

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

CP (IB) No.1196/MB-IV/2022

Under Section 7 of the I&B Code,
2016

In the matter of:

Bank of India

[CIN: U99999MH1906PLC000243]

...Financial Creditor/Applicant

V/s

D B Realty Limited

[CIN: L70200MH2007PLC166818]

...Corporate Debtor/Respondent

Order pronounced on : 04.07.2023

Coram:

Mr. Prabhat Kumar

Hon'ble Member (Technical)

Mr. Kishore Vemulapalli

Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Petitioner(s)

:

Mr. Zal Andhyarujina, Ld .Sr.
Advocate a/w Mr. Karan
Bhide and Mr. Yash Pandya,
Ld. Counsel i/b MV Kini Law
Firm

For the Respondent(s) : Mr. Gaurav Joshi, Ld. Sr.
Advocate

ORDER

Per: Kishore Vemulapalli, Member (Judicial)

1. This is an application being C.P. (IB) No. 1196/NCLT/MB/C-IV/2022 filed by Bank of India, the Financial Creditor/Applicant, under section 7 of Insolvency & Bankruptcy Code, 2016 (I&B Code) against DB Realty Limited, Corporate Debtor, for initiating Corporate Insolvency Resolution Process (CIRP).

1.1 The Application is filed by Mr. Harish V, Assistant General Manager, authorized by the Financial Credit vide Authorization Letter dated 08.11.2019, claiming default amount of Rs. 760,38,97,217.87 (Rupees Seven Hundred Sixty Crore, Thirty-Eight Lakh, Ninety-Seven Thousand, Two Hundred Seventeen and Paise Eighty-Seven only), plus further interest as on 30.09.2022. The date of Default is stated as 30.08.2015 in Part-IV of the Petition. The Financial Creditor has claimed the default qua Corporate


Debtor when the guarantee given by the Corporate Debtor was invoked vide legal notice dated 20.10.2022.

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

The computation of amount in default outstanding as on 30.09.2022 owed to Bank of India [Financial Creditor] by M/s D B Realty Limited [Corporate Guarantor to the Corporate Debtor]

[Amount in Rupees]

Nature of Facility	Outstanding as on NPA date 31.12.2015	Unapplied Interest up to 30.09.2022	Penal Interest Up to 30.09.2022	Recovery made post NPA	Total Dues as on 30.09.2022
Term Loan	240,60,79,293.00	523,54,29,204.89	60,88,719.98	437,00,000.00	760,38,97,217.87
Gross Total					760,38,97,217.87



2. The case of the Financial Creditor is as under :

- 2.1 The Corporate Debtor is a real estate development company which builds customized office space, retail shops, mass residential housing, and cluster redevelopment of old housing, operating in and around Mumbai.

- 2.2 The Financial Creditor had sanctioned a Term Loan of Rs. 225 Cr. to M/s. Pune Buildtech Pvt. Ltd. (Principal Borrower) vide its Sanction Letter dated 25.09.2013 for construction of residential towers in Yerwada Pune. The Corporate Debtor extended their guarantee in favour of Financial Creditor guaranteeing the repayment of the said Term Loan together with interest and other charges by executing the Deed of Guarantee dated 30.09.2013.
- 2.3 The Term Loan, originally sanctioned, was repayable in 21 equal monthly instalments of INR 10.71 crores each commencing 15 months from the date of first disbursement i.e., from February, 2015. Last instalment of INR 10.80 crores payable on October, 2016. Door to door tenor of 3 years from the date of first disbursement. In view of the extension of moratorium period by one year as sought by the Corporate Debtor, the Repayment Schedule has been changed/ modified whereby the door to door tenor was enhanced to four years and the loan was repayable in 21 monthly instalments of Rs. 10.71 Crores, first instalment

was payable in February 2016 and last instalment in October 2017.

2.4 To secure the Term Loan facility, the Principal Borrower created equitable mortgage of properties owned by it in favour of the Financial Creditor, and duly registered with the office of RoC vide Registration of Charges dated 14.11.2013. Further, the said facilities are also collaterally secured by the following securities;

- a. Extension of charge on DB Hill Park admeasuring 80934 sq.mt located at Malad bearing C S No 827A/4A of Malad (E), Taluka Boriwali, MSD, owned by Mr. Tarashankar Chaubey and D B reality Pvt. Ltd. holds development right.
- b. Extension of charge on leasehold rights of Resham Bhavan property admeasuring 1161.34 sq.mt bearing CS No. 1680 of Fort, Mumbai owned by Government of Maharashtra and Lease Hold rights are held by D B Realty Ltd.

