

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV**

CP (IB) No.226/MB-IV/2022

Under Section 7 of the IBC, 2016

In the matter of

BANK OF INDIA LIMITED.

[CIN: U99999MH1906PLC000243]

[PAN: AAACB0472C]

...Financial Creditor

v/s.

BD & P HOTELS (INDIA) PRIVATE
LIMITED

[CIN: U55101MH1997PTCI07571]

...Corporate Debtor

Order Delivered on: **23/06/2023**

Coram:

Mr. Prabhat Kumar

Hon'ble Member (Technical)

Mr. Kishore Vemulapalli

Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For CP

For the Financial Creditor:

Mr. Zal Andhyarujina, Ld.

Sr. Counsel a/w Mr. Karan

Bhide and Mr. Yash Pandya
i/b MV KINI Law Firm, Ld.
Counsel.

For the Corporate Debtor: Mr. Shyam kapadia a/w Mr.
Yash Momaya, Mr. Munaf
Virjee and Mr. Akash
Agarwal i/b ABH Law LLP,
Ld. Counsel.

For IA:

For the Financial Creditor: Mr. Karan Bhide and Mr.
Yash Pandya i/b MV KINI
Law Firm, Ld. Counsel.

For the Corporate Debtor: Mr. Yash Momaya, Mr.
Munaf Virjee and Mr. Akash
Agarwal i/b ABH Law LLP,
Ld. Counsel.

ORDER

Per: Prabhat Kumar, Hon'ble Member

1. This is an Application being CP (IB) No. 226/MB-IV/2022 filed on 18/02/2022 by M/S. Bank of India, the Financial Creditor/Applicant, under section 7 of Insolvency & Bankruptcy Code, 2016 (I&B Code) for initiating Corporate Insolvency Resolution Process (CIRP) in the matter BD & P Hotels (India) Private Limited, the Corporate Debtor.

1.1. The total amount claimed by the Financial Creditor as specified in the Part IV of the Company Petition is Rs. 111,61,53,766/- as due and payable by the Corporate Debtor as on 31.12.2021, together with further interest at 14% thereon compounded with monthly rests from 01.01.2022 along with penal interest at 2% p.a. and other costs and expenses incurred and to be incurred for preservation and enforcement of the securities till the date of full and final payment and/or recovery. The date of default is 01.02.2017.

1.2. The workings for computation of amount in default is reproduced hereinunder:

The computation of amount in default outstanding as on 31.12.2021 owed to Bank of India [Financial Creditor] by BD & P Hotels (India) Private Limited [Corporate Debtor]

S. No.	Particulars	[Amount in INR] Amount
1.	Balance outstanding as on the date of account declared as NPA i.e., on 29.05.2015	58,69,22,889
2.	Normal interest charged to the account from the date of NPA till 31.12.2021	88,38,40,712
3.	Penal interest charged to the account from the date of NPA till 31.12.2021	12,62,629
4.	Cash recovery made after account declared as NPA	35,58,72,464
5.	Net amount payable by the Corporate Debtor to Financial Creditor as at 31.12.2021 [(1+2+3) - 4]	111,61,53,766

[Supporting Bank Statement in respect of the subject loan account bearing number 016065410000245 is enclosed]

2. The Corporate Debtor, BD & P Hotels (India) Pvt. Ltd. is promoted by Marine Drive Hospitality & Realty Private Limited (MDHRPL) earlier known as DB Hospitality Pvt. Ltd. (DBHPL). The company owns a 5-star hotel near Sahar International Airport, Mumbai. The hotel was initially

managed by Le Meridien Hotels and Resorts in 2000. Later BD & P Hotels (India) Pvt. Ltd. entered into an agreement with Hilton International LLC in December 2010 and operated the hotel under the brand "Hilton International" since January 2011.

2.1.MDHRPL, the holding company controls 75% of the equity of BD & P Hotels (India) Pvt. Ltd. The holding company is promoted by DB Group (DB group is a Mumbai-based group, having exposure in real estate, hospitality and other business since 1990) with the objective of setting up a chain of hotels across the country under 5-star deluxe, 5-star and 4-star categories. Other properties of MDHRPL are Le Meridian, Ahmedabad and Grand Hyatt, Goa.

2.2.The Corporate Debtor was sanctioned with a Term Loan /FCL of INR 65 Crores by Bank of India, the Financial Creditor against the future cash receivables of the Hotel to part repay the unsecured loan taken from its holding Company i.e., MDHRPL which controls 75% of the equity of BD & P Hotels (India) Pvt. Ltd. The Term Loan of INR 65 Crores was repayable in 18 quarterly uneven instalments commencing from October 2013. Door to Door tenor was 4 years and 7 months.

2.3.The Corporate Debtor could not pay interest and instalments in time due to a liquidity crunch. Due to default in repayment of dues, the account has been classified as NPA with effect from 9.05.2015 in accordance with guidelines of the Reserve Bank of India.

