IN THE NATIONAL COMPANY LAW TRIBUNAL MUMBAI BENCH-VI

IA No.3903 of 2022 IN CP (IB) No.865/MB/2022

[Under Section 60(5) of the Insolvency and Bankruptcy Code, 2016]

IN THE MATTER OF:

Ojas Tradelease and Mall Management Private Limited
[CIN:U70102MH2006PTC161887]
Knowledge House, Off Shyam Nagar
Jogeshwari-Vikhroli Link Road, Jogeshwari (East)
Mumbai-400060.

…Applicant/Corporate Debtor

V/s.

Central Bank of India
[PAN: AAACC2498P]
Corporate Finance Branch
1st Floor, MMO Building
M.G. Road, Fort
Mumbai-400001

...Respondent/Financial Creditor

Pronounced: 30.08.2024

CORAM:
HON'BLE SHRI K. R. SAJI KUMAR, MEMBER (JUDICIAL)
HON'BLE SHRI SANJIV DUTT, MEMBER (TECHNICAL)

Appearances: Hybrid

Applicant : Sr. Adv. Ashish Kamat a/w. Mr. Harsh Moorjani, Adv Petrushka Dasgupte, Adv. Krishna Baruah, Adv. Ankita Yadav i/b Link Legal.

Respondent : Adv. Amir Arsiwala a/w. Adv. Abdullah Qureshi a/w Adv. Shradha Patil i/b India Law LLP.

ORDER

[PER: SANJIV DUTT, MEMBER (TECHNICAL)]

1. BACKGROUND

1.1 This is an Interlocutory Application (IA) No.3903 of 2022 filed by M/s Ojas Tradelease and Mall Management Private Limited, (hereinafter referred to as "the Applicant/Corporate Debtor") on 13.12.2022 under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "the Code"). This IA challenges the maintainability of Application bearing CP(IB) No.865/MB/2022 (Main Application) filed under Section 7 of the Code read with Rule 4 of Application to Adjudicating Authority Rules (hereinafter referred to as "the AAA Rules") by the Central Bank of India (hereinafter referred to as Respondent/ Financial Creditor) on 22.06.2022, mainly on the grounds that it is barred under the provisions of Section 10A of the Code and that there are parallel proceedings initiated by the Respondent/Financial Creditor for enforcement of the same debt.

1.2 The Main Application was filed by the Respondent/Financial Creditor on 22.06.2022 against the Applicant/Corporate Debtor, which is the Corporate Guarantor to Iskrupa Mall Management Company Private Limited (hereinafter referred to as "the Principal Borrower"). The alleged amount of financial debt claimed to be in default is Rs.72,32,17,258.14/- (Seventy-Two Crores Thirty-Two Lakhs Seventeen Thousand Two Hundred and Fifty-Eight Rupees and Fourteen Paise) as on 29.05.2022 along with interest and other charges and the date of

default is stated to be 31.03.2022 under One-Time Restructuring (hereinafter referred to as “OTR”).

1.3 The Respondent/Financial Creditor granted a Term Loan of Rs.150 crores to the Principal Borrower *vide* Sanction Letter dated 19.09.2015. Pursuant to this, the Respondent/ Financial Creditor entered into a Term Loan Agreement dated 24.09.2015 with the Principal Borrower. The said facility was duly guaranteed by the Applicant/Corporate Debtor through a Deed of Guarantee executed on 24.09.2015.

1.4 Thereafter, default was committed by the Principal Borrower on 30.09.2020 and it requested for an OTR under the Resolution Framework for Covid-19 Related Stress announced by the Reserve Bank of India *vide* its Circular dated 06.08.2020 (hereinafter referred to as “the RBI Covid Circular”). The OTR was executed on 19.06.2021 pursuant to which the Respondent/Financial Creditor entered into a Restructuring Agreement dated 21.06.2021 with the Principal Borrower. Simultaneously, the Corporate Guarantor executed a Deed of Guarantee dated 21.06.2021. However, the Principal Borrower failed to honour its obligation to repay the principal and interest due on 31.03.2022 under the OTR and its loan account was classified as Non-Performing Asset (NPA) on 30.04.2022. Subsequently, Demand Notice dated 06.06.2022 was sent by the Respondent/Financial Creditor to the Principal Borrower, and the Applicant/ Corporate Debtor in its capacity as the Guarantor but no payments were made. This led the Respondent/Financial Creditor to prefer the Main Application under

Section 7 of the Code seeking initiation of CIRP in respect of Applicant/ Corporate Debtor.

2. AVERMENTS OF APPLICANT/CORPORATE DEBTOR IN IA No.3903 OF 2022:

2.1 The Applicant/Corporate Debtor has filed the IA challenging the maintainability and seeking dismissal of the Main Application*, inter alia,* on the ground that the Financial Creditor is admittedly a secured creditor. The debt is secured by way of a number of securities such as tangible assets created out of the Term Loan, receivables and immovable property located at “Acropolis Mall” in Ahmedabad, all being in addition to Personal/Corporate Guarantees. The Respondent/ Financial Creditor ought to prove that the assets of the Principal Borrower are insufficient to satisfy the debt and that there are sufficient reasons for proceeding against multiple entities. As secured creditor, it cannot be allowed to file proceedings for insolvency of the Principal Borrower, let alone the purported Corporate Guarantors and Personal Guarantors. Moreover, the debt is fully secured by outsized securities and the Principal Borrower is fully capable of repaying the debt upon monetising its assets. In fact, without prejudice, it had submitted an OTS (One-Time Settlement) to the Respondent/ Financial Creditor thrice with amendments on 29.06.2022, 18.11.2022 and 23.11.2022.

2.2 Secondly, the Respondent/Financial Creditor has suppressed material facts while filing the Main Application. The Financial Creditor has not disclosed the fact that as many as five different proceedings have been initiated by it against the Principal Borrower, two Corporate Guarantors and two Personal Guarantors under the Code for enforcement of the same debt. A party which suppresses

material facts from the Court is not entitled to any relief and, therefore, on this ground alone, the Main Application filed by the Respondent/ Financial Creditor ought to be dismissed. The Respondent cannot be permitted to pursue the Main Application since it has also filed simultaneous applications against the Applicant/Corporate Debtor/ Corporate Guarantor and another Corporate Guarantor under Section 7 as well as the Personal Guarantors under Section 95 of the Code. The Main Application under Section 7 is not maintainable, if the proceedings under the Code are subsisting against the Principal Borrower.

