application filed under Section 7 of Insolvency and Bankruptcy Code, 2016, we have to see the main factor i.e whether debt is due and payable. When this matter was earlier heard and reserved for order, issue of this application being barred by limitation was argued by both sides in detail. However, this matter was released for clarification on certain aspects. In the meantime, proceedings were stayed by the Hon'ble Gujarat High Court. The Hon'ble Gujarat High Court passed final order directing this Adjudicating Authority to consider other IA filed by the Corporate Debtor along with main CP. This has been done so. However, in the course of hearing of the matter, the Corporate Debtor did not take the plea of the debt barred by limitation. On behalf of Corporate Debtor, a new plea was taken on the basis of document already available on record. This plea was based upon different date of NPA recorded in some of the documents of the Financial Creditor. Accordingly, a plea was made that this debt was not due and payable on the date of classification of the account of the Corporate Debtor as NPA as mentioned in the Form-1 filed by the Financial Creditor. Further, it was claimed that there was a restructuring of the loan and new time schedule was prescribed which was acted upon by both sides, hence, any application filed under Section 7 of Insolvency and Bankruptcy Code, 2016 could be filed only on the basis of default which took place thereafter. Accordingly, focussed argument was made that in the present application, debt was not payable and pre-mature. In this regard, based on the subsequent documents executed by and between the financial lenders and the Corporate Debtor, it was claimed that it was an instance of novation of contract as per the provisions of Section 62 of Indian Contract Act, 1872.

7. In this background, now we will look at the documents referred to by the Corporate Debtor and sequence of events. In Form No.1, Part-IV, admittedly, date of default has been mentioned as 07.09.2017 in respect of working capital loan and as regard to corporate loan, the date of default has been stated as 30.06.2017. The Corporate Debtor has taken a plea that at various places, various datse of default have been mentioned by the Financial Creditor. In this regard, he has referred to the synopsis of the petition, rejoinder filed by the Financial Creditor and written submissions filed by

the Financial Creditor. In addition to this, our attention has also been drawn to letter dated 01.09.2017 as well as 19.09.2017. In our view, for deciding the fate of application filed under Section 7 of IBC, 2016, date mentioned in Form-1 is only material as this form is prescribed under Rule 4(1) of Insolvency and Bankruptcy (Application to Adjudicating Authority Rules), 2016, for filing an application under Section 7 of IBC, 2016. It is significant to note that as per Section 7(2) of the IBC, 2016, application under Section 7(1) is to be mandatorily filed in such form and manner and accompanied by such fees as may be prescribed. The said Rule 4 also provides that such form-1 should be accompanied with document and record as mentioned in Form-1 and as specified in the IBBI (Insolvency Resolution Process for Corporate Person) Regulations, 2016. When we read explanation to Section 7 of IBC, 2016, it is noted that the default can be in respect of financial debt owed not only to the Applicant but to any Financial Creditor of the Corporate Debtor. The definition of Financial Creditor as given in Section 5(7) of the IBC, 2016 includes legal assignee or transferee of Financial Creditor. The application filed under Section 7 of IBC, 2016 can also be filed independently or jointly with other Financial Creditor. In case of an application by an assignee or transferee, Rule 4(2) and Rule 4(4) of

Insolvency and Bankruptcy (Application to Adjudicating Authority Rules), 2016 shall come into play. Accordingly, Form-1. Thus, on combined reading of provisions of Section 7(1), 7(2) of IBC, 2016 and Rule 4 of Insolvency and Bankruptcy (Application to Adjudicating Authority Rules), 2016, it is established beyond doubt that mentioning wrong date in documents other than Form 1 does not have any relevance or bearing on the merits or otherwise of the application filed under Section 7 of IBC, 2016. Thus, we hold that so-called mistakes as claimed by the Corporate Debtor are not of any significance.

8. Having stated so, now we move to the main plea raised by the Corporate Debtor which is that the account of the Corporate Debtor in respect of both facilities had been cured and regularized. In this regard, our attention has been drawn to the sequence of events which occurred since September 2008 till 22.01.2015 to give brief account of the transaction / agreements. The account did not proceed in the desired direction, hence, it is claimed on 25.10.2017, the Financial Creditor(s) offered to review and restructure both facilities for a period of 6 months i.e. till 09.04.2018. In this regard, our attention has been drawn to the copy of said letter placed at pages 1938 to 1940 of the paper book, volume-7. It is noted that bank had given in principle approval of