- 2.4. The Corporate Debtor was sanctioned with a Term Loan /FCL of INR 65 crores [Sixty-Five crores only] by Bank of India, the Financial Creditor, vide its Sanction Letter MLCB/SRG/2013-14/388 dated 28.06.2013 against the future cash receivables of the Hotel.
- 2.5. The Financial had obtained Acknowledgement of Debt and Securities from the Corporate Debtor from time to time and the last such Acknowledgement was obtained on 08.03.2021.
3. The Corporate Debtor has filed reply dated 14.02.2022; 27.06.2022 and 13.02.2023; and additional affidavit dated 07.04.2023 submitting that the Petitioner is acting in a demonstrably high-handed, *mala fide* and illegal manner, and is attempting to misuse the provisions of the Code in a manner not contemplated by law. It is further submitted that –
- 3.1. The Petition is directly barred and prohibited by Section 10A of the Code. In the Petitioner's formulation of its own case, the last acknowledgement received by the Petitioner from the Respondent towards the purported default occurred on March 8, 2021 for a purported sum of INR 32,40,50,039.14/- (Rupees Thirty-Two Crore Forty Lakh Fifty Thousand Thirty-Nine and Fourteen Paise only). Therefore, it is the Petitioner's case that the "default" occurred on March 8, 2021, which is between March 25, 2020 and March 24, 2021. It is trite that a fresh period of limitation shall be computed from the time when the acknowledgment of debt was signed by the debtor. It is the Petitioner's case that "default" occurred on

December 31, 2021. However, the last purported acknowledgement of debt was on March 8, 2021. There is absolutely no explanation as to how the date of purported default changed from March 8, 2021, to December 31, 2021. Therefore, it is evidently clear that the sole reason the Petitioner changed the date of default from March 8, 2021, to December 31, 2021, was to overcome the bar of Section 10A of the Code.

3.2. The present Petition is *ex facie* barred by the law of limitation and the Petitioner cannot rely upon any subsequent notices issued by it to make its claim within limitation. The following dates will demonstrate that as to how the Petition is either barred by limitation or barred by express provisions of the Code:

Sr. No.	Particulars	Date of Default	Period of Limitation ended	Debt is barred as per law
	NPA	May 29, 2015	May 28, 2018	Limitation Act
	NeSL	February 1, 2017	January 31, 2020	Limitation Act
	Notice under SARFAESI Act	May 8, 2017	May 7, 2020	Limitation Act
	Last date of acknowledgement of debt	March 8, 2021	--	Section 10A of the Code.

3.3. The purported debt of INR 111,61,53,766/- (Rupees One Hundred Eleven Crore Sixty-One Lakh Fifty-Three Thousand Seven Hundred and Sixty-Six only) (“**Purported Debt**”) is not crystalized. Pertinently, the Respondent in 2013, had purportedly availed a term loan of INR 65,00,00,000/- (Rupees Sixty-Five Cores only) from the Petitioner. However, all sudden, as on December 31, 2021, the said sum increased to the Purported Debt. It is also pertinent that the Respondent has paid substantial interest on the Credit Facilities availed from the Petitioner. The Petitioner has failed to demonstrate as to how did the said sum usuriously increased to the Purported Debt. Thus, the Petitioner is attempting to declare a solvent company as insolvent by not crystalizing the amount in default. The Petitioner’s reliance on the purported computation sheet (entirely prepared by the Petitioner) at *Page 23 of the Company Petition (Annexure 4)* is totally illegal, misconceived and erroneous. This so-called computation sheet is disputed and denied by the Respondent.

3.4. The Petition is a gross and egregious abuse of the process of law and of the provisions of the Code. The Petitioner itself has contended in the Petition at *Page 11 of the Company Petition* that the fair market value of all the properties of the Respondent as on March 25, 2021, is approximately INR 267,50,00,000/- (Rupees Two Hundred Sixty-Seven Crore Fifty Lakh only). Therefore, it is evident that the value of the Respondent is far more than the Purported Debt. This itself proves that the Petitioner is using the Code as a recovery mechanism and strongly intends to declare a

solvent company as insolvent. Further, the SARFAESI Action by the applicant and that too when the IBC proceedings are pending with this Tribunal manifests that the Financial Creditor is taking actions adversarial to the Corporate Debtor for the sole purpose of recovery of its dues.

3.5. The Respondent states that the Term Loan Agreement, on the basis on which the Petitioner is seeking reliefs, as also the other ancillary agreements, is not valid and legally enforceable for reason of it being insufficiently stamped under applicable law. An instrument that is insufficiently stamped is inadmissible in evidence.

3.6. Due to non-receipt of NOCs from lenders (including the Petitioner) for sale of flats; hurdles and refusal by the Petitioner to permit the Respondent to make withdrawals from the escrow account for the Project leading to further delays; and the cascading effect of the above factors on the cash-flow of the Respondent, resulted in the the Respondent being unable to service the Credit Facilities availed from the Petitioner.

3.7. The global economy along with Indian economy have been gravely affected due to financial crisis caused by COVID-19. The World Health Organization has declared this as a global pandemic. All these reasons have led to extraordinary force majeure events which have engulfed the entire business community to face financial difficulties like ever before. The Respondent will prevent the temporary financial hardships and be

able to end it soon, particularly if the OTS Proposal is accepted, as the Petitioner ought to.

3.8. The Code was enacted to create a comprehensive and robust framework for insolvency and bankruptcy proceedings against entities which are likely to become commercially unviable and perennially sick units with no chance of recovery. However, the Petitioner by filing the captioned Petition under the garb of a purported debt is antithetical to the objective of the Code and is acting to arm-twist and coerce alleged payments against the spirit of the Code. The Respondent is neither a commercially unviable asset nor a potential sick entity. The Respondent and its group companies have been carrying on business for over 40 years and have completed various projects till date, delivering numerous homes to its happy customers. As on date, there are around 800 workers/employees engaged, both directly and indirectly, by the Respondent and its group companies.

