NATIONAL COMPANY LAW TRIBUNAL
AMARAVATI BENCH
(Video Conference)

PRESENT: JUSTICE TELAPROLU RAJANI – MEMBER JUDICIAL

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING HELD ON 10.02.2022 AT 10.30 AM

TC/CP. Nos.	CA/IA No.	Section/ Rule	Name of Parties
CP (IB) No.53/7/AMR/2020	IA(IBC)/142/2021	7 Of IBC	Canara Bank Vs Vantage Machine Tools Pvt Ltd

s

Counsel for Petitioner(s):

Ries

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature

Counsel for Respondent(s):

Ries

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature

ORDER

IA(IBC)/142/2021:

IA (IBC) No.142/2021 is dismissed, vide separate orders.

CP (IB) No.53/7/AMR/2020:

CP (IB) No.53/7/AMR/2020 is dismissed, vide separate orders.

JUSTICE TELAPROLU RAJANI
MEMBER JUDICIAL

NATIONAL COMPANY LAW TRIBUNAL
AMARAVATI BENCH AT HYDERABAD
*** *** ***

I.A.No.142/2021
IN
CP (IB) No. 53/7/AMR/2020

Application filed under Rule 11 Read with Rule 32 of National Company Law Tribunal Rules, 2016
AND

In the matter of
M/s. VANTAGE MACHINE TOOLS PRIVATE LIMITED

Between

M/s. Vantage Machine Tools Private Limited,
D.No.2-48, Gollapalli Village,
Nuzvidu Mandal, Krishna District,
Andhra Pradesh – 521 111.

... Applicant/Corporate Debtor

AND

M/s.Canara Bank,
Venkateswara Puram Branch,
Brindavan Colony, Near Benz Circle,
Vijayawada, A.P. - 520010.

... Respondent/Financial Creditor

Date of pronouncement of orders: 10.02.2022

CORAM:

Justice Telaprolu Rajani, Member Judicial.

Appearance:

For Applicant : Mr. G.Sethu Rama Rao, Advocate

For Respondent : Mr. N.Meher Prasad, Advocate.

ORDER

1. This Application is filed seeking to declare that the Power of Attorney executed by Syndicate Bank shall not be enforced against the customers/borrowers of Canara Bank under the amalgamation scheme as the said Power of Attorney is invalid and void ab-initio and to declare that the authorised signatory Mr.Vamsidhar Naidu is not having valid Power of Attorney or authorization from Canara Bank to initiate present legal proceedings.

2. The brief facts of the Application are that:

a) That the Central Government in consultation with the RBI issued Gazette Notification dated 04.03.2020 for implementing scheme of amalgamation of Syndicate Bank into Canara Bank with effect from 01.04.2020. Under the scheme the Syndicate Bank is Transferor Bank and the Canara Bank is Transferee Bank.

b) From the General Effect of Vesting Clause 4 (1) to 4 (10) it is clear that the Syndicate Bank which is Transferor Bank transferred its rights and powers to the Transferee Bank. The Canara Bank being transferee was authorised to make use of the power of Attorney executed by Syndicate Bank to initiate legal proceedings including insolvency against principal borrower/customer of erstwhile Syndicate Bank who enjoyed credit limits. The Canara Bank should not be construed that it shall make use of the power of attorney executed by Syndicate Bank. The Power of Attorney Mr.Vamsidhar Naidu has suppressed the material facts and abused the process of law. The registry ought not to have numbered the Company Petition. Hence the Petition is liable to be dismissed. Counter is not filed by the Respondent but arguments were extended.

3. Heard both the counsel. Counsel for the Applicant contends that the Power of Attorney given to the signatory on the application is before the merger and hence unless a fresh Power of Attorney is given to the said person by the Canara Bank after the merger he cannot file this Application. The counsel for the Respondent by drawing the attention of this Tribunal to notification dated 04.03.2020 which pertains to the scheme of merger at Clause -8

contends that the Power of Attorney which is given in favour of an employee of the Syndicate Bank would stand good in respect of the Transferee Bank which is the Canara Bank. Clause- 8 is as under:

> ***Clause -8*** *:* " *Unless otherwise expressly provided in this Scheme, all contracts, deeds, bonds, agreements, powers of attorney, grants of legal representation and other instruments of whatever nature subsisting or having effect, immediately before the commencement of this Scheme and to which Transferor Bank is a party or which are in favour of the Transferor Bank, shall be of full force and effect against or in favour of the Transferee Bank, and may be enforced or acted upon as fully and effectively as if in the place of the Transferor Bank, the Transferee Bank had been a party thereto or as if they had been issued in favour of the Transferee Bank thereto and it shall not be necessary to obtain the consent of any third party or other person who is a party to any of the aforesaid instruments or arrangements to give effect to the provision of this sub-paragraph* ".

4. Hence it is clear from the above clause that the Power of Attorney given to the Transferor Bank prior to the commencement of the scheme shall be of full force and effect against or in favour of the Transferee Bank and they may be enforced and acted upon as fully and effectively as if in the place of the Transferor Bank, the Transferee Bank is a party and as if it has been issued in favour of the Transferee Bank. Hence, by virtue of the above there need not be any further discussion to hold that the Power of Attorney given to the employee to the Syndicate Bank prior to the merger, who later has become the employee of the Canara Bank by virtue of the merger, would suffice and would be a proper authorisation for him to file this Application. Hence this application is dismissed.

Accordingly, I.A.No.142/2021 in CP (IB) No. 53/7/AMR/2020 is dismissed.

JUSTICE TELAPROLU RAJANI
MEMBER JUDICIAL

Swamy Naidu

NATIONAL COMPANY LAW TRIBUNAL
AMARAVATI BENCH AT HYDERABAD
*** *** ***

CP (IB) No. 53/7/AMR/2020

Petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 Read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016
AND

In the matter of
M/s. VANTAGE MACHINE TOOLS PRIVATE LIMITED

Between

M/s.Canara Bank,
Venkateswara Puram Branch,
Brindavan Colony, Near Benz Circle,
Vijayawada, A.P. - 520010

... Financial Creditor

AND

M/s. Vantage Machine Tools Private Limited,
D.No.2-48, Gollapalli Village,
Nuzvidu Mandal, Krishna District,
Andhra Pradesh – 521 111.