2.3 Thirdly, pursuant to the RBI Covid Circular, the Respondent/ Financial Creditor had sanctioned the OTR Plan *vide* its letter dated 19.06.2021. A Restructuring Agreement with the Principal Borrower was entered into on 21.06.2021 and a Deed of Guarantee dated 21.06.2021 came to be executed with the Applicant/Corporate Debtor/Corporate Guarantor. Since the Applicant failed to comply with the OTR Plan and to repay the principal and interest fallen due on 31.03.2022, the concessions pertaining to the OTR scheme were withdrawn. In other words, the dues were reversed to the amount due prior to the sanction of OTR and the date of default also reverted as per the pre-OTR period i.e., 30.09.2020. Prior to the filing of the Main Application, the Respondent/Financial Creditor *vide* its notice dated 06.06.2022 sought repayment of loans. Even in that notice, the Respondent/Financial Creditor stated that the Principal Borrower's account had been classified as NPA under OTR on 30.04.2022 (on account of continuous default for 30 days of the cure period from the date of the first default) and dues were calculated with effect from 29.12.2020 when the account actually slipped to NPA.

2.4 Fourthly, the claim of the Respondent is hit by Section 10A of the Code. The date of default as per the Main Application is 30.09.2020, which falls during the prohibited period contemplated by Section 10A of the Code i.e., from 25.03.2020 to 24.03.2021. It is submitted that the transactions shown are all of the period covered by Section 10A of the Code and the claim includes penal interest from the prohibited period. The Main Application is, therefore, filed for default arising during the said period. In view of the admitted pleadings of the Respondent/Financial Creditor itself, the first date of default in the Applicant's case was on 30.09.2020, which is within the prohibited period in terms of Section 10A. It is settled position of law that admission made in the pleadings by a party is the best proof of the facts admitted, as held by the Hon'ble Supreme Court in ***Mohammed Abdul Wahid Vs. Nilofer & Another (2024) 2 SCC 14, Nagindas Ramdas Vs. Dalpatram Iccharam & ors. (1974) 1 SCC 242*** *and* ***Union of India Vs. Ibrahim Uddin & another (2012) 8 SCC 148.*** According to the Applicant/Corporate Guarantor, the Respondent/ Financial Creditor itself has admitted that the first default in repayment of the debt occurred on 30.09.2020 and hence the default amount fell under Section 10A period.

2.5 The Respondent/ Financial Creditor cleverly drafted the Main Application, by disingenuously stating date of default as 31.03.2022 to escape the restrictions imposed by Section 10A of the Code. Placing reliance on the judgment of Hon'ble Supreme Court in ***Ramesh Kymal Vs. Siemens Gamesa Reneweable Power Pvt. Ltd. (2021) 3 SCC 234,*** it is submitted that for a default occurring in the prohibited period covered by Section 10A, an application to initiate CIRP under the provisions of the Code could never be filed. The Respondent/ Financial

Creditor can avail other remedies as may be available under law but no proceedings will lie under the Code for default which has occurred in the said prohibited period. Since the Respondent/ Financial Creditor itself claims that a default occurred on 30.09.2020, the present Application is strictly barred under Section 10A of the Code. It is submitted that as per the terms of the Deed of Guarantee dated 23.12.2019 executed by the Applicant for the facility sanctioned to the Principal Borrower, the liability of the Guarantor is co-extensive. Therefore, in case of default by the Principal Borrower, the Guarantor will be liable from the same date. Consequently, in view of the Respondent's case that the Principal Borrower defaulted on 30.09.2020, the Applicant's date of default would also be 30.09.2020 which is covered under Section 10A.

2.6 It is further submitted that the Respondent/Financial Creditor is abusing the provisions of the Code as a tool of recovery by filing simultaneous applications against the Principal Borrower and the Guarantors. This would effectively result in multiple Corporate Persons/ Personal Guarantors being forced into insolvency in respect of the same debt.

2.7 The Ld. Sr. Counsel for the Applicant/Corporate Debtor relied on Clauses 22 and 48 of the RBI Covid Circular and argued that the Respondent/Financial Creditor cannot shift the date of default under the garb of OTR/Restructuring Agreement, especially when the RBI Covid Circular itself provides that in case of default under the OTR, it would be as if the said OTR/Restructuring Agreement was never entered into. It is contended that the execution of OTR/Restructuring Agreement does not in any manner novate the earlier loan agreements and

rather denies the Applicant/Corporate Debtor its rights under the provisions of Section 10A of the Code.

2.8 The Applicant/Corporate Debtor has referred to the judgments of Hon'ble Supreme Court in ***Rajasthan State Industrial Development and Investment Corporation and Another Vs. Diamond & Gem Development Corporation Limited and Another [(2013) 5 SCC 470], Hindustan Cooperative Housing Building Society Limited Vs. Registrar, Co-operative Societies and another [(2009) 14 SCC 302]*** and ***J.K. Cotton Spinning and Weaving Mills Vs. Union of India [1987 (Supp) SCC 350]*** wherein it has been held that the words "as if" create a legal fiction and such legal fiction should be deemed to be in existence only for the limited purpose for which it was created. In view of the above, it is contended that the Resolution Plan/Restructuring Agreement is deemed to be in existence only for the limited purpose until there is a breach/default under such Restructuring Agreement, in which case it is to be deemed that such Restructuring Agreement was never in existence.

2.9 It is contended that the said RBI Covid Circular cannot override the effect of Section 10A of the Code by implying that entering into a Restructuring Agreement under the said RBI Covid Circular will shift the date of default. It is argued that the date of default as mentioned in Part-IV of the Application as on 31.03.2022 (Under OTR) is only to circumvent the provisions of Section 10A of the Code. The principle whether re-structuring of a loan is tantamount to novation of original contract and whether non-fulfilment of the conditions or pre-conditions of the restructuring relegates the date of default back to the original default date was also considered by NCLT, Kolkata Bench in the matter of ***REC Limited Vs.***

Hiranmaye Energy Limited [C.P. (IB) 138/KB/2021] and in para 16, it was held that even if there is a default under a restructuring, if there is a default in the previous date in repayment, the initial date of default will be considered as default. Referring to the judgments of Hon'ble Supreme Court in ***Hyder Consulting (UK) Ltd. Vs. Governor, State of Orissa [(2015) 2 SCC 189]*** and ***State of U.P. Vs. Synthetics & chemicals Ltd. [(1991) 4 SCC 139],*** it is submitted that the judgment of Hon'ble NCLAT in the connected matter of ***Pradeep Madhukar More, Suspended Director of Syntex Trading & Agency Pvt. Ltd. Vs. Central Bank of India*** *[Company Appeal (AT) (Ins) No.837 of 2023]* is *per incuriam* as the same does not consider and/or is silent on Clause 22 of the said RBI Circular and, therefore, the same will not be binding on this Tribunal.