- c. Subservient charge on residual value on Hotel Le Meridien [Now Hotel Hilton] bearing old Plot No. Y new Plot no D CTS No 41(part) 47 (part) and 41/B/3/B at village Banpada, Taluka Andheri East, Mumbai owned by BD & P Hotels Pvt. Ltd.
- 2.5 The Principal Borrower could not complete the project and stopped construction work somewhere in September, 2016 due to shortage of funds. The Financial Creditor consistently followed up with the Principal Borrower to regularize the above accounts.
- 2.6 The Principal Borrower, despite regular follow up from the Financial Creditor, did not take any steps to regularize the accounts. Due to non-payment of interest from August 2015 onwards, the account has been classified as NPA on 31.12.2015 in accordance with guidelines of Reserve Bank of India.
- 2.7 Subsequently, Authorized Officer of the Financial Creditor issued notice under Section 13(2) of SARFAESI

Act, 2002 to the Corporate Debtor viz M/s. Pune Buildtech Pvt. Ltd.

2.8 Since, there was no positive response to the Notice issued under Section 13(2) from the Corporate Debtor viz M/s. Pune Buildtech Pvt. Ltd., the Financial Creditor was constrained to issue Legal Notice on 20.10.2022 invoking guarantee and calling upon the Corporate Debtor to repay the total outstanding debt of Rs.760,38,97,218/- within 7 days from the date of receipt of the notice. Accordingly, date of default qua Corporate Debtor shall be 03.11.2022 basis admission of the Corporate Debtor of receipt of this notice on 28.10.2022, and the date of default stated in Part IV is qua Principal Borrower. The NESL Certificate dated 17.08.2022 is also filed on record along with Part C, wherein the details of email communication sent by NESL to the Corporate Debtor are also stated.

3. The Corporate Debtor has filed affidavit in reply dated 24.01.2023 submitting that the Petition is not maintainable under the Code and is liable to be dismissed in limine. The Respondent is not a purported "Corporate Debtor" as to describe the

Respondent as a “Corporate Debtor” is a gross mischaracterization, leaving the incorrect impression that the Respondent is liable to be admitted to CIRP. The Respondent submits that the Petition is liable to be dismissed on following reasons:

- a. The Petition is Prohibited by Section 10A Of the Code;
- b. The Petitioner’s claims are Time Barred and are Barred by Limitation; and
- c. Insufficiently Stamped Documents.

3.1 The Principal Borrower, a had availed of a Term Loan amounting to INR 225 Crore from the Financial Creditor for a real estate project being developed by the Principal Borrower at Yerwada, Pune (hereinafter referred to as the "said Project"). The Principal Borrower had also availed credit facilities from Punjab National Bank and Allahabad Bank of INR 30.5 Crore each for the Project. The total borrowing of the Principal Borrower from the Financial Creditor, Punjab National Bank, and Allahabad Bank (for short "the Consortium") was approximately Rs. 286 Crore. The Financial Creditor, Punjab National Bank and

Allahabad Bank have entered into an Inter- Lender Agreement dated June 2, 2014 in respect of their loans.

- 3.2 Owing to various factors beyond the Principal Borrower control, the Principal Borrower was unable to service the Pune Credit Facility availed from the Financial Creditor or the credit facilities availed from Punjab National Bank and Allahabad Bank. In order to achieve a resolution with respect to the Pune Credit Facility, the Principal Borrower has exchanged numerous correspondences (on a without prejudice basis) with the Financial Creditor, Punjab National Bank, and Allahabad Bank for resolution of the Pune Credit Facility since 2017. In the meanwhile, the Principal Borrower decided to sell the said Project to one Classic ARY Promoters and Builders Private Limited. Whilst the OTS proposal was in-principle agreed upon, as is recorded in the Minutes of the Meeting prepared by the Financial Creditor dated December 20, 2017, it is only for want of a formal approval of the OTS from the Financial Creditor that there has been a delay of more than four and a half years in resolving the entire matter, which has only