... Corporate Debtor

Date of pronouncement of orders: 10.02.2022

CORAM:

Justice Telaprolu Rajani, Member Judicial.

Appearance:

For Financial Creditor : Mr. N.Meher Prasad, Advocate.

For Corporate Debtor : Mr. G.Sethu Rama Rao, Advocate

ORDER

1. This Application is filed by the Financial Creditor Canara Bank against the Corporate Debtor M/s. Vantage Machine Tools Private Limited, seeking to initiate Corporate Insolvency Resolution Process (CIRP) as the Corporate Debtor defaulted in repaying the debt which is due to the Financial Creditor.

2. The brief facts of the case as mentioned in the Application are:

   a) The Corporate Debtor is engaged in manufacturing and supply of special purpose machinery. M/s. Vijaya Durga Green Fields Private Limited is engaged in cotton lint trading activities. M/s. Vijaya Durga Green Fields Private Limited also gave its Corporate Guarantee. Directors of both the Companies are also guarantors and have mortgaged their personal properties as security for the debt liability of both the companies. The liability of Vijaya Durga Green Fields Private Limited is Rs.11,14,60,184.18 ps and that of Corporate Debtor is Rs.24,27,96,353.40 ps as on 22.06.2020.

   b) The Financial Creditor Bank sanctioned term loan of Rs.11 Crores to the Corporate Debtor and hypothecation documents were executed by the Corporate Debtor. A

vehicle loan was also sanctioned for Rs.16 Lakhs. Corporate Debtor defaulted in payment of instalments and interest.

c) Default notice was issued by the Applicant's Bank Counsel to the Defendants. The Applicant filed recovery application before the Debt Recovery Tribunal (DRT), Visakhapatnam. The Corporate Debtor did not file its annual financial statements for the Financial Year 2017-18. The secured assets of hypothecated stocks and machinery have a realisable value of about Rs.500 Lakhs approximately. Hence in the above circumstances, this application is filed seeking to initiate CIRP.

3. The Corporate Debtor filed counter denying the facts stated in the Application and further contending as follows:

a) The Corporate Debtor initially availed fund and non-fund based credit facilities and working capital limits of Rs.8 Crores from Central Bank of India. The Canara Bank after observing credit worthiness and performance of Corporate Debtor, proposed to take over the loan account of Corporate Debtor from Central Bank on assurance that they would enhance the limits of term loan amount at lower interest rate than the Central Bank of India. Believing the same, the Corporate Debtor gave its consent. As a result the Financial

Creditor took over the loan accounts of Corporate Debtor from Central Bank of India. A due diligence was conducted before sanction and pre disbursement audit of unit was also conducted by the Canara Bank. Contrary to the assurance, the Financial Creditor on 31.10.2014 sanctioned Rs.11.00 Crores as term loan and working capital limits of Rs.4.00 Crores without any valid reasons, for which the Corporate Debtor took a serious objection. Then the Canara Bank assured that within 3 months they will enhance the working capital limits.

b) The Corporate Debtor is having sufficient work orders on hand. He continuously pursued with the Financial Creditor to enhance the limits but in vain. The negligence of Financial Creditor affected the production of Corporate Debtor. As such it could not execute the work orders to its clients in time.

c) As there is no proper response from Canara Bank, the Corporate Debtor is compelled to approach IDBI and TMD with a proposal to take over the term loan account and working capital limits from Canara Bank. The IDBI and TMB being satisfied with the credentials of the Corporate Debtor expressed their interest to take over the loan accounts from Canara Bank. However, the Financial

Creditor did not issue NOC for taking over the loan accounts either by IBBI or TMB.

d) The Corporate Debtor is a MSME and gained good reputation in the corporate sector for its remarkable services and that paved a way for Corporate Debtor to receive work orders from the State, Central Government institutions and publics sector organizations. As the present working capital limits is not sufficient to meet the operational needs and daily operations to execute work orders on hand, the Corporate Debtor submitted a proposal on 29.07.2017 to the Financial Creditor for enhancement of working capital limits from Rs.8.00 Crores to Rs.23.00 Crores. The Financial Creditor observed few shortfalls and the same is informed to the Corporate Debtor. In compliance of the same the Corporate Debtor complied all queries. But the Financial Creditor did not support the Corporate Debtor.

e) The Financial Creditor appointed MVR Associates vide its letter dated 30.06.2018 to conduct Transaction Audit of Corporate Debtor and Audit report dated 17.07.2018 concluded that "***upon understanding the above transactions and based on the verification made by us we are of the opinion that the transactions took place in the ordinary course of business up to the time of the***

operations took place as stated above for which the Bank loans have been sanctioned". The Bank officials during their visit to the Corporate Debtor recorded that the performance of Corporate Debtor is well.

f) The Corporate Debtor in September, 2018 submitted summary report along with work sheets claiming that the Bank charged excess interest than the actual figures.

g) Due to the non-cooperation of Financial Creditor for extending working capital limits and other aspects, the execution of work orders of the Corporate Debtor got affected, inspite of which the Corporate Debtor is paying instalments to the Financial Creditor regularly.

h) The default as defined under Section 2 (j) of SARFAESI Act means "***non-payment of any principal debt or interest thereon or any other amount payable by a borrower to any secured creditor consequent upon which the account of such borrower is classified as non-performing asset in the books of account of the secured creditor***". The Non-Performing Asset (NPA) is defined under Section 2 (o).