3. REPLY BY RESPONDENT/ FINANCIAL CREDITOR TO IA

3.1 In its Affidavit-in-Reply dated 17.01.2023, the Respondent submits that the law permits it, being a Creditor, to pursue simultaneous proceedings against the Principal Borrower and its Guarantors. Section 128 of the Indian Contract Act, 1872, clearly stipulates that liability of Guarantor shall be co-extensive with that of the Principal Borrower. According to Clause 1 of the Deed of Guarantee dated 21.06.2021, executed between the Applicant and the Respondent, the Applicant's liability is defined as that of a principal debtor. At the option of the Respondent/Financial Creditor, the Guarantor may be treated as primarily liable for the debt of the Principal Borrower, thereby making the Applicant's liability co-extensive with that of the Principal Borrower. The Hon'ble Supreme Court in ***Laxmi Pat Surana Vs. Union Bank of India & Anr. (2021) 8 SCC 481*** has held that when the principal borrower has committed a default, it would enable the

creditor to proceed against both the principal borrower and the guarantor simultaneously since the obligation of the guarantor is co-extensive and co-terminus with that of the principal borrower to defray the debt as prescribed under Section 128 of the Indian Contract Act, 1872. In its Written Submissions, the Respondent/ Financial Creditor has placed reliance on the judgments of the Hon'ble NCLAT in ***State Bank of India Vs. Athena Energy Ventures Pvt. Ltd.*** *[CA (AT)(Ins.) No.633 of 2020],* ***Emerald Realtors Pvt. Ltd. Vs. Suraksha Asset Reconstruction Ltd.*** *[CA (AT)(Ins.) No.394 of 2021]* and ***Naresh Kumar Aggarwal Vs. CFM Asset Reconstruction Pvt. Ltd.*** *[CA (AT)(Ins.) No.470 of 2023],* wherein it has categorically been held that CIRP can be initiated simultaneously against the principal borrowers and corporate guarantors. Hence, the Main Application is very much maintainable under the Code.

3.2 The Applicant's plea that the claim of the Respondent/Financial Creditor is barred by Section 10A of the Code is misplaced, because liability of the Applicant/ Corporate Debtor arises under the Deed of Guarantee dated 21.06.2021, which was executed well after the period of prohibition under Section 10A of the Code had ended. It has been held by the Hon'ble NCLAT in ***Pooja Ramesh Singh Vs. State Bank of India & Anr.*** *[Company Appeal (AT)(Ins.) No.329 of 2023]* and ***IDBI Trusteeship Services Ltd. Vs. Direct Media Distribution Ventures Pvt. Ltd.*** *[Company Appeal (AT)(Ins) No.850 of 2023]* that in case of the guarantor, it is the date of invocation of guarantee which is the "date of default" for the purposes of the Code. Further, the Respondent asserts that Section 10A does not apply to the Main Application, as the date of default is determined to be 31.03.2022 which represents the date on which the terms of the OTR were

breached. The present default occurred under the restructuring done pursuant to the OTR Proposal of the Principal Borrower. On 21.06.2021, the Respondent/ Financial Creditor and the Principal Borrower along with Axis Bank Ltd., entered into a Restructuring Agreement. This resulted in the novation of the transaction/ agreement between the parties. The Corporate Guarantor executed a fresh Deed of Guarantee on 21.06.2021, agreeing to act as surety and to be liable for payment under the OTR by the Principal Borrower. The Principal Borrower failed to pay the first instalment due and payable under the OTR on 31.03.2022, which constituted a "default" on its part under the provisions of the Code. The Financial Creditor sent letter dated 06.06.2022 to the Applicant/Corporate Debtor invoking the guarantee provided by it under the Deed of Guarantee dated 21.06.2021.

3.3 In its Written Submissions, the Respondent/ Financial Creditor has referred to the judgment of Hon'ble NCLAT in ***Pradeep Madhukar More*** *(supra)* which was a case filed by the same Financial Creditor against another company of the Future Group. The facts of that case are identical as it relates to the facility granted to the group company of the Corporate Debtor. It was held that the NPA date reverting to 29.12.2020 as per Clause 48 of the RBI Covid Circular would not be relevant for identifying the "date of default" for the purposes of the Code. Thus, the date of the account of the Principal Borrower becoming NPA is irrelevant for the purposes of determining the "date of default" for an application under Section 7 of the Code. The Ld. Counsel for the Respondent/Financial Creditor submitted that the Corporate Guarantor's argument that Clause 48 of the said RBI Circular also results in the "date of default" reversing and reverting to the NPA date was held to be unsustainable.

3.4 As regards the contention that the debt owed by the Principal Borrower is fully secured by outsized securities executed in favour of the Respondent/ Financial Creditor, it is submitted that the primary security with the Respondent is a first charge *vide* Deed of Hypothecation dated 21.06.2021 covering all tangible assets created from the Term Loan and all receivables of the Principal Borrower, excluding Lease Rental Discounting (LRD) receivables, for which the Principal Borrower has obtained a loan from the Axis Bank Ltd. The said tangible assets were valued at Rs.70.29 Crore and the said receivables at Rs.56.04 Crore as per the Audited Balance Sheet of the Principal Borrower as on 31.03.2020. However, according to the Audited Balance Sheet of the Principal Borrower for F.Y.2020-21, the value of tangible assets diminished from Rs.70.29 Crore to Rs.69.97 Crore (including capital work in progress of Rs.69.49 Crore) and the value of receivables diminished from Rs.56.04 Crore to a meagre Rs.2.26 Crore. Therefore, the primary security may prove to be insufficient to meet the dues owed to the Respondent.