resulted in interest accruing further and further causing losses to the Corporate Debtor. As discussed in the Minutes of Meeting dated December 20, 2017, Classic Promoters and Builders Private Limited deposited an amount of Rs. 5 Crore with the Financial Creditor in a no-lien account on February 8, 2021. The Principal Borrower thus took concrete and irreversible steps to sell the said Project on the assurances given by the Financial Creditor as recorded in the Minutes of Meeting dated December 20, 2017. In order to comply with the terms laid down by the Financial Creditor and in order to show its bona fide in resolving the Credit Facility of the Principal Borrower under the OTS proposal, the Principal Borrower deposited a further sum of Rs. 5 Crores in a no-lien account with the Financial Creditor on February 11, 2021. As such, a total sum of Rs. 10 Crore was deposited with the Financial Creditor as a show of good faith and seriousness towards the OTS proposal, at the request of the Financial Creditor. The said amount of Rs. 10 Cr. is even till date lying deposited in the no-lien account of the Financial Creditor.

- 3.3 In the meantime, Allahabad Bank (merged with Indian Bank) by its sanction letter dated March 30, 2022 approved the OTS proposed by the Principal Borrower. The Principal Borrower has repaid the entire settlement amount and obtained a No Dues Certificate from Indian Bank. Further, the Punjab National Bank by its sanction letter dated June 29, 2022, approved the OTS proposed by the Principal Borrower. The Principal Borrower has repaid the entire settlement amount and obtained a 'No Due Certificate' from Punjab National Bank leading up to each without prejudice OTS proposal being made by the Principal Borrower.
- 3.4 It is stated that even as on March 8, 2021, the Principal Borrower and the Corporate Debtor had mutually agreed that a sum of Rs. 236.36 Crores was payable by the Principal Borrower to the Financial Creditor. The acknowledgement was furnished by the Principal Borrower in the prescribed form provided by the Financial Creditor. It is also clear from the correspondences that each one of the proposals, including the last proposal dated

August 30, 2022 was made after extensive discussions between the top management of the Financial Creditor. Yet, the Financial Creditor has acted in a high-handed, arbitrary, illegal, extortionate, and coercive manner

- 3.5 The attempt to initiate corporate insolvency resolution process through the said Petition is a clear misuse of the provisions of the Code. The said Petition is not only a mala fide attempt in order to coerce the Corporate Debtor into making payment not tenable in law but also a mala fide and gross misuse of provisions of the Code.
- 3.6 Assuming but not admitting, the Financial Creditor's formulation of its case, the said Petition is barred and prohibited under Section 10A of the said Code. In the Financial Creditor's formulation of its case, the last purported acknowledgement received by the Financial Creditor from the Corporate Debtor towards the purported default occurred on March 8, 2021 for a purported sum of Rs. 236,36,79,674/- (Rupees Two Hundred Thirty-Six Crore Thirty- Six Lakh Seventy-Nine Thousand Six Hundred and Seventy-Four only). Therefore, it is the

Financial Creditor's case that the "default" occurred on March 8, 2021, which is between March 25, 2020 and March 24, 2021. Accordingly, in view of the Section 10A of the Code, the said Petition is not maintainable and ought to be dismissed at the threshold, with costs.

3.7 On the Financial Creditor's framing of its case, its claims are hopelessly barred by the laws of limitation. The Financial Creditor has contended in the said Petition that the purported 'default' has occurred on August 30, 2015. It is stated that such allegation has been made with a view to overcome the bar of Section 10A. It has alleged that the purported default has occurred on August 30, 2022.

3.8 It is submitted that the purported debt of Rs. 760,38,97,217.87/- (Rupees Seven Hundred Sixty Crores Thirty-Eight Lakhs Ninety-Seven Thousand Two Hundred Seventeen and eighty-seven paise only) is an imaginary, unjustified and baseless figure. The alleged debt is also not crystalized. It is stated that the Principal Borrower had availed a term loan of Rs. 225,00,00,000/- (Rupees Sixty-Five Cores only) from the Financial

Creditor. In fact, even in the recent years of 2021 and 2022, the Financial Creditor has acknowledged and admitted that only a sum of Rs. 236 Crore was purportedly due by the Principal Borrower. Furthermore, the said Petition does not disclose any discernible, understandable or verifiable basis to arrive at the outrageously inflated figure of Rs. 760 Crores as claimed therein.