3.9. In support of the Petition, the Petitioner has annexed a purported authority letter dated February 14, 2022. Further, in the authority letter, there is no specific mention as to against whom the Petitioner is filing the captioned Petition. The Respondent's name is not mentioned in authority letter. Further, no specific authority is conferred upon 'Harish V', the individual who is purportedly authorized by the Petitioner. Furthermore, the purported authority letter does not specify before which Hon'ble NCLT, the captioned Petition is to be filed.

4. The Corporate Debtor filed an IA-1410/2023 challenging the Petition on ground of Limitation as well as Section 10A of the Code. The Corporate Debtor also filed an IA 1873 of 2023 challenging the maintainability of this Petition on the ground of insufficiency of stamp duty paid on loan / mortgaged documents in view of decision of Constitution Bench of Hon'ble Supreme Court in the case of *N.N. Global Mercantile Private Limited vs. Indo Unique Flame Ltd. and Others 2023 SCC OnLine SC 495*. The corporate debtor has urged this Tribunal in the said IA, after reproducing certain Paras from the said decision in support of its contentions, to consider the findings of the Hon'ble Supreme Court of India in the said judgement before passing any judgement in the Company Petition. It has further submitted that there is no doubt that the Agreements referred to and relied upon by the Petitioner in the present Petition to claim a default from the Respondent are insufficiently stamped. On the face of the Agreements, one can see that such Agreements are insufficiently stamped. It has further been submitted that If this Hon'ble Tribunal does not consider the recent judgement on insufficient stamp duty then any orders judgment passed without considering the same will open flood gates and set a dangerous precedent, where such an order will have a catastrophic impact on the matters.
5. The Financial Creditor has filed rejoinder dated 20.09.2022 and additional affidavit dated 05.12.2022 submitting that the Corporate Debtor has submitted a cumulative settlement for payment of Rs. 540.70 crores for settling the purported debt due and payable by M/s

Pune Buildtech Pvt. Ltd.; M/s. Majestic Infracon Pvt. Ltd. and the Respondent Corporate Debtor. The Corporate Debtor has serviced the loan from the surplus generated from the cashflow of the hotel even after filing of the present petition.

5.1. The Financial Creditor filed an IA-3943/2022 placing on record documents explaining its case for condonation of delay u/s 5 of the Limitation Act. The said IA was filed after this Bench reserved the Application for orders on 6.12.2022 and the same was allowed vide order dated 25.01.2023 after hearing both the parties.

5.2. The Financial Creditor placed on record copy of audited financial statements of the Corporate Debtor for the year ended on 31st March, 2020 and 31st March, 2021, copy of acknowledgement of debts dated 8.3.2021; and OTS proposal vide letter dated 26.02.2018 & subsequent reminder dated 20.9.2019 in relation thereto, OTS Proposal dated 25.03.2022 & further letters from Corporate Debtor in relation thereto, and final OTS proposal dated 30.8.2022, to contend that the present petition is within the period of limitation, as having been filed within a period of three years from the date of default i.e. 1.2.2017, after taking into account subsequent acknowledgements vide audited financial statements of the Corporate Debtor, acknowledgement dated 1.11.2017 & dated 8.3.2021, and vide OTS proposals. Further, it relied upon the decision of Hon'ble Supreme Court in case of Court on its Own Motion (Suo Moto Writ Petition no 3 of 2022), whereby certain period in filing an application came to be excluded for the purpose of Limitation Act.

Findings:

6. This bench has carefully gone through the documents and pleadings available on record and considered the arguments.

6.1. The Counsel for the Corporate Debtor vehemently argued that the present petition is in nature of Recovery Proceedings and no resolution, as the mandate of IBC is, is sought to be intended by the present application. To support its contention, the Counsel drew our attention to the various OTS proposals latest being Proposal dated 25.03.2022, having been submitted by the Corporate Debtor, whereby the Corporate Debtor had offered to pay a sum of Rs. 85.00 crores, raising the earlier offer submitted in year 2018.

6.1.1. During the hearing, he also argued that the Corporate Debtor undertakes to pay a sum of Rs. 32,40,50,039.14, being the amount stated in the acknowledgement of debt signed by the Corporate Debtor on 8.3.2021. It was also argued that he Corporate Debtor had acknowledged only a sum of Rs. 23.10 crores vide acknowledgement dated 8.03.2021 as against the amount of Rs. 32,40,50,039.14 shown as outstanding in the said acknowledgement. He further drew attention of this Bench to the acknowledgement of debt dated 1.11.2017 stating the amount standing as Rs. 34,70,50,424.77, to contend that the corporate debtor had acknowledged this amount only as debt, and present application seeking admission on the basis of default amount of Rs. 111,61,53,766/- is to pressurise the Corporate Debtor to pay the money demanded by it.

6.1.2. On perusal of acknowledgement dated 1.11.2017, this Bench finds that the said acknowledgement states “Outstanding amount as on 31.10.2017 plus uncharged interest w.e.f. 29.05.2015” as Rs. 34,70,50,424.77. This Bench further finds that there is no such averment on the acknowledgement dated 8.3.2021, however, the Bench understands that the lenders, regulated by RBI, are barred from recognizing the interest on the outstanding from the date, such outstanding is classified as NPA in terms of RBI’s Assets Recognition & Account Classification (IRAC) guidelines.