i) Section 35A of Banking Regulation Act, 1949 was inserted by the Banking Companies which empowers Reserve Bank of India (RBI) to issue direction to the Banking Companies

and the Banking Companies are bound to follow the guidelines issued by the RBI. The same was upheld by the Constitution Bench of the Supreme Court in ***Central Bank of India vs. Ravindra and others, (2002) (1) SCC 367*** by virtue of the power conferred under Sections 21 and 35A of the Banking Regulation Act, 1949, the RBI vide its master Circular RBI/2015-16/101, dated 01.07.2015 DBR No.BP.BC 2/21.01.048/2015-16 issued prudential norms on income recognition, asset, classification and provisioning pertaining to advances to all commercial banks. From the said document, it clearly emerges that the decision of the Bank before classifying an asset as NPA should be based on the record of recovery and an account which has some temporary deficiencies like non-available of adequate disbursing power based on the latest available stock statement, balance outstanding exceeding the limit temporarily, etc., should not be classified as NPA.

j) The entity of Corporate Debtor is MSME (Micro, Small and Medium Enterprises) and the MSME units are contributing for the larger economic growth of India and to protect the interest of MSME units, the RBI issued a notification dated 01.01.2019 not to classify the loan accounts of MSME units as NPA and the same is extended till the Financial Year 2020-21.

k) The General Manager of Canara Bank with malicious intention, gave specific instructions to the officials of local and regional branch not to co-operate with the Corporate Debtor, and in violation of the circular, not to classify the accounts of MSME units as NPA issued 8 demand notices in a span of 28 days. To maintain cordial relation with the Bank, the Corporate Debtor complied with the first demand notice and paid the critical overdue amounts. However, the Bank issued series of demand notices with inconsistent claims.

l) The Commissioner of Industries, State of Andhra Pradesh vide letter dated 14.05.2019 communicated to officials of Financial Creditor confirming that the Corporate Debtor is having work orders worth Rs.178.00 Crores and their funds are struck up in Government incentives and subsidies and requested the Financial Creditor to extend the enhancement of working capital limits and not to classify the Corporate Debtor Account as NPA and also undertake restructuring of their present limits.

m) On one hand the Financial Creditor issued demand notices to repay the overdue and on the other hand the Bank directed the Corporate Debtor to furnish the information and documents for restructuring loan accounts. The Financial

Creditor vide its letter dated 29.03.2019 directed the Corporate Debtor to furnish relevant documents for doing needful and further advised Corporate Debtor to regularise overdue amounts to avoid the account becoming NPA. The said letter was received on 30.03.2019. Subsequently the Corporate Debtor continuously made its efforts for renewal /extension of loan accounts time and requested the bank in writing.

n) The Bank was renewing the contract yearly. Suddenly in the month of March, 2019, the account of the Corporate Debtor was declared as NPA and it was directed to deposit the entire outstanding amount in the account. But no reasons were given for the same and no opportunity to the Corporate Debtor seeking clarification as to why his accounts should not be declared as NPA was given. The Financial Creditor issued demand notice under the SARFAESI Act for which the Corporate Debtor replied raising strong objection about classification of debt as NPA. Subsequently, the Financial Creditor issued possession notice under SARFAESI Act and consequent to the same, filed O.A.No.790/2019 and it is pending for adjudication before the DRT, Visakhapatnam.

o) The Corporate Debtor having no other option, submitted its grievances to the Centralized Public Grievance and

Redressing Monitoring System and also to the Hon'ble Prime Minister of India and also with the Financial Creditor. The Corporate Debtor gave representation dated 16.01.2020 to the MD & CEO, pursuant to which, in February, 2020, the Financial Creditor sent its official for inspecting the Corporate Debtor. The respective official inspected and assured to restructure the limits of Corporate Debtor.

p) The Hon'ble Minister, MSME vide his letter requested the Secretary, Ministry of Finance for restructuring of MSME units by Canara Bank. However, the Canara Bank was silent on the same and vide its letter dated 18.05.2020 requested the Governor of RBI to decide the case on merits. Further, the Hon'ble Minister, MSME addressed a letter to the Hon'ble Finance Minister, to give advice to the Financial Creditor to desist pursuing the matter with the NCLT.

q) The Auditor in his report given to the Bank has found no irregularities in the transactions of Corporate Debtor and its other entities are creating employment for more than 2000 employees and even during Covid-19 pandemic the unit paid salaries to the employees. The Financial Creditor is well aware of the same. Hence the Petition is liable to be dismissed.

4. Additional Counter is filed by the Corporate Debtor contending that the Power of Attorney who affixed his signature on verification affidavit, Sri.Vamsidhar Naidu, has suppressed all the material facts. The Corporate Debtor has paid approximately Rs.87 Lakhs from 29.09.2018 to 10.04.2019. An account which has some temporary deficiencies should not be classified as NPA. The Financial Creditor in Company Petition purportedly claims that the date of default is 31.10.2018.The letter dated 31.01.2019 communicated by Respondent Nos.3 &4 and Corporate Debtor is self-explanatory to say that the loan accounts of Corporate Debtor as on 01.01.2019 is standard and is meeting all such conditions issued by the RBI. Hence on the above grounds, the Corporate Debtor seeks to dismiss the Petition.

5. Heard the arguments of both the Counsel and perused the written submissions filed by both the Counsel. It may be noted that the written submissions of both the Counsel were filed after the elaborate oral submissions. In the written submissions filed by the Financial Creditor, it is stated that the Corporate Debtor only questioned the classification of the account as Non-Performing Asset (NPA) and abundant submissions on prudential norms, and RBI guidelines related thereto and judgments in relation thereto, but nowhere denied his default and liability to Financial Creditor. It is also stated that the entire counter of the Corporate Debtor discusses SARFAESI Act and its provisions, but not any issue

relating to the Corporate Insolvency Resolution Process (CIRP). The entire counter of the Corporate Debtor is directed on issues over which Debt Recovery Tribunals (DRT's) have the jurisdiction but not the National Company Law Tribunal (NCLT).