3.9 The present Petition is also hit by the legal prohibition in India on usurious loans. The Financial Creditor has illegally purported to levy usurious penal interest with the mala fide motive of initiating CIRP, and the present Petition is squarely hit by Section 65 of the Code.

3.10 The Corporate Debtor states that the Term Loan Agreement and the Corporate Guarantee, on the basis on which the Financial Creditor 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. Consequently, this Hon'ble Tribunal cannot take cognizance and/or rely upon

this document to entertain any claims made by the Financial Creditor.

3.11 The Corporate Debtor has built a strong reputation of excellence in residential, commercial, and gated community developments. The Corporate Debtor expanding portfolio consists of over 100 million sq. ft of prime property which have been carefully crafted by 15,000 experts and managed by over 500 internationally and nationally acclaimed executives across 35 exclusive projects that have served close to 20,000 satisfied customers till date. The Corporate Debtor has been carrying on its business for over fifteen (15) years and has completed three (3) gigantic projects till date, delivering numerous homes to its happy customers. As on date, there are around 300 workers/employees engaged by the Corporate Debtor and its group companies. The Corporate Debtor is presently engaged in several major projects through its subsidiaries, joint ventures and with its associates. Most of the projects are based in and around Mumbai, and are under various stages of planning and

construction. The Corporate Debtor is a solvent company which is expected to generate huge sums out of its investment made in the ongoing projects. The Corporate Debtor is also working with leading companies which will ensure the success of the ongoing projects.

3.12 The Hon'ble Supreme Court of India and the Hon'ble Appellate National Company Law Tribunal including this Hon'ble Tribunal in a plethora of judgments have stated that the proceedings under the Code cannot be utilized as a recovery mechanism to arm-twist the Corporate Debtor to extort money. If such proceedings are filed with the sole intention to recover money, then such proceedings will be against the spirit of the Code and will be categorized as fraudulent proceedings under Section 65 of the Code for abusing the process of law.

4. The Financial Creditor has filed rejoinder dated 07.02.2023 submitting that the Corporate Debtor in the Reply admits that an amount of INR 236 Crores (as against our claim amounting to INR 760.38 Crores) remains outstanding and due and payable by the Principal Borrower. As such, the debt and the default are duly

admitted in the said Reply and that there is no dispute as to such fact. There is nothing in the said Reply which disputes either the debt or the default alleged in the captioned Petition.

4.1 The captioned Petition is not barred by Section 10A of the Code as alleged or otherwise. It is submitted that, the said Corporate Debtor has from time to time duly acknowledged its liability for the purposes of Section 18 of the Limitation Act, 1963 by executing letters of acknowledgement of liability dated 07.01.2015, 01.11.2017, 15.05.2019, and 08.03.2021. In fact, during the period June, 2017 till August, 2022, the Principal Borrower has duly acknowledged its liability on various occasions by way of one-time settlement offers. The Financial Statements of the Principal Borrower for the financial years 2017-2018, 2018-2019, 2019-2020 and 2020-2021 duly acknowledges its liability towards the said term loan facility.

4.2 The Corporate Debtor has admitted the guarantee given to the Principal Borrower which can be evidently seen from the Annual Report which the Corporate Debtor has

uploaded on the MCA Portal with the ROC. Thereafter, due to the consistent default and refusal of the Corporate Debtor to repay the said term loan, by and under a notice dated 20.10.2022 addressed by on behalf of the Financial Creditor to the Corporate Debtor, the Financial Creditor invoked the Deed of Guarantee and accordingly, called upon the Corporate Debtor to repay the outstanding term loan within 7 days from the receipt of the said notice. The said notice dated 20.10.2022 was received by the Corporate Debtor on 21.10.2022. The Corporate Debtor did not made any payments whatsoever, in pursuance of the above notice.

4.3 The captioned Company Petition was filed by the Financial Creditor against the Corporate Debtor on 02.11.2022. Infact, subsequent to the filing of the Company Petition, the Corporate Guarantor choose to respond to the aforesaid notice dated 20.10.2022 by way of their Reply dated 02.11.2022. it is pertinent to note that in the said Reply dated 02.11.2022 also, the Corporate Debtor has infact admitted an amount of INR 236.36

Crores as due and payable as on 08.03.2021 (as against our claim amounting to INR 760.38 Crores).