3.5 There is only one collateral security in the form of a mortgage on the immovable property located at “Acropolis Mall”, Thatlej, Ahmedabad (hereinafter referred to as “the mortgaged property”) owned by the Applicant. The Respondent/ Financial Creditor holds second charge over the said mortgaged property while the first charge is held by IDBI Trusteeship Services Limited (ITSL). ITSL has filed Commercial Suit (L) No.18692 of 2022 against the Applicant/Corporate Guarantor before the Hon’ble Bombay High Court on 14.06.2022 for its outstanding dues. The dues of ITSL are around Rs.401 Crores, whereas the value of the mortgaged property is only around Rs.248 Crore. Therefore, the

value of the mortgaged property is clearly not sufficient to cover the very dues of ITSL, the first charge holder. This would leave nothing to be distributed to the Respondent, being the second charge holder.

3.6 Although the Applicant/Corporate Guarantor pleads that it is in the process of monetising the mall owned by them (valued at Rs.141,82,00,000/-) and that it would attempt to service the debts due to the Respondent/Financial Creditor from the sale proceeds, it admits on Affidavit that the said mall is currently charged with IFCI Limited, which would mean that IFCI Limited's dues will have to be first paid in full from the sale proceeds and the surplus, if any, would be appropriated towards the Respondent's debts. Therefore, there is no guarantee that the sale proceeds will be sufficient to satisfy the dues claimed by the Respondent/Financial Creditor. Further, such promises are mere delaying tactics employed by the Applicant/Corporate Guarantor to derail the time-bound process under the Code. The Respondent/Financial Creditor invoked the corporate and personal guarantees and thereafter approached this Tribunal as no payment was forthcoming despite demand. No provision under the Code and the Rules and Regulations made thereunder prohibits a creditor from initiating insolvency proceedings on the sole ground that it is a secured creditor. By virtue of being a secured creditor, the law merely grants the Respondent/Financial Creditor an option of enforcing the securities executed in the Respondent's favour. However, there is no legal compulsion that a secured creditor must first enforce the securities in its favour before proceeding with other legal remedies.

3.7 Further, there is neither any provision under the Code nor in the format of application under Form-1 of the AAA Rules, requiring the Respondent/Financial

Creditor to disclose list of all proceedings initiated against the Principal Borrower or other guarantors for the same debt. Similarly, the OTS Proposals were given by the Applicant/Corporate Debtor after the Main Application had already been filed, and, accordingly, the same could not be brought to the notice of the Tribunal. Therefore, the Applicant's allegation that the Respondent/Financial Creditor suppressed material facts by not informing the Tribunal about the other four proceedings is incorrect.

3.8 It is submitted that the Respondent/Financial Creditor in its commercial wisdom has chosen not to proceed with the OTS proposal because the Applicant has not deposited the agreed amount stipulated in the settlement proposal, as committed by it up to the date of filing the Affidavit-in-Reply. The Respondent had informed the Applicant *vide* letter dated 05.01.2023 to deposit 10% of the total outstanding debt amounting to Rs.5.63 Crore. However, the Applicant has only deposited a sum of Rs.1 Crore out of the total upfront payment of Rs.5.63 Crore as committed. Consequently, the Respondent informed the Applicant/Corporate Guarantor *vide* letter dated 13.01.2023, that the OTS proposal could not be proceeded with due to non-compliance with the agreed terms. The Principal Borrower and its Guarantors including the Applicant are part of the Future Group of Companies that are currently facing severe financial stress. The Respondent in its commercial wisdom has only enforced its rights under the Code and done nothing against the legislative intent of the Code.

3.9 The Respondent/Financial Creditor has distinguished judgments cited by the Applicant/ Corporate Debtor in support of its arguments. Referring to the case of ***Hyder Consulting*** (supra) cited by the Applicant/Corporate Debtor, it is

submitted that the judgment of the Hon'ble NCLAT in ***Pradeep Madhukar More*** (supra) cannot be said to be *per incuriam* as it has considered the entire RBI Covid Circular.

3.10 As regards the Applicant/ Corporate Debtor's plea based on Clause 22 of the RBI Covid Circular, it is submitted that no such argument finds place in the IA and hence, it is unsustainable. Even otherwise, this Clause only states that failure of OTR results in the account being dealt with under the original Prudential Framework dated 07.06.2019 as if the restructuring was never undertaken. There is nothing in Clause 22 to suggest that in case of default under the terms of restructuring of debt, the OTR is rendered void. It is absurd to contend that the Principal Borrower can take advantage of its default on repayment under the OTR and then plead that its own act of default renders the OTR void.

4. ANALYSIS AND FINDINGS

4.1 At the outset, we note that the Hon'ble Bombay High Court *vide* common order dated 15.02.2024 passed in Writ Petition (L) No.25350 of 2023 and Writ Petition (L) No.27363 of 2023 filed by the Corporate Guarantors viz., Future Corporate Resources Private Limited and the Applicant/Corporate Debtor herein directed this Tribunal to adjudicate, at the first instance, the IAs filed by the above parties challenging the issue as to maintainability of the Main Application, *inter alia,* on the ground of Section 10A of the Code. We heard the learned Counsel for the Applicant and the Respondent and also carefully perused the documents and materials available on record including written submissions by both parties.

4.2 First of all, the law is already settled that parallel proceedings under Section 7 of the Code can be initiated by a financial creditor against the principal borrower as

well as the guarantors. Liability of the surety or guarantor is co-extensive with that of the principal debtor under Section 128 of the Indian Contract Act, 1872 and that a creditor is not bound to first exhaust remedy against the principal debtor before initiating proceedings against the surety. In other words, both the principal debtor and the surety are liable at the same time to the creditors. The very object of the guarantee will be defeated if the creditor is asked to postpone his remedies against the surety. The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 in Section 60(2) of the Code with retrospective effect from 06.06.2018 also expressly provides for institution of simultaneous proceedings for initiating CIRP against the principal borrower and the corporate/ personal guarantors. The Respondent/ Financial Creditor has invited our attention to the judgments of Hon'ble NCLAT, cited in para 3.1 above wherein relying on the judgment of the Hon'ble Supreme Court in ***Laxmi Pat Surana*** (supra), it has been reiterated that CIRP can be initiated simultaneously against the primary borrower and the corporate guarantors. Just because no other lender of the Principal Borrower has filed any proceedings under Section 7 of the Code by itself cannot be a valid defence against the impugned action of the Respondent/ Financial Creditor in filing the Application for initiating CIRP in respect of the Applicant/Corporate Debtor. Therefore, the plea raised by the Applicant/Corporate Debtor on this ground is legally unsustainable and is accordingly rejected.