6. The Corporate Debtor in his counter admitted availing of the financial facilities. The concept of default for the purpose of this Application has to be understood in terms of Section 7 of IBC, 2016 and default is defined under Section 3 (12) of IBC, 2016 which is as follows:

> "***Section 3 (12)**: "default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be".*

7. It is contended that the definition of debt under IBC has no bearing or relation with classification of loan account as NPA and it is only relevant of for the purpose of SARFAESI Act. The N*e*SL reports filed with the Application establish the default in payment of debt by the Corporate Debtor. Statement of Accounts are also filed to show the character of default. The Financial Creditor filed Application complying with Section 7 of IBC, 2016. The N*e*SL is India's first information utility and is

registered with the Insolvency and Bankruptcy Board of India (IBBI). The primary role of N*e*SL is to serve as a repository of legal evidence holding the information pertaining to any debt/claim as submitted by the Financial or Operational Creditor and verified and authenticated by the parties to the debt.

8. According to Section 7 of IBC,2016 where the Adjudicating Authority is satisfied that a default has occurred and the Application under Sub-section 2 is complete and there are no disciplinary proceedings pending against the proposed Resolution Professional it may by order admit such application. The Counsel has also relied on certain judgments which would be discussed while deciding the respective issues.

9. The Corporate Debtor in the written submissions contends as follows:

   a) Section 35A of Banking Regulations Act, 1949 empowers Reserve Bank of India (RBI) to issue directions to the Banking Companies. The Financial Creditor herein, is not an exception from following the guidelines issued by the RBI. The Financial Creditor is well aware that the Corporate Debtor entity is Micro, Small & Medium Enterprises (MSME). The Financial Creditor is aware that RBI, by exercising powers conferred under Section 21 & 35A of Banking Regulations Act, 1949, in consultation with the

Ministry of Finance and Ministry of MSME issued notification dated 01.01.2019 with various guidelines for not classifying the loan accounts of MSME units as NPA and the same is extended till the Financial Year 2020-2021. Intent of the legislature under RBI guidelines is to revive the MSME units under the scheme of One Time Restructure which is similar to the intent of the legislature under the IBC, 2016, which is to revive the Corporate Debtor and not to use the code as a tool for recovery of money. In the present case, the Financial Creditor having grudge on the promoters of Corporate Debtor initiated the present malicious proceedings by abusing the guidelines of RBI. As per the guidelines of RBI dated 01.01.2019, the MSME units loan account have not become defaulted or NPA as on 01.01.2019 and the Banks ought not to have declared or treated the loan account as default or NPA and shall accommodate such accounts as standard under One Time Restructure.

b) The Financial Creditor violated the guidelines of RBI dated 01.07.2015 that classifying loan account as NPA is based on recovery. An account which has some temporary deficiencies like non availability of adequate disbursing power based on the latest available stock statement, balance outstanding exceeding the limit temporarily, non-

submission of stock statements, and non-renewal of limits on the due date, etc., should not be classified as NPA. Further, the RBI in its master circular dated 01.07.2015 in Clause-4.2.4 enumerated various guidelines which the Bank must follow for the removal of temporary deficiencies. Clause-4.2.5 of the said circular mandates that where the arrears of interest and principal are cleared by the borrower in the case of loan accounts classified as NPA's, the account should not any longer be treated as non-performing and it should be classified as standard account.

c) The Financial Creditor arrayed in the written arguments that classification of loan accounts of Corporate Debtor as NPA is declared under SARFAESI Act, 2002; that the default and classification of NPA is independent in nature and shall not be read together which is only a perception of Financial Creditor.

d) The Financial Creditor ignored the fact that the loan agreements entered by him with the Corporate Debtor are under the provisions of SARFAESI Act, 2002. The Apex Court in various judgements held that the date of classification of NPA is the yardstick of date of default. There is no default committed by the Corporate Debtor.

e) The Corporate Debtor from 29.09.2018 to 10.04.2019 has paid approximately Rs.87 Lakhs to the Financial Creditor and has not defaulted any payments. Except saying that the Corporate Debtor has defaulted in making payments, the Financial Creditor did not produce any evidence depicting the quantum of amounts defaulted and the period of default. Further as already stated, as the Corporate Debtor is an MSME Unit and should not be classified as NPA. The dates of default mentioned by the Financial Creditor are inconsistent.

f) The letter dated 31.01.2019 by the Financial Creditor would show that the loan accounts of Corporate Debtor as on 01.01.2019 is standard and is meeting all such conditions/guidelines issued by the RBI in its Master Circular dated 01.01.2019.

g) The Corporate Debtor is always willing to settle the dues, the Financial Creditor purposefully issued 7 demand notices in a span of 25 days. The Industries Secretary, Government of Andhra Pradesh wrote a letter to Financial Creditor not to declare the loan accounts of Corporate Debtor as NPA as the Corporate Debtor is having work orders approximately for more than Rs.170 Crores, which indicates that the Company is solvent.

h) The Corporate Debtor having no other option submitted its grievances to the Centralized Public Grievance and Redressing Monitoring System and the same was registered. It also submitted its grievance to the Hon'ble Prime Minister and lodged a complaint with PMO and the same was registered on 30.08.2019. In February, 2020, the Financial Creditor sent its official to inspect the Corporate Debtor, who, after inspecting observed that the operations and performance of the unit are satisfactory and assured to recommend for restructuring of limits.

i) The Financial Creditor after seeing the steps taken by the Corporate Debtor, in order to cause harm, declared the accounts of Corporate Debtor as fraud on 22.05.2020. In fact no default is committed by the Corporate Debtor.

j) The citations filed by the Financial Creditor and the ratio laid down by the Apex Court is on different factual aspect and cannot be applied to this case. On the above grounds the Corporate Debtor seeks to dismiss the application.

10. The Points, that crop up from the pleadings and the arguments, for settlement by this Tribunal are as follows:

I. Whether there is a default committed by the Corporate Debtor in terms of Section 3 (12) of IBC, 2016.

II. Whether the circulars and the guidelines issued by the RBI are binding on the Financial Creditor.

III. Whether the Corporate Debtor has become liable to pay the debt that is due to the Financial Creditor as on the date of filing this Application.