- 4.4 The conduct of the Principal Borrower as well as the Corporate Debtor in admitting that at least 236.84 Crores remains due and payable and outstanding (as against our claim amounting to INR 760.38 Crores), and yet not repaying the same demonstrates the malafide intention of the Principal Borrower and the Corporate Debtor.
- 4.5 It is further stated that according to the Hon'ble NCLAT Judgment passed in "*Vipul Himatlal Shah v. Teco Industries*" it was reiterated that "*in case the record of Information Utility shows that there is a debt which is in default, the Adjudicating Authority or the Appellate Authority are not required to further examine the record maintained by the Information Utility*".
- 4.6 During the last 4-5 years the Financial Creditor has been providing ample opportunities to the Principal Borrower as well as its group companies to resolve successfully all their loan accounts through resolution. However, it is submitted that the amount offered in those OTS proposals is not in match with the intrinsic value of the mortgaged

assets held as securities for the loan accounts. In addition to the aforesaid, there are a plethora of Judgments of the Hon'ble Appellate Tribunal and of this Hon'ble Tribunal that the Financial Creditor cannot be compelled to accept the OTS Proposal. Further, in the matter of *The Bijnor Urban Cooperative Bank Limited, Bijnor & others v. Meenal Agarwal & others (Civil Appeal No. 7411 of 2021)*, the Hon'ble Supreme Court held that “*No borrower can, as a matter of right, pray for grant of benefit of One Time Settlement Scheme*”. It is further stated that “*no bank can be compelled to accept a lesser amount under the OTS scheme despite the fact that the Bank is able to recover the entire loan amount by auctioning the secured property / mortgaged property. When the loan is disbursed by the bank and the outstanding amount is due and payable to the bank, it will always take a conscious decision in the interest of the bank and in its commercial wisdom*”.

- 4.7 The Corporate Debtor is deceptively stating that the date of default is 08.03.2021 and accordingly the Company Petition falls within the Section 10A period which bars from filing any petition within the stipulated time as

prescribed under the Section 10A period. As aforesaid, this contention of the Corporate Debtor is denied and disputed. It is pertinent to note that the date on which the Corporate Debtor is allegedly relying on 08.03.2021 is the date on which the Principal Borrower and the Principal Borrower have signed Acknowledgment of Debt.

- 4.8 The Financial Creditor submits that the Company Petition is not barred by limitation and is well within limitation. Also, the Hon'ble Supreme Court in a recent judgment dated 15.4.2021 delivered in the case of *Asset Reconstruction Company (India) Limited Versus Bishal Jaiswal & Anr* has held that “*Section 18 of the Limitation Act, which extends the period of limitation depending upon an acknowledgement of debt made in writing and signed by the Corporate Debtor, applies to proceedings under the IBC*”. It is further submitted that in *Vidhyasagar Prasad v. UCO Bank & Anr. in Company Appeal 238 of 2020*, the NCLAT held that “*to sum up, in our considered opinion an application under Section 7 of the IBC would not be barred by limitation, on the ground that it had been filed beyond a period of three years from the date of declaration of*

the loan account of the Corporate Debtor as NPA, if there were an acknowledgement of the debt by the Corporate Debtor before expiry of the period of limitation of three years, in which case the period of limitation would get extended by a further period of three years”.

- 4.9 With reference to paragraphs 35 to 39, the contents thereof are beyond the purview of this Hon’ble Tribunal. The application under Section 7 deserves to be admitted as long as it meets the pecuniary threshold prescribed under the Code. Admittedly, the Corporate Debtor has acknowledged the existence of debt and due to non-payment of the same default stands acknowledged. Further, the Hon’ble National Company Law Appellant Tribunal (“NCLAT”) vide its Judgment dated 11.11.2022 in the matter of Suzlon Synthetics Limited v. Stressed Asset Stabilization Fund has rightly held that *“In so far as the facts included in the Section 7 application in Form 1 application is concerned, the Financial Creditor as to provide information about the debt which is due and payable and also the date and record of default. There is no requirement in the*

adjudication of section 7 application to calculate and fix the exact amount of debt in default of repayment. It is only seen whether the amount in default is more than the minimum or threshold value that is prescribed in section 4 (1) of the IBC”.

