IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH-VI

CP (IB) No. 348/MB-VI/2022
[With IAs 4183/2023; 4520/2023 & 446/2024]

[Under Section 7 of the Insolvency and Bankruptcy Code, 2016 r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016]

IN THE MATTER OF:

ICICI BANK LIMITED

[CIN- L65190GJ1994PLC021012]

Registered Office: ICICI Bank Tower, Near-

Chakli Circle, Old Padra Road Vadodara - 390007

Gujarat.

…Financial Creditor

V/s

SUPREME HOUSING AND HOSPITALITY PRIVATE LIMITED

[CIN- U45201MH2006PTC165665]

Registered Office: Sharma Bungalow,

Behind Lake Castle Building, Hiranandani Garden

Powai, Mumbai -40007, Maharashtra

...Corporate Debtor

Pronounced: 14.02.2024

CORAM:

HON'BLE SHRI K. R. SAJI KUMAR, MEMBER (JUDICIAL)

HON'BLE SHRI SANJIV DUTT, MEMBER (TECHNICAL)

Appearances: Hybrid

Financial Creditor :	Sr. Adv. Gaurav Joshi a/w Adv. Sushmita Gandhi a/w. Adv. Nasrin Shaikh a/w Adv Kushal B. i/s Induslaw.
Corporate Debtor :	Sr. Adv. Vikram Nankani a/w Adv. Rohan Agrawal, Adv. Sujit Lahoti, Adv. Shrushti Relekar a/w. Adv. Tejasvi, i/b Sujit Lahoti & Associates.

ORDER

[Per: K. R. SAJI KUMAR, MEMBER (JUDICIAL)]

1. **Background**

1.1 This C.P. (IB) No. 348/MB/C-VI/2022 (Present Application) was filed by ICICI Bank Limited, the Financial Creditor (FC), on 18.02.2022, under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC) for initiating Corporate Insolvency Resolution Process (CIRP) in respect of Supreme Housing and Hospitality Private Limited, the Corporate Debtor (CD)**.** A total amount of Rs. 157,47,06,087.33/- was disbursed by the FC to two Borrowers, viz., Supreme Infrastructure India Limited (SIIL) and Supreme Vasai Bhiwandi Tollways Private Limited (SVBTPL) against which the CD had executed two Indenture of Mortgages. A total amount of Rs. 268,39,09,810.87/- (Two Hundred Sixty-Eight Crores Thirty-Nine Lakh Nine Thousand Eight Hundred Ten Rupees and Paise Eighty-Seven) is claimed by the FC to be in default by the CD as on 31.01.2022. According to the FC, the credit facilities given to the Borrowers/SIIL and SVBTPL, were guaranteed by the CD under the said Indenture of Mortgages. According to the FC, the date of invocation of guarantee in respect of the credit facilities provided to SIIL under one of the Indenture of Mortgages (Deed), is 19.03.2018 and the date of invocation of guarantee in respect of the other deed of Indenture of Mortgage for facilities extended to SVBTPL is 01.08.2017.

1.2 An IA No. 4183/2023 is filed by the CD praying for keeping the Present Application in abeyance, by exercising the inherent and discretionary powers of this Tribunal under Rule 11 of the National Company Law Tribunal Rules, 2016 (NCLT Rules), keeping in mind the provisions of Section 7(5)(a) of the IBC and the ratio laid down by the Hon'ble Supreme Court in *Vidarbha* judgment dated 12.07.2022 in Appeal No. 4633/2021. The prayer is effectively for keeping the Present Application *sine die* or until an order in CA (CAA) 153/2022, filed under Sections 230-232 of the Companies Act, 2013 (Companies Act), pending before Bench II of this Tribunal, is passed.

1.3 Another IA No. 4520/2023 is filed by the CD to amend IA No. 4183/2023 with respect to amendment of the CP number mentioned wrongly therein. Yet another IA No. 446/2024 is filed by the CD placing on record the Minutes of the Joint Lenders' Meeting (JLM), in the Scheme Application. According to the CD, these Minutes have some bearing on the merits of the Present Application.

2 Contentions of FC

2.1 The FC submits that it had sanctioned credit facilities to the tune of Rs. 200 Crores to SIIL on 29.06.2011, for the purpose of taking over its existing term loans and investing in a special purpose vehicle in the form of redeemable preference shares issued by the said vehicle. The said facilities were in the nature of Restructured Term Loan of Rs.

115,61,11,042.80/- and Funded Interest Term Loan of Rs. 19,08,95,044.53/- in favour of SIIL and Rs. 35,00,00,000/- by way of Corporate Rupee Term Loan, in favour of SVBPTL. The CD provided corporate guarantees in lieu of the repayment of credit facilities given by the FC to the Borrowers/SIIL & SVBTPL.