IV. To what result.

I. <u>Whether there is a default committed by the Corporate Debtor in terms of Section 3 (12) of IBC, 2016.</u>

The contention of the Corporate Debtor all through has been that default in terms of the SARFAESI Act has not taken place. Hence Corporate Insolvency Resolution Process (CIRP) cannot be initiated against the Corporate Debtor. Section 2 (j) of SARFAESI Act defines default as follows:

> "***default means non-payment of any principal debt or interest thereon or any other amount payable by a borrower to any secured creditor consequent upon which the account of such***

borrower is classified as non-performing asset in the books of account of the secured creditor ".

While Section 3 (12) of IBC, 2016 defines default as follows:

"***Section 3(12): default means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be***".

The Insolvency and Bankruptcy Code (IBC) is an independent code and self-contained. For the purpose of initiating an action under SARFAESI Act, the default as defined thereunder is required, which is only after classifying the debt as NPA. Since the secured creditor under SARFAESI Act is given power to proceed against the borrower directly and since it is a stringent action, default is construed as the date on which the account is declared as NPA. But so far as the default under IBC is concerned, when the debt becomes payable in whole or in any part or instalment and if the Corporate Debtor does not pay the said due amount, it amounts to default.

The contention of the Corporate Debtor that unless the account of the Corporate Debtor is classified as NPA it

cannot be considered as default and no CRIP can be ordered is not sound in the light of the above observations. When once a loan is taken by the Corporate Debtor from the Financial Creditor, its respective acts attract various statutes and he would be liable for the actions that are permitted to be taken under each of the statutes independently. There is no need to borrow the definition from SARFAESI Act, since default is very much defined under IBC.

The Financial Creditor has issued a loan of Rs.24,27,96,353.40 Crores to the Corporate Debtor and it has become overdue. The N*e*SL has also given a certificate which reflects that the Corporate Debtor has defaulted in discharging the loan instalments as agreed. N*e*SL is National E-Governance Services Limited and is an information utility registered with Insolvency and Bankruptcy Board of India (IBBI) and Insolvency and Bankruptcy Code, 2016 and is obliged to provide services prescribed under Section 213 & Section 214 of the IBC, 2016 along with such other services as may be prescribed under the provisions. Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017. Hence the contention of the Corporate Debtor that the Financial Creditor did not file any statement of account showing their default seems to be a misconception. The statement of

account is also filed along with the application which very much shows the outstanding dues on those respective dates. The contention that there are variations in the dates mentioned by the Financial Creditor as the date of default, need not be given much weight, as obviously by the date of filing the application there is a default committed by the Corporate Debtor. When it is held that declaration of the Corporate Debtor's account as NPA is not a precondition for filing this Application it would suffice if default in terms of Section 3 (12) of IBC, 2016 is committed by the date of filing the Application. But whether the said default would amount to default in the light of the material presented before the Tribunal and would entitle the Financial Creditor to seek for initiation of CIRP shall be discussed under points No. II & III.

II. Whether the circulars and the guidelines issued by the RBI are binding on the Financial Creditor.

And

III. Whether the Corporate Debtor has become liable to pay the debt that is due to the Financial Creditor as on the date of filing this Application.

Both the points No. II & III are taken up together for the sake of convenience.

The contention of the Corporate Debtor with regard to the right of the Financial Creditor to move this Application is that the RBI has issued guidelines to the effect that the loan accounts of MSME units which have been not classified as substandard or default as on 01.01.2019 shall not be downgraded in the asset classification and shall treat the loan accounts as standard. With regard to loan accounts which have become stressed, it has been decided to permit a onetime restructuring of existing loans to MSME by treating the loan account as standard without a downgrade in the asset classification. There is no dispute that the Corporate Debtor is an MSME and the loan account have become stressed. It is also not in dispute that the loan account has not been classified as substandard by 01.01.2019.

It is also not disputed that accepting the RBI circular, the Financial Creditor has sought for the relevant information from the Corporate Debtor for restructuring of loan accounts. It can be seen that the intent of the legislature under the RBI guidelines is to revive the MSME units under the Scheme of One Time Restructure (OTR). The intent of the legislature in enacting the IBC is also to revive the Corporate Debtor and not use IBC as tool for recovery of monies. The guidelines of the RBI dated 01.07.2015 are also to the effect that an account, which has some temporary

deficiencies like non availability of adequate disbursing power based on the latest available stock statement, balance outstanding exceeding the limit temporarily, non-submission of stock statements and non-renewal of limits on the due date, etc., should not be classified as NPA. The master circular dated 01.07.2015 of RBI in Clause 4.2.4 enumerated various guidelines which the Bank must follow for the removal of the temporary deficiencies. Clause 4.2.5 of the said circular mandates that where the arrears of interest and principal are cleared by the borrower in case of loan accounts classified as NPAs, the accounts should not be treated as non-performing and should be classified as standard.

The facts of the present case reveal that the Financial Creditor has called upon the Corporate Debtor to cooperate for restructuring of the loan and the same was accepted by the Corporate Debtor. The contention of the Financial Creditor is that the request for restructuring is found as non-viable and hence the same cannot be taken as a ground to contend that the Corporate Debtor did not commit any default.

The correspondence between the parties is filed by the Corporate Debtor. The RBI's circular dated 01.01.2019 is in

respect of restructuring of advances to MSMEs. It is categorically stated in the said circular that with a view to facilitate meaningful restructuring of MSME accounts that have become stressed it has been decided to permit a One Time Restructuring of existing loans to MSMEs classified as standard without a downgrade in the asset classification subject to the certain conditions. Following the said circular, a letter was issued by the Financial Creditor that they have sent letters and emails on various dates to clear over dues but it was found that the limits and loans of group accounts of the Corporate Debtor are still with over dues. It is also mentioned that the Financial Creditor has introduced facility of restructuring under RBI guidelines for the units which are registered with Goods and Service Tax (GST) and are in stress due to various genuine reasons.