- 4.10 This Hon’ble Tribunal in the matter of *Vistra ITCL India Limited v. Satra Properties (India) Limited* in Misc. Application 180 of 2020 in Company Petition No. 1632/2019 has held that “*the issue of stamp duty is irrelevant and uncalled for in a Section 7 Application more so when the ‘debt’ and ‘default’ are proved otherwise*”. The Hon’ble Bench also relied on a similar judgment of the Hon’ble NCLAT, Chennai Bench in Company Appeal (AT)(CH)(Insolvency) No. 22 of 2021 in *Ashique Ponnamparambath v.. The Federal Bank Limited* where the appeal was rejected with the observations that even if the loan documents are insufficiently stamped and it cannot be accepted in evidence, since the debt and default are proved beyond doubt and therefore dismissed the appeal.

Findings:

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

5.1 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 31.08.2022, having been submitted by the Principal Borrower. The Corporate Debtor also placed reliance on the Hon'ble Supreme Court's decision in the case of *Vidarbha Industries (2022 (8) SCC 352)*.

5.1.1 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.”

5.1.2 Even the case of Corporate Debtor is not sustainable in view of 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.”

5.1.3 Hence, this Bench does not find any merit in the 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.

5.1.4 The sufficiency of security is not a relevant consideration in a proceeding u/s 7 of the Code, however it is dealt with in detail in later paras. 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.

5.2 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 Guarantee of the Corporate Debtor was invoked on 20.10.2022 asking it to pay within 7 days the amount claimed in default, accordingly the date of default qua corporate debtor would be 03.11.2022, considering that the notice for invocation of guarantee is acknowledged to have been received on 28.10.2022. The date of default qua Principal Borrower is stated as 30.08.2015 in part IV of the Form 1 forming part of the present petition and is further evidenced by the record of

default at NeSL portal . The Corporate Debtor has not disputed that this is not correct date of default qua Principal Borrower and the fact of invocation of guarantee qua Corporate Debtor. 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.

5.2.1 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.

5.3 The Corporate Debtor has also argued the date of default qua Principal Borrower, as stated in Part IV of Form 1 forming part of the petition, is 31.12.2015, and accordingly, the period of limitation runs from the said date of default. The present petition is filed on 04.11.2022, 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.

5.3.1 This Bench notices that the Principal Borrower has acknowledged the debt of Rs. 228,55,21,768/- vide acknowledgement dated 07.01.2015. Further, the debt was acknowledged on 01.11.2017, 15.05.2019 and 08.03.2021. The acknowledgment dated 15.05.2019 confirms the debt of Rs.236,92,95,293/- as due and payable as on 31.12.2018 plus uncharged interest w.e.f.31.12.2015. In view of said acknowledgement, the period of limitation extends upto 14.04.2022 and thereafter upto 07.03.2024 vide last acknowledgement dated 08.03.2021.

5.3.2 This Bench also finds that the Principal Borrower has acknowledged the said debt in its audited financial statement for the year ended on 31.03.2018, 31.03.2019, 31.3.2020 and 31.03.2021, which contains the corresponding amounts for the preceding year also. The said financial statements clearly show that the Principal Borrower owes debt to the applicant bank, and such acknowledgement extends the period of limitation.

- 5.3.3 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, the various OTS proposals vide letters beginning from 22.06.2017 and ending on 31.10.2022 further extends the period of Limitation.
- 5.3.4 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.
- 5.3.5 Nonetheless, in the case of *Suo Moto Writ Petition (C) No. 3 of 2020 in Re: Cognizance For Extension of Limitation*, 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 01.11.2017, the present Petition can be held to have been filed within the period of Limitation. Hence, this contention of the Corporate Debtor is rejected.

5.4 The Corporate Debtor has challenged the maintainability of this Petition on the ground of insufficiency of stamp duty paid on the Term Loan Agreement including the other ancillary agreements, and also submitted that such documents are not valid and legally enforceable for reason of it being insufficiently stamped under applicable law. In view of the insufficiently stamped agreement, this Hon'ble Tribunal cannot act and give effect to such agreement.

5.4.1 This Bench notices that the Hon'ble Supreme Court in the case of *NN Global Limited Vs. Indo Unique Flame Ltd. and Others (2023 SCC OnLine SC 495)* (“*NN Global*”) 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".

5.4.2 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.

5.4.3 This Bench finds that the Deed of Mortgage dated 15.10.2013 and Joint Deed of Mortgage dated July 28, 2014 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 Deed of Mortgage and Joint Deed of Mortgage 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.