2.2 Out of the above sanctioned Funded Interest Term Loan, the FC disbursed Rs. 7,12,39,805.10/- to SIIL and Rs. 22,77,00,000/- to SVBPTL. There have been execution of multiple documents such as credit arrangements; amendatory credit arrangements; supplemental arrangements; Deed of Hypothecation; Indenture of Mortgages; Corporate Rupee Loan Facility Agreement; Share Pledge Agreement and Amendment to Share Pledge Agreement; Corporate Guarantee Agreement; Personal Guarantee Agreement; Master Restructuring JLF Agreement, etc., by SIIL and SVBPTL starting from 29.06.2011, being the date of sanction of credit facilities up to 12.06.2015.

2.3 SVBTPL executed a Deed of Hypothecation in favour of the FC for securing the Restructured Credit Facilities availed by it. Further, the FC issued Pledge Invocation Notice in respect of the 33,00,000 equity shares pledged by Mr. Bhawanishankar Sharma and Mr. Vikram Sharma, Directors of the CD on 04.08.2016. A Loan Recall notice was also issued on 04.08.2016 by the FC for recalling the Restructured Rupee Term Loan and the Funded Interest Term Loan including

invocation of guarantees executed by the Directors of the CD, Mr. Bhawanishankar Sharma, Mr. Vikram Sharma and Mr. Vikas Sharma.

2.4 The Ld. Sr. Counsel for the FC submitted that as SIIL defaulted in repayment under the Restructured Credit facilities, the FC invoked guarantee provided by the CD on 15.03.2018. According to the Ld. Sr. Counsel for the FC, SIIL and SVBTPL admitted and acknowledged the debt and liability of Rs. 137.74 crore and Rs. 28.82 crore respectively as being due and payable by them in the letter dated 25.09.2018. In the said letter (Exhibit 'WW'), the SIIL and SVBTPL (Borrowers) have admitted the liability and had expressed inability to timely repay the facilities due to economic slowdown and other reasons not completely attributable to them.

2.5 Subsequently, on 05.10.2018, the FC rejected the proposal of the SIIL to settle the outstanding loan facilities and asked it to tender the full outstanding dues including interest, penal interest and other charges. Subsequently, a credit arrangement letter was issued on 04.12.2018, wherein the SIIL was called upon to accept the arrangement letter but SIIL did not accept the same. Later, on 15.07.2019, an undertaking was issued by SIIL that the terms of the order passed by the Hon'ble High Court of Bombay in Commercial Suit (L) No. 1137/2018 dated 19.10.2018, shall be a mandatory part of any resolution plan submitted by it, including but not limited to the terms relating to payment and enforcement of security. On 30.09.2020, SIIL and BHS Housing Private

Limited, (another corporate guarantor) addressed a revival letter to the security Trustee with respect to the credit facilities.

2.6 The FC by notice dated 04.08.2016, recalled the financial assistance granted to SIIL, and on 10.02.2017, recalled the financial assistance extended to SVBTPL. The guarantee given by the CD in respect of the facility to SIIL under the Deed dated 21.06.2014, was invoked by the FC on 15.03.2018; and the guarantee given by the CD in respect of the facility to SVBTPL under the Indenture of Mortgage dated 30.07.2014, was invoked by the FC on 31.05.2018. The Deed dated 21.06.2014 and the Indenture of Mortgage dated 30.07.2014 are identical and similarly worded, both were respectively executed by the CD for the purpose of securing repayment of the credit facilities given by the FC to the Borrowers/SIIL & SVBTPL.

2.7 However, both SIIL and SVBPTL committed default, and the FC recalled the loan facility and also invoked the guarantee given by SVBTPL. Neither SIIL nor SVBTPL replied to the recall notice dated 04.08.2016, or repaid the loan with interest to the FC. According to the FC, as on 31.01.2022, a total amount of Rs. 2,23,20,98,291.81/- stood outstanding by SIIL, and Rs. 45,18,11,519.06/- stood outstanding by SVBTPL, total by both being Rs. 268,39,09,810.87/-. The date of default by SIIL is 19.03.2018 and that of SVBTPL is 01.08.2017, being the respective dates of invocation of guarantees. The said amounts have become payable by the Borrowers/SIIL & SVBTPL, as principal

borrowers, and the CD as guarantor has not paid the same, and are in default. Hence, the FC prays that CIRP be ordered in respect of the CD under Section 7 of the IBC.

3 Contentions of CD

3.1 The main contention of the CD is that it has not executed any guarantee or counter indemnity in favour of the FC, and hence, it owes no financial liability towards it. According to the CD, there is no existence of "financial debt" within the meaning of Section 5(8) of the IBC. This contention is primarily based on the contents of the letter dated 20.06.2014, from the FC requesting SIIL/Borrower, to create second charge in "Wing B of Supreme Business Park" (mortgaged property) belonging to it, in relation to the loan facility sanctioned and disbursed by the FC to it. The Ld. Sr. Counsel for the CD submits that in the said letter, there is no reference to any guarantee but the request of the officer of FC was only to create a second charge as there was shortfall in the security in respect of the credit facilities availed of by SIIL and SVBTPL on 21.06.2014 and 30.07.2014 respectively. According to the Ld. Sr. Counsel for the CD, the Deed is in the nature of a simple mortgage, and is considered as a guarantee by the FC due to its gross misunderstanding of the document. The Deed does not have any element of guarantee. To substantiate the submissions, he brought to our attention definitions of certain expressions used in the Deed such