4.3 Secondly, let us consider the issue whether the Respondent/ Financial Creditor being a secured creditor is precluded from filing proceedings for insolvency of the Principal Borrower or the Applicant/Corporate Debtor/ Corporate Guarantor,

so long as it satisfies the pre-requisite conditions of Section 7 of the Code. We find that there is no provision in the Code which bars a creditor from initiating insolvency proceedings against the principal borrower solely on the ground that it is a secured creditor. There is no legal compulsion or prohibition that a secured creditor must first enforce the securities in its favour before taking recourse to the legal remedies available under the Code. Therefore, the plea taken up by the Applicant/Corporate Debtor on this count is found to be misconceived and is accordingly dismissed.

4.4 Thirdly, it is proposed to test the merit of the Applicant's contention whether it is necessary for the Respondent/ Financial Creditor to prove that the assets of the Principal Borrower are insufficient to satisfy the debt before proceeding against it in its capacity as the Corporate Guarantor under Section 7 of the Code. We find that such contention is supported neither by any statutory provisions under the Code nor any judicial precedents. The twin requirements of Section 7 of the Code are existence of financial debt exceeding the prescribed monetary threshold limit coupled with default in repayment thereof. No burden lies on the financial creditor in law to prove that the assets of the primary borrower are inadequate to pay off the debt in full. All that a financial creditor has to prove is that a corporate debtor owes the former a financial debt in excess of the specified threshold limit which is due and payable and that a default has occurred in repayment thereof and nothing more. In these circumstances, the aforesaid plea taken up by the Applicant/Corporate Debtor is found to be legally untenable and is accordingly dismissed.

4.5 As regards the contention of adequacy or otherwise of the primary security by way of hypothecation of tangible assets and receivables (other than LRD receivables) as well as the collateral security by way of the mortgaged property, we find that even though not legally required to do so under Section 7 of the Code, the Respondent/Financial Creditor has nonetheless demonstrated that the primary security may not prove to be sufficient to meet the dues owed by the Applicant/Corporate Debtor to the Respondent/Financial Creditor. However, this is not a relevant factor in determination of existence of default in an application under Section 7 of the Code. Be that as it may, it is noticed that the first charge holder is IDBI Trusteeship Services Ltd. (ITSL), while the Respondent/Financial Creditor is the second charge holder and the value of the mortgaged property does not appear to be sufficient to cover the dues of even the former so that nothing would be left to be distributed to the latter. In any case, the present proceedings before this Tribunal is for initiating corporate insolvency resolution process under the Code and not for recovery and hence, we are not inclined to deal with this as an issue raised by the Applicant/ Corporate Debtor.

4.6 Fourthly, as regards the OTS proposals submitted by the Principal Borrower to the Respondent/Financial Creditor, it is noticed from the record that the Principal Borrower was required to deposit token amount of 10% of the settlement offer of Rs.56.2 Crore so as to confirm its willingness and demonstrate its *bona fides* in the matter. However, it transpires that the Principal Borrower only deposited a sum of Rs.1 Crore as against agreed upfront payment of Rs.5.62 Crore due to which the Respondent *vide* its letter dated 13.01.2023, informed the Principal Borrower that the OTS proposal could not be proceeded with owing to non-

compliance of stipulated terms. This lends credence to the submission of the Respondent/Financial Creditor that the Principal Borrower and its guarantors including the present Applicant/Corporate Debtor are currently undergoing severe financial distress and are consequently unable to discharge the debts owed to the various financial creditors or even to offer mutually agreeable OTS proposals and then abide by the terms of such settlements. Further, Note 30 of 'Notes on Accounts' forming integral part of financial statements of the Principal Borrower for the year ended on 31.03.2021, categorically states that "*net worth of the company has been eroded fully as on 31st March, 2021."* Even the guarantors of the Principal Borrower including the Applicant/ Corporate Debtor have also failed to repay the outstanding debt despite demand by the Respondent/Financial Creditor.

4.7 Finally, it is proposed to examine whether the claim of the Respondent/Financial Creditor in the main Application qua the Applicant/Corporate Debtor is hit by the provisions of Section 10A of the Code, as strongly pleaded and argued on behalf of the Applicant/Corporate Debtor. It is considered imperative to recapitulate the relevant facts pertaining to this issue. It is an undisputed fact that Term Loan of Rs.150 Crore was availed by Iskrupa Mall Management Company Private Limited, the Principal Borrower from the Respondent/Financial Creditor *vide* Sanction Letter dated 19.09.2015, with the Applicant/Corporate Debtor standing as surety or guarantor. The Loan was advanced for a tenure of five years. The moratorium period of the loan was 36 months from the date of first disbursement and the Principal Borrower was required to pay the said loan in 8 equal quarterly installments of Rs.18.75 Crore each over the next two years. Interest @11.50 %

p.a. was payable monthly from the date of first disbursement until repayment of the said loan.

4.8 However, the Principal Borrower committed default in repayment of the loan on 30.09.2020 and its loan account was classified as NPA on 29.12.2020. The Principal Borrower approached the Respondent/Financial Creditor for OTR under the RBI Covid Circular dated 06.08.2020. The OTR proposal was approved by the Respondent/Financial Creditor *vide* Sanction Letter dated 19.06.2021. Thereafter, the Restructuring Agreement dated 21.06.2021 was executed by the Principal Borrower with its two Lenders, viz., the Respondent/ Financial Creditor and Axis Bank Ltd. Pursuant thereto, the Applicant/Corporate Debtor in its capacity as corporate guarantor executed a Deed of Guarantee dated 21.06.2021 i.e., much after the prohibition period under Section 10A came to an end on 24.03.2021. However, the Principal Borrower failed to honour the debt obligations even under the OTR and defaulted in repayment of principal and interest which fell due on 31.03.2022. On account of continuous default for 30 days therefrom, the loan account of the Principal Borrower slipped to NPA on 30.04.2022. The Respondent/Financial Creditor sent default notice dated 04.05.2022 to the Principal Borrower and its guarantors and called upon the Principal Borrower to clear all outstanding dues immediately together with applicable interest, etc. Further, demand notice dated 06.06.2022 was addressed to both the Corporate Guarantors including the Applicant/Corporate Debtor calling upon them to unconditionally pay the unpaid debt in default in full within 14 days from the date of receipt of the said letter failing which CIRP under the Code would be initiated against them.