5.4.4 This Bench finds that the Deed of Mortgage, Joint Deed of Mortgage, 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.

5.5 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.

5.5.1 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.

5.5.2 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.

5.5.3 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*”.

5.5.4 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 17.08.2022, 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 06.01.2015, 01.11.2017, 02.01.2019 and 08.03.2021, besides copy of Sanction Letter, Mortgage Deed & Joint Mortgage Deed, Term Loan Agreement and other ancillary agreement. The Financial Creditor also filed audited Financial Statements of the Principal Borrower for the year ended on 31.03.2018, 31.03.2019, 31.03.2020 and 31.03.2021 as well as OTS offers made by the Corporate Debtor.

5.5.5 It is not the case of Corporate Debtor that NESL report dated 17.08.2022, copies of entries in Banker's Book, Copy of Notice u/s 13(2) of SARFAESI, Act 2002, copy of acknowledgement of debt dated 06.01.2015, 01.11.2017, 02.01.2019 and 08.03.2021, audited Financial Statements of the Principal Borrower, 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 06.01.2015, 01.11.2017, 02.01.2019 and 08.03.2021, and audited Financial Statements of the Principal Borrower 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.

5.5.6 This Bench finds the plea of insufficiency of stamp duty raised by the Corporate Debtor, to dislodge the present

petition, is contrary to the admission of Principal Borrower 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 Principal Borrower's actions, would only benefit the Principal Borrower & the Corporate Debtor at the cost of Financial Creditor, more so when the amount of deficient stamp paper was recoverable from the Principal Borrower itself.

5.5.7 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.

5.5.8 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.

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

5.6 The Corporate Debtor has filed an IA-2715/2023 on 23.06.2023 and the same was listed on 03.07.2023 praying for deferment/pronouncement of any final order/judgment in CP (IB) No.1196/MB-IV/2022 till such time the applicant/financial creditor has considered the OTS proposal of the Principal Borrower. It is submitted that the Principal Borrower has submitted letters dated 27.01.2023, 08.02.2023 and 24.05.2023 expressing to settle the matter amicably for Rs.374.83 Crore with some modifications to the terms from time to time. The pronouncement of Order in the case of another Corporate Guarantor i.e. Marin Drive

Hospitality & Reality Private Limited to the credit facilities granted to the Corporate Debtor was listed on 28.06.2023, and the pronouncement of that order came to be deferred after mentioning by the Corporate Guarantor on the ground of settlement proposal is being under consideration of the Financial Creditor/Applicant. The Financial Creditor placed on record a praecipe dated 28.06.2023 on that day stating that-

“3. In response to the prayer clause of the said Interlocutory Application, the Financial Creditor submits its current factual position as under:

- a. The Corporate Debtor submitted an OTS proposal, to the Financial Creditor for the settlement of its dues, which is under consideration with the Financial Creditor.*
- b. In furtherance of the same, the Corporate Debtor deposited INR 10 Crores with the Financial Creditor as a token amount in No Lien Account with the Financial Creditor.*
- c. Accordingly, the OTS Amount, as offered by the Corporate Debtor, has to be paid within 90 days from the date of approval, if the same is approved.*
- d. Since the Account is classified under fraud category, the Financial Creditor is in the process of formulating a*

Board Policy on dealing with fraud accounts in terms of settlement, in accordance with the recent RBI Circular dated 08.06.2023.

e. Thereafter, the Corporate Debtor's request would be submitted to the Competent Authority for consideration as per the Financial Creditor's extent guidelines."

5.6.1 This bench directed applicant financial creditor to be present in person through a responsible and authorized officer to update this bench about the exact facts pertaining to the OTS proposal, in view of deficient and unclear submissions in the praecipe and posted the matter on 04.07.2023 . In the meantime, this IA came to be listed for hearing on 03.07.2023. One DGM represented the Applicant/Financial Creditor, and again reiterated that the Financial Creditor is in the process of formulating a board policy on dealing with fraud accounts in terms of settlement, in accordance with the recent RBI circular dated 08.06.2023, and submitted that the Principal Borrower's request can be submitted to competent authority for consideration/approval thereafter. The officer present in person categorically

stated that he has instruction to pray for admission of the Principal Borrower into CIRP. This bench was handed over another praecipe dated 29.06.2023 from the advocate for the Financial Creditor stating that the Financial Creditor has no objection to the matter being kept in abeyance till the Competent Authority of the Financial Creditor has taken a decision in the matter.