6.1.3. It follows therefrom that the Corporate Debtor had acknowledged its obligation to pay uncharged interest w.e.f. 29.05.2015, in addition to outstanding amount of Rs. 34,70,50,424.77. The said interest is payable under the terms of sanction and it can not be concluded that the Corporate Debtor, having acknowledged a sum of Rs. 34,70,50,424.77 only, is bound by that amount only. This Bench notices that the Corporate Debtor has offered to pay a sum of Rs. 85.00 crores in its last OTS offer, and this offer came to be made based on its liability to pay a sum of Rs. 32,40,50,039.14 alongwith uncharged interest w.e.f. 29.05.2015 thereon. This Bench further notices from the audited financial statements for the year ended on 31.3.2020 and 31.3.2021 that the Corporate Debtor has stated a sum of Rs. 6215.86 lacs and Rs. 5440.49 lacs as “Overdue amounts due to the Bank” respectively. Further, the Auditor’s Report on the financial statements for the year ended on 31.03.2020 and 31.3.2021 gives the details

of default to banks and shows an amount of Rs. 40,15,67,230/- (Principal) plus 10,39,09,090/- (Interest accrued) and Rs. 32,40,50,039/- (Principal), being in default to the Applicant Bank since November, 2014, respectively and that interest on such loan has not been provided in terms of note no. 15.2 to the said financial statement. Further, the Auditor's Report on the financial statements for the year ended on 31.03.2020 also states the amount of accrued interest on such loan and not provided in books of account as Rs. 4,20,78,978/-.

6.1.4. This Bench notices that the Hon'ble Supreme Court in the case of *Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors. (2019) ibclaw.in 03 SC* had held that "*The Explanation to Section 7(1) also makes it clear that the Code may be triggered by such persons in respect of a default made to any other financial creditor of the corporate debtor, making it clear that once triggered, the resolution process under the Code is a collective proceeding in rem which seeks, in the first instance, to rehabilitate the corporate debtor. Under Section 7(4), the Adjudicating Authority shall, within the prescribed period, ascertain the existence of a default on the basis of evidence furnished by the financial creditor; and under Section 7(5), the Adjudicating Authority has to be satisfied that a default has occurred, when it may, by order, admit the application, or dismiss the application if such default has not occurred.*"

6.1.5. The reliance of Corporate Debtor on the Hon'ble Supreme Court's decision in the case of *Vidarbha Industries (2022 (8) SCC 352)* is not sustainable in view of later decision in the case of

M. Suresh Kumar Reddy Vs. Canara Bank & Ors. (2023) ibclaw.in 67 SC holding that “it was clarified by the order in review that the decision in the case of *Vidarbha Industries ((2022 (8) SCC 352))* was in the setting of facts of the case before this Court. Hence, the decision in the case of *Vidarbha Industries ((2022 (8) SCC 352))* cannot be read and understood as taking a view which is contrary to the view taken in the cases of *Innoventive Industries (((2018) 1 SCC 407))* and *E.S. Krishnamurthy (((2022) 3 SCC 161))*. The view taken in the case of *Innoventive Industries (((2018) 1 SCC 407))* still holds good.”

6.1.6. Hence, this Bench does not find any merit in this argument that the said proceedings are meant to recover the outstanding and do not seek the resolution of the Corporate Debtor, as mandated under the IBC.

6.2. The sufficiency of security is not a relevant consideration in a proceeding u/s 7 of the Code. On the contrary, it invalidates the argument of the Corporate Debtor that the present proceedings seek to recover the outstanding than to resolve the corporate debtor. A lender, having comfortable security and intending to recover its money, would prefer to take over the assets of the borrower under SARFAESI Act to have it auctioned for realization of its outstanding.

6.3. The Corporate Debtor has further pleaded that the financial creditor has relied upon an acknowledgement dated 08.03.2021 to support its case being within the limitation period. This Bench finds that the date of default is stated as 01.02.2017 in part IV of the Form 1 forming part of the present petition. The Corporate Debtor has not disputed that this is not correct date of default.

Instead, the Corporate Debtor argues that fresh date of default comes into existence when the outstanding debt is said to have been acknowledged i.e. 08.3.2021 by the Corporate Debtor and the said date falls within the period prescribed in section 10A of the IBC barring filing of any application u/s 7, 9, & 10 under the IBC.

6.4. This Bench finds the said argument is ex-facie illegal and not in accordance with stated position in numerous decisions of higher courts, wherein it has been consistently held that the default arises when the debt due is not paid and the subsequent events do not give rise to any fresh date of default. The subsequent acknowledgement acknowledges the liability and does not cause any default having come into existence.

6.5. The Corporate Debtor has also argued the date of default as stated in Part IV of Form 1 forming part of the petition is 01.02.2017, and accordingly, the period of limitation runs from the said date of default. The present petition is filed on 18.02.2022, hence, the said application, having been filed beyond a period of 3 years from the date of default, the present application deserve to be dismissed on ground of limitation.

6.5.1. This Bench notices that the Corporate Debtor has acknowledged the debt of Rs. 34,70,50,424.77 plus uncharged interest thereon w.e.f. w.e.f. 29.05.2015 vide acknowledgement dated 1.11.2017. In view of said acknowledgement, the period of limitation extends upto 31.10.2020. Further, the Corporate Debtor has

acknowledged the debt of Rs. 32,40,50,039.14 vide acknowledgement dated 08.3.2021.