implementation S4A scheme with reference date as on 03.08.2017. It is also noted that as per term of such re-structuring if S4A is not implemented within stipulated time then all concessions would stand withdrawn. However, it is not provided therein that in such event such accounts of Corporate Debtor would be treated again NPA from earlier dates when accounts were firstly classified as NPA. Even if we assume it to be so, then also date of NPA is different than the date mentioned in Form-1 for the event of default. It is also noted that this letter has been given in duplicate and one copy of the same was to be returned by the Corporate Debtor after signing as a token of acceptance. It is also noted that in pursuance of such renewed arrangements between Applicant – Financial Creditor and Corporate Debtor, the Corporate Debtor not only gave the signed letter as required but also deposited a sum of Rs.66030605/- in Cash Credit Account on 31.10.2017. Similar situation applies to corporate loan. In this regard, it is noted that on 31.08.2018, the Corporate Debtor paid a sum of Rs.13,12,85,920/- and regularized this account by paying all past instalment. It is further noted that another sum of Rs.2,99,69,878/- has been paid on 04.09.2018. Thus, in our view, there is a written contract / arrangement between the parties since beginning and such written contract has bene modified or revised from time to time. After the account becoming NPA, restructuring of the account has been done subsequently through a written agreement again and which has been acted upon by both sides. Hence, original contract / arrangement stands substituted in terms of provisions of Section 62 of the Indian Contract Act, 1872 by such new agreement. Thus, there is established fact situation of a novation of contract between parties whereby earlier arrangement / contract stood extinguished and parties are governed by the new contract / arrangement. This factual position is of substantial nature and goes to the root of the matter because if such subsequent contract is ignored, then the sanctity of contract gets lost. At this stage, it may not be out of place to mentioned that this provision of Section 62 of Indian Contract Act, 1872 is not contrary to any provisions of IBC, 2016, hence, Section 238 of IBC, 2016 does not come into play as far as this aspect is concerned. It is also worth mentioning that provisions of Section 238 of IBC, 2016 also apply to instrument in form of agreement executed with mutual understanding / agreement by both sides and, therefore, such instrument is to be given effect too, if it is not contrary to any provisions of IBC, 2016.

9. Accordingly, we hold that proceedings initiated on the basis of any default committed by the Corporate Debtor prior in 09.04.2018 are not maintainable. In this regard, we further find that such restructuring has been done in pursuance of the circular of RBI dated 12.02.2018 which was subsequently rescinded / withdrawn by RBI as consequence of the decision of Hon'ble Supreme Court in the case Dharani Sugar Chemical Ltd Vs. Union of India & Others (2019) 5 SCC 480. However, there is nothing in that decision, which, in our humble view, declares action taken by the banks in accordance with said circular till it was declared ultra-virus would also stand invalid. It is in dispute that RBI is sectoral regulator and its directions are binding on the entities covered within that sector. Thus, even though, such circular was declared ultra-virus subsequently action taken by the entities governed by such circular when the circular was in force does not become null and void by implication or otherwise. Thus, we do not find any merit in the contentions taken by the Financial Creditor, in the rejoinder, that because of such decision of the Hon'ble Supreme Court, action taken by the lenders in pursuance of such circular should be declared as null and void. Hence, we reject the same.

10. In view of the above fats and applicable legal position, we hold that present application is based upon an event which became invalid in view of subsequent contractual arrangement between the parties involved herein, we further hold that it is an instance of premature application, hence, it is liable to be dismissed as requirement of debt being payable as on the date as mentioned in Form-1 is not fulfilled.

11. In IA 54 of 2021, various technical pleas have been taken. The said technical pleas have also been taken in written submissions as well as in affidavit of reply. In this view, this application appears to be superfluous. However, we have indicated in the initial part of our conclusion that we will decide this issue after deciding the issues on merit. Since, we have already dismissed the application on merits, hence, now we do not find necessity that the contention raised by both parties in this regard whether through this IA or otherwise, hence, this application stands dismissed and disposed of accordingly.

12. IA 180 of 2021, several grounds have bene taken against certain actions taken by the Applicant between filing of additional documents without our permission stating some additional facts in the written submissions alongwith documents being attached thereto. This aspect has also been pleaded

by the Corporate Debtor while arguing the main matter. Financial Creditor has also replied. However, in view of our decision on merit, we do not consider it necessary to get ourselves involved in this controversy. Thus, for this reason, this IA 180 of 2021 is also dismissed and disposed-off.

13. Urgent certified copy of this order, if applied for, be issued upon compliance with all requisite formalities.

14. CP(IB) No. 245/7/NCLT/2020, IA 54 of 2021 and IA 180 of 2021 stand dismissed and disposed of.

(Virendra Kumar Gupta)
Member (Technical)

(Madan Bhalachandra Gosavi)
Member (Judicial)

Prakash