It recites that they have handed over the forms in three sets to the employee of the Corporate Debtor by name Mr.Gopi and the details are required to be furnished by the Corporate Debtor. It also recites that they are again sending enclosed forms in 3 sets and the Corporate Debtor was called upon to furnish the required details. It is also stated that the Financial Creditor is requesting to submit the said details immediately so as to enable them to process and submit to competent authority to take appropriate decision.

Hence from the said letter dated 31.01.2019 it is clear that the Corporate Debtor is in stress due to various genuine reasons.

A letter dated 14.02.2019 issued by the Financial Creditor to the Corporate Debtor specifies the data which is required to be provided by the Corporate Debtor. A letter dated 21.02.2019 issued by the Corporate Debtor to the Financial Creditor shows that the required information is furnished to the Financial Creditor. However, one objection was mentioned on the said letter in the form of endorsement by Financial Creditor, that UDIN number is not mentioned and signature of borrower is not available in all the submitted papers and hence it may not be valid. A letter dated 27.02.2019 is in respect of submission of some more documents which includes the UDIN number and the same is acknowledged without any observations. A letter dated 16.05.2019 issued by the Financial Creditor to the Corporate Debtor shows that the request of the Corporate Debtor for restructure was placed before the committee for stressed MSMEs for Corrective Action Plan under framework for revival and rehabilitation for MSMEs. It also shows that the committee examined the request and advised recovery action under Corrective Action Plan. A letter dated 02.07.2019 issued by the Corporate Debtor to the Financial

Creditor shows that the recovery action taken by the Financial Creditor has been informed to the Financial Creditor and it was represented by the Financial Creditor that the suit filed would be withdrawn and that the restructure proposal would be considered afresh. It also mentions that there are several pending observations lying unresolved, despite the matter being taken up with the Financial Creditor on the regular basis. It also shows that the Financial Creditor has committed to comply all the pending matters before submitting a fresh restructure proposal, but they have submitted the restructure proposal without complying with any of the issues discussed during their meetings. The observations that were to be complied with are mentioned in the said letter which is with regard to rectification of supplemental memorandum of deposit of title deeds, closer of current account with Central Bank of India, reconciliation of machinery purchased out of term loan 1 and 2, corporate guarantee of the Corporate Debtor, etc. In a letter dated 21.08.2019 the Financial Creditor informed the Corporate Debtor that various compliances ought to be met for restructuring of limits and the Corporate Debtor was called upon to fulfil the same to enable them to proceed with the matter. A bare denial of the allegations in the representations dated 05.08.2019 by the Corporate Debtor is made. The Financial Creditor does not mention

any reasons as to why the account of the Corporate Debtor is not restructured. That the RBI guidelines are binding on all the scheduled banks is the ruling of the Constitution Bench of Supreme Court in ***Central Bank of India vs. Ravindra & others,*** **reported in** ***(2002) (1) SCC 367,*** wherein it was categorically held as follows:

"55... (5) *The power conferred by Sections 21 and 35A of the Banking Regulation Act, 1949 is coupled with duty to act. The Reserve Bank of India is the prime banking institution of the country entrusted with a supervisory role over banking and conferred with the authority of issuing binding directions, having statutory force, in the interest of the public in general 16 of 30 and preventing banking affairs from deterioration and prejudice as also to secure the proper management of any banking company generally. The Reserve Bank of India is one of the watchdogs of finance and economy of the nation. It is, and it ought to be, aware of all relevant factors, including credit conditions as prevailing, which would invite its policy decisions. RBI has been issuing directions/circulars from time to time which, inter alia, deal with the rate of interest which can be charged and the periods at the end of which rests can be struck down, interest calculated thereon and charged and capitalised. It should continue to issue such directives. Its circulars shall bind those who fall within the net of such directives. For such transaction which are not squarely governed by such circulars, the RBI directives may be treated as standards for the purpose of deciding whether the interest charged is excessive, usurious or opposed to public policy.*"

The said ratio was emphasised in another judgment of Supreme Court in ***M/s. Sardar Associates and Others vs. Punjab and Sind Bank and others, 2009 (8) SCC 257.*** Hence when the restructuring of the account of the lonee is taken up as per the guidelines and circulars issued by the RBI, the same has to be completed. There is absolutely no reason furnished by the Financial Creditor for not restructuring the loan account of the Corporate Debtor. One submission that is made is that the loan account of the Corporate Debtor is held to be fraud and hence they did not consider the restructuring. But the same is not reflected in any of the correspondence between the parties. It can be noted that the last letter informing the Corporate Debtor that the restructuring proposal submitted by it is found not viable is on 25.03.2019. A letter dated 02.05.2019 informs the Corporate Debtor that its proposal for restructuring is lodged and the same was informed to the Corporate Debtor. But a letter dated 06.05.2019 informing the Corporate Debtor that the request for restructuring was placed before the committee for stressed MSMEs for correcting action plan under framework for revival and rehabilitation of MSMEs is issued by the Financial Creditor. It also informs that the committee examined and advised recovery action and correct the action plan.

Subsequent to the letter dated 06.05.2019 issued by the Financial Creditor, the Corporate Debtor has addressed a letter dated 02.07.2019 raising several issues, the letter shows that Executive Director and General Manager, MSME wing HO of the Corporate Debtor along with officials from their circle office and branch in the meeting held on 19.06.2019, the Corporate Debtor has informed the Bank has initiated recovery action as per the decision of committee for Stressed MSME accounts and that the Financial Creditor has represented that the suit filed is to be withdrawn and would consider the restructure proposal afresh, it also mentions that there are several pending observations lying unresolved with regard to the Director Mr.P Soma Sekhar. It is stated that he has resigned from the Board on 21.01.2019 on account of mismanagement, misappropriation, etc., inducing the banks to sanction higher limits to the Corporate Debtor and their group companies. He also lodged an FIR against Smt.Nandamuri Meena Latha who is one of the Directors of the Corporate Debtor. In the said letter, elaborate explanation was given for the difficulties faced by the Corporate Debtor. A letter dated 21.08.2019 was issued by the Financial Creditor to the Corporate Debtor which informed that they have already informed the Corporate Debtor by their letter dated 02.07.2019 regarding various compliances to be met for

restructuring of limits. The Corporate Debtor was advised to fulfil the same to enable them to proceed in the matter. Letter dated 15.02.2020 to the Chief Manager of the Financial Creditor informs that Mr.Potluri Somasekhar is no more director and he has submitted a request to the Financial Creditor for withdrawal of his personal guarantee, and that they are making all efforts, to continue him as guarantor or alternatively provide another guarantor. It is also informed that he would continue to be guarantor till the Bank discharges him and hence the Bank's interest is amply secured. It also informs that they have procured work orders worth Rs.300 Crores from various companies.