4.9 Thus, based on the factual matrix, it emerges that the Principal Borrower committed its first default on 30.09.2020. The Applicant/Corporate Debtor contends that since the liability of the Guarantor is co-extensive with that of the Principal Borrower as per the terms of the Deed of Guarantee dated 23.12.2019, the date of default in case of the Applicant/ Corporate Debtor/Corporate Guarantor would also be 30.09.2020, which is covered under Section 10A, and hence, the Main Application is not maintainable. There is no doubt that a corporate guarantor's liability is co-extensive with that of the primary borrower but whether the date of occurrence of default in case of the primary borrower as well as the corporate guarantor would be the same depends on the terms of guarantee. It is well settled that the loan agreement between Bank and Principal Borrower and Deed of Guarantee between Bank and Corporate Guarantor are two different transactions/contracts and Corporate Guarantor's liability has to be read from the Deed of Guarantee. The liability of the primary borrower arises in terms of the loan documents whereas the liability of the corporate guarantor arises under the terms of the deed of guarantee which is a separate contract. The Applicant/Corporate Debtor has not succeeded in drawing our attention to either any statutory provision under the Code or any judicial precedent in support of its contention that default of the Corporate Guarantor would arise on the same date on which the Principal Borrower committed the default in repayment of debt irrespective of the terms of the relevant loan agreement and guarantee deed.

4.10 It is well-settled that the liability of the guarantor depends on the terms of his contract, as held by the Hon'ble Supreme Court in ***Syndicate Bank Vs. Channaveerappa Beleri & Ors. [(2006) 11 SCC 506]***. In this connection, it is

relevant to consider the relevant clauses of the Deed of Corporate Guarantee executed between the Respondent/Financial Creditor and the Applicant/Corporate Debtor in the present case. A perusal of the Deed of Corporate Guarantee dated 24.09.2015, executed at the time of original loan sanction, reveals that the said guarantee was ***payable on demand*** (Clause 1) and any such demand made by the Bank/Financial Creditor ***on the guarantor*** was to be ***final, conclusive and binding*** (Clause 2). In order to give effect to the guarantee, the Bank/Financial Creditor was entitled to act ***as if the guarantor were principal debtor*** to the Bank for all payments guaranteed by it (Clause 8). The Guarantee was a ***continuing one and was irrevocable*** (Clauses 10 and 13). Similarly, the Deed of Guarantee dated 21.06.2021 executed pursuant to the OTR is also an ***unconditional, irrevocable and continuing guarantee*** from the guarantor in favour of the Bank/Financial Creditor. The Respondent/Financial Creditor has relied on the judgments of Hon'ble NCLAT in ***Pooja Ramesh Singh Vs. State Bank of India & Anr.*** *[Company Appeal (AT)(Ins.) No.329 of 2023]* and ***IDBI Trusteeship Services Ltd. Vs. Direct Media Distribution Ventures Pvt. Ltd.*** *[Company Appeal (AT)(Ins) No.850 of 2023]* wherein it has been held that in case of on demand guarantee deed, the default shall arise on the part of the guarantor only when demand notice is issued as contemplated in the Deed of Guarantee. In view of the above, it follows that the liability of the Applicant/Corporate Debtor/Corporate Guarantor will arise not when the Principal Borrower defaulted in repayment of outstanding debt but only when the Respondent/Financial Creditor invoked the guarantee and demanded full

payment of the unpaid debt in default. In other words, default on the part of the Applicant/Corporate Debtor/ Guarantor cannot be said to have occurred on 30.09.2020, when the Principal Borrower committed default. Nor can the default at the end of the Corporate Debtor/ Guarantor be said to have been committed on 29.12.2020 when the loan account of the Principal Borrower was declared as NPA.

4.11 It is noticed from the record that the Respondent/Financial Creditor issued Demand Notice to the two Corporate Guarantors including the Applicant/Corporate Debtor on 06.06.2022 calling upon them to unconditionally pay the total outstanding dues within 14 days from the date of receipt of the said notice, which the Applicant/Corporate Debtor failed to do. It is a matter of record that no such demand notice was sent to the Applicant/Corporate Debtor at the time of original default occurring on 30.09.2020. Therefore, it is crystal clear that 30.09.2020, can by no stretch of imagination, be treated as the date of default in the case of the Applicant/Corporate Debtor/Corporate Guarantor. As a matter of fact, the actual default by the Corporate Guarantor would arise only upon non-payment of the amount due after the expiry of 14 days from 06.06.2022, being the date of Demand Notice i.e., on 20.06.2022. Since 20.06.2022 is far beyond the time period during which the embargo contained in Section 10A of the Code remained in force, the Main Application preferred by Respondent/Financial Creditor under Section 7 of the Code can by no means be said to be barred under Section 10A. Thus, the plea taken up by the Applicant/Corporate Debtor on this count is found to be devoid of substance and is accordingly dismissed.

4.12 As regards the contentions raised by the Applicant/Corporate Debtor based on Clauses 22 and 48 of the RBI Covid Circular dated 06.08.2020, it is pertinent to mention that the Applicant/Corporate Debtor has referred to aforesaid Clauses of the RBI Covid Circular only in its written submissions/oral arguments and the same were not pleaded in the IA. Thus, the Applicant/Corporate Debtor is trying to enlarge the scope of the IA which is not permissible. Further, the RBI Covid Circular was applicable only to eligible borrowers whether corporate persons or otherwise having stress on account of Covid-19 and had no applicability in case of guarantors like the Applicant/ Corporate Guarantor in the present case. In view of this position, the plea taken up by the Applicant/Corporate Debtor is liable to be dismissed as untenable.