6.5.2. This Bench finds that the Corporate Debtor has acknowledged the said debt in its audited financial statement for the year ended on 31.03.2020 and 31.03.2021, which contains the corresponding amounts for the preceding year i.e. 31.03.2019 & 31.03.2020 also. The said financial statements clearly show that the Corporate Debtor owes debt to the applicant bank, as succinctly explained in para 6.1.3 above, and such acknowledgement extends the period of limitation.

6.5.3. Further, in the case of *Tejas Khandhar Vs. Bank of Baroda (2022) ibclaw.in 496 NCLAT*, it was held that “*Keeping in view the aforementioned ratio laid down by the Hon’ble Apex Court in ‘Dena Bank (now Bank of Baroda)’ (Supra), this Tribunal is of the considered view that the OTS proposal dated 01.08.2016 and the subsequent one on 27.03.2018 falls within the definition of the ambit of ‘acknowledgement of debt’ as envisaged under Section 18 of the Limitation Act, 1963*”. Thus, OTS proposal vide letter dated 26.02.2018 & subsequent reminder dated 20.9.2019 in relation thereto further extends the period of Limitation.

6.5.4. In the case of *Dena Bank Vs. C. Shivakumar Reddy and Anr (2021) ibclaw.in 69 SC*, the Hon’ble Supreme Court held that acknowledgement of debt in the audited financial statements is a valid acknowledgement of debt u/s 18 of the Limitation Act, thus the period of limitation further gets extended.

6.5.5. Nonetheless, in the case of *Suo Motu Writ Petition (C) NO. 3 OF 2020*

In Re: Cognizance For Extension Of Limitation

(Suo Motu Writ Petition (C) NO. 3 OF 2020), the Hon'ble Supreme Court ordered to exclude the period from 15.03.2020 to 28.02.2022 for the purpose of computation of Limitation Period vide its order dated 10.01.2022. In view of this also read together with acknowledgement dated 1.11.2017, the present petition can be held to have been filed within the period of limitation. Hence, this contention of the Corporate Debtor is also rejected.

6.6. The Corporate Debtor has challenged the maintainability of this Petition on the ground of insufficiency of stamp duty paid on loan / mortgaged documents in view of decision of *N.N. Global Mercantile Private Limited (Supra)*. The corporate debtor has contended that the Term Loan Agreement including the other ancillary agreements as mentioned aforesaid, on the basis on which the Petitioner is seeking reliefs, are not valid and legally enforceable for reason of it being insufficiently stamped under applicable law on the ground that the Term Loan and other ancillary agreements are executed in New Delhi, save and except the Supplemental Agreement which was executed in Mumbai. Thus, once such agreements are relied upon by the Petitioner before this Hon'ble Tribunal, which is exercising its jurisdiction in Mumbai, such agreements are known to be brought in Maharashtra. Once brought into Maharashtra for purpose of filing the present Petition under the Code, it is liable to payment of stamp duty under Maharashtra Stamp Act, 1958. It is further stated that as per the provisions of the Stamp Act, the Term Loan

Agreement is liable to payment of stamp duty under Article 5(h)(A)(iv) of Schedule 1 of the Stamp Act, which provides payment of stamp duty at the rate of 0.2% of the amount agreed in the contract.

6.6.1. It is also contended that, in the present case, the Credit Facilities which was sanctioned to the Respondent was Rs.65 Crores. Therefore, the agreed contractual value under the Term Loan Agreement is clearly over Rs.10 Lakh. In view thereof, 0.2% of the total contract value i.e. Rs.65 Crores will be levied. 0.2% of 65 Crores is Rs.13 Lakh which will be payable as the stamp duty on the Term Loan Agreement. The Petitioner has admittedly paid only Rs. 100/- as evident from the stamp affixed on the Term Loan Agreement. In view of the insufficiently stamped agreement, this Hon'ble Tribunal cannot act and give effect to such agreement. Likewise, the other ancillary agreement inter alia Hypothecation Agreement which is also executed in New Delhi is stamped only at Rs. 100/- in place of Rs.13 Lakh when the same is relied upon by the Petitioner in the State of Maharashtra. Even in the case of Supplemental Mortgage Agreement, which is executed in Mumbai, Maharashtra, there is a deficient stamp duty of Rs.3 Lakh as only Rs.10 Lakh is paid instead of Rs.13 Lakh. Considering while executing the Agreements, the requisite stamp duty was not paid, in addition thereto, penalty at the rate of 2% per month shall be levied on such Agreements. Therefore, in view of the insufficient stamp duty, this Hon'ble

Tribunal cannot take into account such Agreements and give effect thereto.

6.7. This Bench notices that the issue for consideration before the Hon'ble Supreme Court in case of N. N. Global (Supra) was "*Whether the statutory bar contained in Section 35 of the Stamp Act applicable to instruments chargeable to stamp duty under Section 3 read with the Schedule to the Act, would also render the arbitration agreement contained in such an instrument, as being non-existent, pending payment of stamp duty on the substantive contract/instrument?*"

6.7.1. The Corporate Debtor has reproduced Para No. 69, 72, 76, 81, 96, 112, 114(v), 120 & 124 from the said decision in support of its contention.

6.7.2. In this case, the Constitutional Bench, by majority of 3:2, held at para 120 that "*An instrument, which is exigible to stamp duty, may contain an Arbitration Clause and which is not stamped, cannot be said to be a contract, which is enforceable in law within the meaning of Section 2(h) of the Contract Act and is not enforceable under Section 2(g) of the Contract Act. An unstamped instrument, when it is required to be stamped, being not a contract and not enforceable in law, cannot, therefore, exist in law*" and further held that "*the provisions of Sections 33 and the bar under Section 35 of the Stamp Act, applicable to instruments chargeable to stamp duty under Section 3 read with the Schedule to the Stamp Act, would render the Arbitration Agreement contained in such instrument as being non-existent in law unless the instrument is validated under the Stamp Act*".