as "facility agreement", "borrower", "mortgagor", mortgagee", "mortgaged property", etc. Further, according to him, *vide* Board Resolution of the CD dated 21.05.2014, the CD had authorised its CEO only to create second charge on the mortgaged property and it does not talk about guarantee. When the CEO of the CD was only authorised to *"execute such documents and papers as may be necessary and the drafts of the mortgage documents including the Indenture of Mortgage placed on the table and duly initialed by the Chairman for the purpose of identification",* he could not have executed a guarantee document, according to the Ld. Sr. Counsel. He vehemently argued that this Board Resolution of the CD is an authority given to the officer to execute mortgage documents in connection with the security. He further argued that a guarantor does not provide securities and while executing a mortgage deed, any recital as to guarantee cannot be regarded as indemnity or guarantee but only security in the form of mortgage. According to him, a complete reading of the events would reveal the intention of the parties to create the document. He specifically addressed the recital in Clause 35 of the Deed that the Mortgagor (CD) would be furnishing Board Resolution in relation to the 'Mortgaged and the guarantee obligations.' However, in the Board resolution, the CD had only provided the Board's resolve to create second charge on the mortgaged property. Since the CEO of the CD did not have the authority to execute any guarantee, but a mortgage deed, the Deed could not

have been one in the nature of guarantee. He further pointed out that the letters dated 30.04.2014 and 31.07.2014, written by the officers of the FC, addressed to the Sub-Registrar only refer to their authority to sign indenture of mortgage and other documents, for the property belonging to the CD, as may be required to complete mortgage formalities in relation to the financial assistance sanctioned to SIIIL and SVBTPL by the FC. According to the Ld. Sr. Counsel, guarantee cannot be read into these letters. He further argued that the liability of the CD is limited to the value of the property under the Deed. The FC has only a second charge to the mortgaged property as Canara Bank (erstwhile Syndicate Bank) possesses the first charge. He advocated that a mortgage is not included within the definition of a "financial debt" under Section 5(8) of the IBC, and thus, the FC has no relationship with the CD as a financial creditor. Citing the decision of the Hon'ble Supreme Court in *Anuj Jain, IRP for Jaypee Infratech Limited Vs. Axis Bank Limited* [(2020) 8 SCC 401)], he argued that the CD cannot be regarded as a debtor, as it does not owe any debt to the FC. He also referred to the Hon'ble Apex Court's decision in *Phoenix ARC (P) Ltd. Vs. Ketulbhai Ramubhai Patel* [(2021) 2 SCC 799)], wherein it was held that a secured creditor, by virtue of collateral security extended by a CD, would not be covered by the definition of "financial creditor" under Sections 5(7) and 5(8) of the IBC.

3.2 The next argument of the Ld. Sr. Counsel for the CD revolves around a Scheme of Compromise and Arrangement under Sections 230-232 of the Companies Act (Scheme) by SIIL in July 2022, wherein the Canara Bank had proposed a Composite Scheme of Arrangement with its secured financial creditors. Hence, according to him, the Present Application under Section 7 of the IBC should not be proceeded with in view of the Scheme. He fiercely advocated that there is no statutory or express bar or prohibition from Sections 5 to 32 of the IBC to consider the Scheme as a relevant factor under Section 7 of the IBC. He further submitted that the objective of Sections 230-232 of the Companies Act is to restructure a debt and to help the CD to come out of its debt.

3.3 The final argument of the Ld. Sr. Counsel for the CD is that the FC is adopting this Section 7 Application as a recovery mechanism which is not the objective of the IBC as reflected in many of the judgements of the Hon'ble Apex Court, Hon'ble NCLAT and other Tribunals. He submitted that the CD is*, inter alia,* engaged in the business of real estate and development of infrastructure projects and employs number of persons on direct and contractual basis. Being a solvent company, it is presently executing infrastructure projects. It is submitted that order of admission passed under Section 7 of the IBC would hamper its various stakeholders and would adversely affect its prospects of restructuring of the facilities under the Scheme. In the above

circumstance, the Ld. Sr. Counsel sums up by saying that admission of the CD into CIRP is to be avoided.

4 Analysis and Findings

4.1 We have considered all the documents and pleadings and heard at length both the Ld. Sr. Counsel for the FC and the CD. In order to admit an application under Section 7 of the IBC, the Adjudicating Authority has to satisfy as to whether-

(i) a default has occurred;

(ii) the application is complete; and

(iii) there is no disciplinary proceeding pending against the proposed resolution professional.

4.2 The term "default" is defined under Section 3(12) of the IBC as non-payment of debt when the whole or any part or instalment of the amount of debt has become due and payable and is not paid by the corporate debtor. "Debt" is defined under Section 3(11) as a liability or obligation in respect of a claim which is due from any person and includes a financial debt. The term "claim" under Section 3(6)(b) means a right to payment or right to remedy if such right gives rise to a right to payment. The expression "financial debt" under Section 5(8)(h) includes any counter-indemnity obligation in respect of a guarantee, indemnity, etc. Under Section 3(30), secured creditor is a creditor in favour of whom security interest is created. As defined in Section 3(31) of the IBC,

"security interest" is a right, title, or interest or claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment, and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of a person.