4.13 Be that as it may, it is proposed to consider the aforesaid clauses of the RBI Covid Circular. Clause 22 of the RBI Covid Circular reads as under:-

> *"If any of the above timelines are breached at any point, the resolution process ceases to apply immediately in respect of the borrower concerned. Any resolution plan implemented in breach of the above stipulated timelines shall be fully governed by the Prudential Framework, or the relevant instructions as applicable to specific category of lending institutions where the Prudential Framework is not applicable, as if the resolution process was never invoked under this framework".*

A perusal of above clause reveals that it speaks of consequences of breach of certain timelines laid out in Clauses 16, 17 and 18 with regard to invoking

of resolution process, implementation of resolution plan within specified time and signing of Inter-Creditor Agreements (ICA) by lending institutions within specified time. All it says is that any resolution plan implemented in breach of stipulated timelines shall be fully governed by the Prudential Framework dated 07.06.2019 rather than the RBI Covid Circular. In other words, Clause 22 does not at all make mention of any "default under the Restructuring Agreement" as contended by the Applicant/Corporate Debtor. The Applicant/Corporate Debtor has not brought out any such breach of timelines prescribed in Clauses 16,17 and 18 of the RBI Covid Circular in its own case which would have the effect of nullifying the Restructuring Agreement. To contend that Clause 22 provides that in the event of default under the Restructuring Agreement, the resolution plan will cease to be applicable as if the same was never invoked is nothing but a figment of imagination of the Applicant/Corporate Debtor. Reliance by the Applicant/ Corporate Debtor on Clause 22 of the RBI Covid Circular is thus found to be misplaced and misconstrued and its plea based thereon is accordingly dismissed.

4.14 As per Clause 48 of the RBI Covid Circular, in the event of default by the borrower with any of the signatories to ICA at the end of the review period, the asset classification of the borrower with all lending institutions, including those who did not sign the ICA shall be downgraded to NPA from the date of implementation of the resolution plan or the date from which the borrower had been classified as NPA before implementation of the plan, whichever is earlier. It is observed that this Clause was considered by the Hon'ble NCLAT in ***Pradeep Madhukar More (supra)*** wherein it was categorically held that

Clause 48 is only to be read with regard to downgrading of asset classification of borrower to NPA for the relevant date and this Clause 48 is not relevant to find out the event of default, which occurred under the OTR/Restructuring Agreement and which is the foundation of Section 7 Application. Clause 48 is intended to effect downgrading of asset classification of the borrower to NPA pursuant to default so that the reliefs and concessions granted to the borrower under the OTR can be withdrawn. Hence, reliance on Clause 48 of the RBI Covid Circular is of no help to the Applicant/Corporate Debtor. There is nothing in the RBI Covid Circular to indicate that such downgrading of borrower's account to NPA from the date of implementation of resolution plan or prior thereto will also apply or hold good for the purpose of the Code too. Similarly, there is nothing in the Code or the regulations made thereunder to the effect that date of default in such cases will be ascertained in accordance with the RBI Covid Circular. The RBI Covid Circular cannot be interpreted *de hors* the context in which it was issued and the purpose for which it was issued. Thus, it is clear that it is not the RBI Covid Circular which will dictate the manner of determination of date of default under the Code and that the same will instead be governed by the provisions of Section 3(12) of the Code.

4.15 On perusal of Clause 48, it is apparent that this clause has no applicability in case of the Applicant/ Corporate Guarantor and is instead applicable in case of the Principal Borrower which committed the default under the OTR. Pursuant to default under the OTR, the reliefs and concessions granted to the Principal Borrower would stand withdrawn in terms of Clause 48 and the outstanding dues would be reversed to the amount due prior to the sanction

of OTR. In these circumstances, the amount of debt due will have to be calculated w.e.f. 29.12.2020 when the loan account of the Principal Borrower was classified as NPA under the original loan documents before implementation of the OTR. However, Clause 48 nowhere states that the date of default for purposes of the Code will also stand reverted to the pre-OTR period, i.e., 30.09.2020. It needs to be borne in mind that the RBI Covid Circular cannot override the provisions of the Code. Further, Clause 48 deals only with the consequence of default by a borrower under OTR for the limited purpose of asset classification of such borrower in the records of all lenders. We find that there is nothing in Clause 48 to even remotely suggest that in the event of default under the OTR, the Restructuring Agreement itself will cease to apply or will become invalid or void. Merely because the NPA date is mentioned in the Application as 29.12.2020 in compliance with the requirements of Clause 48, no benefit can be derived by the Applicant/ Corporate Debtor by contending that the Application was filed for default during the prohibited period contemplated under Section 10A of the Code.

4.16 In order to appreciate the nature and effect of the OTR, it is imperative to consider the main features of the OTR as well as certain relevant clauses of the Restructuring Agreement dated 21.06.2021 executed pursuant to the RBI Covid Circular between the Principal Borrower and its two lenders, namely, the Respondent/Financial Creditor and Axis Bank Limited. It is noticed from the record that the Respondent/Financial Creditor approved the OTR proposal of the Principal Borrower *vide* letter dated 19.06.2021 under the RBI Covid Circular by way of Restructuring the existing Term Loan on the existing rate

of interest; allowing moratorium in payment of interest and installment for 18 months on the Term Loan over and above 6 months already allowed under RBI Regulatory Package; extending the repayment schedule of the Term Loan by 18 months under OTR; approving funding of the interest on Term Loan for the period December, 2020 to February, 2022 as Funded Interest Term Loan (FITL) of Rs.8.23 Crore carrying interest @ 10.35% and permitting waiver of the uncharged interest on Term Loan for the period December, 2020 till date of implementation. Thus, fresh FITL of Rs.8.23 crores was sanctioned under the OTR and was disbursed to the Corporate Debtor from 21.06.2021 to 02.03.2022.

4.17 Coming now to the terms of the Restructuring Agreement, Clause 2.1(b) states that upon execution of the Agreement, all the rights and obligations of the parties under the original loan Agreement and other Existing Finance Documents shall stand supplemented by the rights and obligations under this Agreement. Clause 2.1(c) clarifies that the provisions of the Existing Finance Documents which are not inconsistent with the provisions of this Agreement shall continue to be binding on the Borrower, Lender and other parties to such Existing Finance Documents. Clause 2.1(e) provides that this Agreement shall constitute the entire Agreement between the parties concerning the outstanding loans and FITL and supersedes all previous proposals, agreements, understandings, negotiations and other written and oral communications in relation thereto. As per Clause 8.1, each of the following events shall, *inter alia,* constitute an Event of Default under this Agreement.