6.7.3. From the above proposition, this Bench notices that the Hon'ble Court held that an instrument, which is not stamped or insufficiently stamped in accordance with the Stamps Act, is not an enforceable instrument, hence is a void contract in terms of provisions of Contract Act. Accordingly, such instrument can not be taken in evidence by the Court.

6.7.4. This Bench also notices that the Hon'ble Court held at Para 114.v, while adverting to the issue how the Courts will act when an instrument is not stamped or insufficiently stamped, that *"We may, however, qualify what we have said with a caveat. There may be cases, where no stamp duty is seen paid. It paves the way for the unambiguous discharge of duty under Sections 33 and 35 of the Stamp Act. There may, however, be cases, where it may be stamped but the objection is taken by the party that it is not duly stamped. In such cases, no doubt, it is ordinarily the duty of the Court to examine the matter with reference to the duty under Section 33(2). If the claim that it is insufficiently stamped, appears to the Court to be on the face of it, wholly without foundation, it may make the Reference on the basis of the existence of an Arbitration Agreement otherwise and then leave it open to the Arbitrator to exercise the power under Section 33, should it become necessary. This approach does justice to the word 'examine' in Section 33(2) of the Stamp Act while not ignoring the command of Section 11(6A) of the Act. It is not to be confused with the duty to examine prima facie whether an 'Arbitration Agreement' exists under Section 11(6A) of the Act, but is related to the duty to examine the matter under Section 33(2) of the Stamp Act"*.

6.8. Section 34 of the Maharashtra Stamp Act (“Stamp Act”) provides that –

34. No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer unless such instrument is duly stamped or if the instrument is written on sheet of paper with impressed stamp such stamp paper is purchased in the name of one of the parties to the instrument :

Provided that,—

(a) any such instrument shall, subject to all just exceptions, be admitted in evidence on payment of—

- (i) the duty with which the same is chargeable, or in the case of an instrument insufficiently stamped, the amount required to make up such duty, and*
- (ii) a penalty at the rate of 2 per cent. of the deficient portion of the stamp duty for every month or part thereof, from the date of execution of such instrument :*

Provided that, in no case, the amount of the penalty shall exceed four times the deficient portion of the stamp duty ;

b) where a contract or agreement of any kind is effected by correspondence consisting of two or more letters and any one of the letters bears the proper stamp, the contract or agreement shall be deemed to be duly stamped ;

6.8.1. Section 19 of Maharashtra Stamp Act provides that –

19. Where any instrument of the nature described in any article in Schedule I and relating to any property situate or to any matter or thing done or to be done in this State is executed out of the State and subsequently such instrument or a copy of the instrument is received in the State,—

(a) the amount of duty chargeable on such instrument or a copy of the instrument shall be the amount of duty chargeable under Schedule I on a document of the like description executed in this State less the amount of duty, if any already paid under any law in force in India excluding the State of Jammu and Kashmir on such instrument when it was executed ;

(b) and in addition to the stamps, if any, already affixed thereto such instrument [or a copy of the instrument] shall be stamped with the stamps necessary for the payment of the duty chargeable on it under clause (a) of this section in the same manner and at the same time and by the same persons as though such instrument or a copy of the instrument were an instrument received in this State for the first time at the time when it became chargeable with the higher duty, and

(c) the provisions contained in clause (b) of the proviso to sub- section (3) of section 32 shall apply to such instrument or a copy of such instrument as if such were an instrument executed or first executed out of this State and first received in this State when it became chargeable to the higher duty aforesaid, but the provisions contained in clause (a) of the said proviso shall not apply thereto.

6.8.2. Section 4(1) of the Maharashtra Stamp Act provides that *“Where, in the case of any development agreement, sale, lease mortgage, or settlement, several instruments are employed for completing the transaction, the principal instrument only shall be chargeable with the duty prescribed in Schedule-1 for the conveyance, development agreement, lease mortgage or settlement and each of the other instruments shall be chargeable with the duty of One Hundred Rupees instead of the duty is any prescribed for it in that Schedule”*. Section 4(3) further provides that *“If the parties fail to determine the principal instrument between themselves then the officer before whom the instrument is produced may, for the purposes of this section determine the principal amount”*.

6.8.3. This Bench finds that Entry 6 of Schedule 1 to the Maharashtra Stamp Act deals with any instrument evidencing an agreement relating to—(1) The deposit of the title deeds or instrument constituting or being evidence of the title to any property whatever (other than a marketable security), where such deposit has been made by way of security for the repayment of money advanced or to be advanced by way of loan or an existing or future debt; and Article 40 deals with MORTGAGE-DEED, not being an agreement relating to Deposit of Title Deeds, Pawn or Pledge or Hypothecation (Article 6), Bottomry Bond (Article 14), Mortgage of a Crop (Article 41), Respondentia Bond (Article 53), or Security Bond of Mortgage Deed (Article 54) when possession is not given or agreed to be given as aforesaid. The stamp duty rate prescribed, at relevant point of time, in Article 6 is 0.2 per

cent. of the amount secured by such deed and in Article 40 it is 0.5 per cent. of the amount secured by such deed, subject to the maximum of ten lakh rupees.