4.3 In the light of the above, it is incumbent upon us to analyse if there is a debt which is due and payable to the FC by the Borrowers/SIIL & SVBTPL and the CD, as also if there is a default in repayment of such debt by them. The documents for ascertaining the existence of default in this matter are as under:

(i) Facility Agreement dated 01.07.2011, for rupee term loan of Rs. 200 Crore to SIIL;

(ii) Share Pledge Agreement dated 24.10.2011, executed by SIIL, which is a group company of the CD and its Directors Mr. Bhawanishankar Sharma and Mr. Vikram Sharma, in favour of the FC, pledging certain shares;

(iii) Power of attorney in respect of the pledged shares by the Directors of SIIL in favour of the FC, to exercise all rights and obligations of the shares;

(iv) Confirmation and acknowledgment of security interest created pursuant to the facility documents dated 24.10.2011;

(v) Deed of Hypothecation dated 16.01.2012, between SIIL and the FC in respect of certain movable properties;

(vi) Indenture of Mortgage dated 21.06.2014, executed by the CD, mortgaging certain immovable property called “Supreme Business Park” in Powai, Mumbai, as security for the facilities obtained by SIIL as per the Facility Agreement dated 01.07.2011.

4.4 It is the case of the CD that the Indenture of Mortgage dated 21.06.2014 (Deed) was executed since there was a shortfall in the security offered by the Borrower/SIIL in respect of the Facility Agreement between the FC and SIIL. According to the Ld. Sr. Counsel for the CD, there is only a mortgagor-mortgagee relationship between the CD and the FC. As the title of the Deed indicates, there is no legal guarantee given by the CD promising or offering to pay the FC any amount if defaulted by the Borrowers/SIIL & SVBPTL. He argued that mortgage does not fall within ‘financial debt’ under Section 5(8) of the IBC, and there is no question of any financial debt owed to the FC by the CD. According to him, the FC is taking a chance to read the terms of the mortgage as guarantee and is attempting to use NCLT as a recovery forum, which is against the intention of the IBC. He further explained that a document of guarantee is coextensive and, therefore, at the best, the Deed can be said to be one of co-obligation. On the contrary, according to the Ld. Sr. Counsel for the FC, a document should be read as a whole and the title alone does not determine the

character of the document. Hence, this aspect warrants close examination and scrutiny.

4.5 The Ld. Sr. Counsel for the CD has submitted that there is no dispute whatsoever as to the execution of the Deed. The debt and default are also undisputed and indisputable. The only objection, according to him, is that the CD had no intention and purpose of execution of the Deed as a guarantee to the loan sanctioned and disbursed. Examination of the Board Resolution of the CD dated 21.05.2014, for creating second charge on the property, viz., "Supreme Business Park", shows that the CD authorised Mr. Shivanand Samant, CEO "…*to sign and seal any deeds, documents, agreements and may be necessary to execute all the pledge documents and shall sign thereto to do all other acts, deeds and things as may be necessary in this behalf."* (Emphasis Supplied). The CEO was further authorised *"…to affix the Common Seal of the Company wherever necessary in accordance with the Articles of Association and Mr. Bhawanishankar H. Sharma or Mr. Navneet Katiyar, Authorised Signatories, … to countersign the same in the token thereof."* (Emphasis Supplied). Mr. Bhawanishankar H. Sharma is none other than the Director of the CD who has drawn and signed the said Board Resolution for and on behalf of Board. The First Schedule to the Deed shows that Mr. Shivanand Samant, CEO signed and affixed the Common Seal of the CD in the presence of Mr. Bhavanishankar H. Sharma, Director, who has also signed in token as mandated by the

Board. According to the Ld. Sr. Counsel, the CD had no intention to sign and execute a guarantee deed. Further, the intention of the FC was only with respect to creation of second charge on the mortgaged property due to shortfall of the security in the Rupee Term Loan given to SIIL and SVBTPL. However, the first paragraph of the Board Resolution states that *"the company do approve and execute such documents and papers as may be necessary and that the drafts of the mortgage documents including the Indenture of Mortgage placed on the table and duly initialled by the Chairman for the purpose of identification…."* (Emphasis Supplied). The CD has no case that the CEO had signed and executed the Deed against the 'will' of the Board. There is nothing to show that the draft of the Deed was not placed on the table of the Chairman for due initialling for the purpose of identification. The Minutes of Board Resolution was drawn out and signed by Mr. Bhavanishankar H. Sharma, Director. He also countersigned the execution of the Deed which was signed and stamped by the CEO. It is, therefore, hard to believe that Mr. Sharma had not read and understood the terms of the Deed before countersigning. All the above clearly indicate that the CD had full knowledge and information as to the contents of the Deed and its several facets. The Ld. Sr. Counsel for the FC has drawn our attention to the terms of the Deed which make provisions for making good the shortfall by the CD. We, therefore, feel that intention of the parties to

the Deed is to be seen before construing the various terms. The Ld. Sr. Counsel for the FC further submitted that, as known in commercial parlance, indenture of mortgage is an agreement between lender and borrower containing the terms and conditions of loan agreement. Guarantee deed is one where the guarantor agrees to guarantee obligations of a third party in the event of failure of that party to fulfil the obligations. As is well established, guarantor's liability is coextensive with that of the principal borrower. According to him, whatever be the title of an agreement, the clauses of the agreement would determine the real intent and purport.