The Corporate Debtor has taken up the issue with the concerned Ministry and the Departments. The contention of the Corporate Debtor with regard to the discrepancies in the statements of the Financial Creditor can here be noted. It is contended that in a mail issued to the Corporate Debtor, the critical amount was reflected as few lakhs and in the letter dated 14.03.2019 also it is shown as few lakhs whereas, in the letter dated 25.03.2019 which is after 11 days of the said letter, the critical amount is shown as Rs.5 Crores and odd. Be that as it may, the Government of Andhra Pradesh, Commissioner of Industries issued a letter dated 14.05.2019 to the Branch Manager of the Financial Creditor stating that

the Corporate Debtor has informed that they procured work order worth Rs.178 Crores from various companies in the last two years, and they have sought enhancement of working capital limits of Rs.10 Crores from their Bankers as they have pending orders worth Rs.178 Crores. It is also mentioned that the Corporate Debtor has informed them that their unit is at the stage of becoming sick as no sufficient working capital limits are extended and as their funds are stuck up in government incentives and subsidies due to non-release of funds by the government. It was recommended that the unit is eligible for all the incentives mentioned therein which are the incentives to which the MSME units are eligible as offered by the Industries Department.

A request was made not to classify the account of Corporate Debtor as NPA as they are committed to service interest and instalments out of government incentives and subsidies and to undertake restructuring of their present limit and to cooperate in all their activities. A letter was issued by the Ministry of State for MSME to the Secretary DFS, Minister of Finance, Government of India stating that a representation requesting for restructuring by the Financial Creditor is received and that the Corporate Debtor has appraised him about the non-cooperation of the Financial Creditor authorities in restructuring the loan. It also

mentions that the Corporate Debtor met the Minister of Finance, Government of India and explained about their position. He also mentioned that he asked the Corporate Debtor to explain their position clearly through documentary evidence with regard to the allegations made by the MD, Canara Bank. He also requested the Minister of Finance, Government of India to peruse the said documents to ascertain the merit of her request. He further mentions that the said documents would help to understand how the Canara Bank authorities considering her account "standard" at that time issued letter dated 31.01.2019 to her Company for credit restructuring as per RBI guidelines and subsequently issued a barrage of letters conveying unexplained over dues making her account substandard and technically NPA. A request was made to consider the Petition of the Corporate Debtor for restructuring her MSME unit by taking into consideration the overall status of the MSME account in January, 2019 and considering that MSME units are facing huge setback due to prevailing lockdown.

A letter addressed to the Manager, RBI by the Corporate Debtor explains about the allegations of fraud and forgery by stating that they have not siphoned the funds as alleged and no adverse observations were made by the

Financial Creditor from 2014 to 2019 and it is only in 2020 that the Corporate Debtor was charged as wilful defaulter for diversion and siphoning of funds. It is also brought to the notice of the said manager that the Financial Creditor conducted transaction audit through their appointed chartered accountants, who categorically certified that there was no diversion and siphoning of funds. The appointed chartered engineers of the Financial Creditor also verified that they have procured machinery out of term loan and machinery obtained out of term loans have been properly installed and erected. The contents of the said letter are not denied by the Financial Creditor and no explanation is offered for the same. A letter was addressed by the Ministry of State for MSME to the Minister of Finance and Corporate Affairs enclosing a petition received from the Executive Director of the Corporate Debtor requesting for intervention to restrain the Financial Creditor from pursuing the liquidation of MSME unit through the NCLT. It also states that the said petition revealed that the Financial Creditor has been targeting the MSME units by wrongly classifying it as NPA denying it the benefit of restructuring, despite eligibility, as per the RBI guidelines dated 01.01.2019 and conveying the account status as fraud. The Minister, MSME testifies that the Corporate Debtor is credit worthy and capable of repaying the loan and he requested for the

personal intervention of the Minister of Finance and Corporate Affairs to look into the case and issue an advisory to the Canara Bank to desist from pursuing the matter with NCLT. It also mentions that a request is pending with RBI for initiating an independent arbitration process. The Minister also mentions that in the prevailing difficult times of Covid pandemic, the government is sensitive to the needs of MSMEs, Banks should exercise NCLT options using only as a last resort.

From the above correspondence it is clear that though default in terms of Section 3 (12) of IBC, 2016 is committed by the Corporate Debtor, the subsequent events do not qualify the non-payment of the amounts as undertaken by the Corporate Debtor as a default. When the Corporate Debtor has been given a facility of restructuring of loan inspite of he not repaying the loan as agreed, until that facility is extended to CD or is refused on valid reasons and grounds the non-payment of the loan cannot be termed as default. The theme of the IBC is to keep the Companies as ongoing concerns and if they are viable they should be supported for the purpose of revival. The correspondence discussed above would show that the difficulties faced by the Corporate Debtor are due to genuine reasons and that the restructuring of the account

would help the Corporate Debtor in reviving the unit. Hence unless the denial of restructuring is based on genuine reasons, it cannot be said that there is a default committed by the Corporate Debtor. The above correspondence would show that the account of the Corporate Debtor is categorised as fraud based on the complaint given by its ex-director Mr.Soma Sekhar. A request for appointment of independent arbitrator is also lying with the RBI. There is no record to show that any opportunity was given to the Corporate Debtor before the account was declared as fraud. The correspondence shows otherwise. Allegation of fraud is a matter which needs thorough investigation and ample opportunity to the offender. Hence unless there are well founded reasons for declaring the account as fraud and for not extending the facility of restructuring to the Corporate Debtor for which he is lawfully entitled, it cannot be said that the Corporate Debtor has committed default. If the allegations of fraud are proved to be false, perhaps the consideration for restructuring of the account would be available, in which case the declaration of the account as NPA would become invalid and consequently the present alleged default. It can be noted that the Chartered Accountants appointed by the Financial Creditor itself have testified that the transactions are normal and there is no diversion or siphoning of funds. The guidelines of RBI

dated 01.07.2015 would not permit for an account to be classified as NPA for the reasons mentioned therein, which are inclusive. The correspondence reflects that the Corporate Debtor could not get the government incentives and subsidies due to non-release of funds, which offers a ground for non-classification of the account as NPA.