(a) Default by the Borrower in the payment of any installment of the principal amount under the Loans and FITL on the Due date.

(b) Default by the Borrower in payment of any installment of interest on the Loans and FITL on any Interest Payment Date.

The Fourth Schedule of the Restructuring Agreement contains the Amortisation Schedule for Loans under which repayment of outstanding loan of Rs.61.15 Crore was to be made in three structured quarterly installments commencing from 31.03.2022 to 30.09.2022 after the end of moratorium period. The first installment payable to the Respondent/Financial Creditor as on 31.03.2022 was Rs.18.75 Crore. Similarly, as per Amortisation Schedule for FITL, the first quarterly installment repayable as on 31.03.2022 was Rs.2.74 Crore. It is pertinent to mention that the Applicant/Corporate Debtor committed default in payment of the very first quarterly installment of its restructured loan account and FITL account falling due on 31.03.2022 under the OTR/ Restructuring Agreement. It is thus evident that the aforesaid defaults including the one pertaining to the fresh FITL account occurred on 31.03.2022 under Clause 8.1 of the Restructuring Agreement and not under the original loan agreement.

4.18 Thus, it is found that the Restructuring Agreement dated 21.06.2021 constituted the entire Agreement between the parties concerning the outstanding loans and FITL (which was disbursed only under the OTR) and modified all previous agreements in relation thereto. Further, it was only the Restructuring Agreement which was to govern the events of default in payment of any installment of

principal amount or interest under the loans and FITL and consequences thereof. Since the default in repayment of principal and interest on Term Loan and FITL due as on 31.03.2022 has taken place under the OTR, the said Restructuring Agreement will prevail with full force and the same cannot be wished away or negated nor can the OTR be said to have been rendered void, as contended by the Applicant/ Corporate Debtor. It is noticed on perusal of the order of co-ordinate Bench of NCLT, Kolkata in ***REC Ltd.*** (supra) relied upon by the Applicant that this order actually supports the case of the Respondent/ Financial Creditor. In that case, while the date of default mentioned in Part-IV of the application was based on the original sanction of loan facilities, the contention of the corporate debtor was that the date of default should be reckoned on the basis of the restructured loan which fell within the prohibited period covered by Section 10A of the Code. While accepting the corporate debtor's contention and admitting the application, the learned co-ordinate Bench concluded that the restructured plan was a new financial contract; that the default had taken place in payment of the very first instalment of debt and interest that fell due in terms of the revised restructuring plan (as in the present case) and that the date of default being 31.03.2021 was outside the 10A period.

4.19 It is now proposed to deal with the judicial decisions cited on behalf of the Applicant/ Corporate Debtor. For instance, the judgment of Hon'ble Supreme Court in ***Ramesh Kymal*** (supra) has no application to the present case as no change of date of default is being sought by the Respondent/ Financial Creditor and Part-IV of the present Application clearly states that the date of default is 31.03.2022 under Section 7 of the Code on the basis of a subsequent default

under the OTR. Similarly, with regard to the judgments cited in para 2.4 above, there is no room for doubt that admission made in the pleadings by a party is the best proof of the admitted facts. However, the Applicant/ Corporate Debtor conveniently chooses to overlook the fact that the pleadings of the Respondent/ Financial Creditor in Part-IV of the Application also show that the "date of default" is 31.03.2022 when the Corporate Debtor committed a default in paying the instalment due and payable under the OTR Agreement dated 21.06.2021. Further, the legal proposition emerging from the cases of ***Rajasthan State Industrial Development and Investment Corporation, Hindustan Cooperative Housing Building Society Limited*** and ***J.K. Cotton Spinning and Weaving Mills*** (supra) is well-settled that the phrase "*as if*" creates a legal fiction and that such legal fiction should be deemed to be in existence only for the limited purpose for which it was created. However, this does not mean that the legal or deemed fiction can be applied in such a manner and to such an extent as to draw far-fetched and implausible inferences or conclusions like the one drawn by the Applicant/ Corporate Debtor contending that "*Clause 22 (of RBI Covid Circular) provides that in the event of default under the Restructuring Agreement, the resolution plan will cease to be applicable as if the same was never invoked*". We have already brought out in Para 4.13 above as to how this contention raised by the Applicant/ Corporate Debtor is totally misconstrued.

4.20 It is well-settled that the provisions of the Code must be given a purposive interpretation in order to serve the avowed objective of the Code. An interpretation which defeats the very purpose or objective of the Code or renders it nugatory and otiose has to be avoided. If the interpretation sought to be put by

the Applicant/Corporate Debtor on the RBI Covid Circular is accepted, a defaulter corporate debtor would stand to derive multiple advantages – having already committed a default under the original loan documents, it once again commits default under the terms of the OTR and above all, it would also manage to escape from the consequences of default of financial debt seeking shelter under the provisions of Section 10A of the Code because all such OTRs sanctioned under the RBI Covid Circular would involve defaults occurring during the period covered by Section 10A. To sum up, the cause of action for the Main Application under Section 7 arose in the present case on 20.06.2022, as brought out in Para 4.11 above when pursuant to invocation of guarantee by the Respondent/ Financial Creditor, the Applicant/Corporate Guarantor failed to pay the outstanding dues of Rs.72.32 Crore in default in full in terms of the Deed of Guarantee. In these circumstances, we have no hesitation in holding that since the default occurred in the instant case long after the expiry of the prohibited period covered under Section 10A, the Application filed by the Respondent/ Financial Creditor is maintainable and is not at all barred under Section 10A of the Code.

4.21 Accordingly, in view of aforesaid discussions and findings, I.A. No.3903 of 2022 is **dismissed.**

4.22 This order in the IA being adverse to the Applicant/Corporate Debtor who is the Petitioner in the Writ Petition before the Hon'ble Bombay High Court, we are desisting from giving effect to this order until 24.09.2024 in deference to the common order dated 15.02.2024 passed by the Hon'ble High Court in WP (L) No.25350 of 2023 and WP (L) No.27363 of 2023.

4.23 List the Main Application for orders on 24.09.2024.

4.24 A copy of this order shall be electronically communicated to the Insolvency and Bankruptcy Board of India for their information and record.

Sd/-
SANJIV DUTT
MEMBER (TECHNICAL)

Sd/-
K. R. SAJI KUMAR
MEMBER (JUDICIAL)

Deepa