5.6.2 This bench has considered these submissions and finds that consideration of the Principal Borrower's proposal for settlement is at premature stage in view of, formulation of a board policy on dealing with fraud accounts is still to take place. This bench further finds that the account of the Principal Borrower is in defaults since 31.10.2015 and there have been numerous OTS proposal having been discussed between the parties, however, it yielded no result.

5.6.3 This bench finds that the Hon'ble Supreme Court in the matter of *M. Suresh Kumar Reddy Vs. Canara Bank & Ors. (2023) ibclaw.in 67 SC* held that "*If the NCLT finds that there is a debt, but it has not become due and payable, the application under Section 7 can be rejected. Otherwise, there is no ground available to reject the application*". Further, the

resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests, as held in *Swiss Ribbons Pvt. Ltd. & Anr [2019] ibclaw.in 03 SC*. In view of this, we are not inclined to entertain the prayer for deferment of pronouncement of the order in this case, more so, this application is pending for its adjudication before this tribunal for about more than a year, even though the court mandates decision on such applications within 14 days of its filing.

6. Accordingly, IA-2715/2023 is **dismissed**.
7. Since, there exist a Financial Debt of more than Rs.1.00 Crore; the Corporate Debtor has default in repayment thereof on 31.12.2015; 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. The Financial Creditor has proposed the name of Mr. Prashant Jain, a registered insolvency resolution professional having Registration Number [IBBI/IPA-001/IP-P01368/2018-2019/12131] as Interim Resolution Professional, to carry out

the functions as mentioned under I&B Code and has also given his declaration that no disciplinary proceedings are pending against him.

ORDER

- a) This Application being C.P. (IB) No. 1196/NCLT/MB/C-IV/2022 filed by Bank of India, the Financial Creditor/Applicant, under section 7 of Insolvency & Bankruptcy Code, 2016 (I&B Code) in the matter of DB Reality Limited, Corporate Debtor, for initiating Corporate Insolvency Resolution Process (CIRP) is **admitted**. We further declare moratorium u/s 14 of I&B Code with consequential directions as mentioned below:

I. That this Bench as a result of this prohibits:

- a) 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;
- b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

- c) 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 Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
 - d) the recovery of any property by an owner or lessor where such property is occupied by or in possession of the corporate debtor.
- II. That 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.
- III. That the provisions of sub-section (1) of Section 14 of I&B Code shall not apply to
- a. such transactions as may be notified by the Central Government in consultation with any financial sector regulator;
 - b. a surety in a contract of guarantee to a Corporate Debtor.
- IV. That the order of moratorium shall have effect from the date of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution

plan under sub-section (1) of section 31 of I&B Code or passes an order for the liquidation of the corporate debtor under section 33 of I&B Code, as the case may be.

V. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of I&B Code.

VI. That this Bench appoints Mr. Prashant Jain, a registered insolvency resolution professional having Registration Number [IBBI/IPA-001/IP-P01368/2018-19/12131], Phone No. 9322743902, email- ipprashantjain@gmail.com as Interim Resolution Professional to carry out the functions as mentioned under I&B Code, the fee payable to IRP/RP shall comply with the IBBI Regulations/Circulars/Directions issued in this regard.

VII. The Financial Creditor shall deposit a sum of Rs.5,00,000/- (Rupees five lakh only) with the IRP to meet the expenses arising out of issuing public notice and inviting claims, in case the Funds are not found available with the Corporate Debtor by the IRP. The said amount shall be treated as Interim Finance provided by the Financial Creditor. The expenses, so incurred

by IRP, are subject to ratification by the Committee of Creditors (CoC).

VIII. A copy of this Order be sent to the Registrar of Companies, Maharashtra, Mumbai, for updating the Master Data of the Corporate Debtor.

IX. The Registry is directed to immediately communicate this order to the Financial Creditor, the Corporate Debtor and the Interim Resolution Professional even by way of email or WhatsApp. Compliance report of the order by Designated Registrar is to be submitted today.

Sd/-

Prabhat Kumar
Member (Technical)

04.07.2023

Sd/-

Kishore Vemulapalli
Member (Judicial)