4.6 The Ld. Sr. Counsel for the CD submitted that the authority letters dated 30.04.2014 and 31.07.2014, written to the Sub-Registrar by the officers of the FC were for registration of mortgage and not for registration of guarantee. However, we feel that these letters do not reflect the real intention of FC as to the particular nature of the document but these are only to demonstrate their authority to represent the FC before the Sub-Registrar to execute the document. Hence, we hold that the letters cannot be determinative as to the contents or character of the document. This is decided against the CD.

4.7 Now, let us closely examine the Deed as to its contents and character. It is titled and styled as 'Indenture of Mortgage'. Dictionary meaning of indenture is that it is a formal contract. Mortgage is a contract for giving right by one party to the other to take away the property in the event of

failure of repayment of the money borrowed with or without interest. The Deed creates a second charge and mortgage of the properties of the CD, as SIIL was unable to create the required security in respect of Facility Agreement. The FC, therefore, asked the CD to create second charge as there was shortfall in the security provided by SIIL and SVBTPL. The Deed is registered as a mortgage deed. A close scrutiny of the Deed reveals its various facets. **Clauses 4 and 7** of the Deed empower the Mortgagee/FC to sell the mortgaged property and realise the debt in the event of any default. **Clause 5** states that the mortgaged property shall remain as security with the Mortgagee/FC as enforceable for the due payment of debt. On happening of default by the Mortgagor/CD, it empowers the Mortgagee/FC, by **Clause 8** (Page 139-140)*, inter alia,* to carry on and manage its business; appoint Receiver; employ experts, officers, agents, managers, clerks, accountants, servants, workmen and others to carry on its business; to do any other things to continue the business; acquire and provide machinery, materials and things for the business; insure the mortgaged properties against loss or damage by fire and against for sums; settle, arrange, compromise and submit to arbitration any accounts, claims, questions, or disputes whatsoever which may arise in connection with the said business or mortgaged properties; demise, let out, sub-let the mortgaged properties or any part thereof; exchange the mortgaged properties for any other security or property; assent modification of any

contract or arrangements in respect of the mortgaged properties; establish, maintain and operate all the accounts; give discharge for accounts paid to the Mortgagor/CD by any persons; sign receipts in respect of amounts received; renew, replace such plant/equipment as shall be worn out or lost or otherwise becomes unserviceable; repair, keep in repair the buildings, machinery, plant and the property comprised in the mortgaged properties; carry on the business without being answerable for any loss or damage which may happen, etc. Further, the Mortgagee/FC is empowered to borrow monies on security of the mortgaged property under **Clause 9** (Page 140). The Mortgagee/FC is given right to sell the mortgaged property under **Clause 10** (Page 140) under the provisions of the Transfer of Property Act, 1882.

4.8 Further, **Clause 31** (Page 149) states that in the event of default on the part of the Borrowers/SIIL & SVBTPL under the Facility Agreement, the Mortgagor/CD shall, upon demand to the Mortgagee/FC, forthwith pay to the Mortgagee/FC without demur all/part of the amounts demanded by the Mortgagee/FC and payable by the Borrower/SIIL & SVBTPL under the Facility Agreement. It has been further agreed by the Mortgagor/CD that any such demand made by the Mortgagee/FC on the Mortgagor/CD shall be final, conclusive and binding notwithstanding any difference or any dispute between the Mortgagee/FC and the Borrower/SIIL & SVBTPL. It was vehemently

argued by the Ld. Sr. Counsel for the CD that the consequence of default of payment is only the right to demand payments from the CD and sale of the mortgaged properties by the FC as contained this Clause.

4.9 However, **Clause 33** (Page 149) states:

"The Mortgagor understands that the Mortgagee has agreed to provide the Facilities to the Borrower upon the firm guarantee of the Mortgagor that, in the event of any shortfall in meeting the payment/repayment obligations of the Borrower under the Facility Agreement and the Transaction Documents, the same shall be made good by the Mortgagor, and in support of this assurance the Mortgagor has agreed to mortgage the Mortgaged Properties in accordance with the terms and conditions of this Indenture of Mortgage." (Emphasis Supplied). This shows that the CD had understood that besides being a mortgage, the Deed also guaranteed payment and it agreed to make good the FC in the event of shortfall in meeting the payment/repayment by the Borrower (SIIL). The Ld. Sr. Counsel for the FC has drawn our attention to **Clause 36** (Page 149-150), wherein, it is stated:

"The Mortgagor hereby represents and warrants that the Mortgagor is providing this mortgage and guarantee in favour of the Mortgagee, for securing the Facilities availed by the Borrower, and in the ordinary course of business of the Mortgagor." (Emphasis Supplied). According to the Ld. Sr. Counsel, this clearly points to the guarantee by the CD by

promise to make good the FC, in the event of any default by the Borrower (SIIL). It is interesting to note the recitals of the Deed (Page 150-151) in **Clause 41** of the Deed:

"The rights of the Mortgagee against the Mortgagor shall remain in full force and effect notwithstanding any arrangement which may be reached between the Mortgagee and the other guarantor(s), if any, or notwithstanding the release of that other or others from liability and notwithstanding that any time thereafter the other guarantor(s) may cease for any reason whatsoever to be liable to the Mortgagee, the Mortgagee shall be at liberty to require the performance by the Mortgagor of their obligations hereunder to the same extent and in all respects as if the Mortgagor had at all times been solely liable to perform the said obligations." (Emphasis Supplied). This also indicates that the rights of FC against the CD "shall remain in full force and effect". The expressions *"the other guarantor(s), if any"*; *"the release of that other or others from liability"* and *"notwithstanding that any time thereafter the other guarantor(s) may cease for any reason whatsoever to be liable to the Mortgagee"* denote that the CD is also treated as a guarantor with any other guarantor(s).

Further, the recital in **Clause 41**, *inter alia,* that *"…..Mortgagee shall be at liberty to require the performance by the Mortgagor of their obligations hereunder to the same extent in all respects as if the Mortgagor had at all times been solely liable to perform the said*

obligations" indicates a nexus of principal borrower (SIIL) and guarantor (CD) vis-à-vis the FC.

Clause 49 of the Deed states that *"These presents shall be a continuing one and shall remain in force and effect till such time the Borrower repays/pays in full the Facilities together with all interest, commission, costs, charges, expenses and all other monies payable under the Facility Agreement and/or the other Transaction Documents."* (Emphasis Supplied). This shows that the obligations of the CD are in the nature of continuing guarantee till the time the Borrower/SIIL discharges its liability towards the FC.

Again, **Clause 51**, says that *"Any admission or acknowledgment in writing given by or any part payment made by the Borrower in respect of the Facilities shall be binding on the Mortgagor and shall be treated as given on behalf of the Mortgagor also."* (Emphasis Suppled). This is to bind the CD with the continuing obligations of the Borrower/SIIL towards the FC.

Clause 52 says that *"These presents are in addition to and not by way of limitation of or substitution for, any other guarantee(s) that the Mortgagor may have previously given or may hereafter give to the Mortgagee (whether alone or jointly with other parties) and these presents shall not revoke or limit any such other guarantee(s)."* This is telescoped to the other personal guarantees given by the Directors Mr.

Bhawanishankar Sharma and Mr. Vikram Sharma to the FC on 29.07.2014.

In short, all the above Clauses clearly bring out the fact that the Deed is not a simple mortgage but contains various Clauses and recitals indicating different activities agreed to by the Mortgagor/CD in respect of its liability to the Mortgagee/FC. The Clauses embedded in the Deed travel beyond the bounds of a simple mortgage. We find that the expressions “mortgage” and “guarantee” are used in Clauses 31, 32, 33, 35, 36, 41, 49 and 51 which demonstrates that the Deed is a document that creates multiple obligations, including mortgage and guarantee. The recitals in the above Clauses are in the nature of a contract to perform the promise of guarantee by the CD, and to make good the FC, in the event of default by the Borrower/SIIL. As per law settled in catena of cases, a contract should be read as a whole in order to ascertain its true nature, rather than fixing on the contractual terms individually. Although title to a document can give a general idea of the contract, the contents would determine the real nature of the contract. In *Faquir Chand Gulati Vs. Uppal Agencies Pvt. Ltd.,* [Civil Appeal No. 3302/2005], the Hon’ble Supreme Court reiterated the legal position that the title or caption or the nomenclature of the instrument/document is not determinative of its nature and character, though the name may usually give some indication of the nature of the instrument/document. The nature and true purpose of a document has to be determined with

reference to the terms of the document, which express the intention of the parties. As held in *Bihar SEB Vs. Green Rubber Industries* [(1990) 1 SCC 731], every contract is to be considered with reference to its object and the whole of its terms and accordingly the whole context must be considered in endeavouring to collect the intention of the parties, even though the immediate object of inquiry is the meaning of an isolated clause.