The rulings relied upon by the Financial Creditor though are not relevant are mentioned hereunder:

i. The Supreme Court of India in ***Civil Appeal No.8337 - 8338 of 2017 between M/s. Innoventive Industries Limited Vs. ICICI Bank and another***, which is to the effect that it is at the stage of Section 7 (5) where the adjudicating authority is to be satisfied that a default has occurred, that the Corporate Debtor is entitled to point out that the default has not occurred in the sense that a debt which may also include a disputed claim is not due. A debt may not be due if it is not payable in law or in fact. The moment the Adjudicating Authority is satisfied that a default has occurred, the Application must be admitted unless it is incomplete, in which case, it may give notice to the Bank to rectify the defect within 7 days of receipt of a notice from the Adjudicating Authority under Sub Section 7. The

Adjudicating Authority shall then communicate the order passed to the Financial Creditor and Corporate Debtor within 7 days of admission or rejection of such application as the case may be.

The Financial Creditor has perhaps relied on the said judgement to contend that once the Adjudicating Authority is satisfied that the default has occurred, the application must be admitted. But the same judgment is to the effect that a debt may not be due if it is not payable in law or in fact. As already observed when an option of restructuring is extended to the Corporate Debtor and the same is not concluded, the debt does not become payable and hence does not amount to default.

ii. The Supreme Court of India in ***Civil Appeal No. 676 of 2021 between Pratap Technocrats (P) Ltd and others Vs. Monitoring Committee of Reliance Infratel Ltd & Another.*** This judgment is to the effect that the IBC is a complete code in itself, it defines what is fair and equitable treatment by constituting a comprehensive framework within which the accord take part in the insolvency process. The process envisaged by the IBC is a direct representation of certain economic goals of

the Indian Economy. It is enacted after due deliberation in parliament and accords rights and obligations, that are strictly regulated and coordinated by the statute and its regulations. To argue that the residuary jurisdiction must be exercised to alter the delicate economic coordination that is envisaged by the Statute would do violence on its purpose and would be an impermissible exercise of Adjudicating Authorities power of judicial review. The UNCITRAL, in its legislative guide on Insolvency Law has succinctly prefaced its recommendations in the following terms.

> *"C.15. Since an insolvency regime cannot fully protect the interests of all parties, some of the key policy choices to be made when designing an insolvency law relate to defining the broad goals of the law (rescuing businesses in financial difficulty, protecting employment, protecting the interests of creditors, encouraging the development of an entrepreneurial class) and achieving the desired balance between the specific objectives identified above. Insolvency laws achieve that balance by reapportioning the risks of insolvency in a way that suits a State's economic, social and political goals. As such, an insolvency law can have widespread effects in the broader economy."*

Hence, once the requirements of the IBC have been fulfilled, the Adjudicating Authority and

Appellant Authority are duty bound to abide by the discipline of the Statutory Provisions. It needs no emphasis that neither the Adjudicating Authority nor the Appellant Authority have an unchartered jurisdiction in equity. This judgment was relied upon to say that there is no jurisdiction in equity to the NCLT. In this case no equities are taken as a basis for the conclusion drawn by this Tribunal, and hence the said judgment does not have any application.

iii. The Supreme Court of India in ***Civil Appeal No.9664 of 2019 between Arun Kumar Jagatramka Vs. Jindal Steel and Power Ltd and another***. The said judgment has offered a note of caution for the NCLT and NCLAT from judicially interfering in the framework envisaged under the IBC. It was observed that IBC was introduced in order to overhaul the Insolvency and Bankruptcy regime in India. The need for judicial intervention and innovation from NCLT and NCLAT should be kept at its bare minimum and should not disturb the foundation as principles of the IBC. There is no such intervention in this case, hence the said judgment does not apply.

iv. The Supreme Court of India in ***Civil Appeal No.3325 of 2020 between E.S Krishnamurthy and others vs. M/s.Bharath Hi Tech Builders Pvt Ltd.*** The said judgment is to the effect that once the requirements of IBC have been fulfilled the Adjudicating Authority and the Appellant Authority are duty bound to abide by the discipline of the statutory provisions. There is no deviation made from the said dicta of the Supreme Court, hence no further discussion is required on the said judgment.

v. The judgment of the NCLAT, Chennai Bench in ***Company Appeal (AT)(CH) (INS) No. 08 of 2021 between Shapoorji Pallonji and Company Private Limited vs. M/s. Shore Dwelling Pvt. Ltd.*** The said judgment found fault with the Adjudicating Authority which dismissed the application considering that the Application is filed for recovery of debt. Holding that the object of IBC is for resolution of the Corporate Debtor in a time bound manner, it held that the forum NCLT has been created for resolution of Insolvency, Liquidation and Bankruptcy. The Code separates commercial aspects of Insolvency and Bankruptcy Proceedings from judicial aspects, therefore the Adjudicating Authority is not a court of equity but for

resolution of Insolvency in a time bound manner. The observations in respect of the 3rd judgment would hold good for this judgment also.

In the light of the aforementioned reasons and discussions Points No. II & III are answered in favour of the Corporate Debtor.

IV. To what result

In the result, the Petition is dismissed.

JUSTICE TELAPROLU RAJANI
MEMBER JUDICIAL

Swamy Naidu