6.8.4. This Bench finds that the Deed of Supplemental Mortgage dated 4.7.2013 creates a Registered Mortgage and not an agreement relating to deposit of title deeds, hence, such mortgage deed would be subject the stamp duty under Entry 40, which prescribes maximum duty of Rs. 10.00 lacs. It is not in dispute that this Mortgage deed has been executed upon payment of stamp duty of Rs. 10.00 lacs and is a registered document. Further, the said supplemental mortgage deed is the principal instrument having been executed pursuant to sanction letter dated 28.06.2013 mandating execution of necessary security documents for the sanction limits before release of such limits. Accordingly, the Term Loan Agreement and the other ancillary agreement inter alia Hypothecation Agreement, having been executed on a stamp of Rs.100/- in state of Delhi, is also sufficiently stamped in view of section 4(1) of the Maharashtra Stamp Act.

6.8.5. The Corporate Debtor's contention is that the said Mortgage Agreement as well as the agreement was also exigible to stamp duty under entry-5(h)(A)(iv) of schedule 1. However, this Bench finds that the Supplemental Mortgage Deed, the Term Loan Agreement and the other ancillary agreement inter alia Hypothecation Agreement, are sufficiently stamped and the contention of the Corporate Debtor are based on mistaken appreciation of the facts pertaining thereto. Even if the

contention of the Corporate Debtor is taken into account, the said contention gives rise to issue of classification under Schedule-1 of the Stamp Act. This Bench finds that the Hon'ble Supreme Court in the case of NN Global (Supra) laid down guideline in these words “*If the claim that it is insufficiently stamped, appears to the Court to be on the face of it, wholly without foundation, it may make the Reference on the basis of the existence of an Arbitration Agreement otherwise and then leave it open to the Arbitrator to exercise the power under Section 33, should it become necessary. This approach does justice to the word ‘examine’ in Section 33(2) of the Stamp Act while not ignoring the command of Section 11(6A) of the Act.*” Accordingly, this Bench is of the considered view that this Bench, after having recorded the findings that said documents are sufficiently stamped, can proceed further to take these documents in evidence and leaving the issue of determination to the IRP/RP to be appointed in this case, in case the present petition is admitted.

6.9. Nonetheless, this Bench considers it appropriate to deal with the issue whether insufficiently stamped loan agreements and mortgage agreements can have a bearing on the adjudication of an application u/s 7 of the Code in case the claim can otherwise be substantiated.

6.9.1. This Bench finds that the law laid down in N N Global makes the contract, which is unstamped or insufficiently stamped, void, and the said decision further lays down the principle that such contract gets revived upon payment of duty with penalty under the Stamp Act. It follows therefrom that

an instrument, insufficiently stamped or unstamped, is eclipsed by shadow of insufficiency of stamp duty paid on such instrument and cannot be taken in evidence; and once such shadow gets removed, the contract revives and becomes an enforceable instrument.

6.9.2. This Bench also finds that the law laid down in N N Global requires the Court or Public Authority to impound such instrument, in case it is unstamped or is found insufficiently stamped prima-facie and further mandates the Court or Public Authority to ensure that the Stamp Duty is paid in accordance with the applicable Stamp Act before allowing enforcement of rights arising from such instrument.

6.9.3. This Bench finds the plea of insufficiency of stamp duty raised by the Corporate Debtor, to dislodge the present petition, to be contrary to its own admission while seeking disbursement of the Term Loan under these very agreements and subsequent acknowledgements, OTS proposals and its financial statements. This Bench feels that the dislodgement of the position, which remained legal for sufficiently long time as per Corporate Debtor's actions, would only benefit the Corporate Debtor at the cost of Financial Creditor, more so when the amount of deficient stamp paper was recoverable from the Corporate Debtor itself.

6.9.4. The IBC was enacted to facilitate the revival of the debtor by a resolution process, and such resolution process, as contained in the IBC, does not stipulate that the enforcement of such rights in the resolution process. The Hon'ble Supreme Court

in case of *Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors. (2019) ibclaw.in 03 SC* had held that “*It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors*”.

6.9.5. The Tribunal, while adjudicating upon an application for admission into Resolution Process filed by a creditor, is mandated to ascertain the existence of the debt, and any default in payment of such debt. Ascertainment of existence of debt and default is not necessarily to be evidenced by a loan agreement or ancillary agreement or mortgage agreement. Instead, it can be proved by other means, as provided in Section 7(3) of the IBC prescribing record of default recorded with the information utility or such other records or evidence such may be specified. Further, Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 prescribed Form-1 under Chapter-II and IV of Part-II of the Code for making an Application under 7 of the Code by Financial Creditor. Part-V of this Application requires details of financial debt document records and evidence of default to be stated by the Applicant. In the present Application, the Financial Creditor has provided NESL report dated 29.12.2021, copies of entries in Banker’s Book, Copy of Notice u/s 13(2) of SARFAESI, Act 2002 and copy of

acknowledgement of debt dated 31.12.2014, 01.11.2017 and 08.03.2021, besides copy of Sanction Letter, Supplemental Mortgage Deed, Term Loan Agreement and other ancillary agreement. The Financial Creditor also filed audited Financial Statements of the Corporate Debtor for the year ended on 31.03.2020 and 31.03.2021 as well as OTS offers made by the Corporate Debtor.

6.9.6. It is not the case of Corporate Debtor that NESL report dated 29.12.2021, copies of entries in Banker's Book, Copy of Notice u/s 13(2) of SARFAESI, Act 2002, copy of acknowledgement of debt dated 31.12.2014, 01.11.2017 and 08.03.2021, audited Financial Statements of the Corporate Debtor, and OTS offers require payment of stamp duty under Maharashtra Stamp Act. This Bench finds that entries in Banker's Book evidence the amount claimed to have been given as loan, and default in payment thereof is evidenced from Notice u/s 13(2) of SARFAESI, Act 2002, copy of acknowledgement of debt dated 31.12.2014, 01.11.2017 and 08.03.2021, and audited Financial Statements of the Corporate Debtor as well as OTS offer letters placed on record as demonstrated in the preceding paras. Accordingly, this Bench of the view that, even if the contention of the Corporate Debtor is accepted that the Supplemental Mortgage Deed, Term Loan Agreement and other ancillary agreement cannot be taken in evidence to establish the existence of debt and default in payment thereof, this Bench finds that the fact of debt and default stands proved otherwise by other evidences,

as is held in case of Hon'ble NCLAT, Chennai Bench decision in the case of *Ashique Ponnamparambath vs. The Federal Bank Limited* (2021) ibclaw.in 336 NCLAT.

6.9.7. This Bench further notices that in the case of Swiss Ribbons (Supra), the Hon'ble Court also held that "*the interests of the corporate debtor have, therefore, been bifurcated and separated from that of its promoters / those who are in management. Thus, the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests*". In other words the present application u/s 7 of the Code does not seek enforcement of security or any loan agreement at this stage and also during the CIRP process.

6.9.8. It shall be pertinent to note that the stamp duty even if paid by the lender, is recoverable from the borrower i.e. the Corporate Debtor in the present case. This Bench is of the considered view that interest of the state shall be protected in case IRP/RP is directed to notify the collector of stamps to file its claim for a deficiency in a stamp duty in case there is an objection raised by the Corporate Debtor.

6.9.9. In view of above discussions, this Bench does not find any merit in the arguments of the Corporate Debtor on this issue.

7. Since, there exist a Financial Debt of more than Rs.1.00 Crore; the Corporate Debtor has default in repayment thereof on 01.02.2017; the Petition is within Limitation period in view of various acknowledgement extending the period of limitation; and the Petition

is complete and has been filed under the proper form, this Bench finds that present Petition deserves to be admitted.

8. IA No.1873/2023 and IA 1410/2023 filed by the Corporate Debtor is dismissed as not maintainable.

ORDER

9. The petition bearing CP (IB) No.226/MB-IV/2022 filed by, M/S. Bank of India, the Financial Creditor/Applicant, under section 7 of Insolvency & Bankruptcy Code, 2016 (I&B Code) for initiating Corporate Insolvency Resolution Process (CIRP) in the matter of BD & P Hotels (India) Private Limited, the Corporate Debtor is **admitted**.

- a) There shall be a moratorium under section 14 of the IBC, in regard to the following:

- (i) The institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
- (ii) Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;
- (iii) Any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the Securitisation and

Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002;

- (iv) The recovery of any property by an owner or lessor where such property is occupied by or in possession of the Corporate Debtor.
- (c) Notwithstanding the above, during the period of moratorium, -
 - (v) The supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period;
 - (vi) That the provisions of sub-section (1) of section 14 of the IBC shall not apply to such transactions as may be notified by the Central Government in consultation with any sectoral regulator;
- (d) The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Tribunal approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.
- (e) Public announcement of the CIRP shall be made immediately as specified under section 13 of the IBC read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

- (f) The bench hereby appoints Mr. Birendra Kumar Agarwal, an Insolvency Professional registered with Indian Institute of Insolvency Professionals of ICAI having registration number IBBI/IPA-001/IP-P00564/2017-2018/11040 and email- bk@bhamaconsulting.com/ bka2001_2002@yahoo.co.in . He is appointed as IRP for conducting CIRP of the Corporate Debtor and to carry the functions as mentioned under IBC, the fee payable to IRP/RP shall comply with the IBBI Regulations/Circulars/Directions issued in this regard. The IRP shall carry out functions as contemplated by Sections 15,17,18,19,20,21 of the IBC.
- (g) During the CIRP Period, the management of the Corporate Debtor shall vest in the IRP or, as the case may be, the RP in terms of section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within a period of one week from the date of receipt of this Order, in default of which coercive steps will follow.
- (h) The Financial Creditor shall deposit a sum of Rs.5,00,000/- (Rupees Five lakh only) with the IRP to meet the initial CIRP cost, if demanded by the IRP to fund initial expenses on issuing public notice and inviting claims. The amount so deposited shall be interim finance and paid back to the applicant on priority upon the funds available with IRP/RP. The expenses, incurred by IRP out of this fund, are subject to approval by the Committee of Creditors (CoC).

- (j) The Registry is directed to communicate this Order to the Financial Creditor, the Corporate Debtor and the IRP by Speed Post and email immediately, and in any case, not later than two days from the date of this Order.
- (k) A copy of this Order be sent to the Registrar of Companies, Maharashtra, Mumbai, for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court **within seven days** from the date of receipt of a copy of this order.

Sd/-

PRABHAT KUMAR
MEMBER (TECHNICAL)
23/06/2023

Sd/-

KISHORE VEMULAPALLI
MEMBER (JUDICIAL)