4.10 We feel that when the language of the contract is clear, the plain language of the terms is to be applied. Further, it has been held by the Hon'ble Apex Court in *Nabha Power Limited (NPL) Vs. Punjab State Power Corporation Limited (PSPCL) & Anr*. [Civil Appeal No. 179 of 2017], that in the multi-clause contract inter se the parties have to be understood and interpreted in a manner that any view, on a particular clause of the contract, should not do violence to another part of the contract. Here is a case where the Director of the CD had drawn and signed the Board Resolution dated 21.05.2014, on behalf of the Board, authorising the CEO to execute the documents, wherein the Board also authorised him to countersign the execution of the Deed in token thereof. The same Director has actually signed the Deed dated 21.06.2014, in token thereof. There is nothing to show that the said Director did not/could not go through the contents of the Deed before he put his hand in token thereof. It can only be presumed that the Director of the CD was a witness to the execution of the Deed between

the CD and the FC in relation to the loan availed of by the Borrower/SIIL, wherein the CD also undertook guarantee to the Facility Agreement and Transaction Documents. The same Director Mr. Bhavanishankar H. Sharma conveyed the decision of the Board of the CD authorising the CEO to execute the documents in favour of the FC as also authorised himself and another Director to countersign execution of the Deed in token thereof. This clearly demonstrates that by signifying the CD's willingness, the CEO executed the Deed, which was countersigned by the same Mr. Bhavanishankar H. Sharma, thus concluding a "promise" within the meaning of Section 2(b) of the Indian Contract Act, 1872. Going by the recitals in the Deed, we hold that the Deed is not a mortgage deed simpliciter but it is a composite document containing many terms including one of guarantee. The FC herein not only has a security interest over the mortgaged property, but in the event of default by the Borrowers/SIIL & SVBTPL, the FC is entitled under the Facility Agreement to require the CD to pay forthwith the amounts due and payable by the said borrowers. The CD is thus a Mortgagor as well as a Guarantor. We hold that the Deed is squarely a contract of guarantee within the meaning of Section 126 of the Indian Contract Act, 1872.

4.11 The CD filed Commercial Suit (L) No. 1137/2018 before the Hon'ble Bombay High Court for redemption of mortgage security created in favour of the Syndicate Bank (now Canara Bank) over Supreme

Business Park (mortgaged property under the Deed in the instant matter). The Borrowers/SIIL & SVBTPL and the FC herein were defendants in the said suit. The Hon'ble Court on 19.10.2018, recorded that a full and final settlement was reached by the parties for Rs. 146,09,58,670.09/- payable on 30.09.2018 under the Facilities given by FC herein to SIIL & SVBTPL. The Borrowers (SIIL & SVBTPL) were ordered to pay the above said amount to the FC. Further, *vide* letter dated 15.07.2019, the Borrower/SIIL undertook that the terms of the said order passed by the Hon'ble Court shall be a mandatory part of any resolution plan submitted by it. The execution of the Deed is not disputed, and hence, there is no necessity to further chase this issue. There has been acknowledgment of debt by the Borrowers/SIIL & SVBTPL *vide* letters dated 25.08.2028 and 31.08.2018. The liability of the CD is the same as that of the Borrowers and this position has been upheld in catena of judgments. The guarantees given by the CD were invoked on 21.07.2017 and on 15.03.2018 in respect of Borrowers/SIIL & SVBTPL, respectively calling upon them to pay within 7 days of the date of receipt of the notices of invocation. Failure to make payments by the CD arose on 01.08.2017 and 25.07.2018. Although the CD has pleaded that this Application is barred by the law of limitation, it was not raised at the time of arguments by the Ld. Sr. Counsel for the CD; hence, we are not addressing this issue. By excluding the period between 15.03.2020 till 28.02.2021, as per the order of the Hon'ble

Supreme Court in *suo motu* Petition No. 3/2020, this Application was filed on 18.02.2022, and hence, it is within the period of limitation.

4.12 The Ld. Sr. Counsel for the CD argued that SIIL has proposed the Scheme with all its financial creditors, including the FC herein, and the Scheme will be voted to by majority. A Joint Lender's Forum (JLF) has already convened several meetings and JLF is expected to vote on the Scheme. Hence, according to him, success of the Present Application under Section 7 of the IBC would fail the Scheme under Section 230-232 of the Companies Act. However, on a perusal of the Minutes dated 21.12.2023, it is found that ICICI Bank (FC herein) informed the lenders that their competent authority did not recommend the proposal and requested for allowing the continuation of their security with respect to the mortgaged property to enable them to resubmit their proposal with the revised terms. Hence, this Application under Section 7 of the IBC does not have anything to do with the Scheme, and hence, IA 446/2024 is disposed of as the prayer was only to take the above on record. Now, IA 4183/2023 read with IA 4520/2023 have been filed praying for stay of the Present Application on the ground that the Scheme is pending in Company Petition No. 348/2022 before Bench II of this Tribunal. The Ld. Sr. Counsel for the CD argued that the Present Application should not be proceeded with until the success or otherwise of the Scheme is known. Further, we find that another scheme application filed by the CD

vide CA(CAA) 233/MB/C-III/2023, before Bench III of this Tribunal has been dismissed on 24.01.2024, *inter alia,* observing as follows:

"It is also strange to note that the Applicant Company is seeking stay of proceedings of any nature or whatsoever against it by any of its creditors during the pendency of approval of the present scheme. We have no hesitation in holding that the proposed scheme is prima facie against the spirit of the I&B Code in the garb of Compromise & arrangement scheme with the creditors under the Companies Act, 2013." Hence, we find no merit in the prayer for keeping the Present Application in abeyance. The Hon'ble Supreme Court in *Suresh Kumar Reddy Vs. Canara Bank* [(2023) ibclaw in 67 SC], has already distinguished *Vidarbha* matter and observed that when existence of debt and default have been proved, the NCLT is only bound to admit an application under Section 7 of the IBC. Admission of an application under Section 7 of the IBC is on ascertaining the existence of default by a corporate debtor. The IBC made inroads into the Companies Act, among other Acts, in Section 230, for the purpose of filing an application for compromise or arrangement by a liquidator appointed under the IBC. There is no effect of Sections 230-232 of the Companies Act on an application pending admission under Section 7 of the IBC. The statutory primacy of IBC over other laws, under Section 238, has since been upheld by various Benches of this Tribunal, the Hon'ble NCLAT and the Hon'ble Apex Court. In view of the above, we hold that an

application under Section 7 of the IBC, pending admission, cannot be stalled by an application proposed by the CD under Section 230 of the Companies Act. We feel that both the IBC and the Companies Act must exist harmoniously. But initiation of CIRP under Section 7 of the IBC by a financial creditor cannot be eclipsed by Sections 230-232 of the Companies Act. If such a proposition is allowed, it would encourage corporate debtors to propose schemes under Sections 230-232 of the Companies Act to derail Section 7 applications, leading to miscarriage of justice. Hence, this issue is decided against the CD. These IAs have, consequently, become infructuous, and are, accordingly, dismissed.

4.13 Another aspect raised by the Ld. Sr. Counsel for CD is that the FC is attempting to use this forum as a recovery court. The Sr. Counsel vehemently argued and cited judgements of the Hon'ble SC in *SS Engineers Vs. Hindustan Petroleum Corporation Limited* [2022 SCC Online SC 1385] by saying that, *"it is not the object of the IBC that CIRP should be initiated to penalise solvent companies for non-payment of disputed dues claimed by an operational creditor."* We respectfully disagree with this argument as the Hon'ble Supreme Court in that case was dealing with a matter of operational creditor and not of a financial creditor, hence the context is different and this argument is devoid of merit. Further, *Anuj Jain* and *Phoenix ARC* are inapplicable to the instant matter as we have already found that the Deed has the

character of guarantee as well, and hence, there exists financial debt, within the meaning of Section 5(8) of the IBC.

4.14 In the light of the above facts and law as discussed above, we are of the considered view that in such circumstances, it is imperative that CIRP be initiated in respect of the CD. There exists a “financial debt” as defined under Section 5(8) of the IBC and the CD has committed default since the Borrowers/SIIL & SVBTPL failed to repay the amounts due and payable under the credit facilities after invocation of guarantees by the FC. The guarantees given by the CD to FC were invoked on 15.03.2018 and on 31.05.2018 respectively. We, therefore, find merit in the documents submitted and the arguments advanced by the FC in rebuttal to the reply filed and arguments advanced by the CD. The FC has proved the existence of the debt and default; and the debt remains unpaid and is in default. In view of the above, the present Application filed under Section 7 of the IBC to initiate CIRP in the matter of the CD deserves to be admitted.

4.15 The Applicant has proposed the name of Mr. Prashant Jain, a registered Insolvency Professional having Registration Number- IBBI / IPA-001 / IP - P01368 / 2018 - 2019 / 12131 and e-mail ipprashantjain@gmail.com as the Interim Resolution Professional (IRP), to carry out the functions as mentioned under the IBC and has also given his declaration in Form 2 dated 12.02.2022, having valid

Authorisation for Assignment, stating that no disciplinary proceedings are pending against him.

ORDER

This Application being **C.P. (IB) No. 348/NCLT/MB/C-VI/2022** filed under Section 7 of the IBC by the FC for initiating CIRP in the case of Supreme Housing and Hospitality Private Limited, the CD, is a**dmitted.**

We further declare moratorium u/s 14 of the IBC, with consequential directions as follows:

I. We prohibit-

a) the institution of suits or continuation of pending suits or proceedings against the CD 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 CD 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 CD in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

d) the recovery of any property by an owner or lessor where such property is occupied by or in possession of the CD.

II. That the supply of essential goods or services to the CD, if continuing, shall not be terminated or suspended or interrupted during the moratorium period.

III. That the order of moratorium shall have effect from the date of this order till the completion of the CIRP or until this Bench approves the resolution plan under section 31(1) of the IBC or passes an order for the liquidation of the CD under section 33 thereof, as the case may be.

IV. That the public announcement of the CIRP shall be made in accordance with the provisions of the IBC, the Rules and Regulations made thereunder.

V. That this Bench hereby appoints Mr. Prashant Jain, a registered Insolvency Professional having Registration Number- IBBI / IPA-001 / IP - P01368 / 2018 - 2019 / 12131 and e-mail ipprashantjain@gmail.com as the IRP to carry out the functions under the IBC, the fee payable to IRP/RP shall be in accordance with the Regulations/Circulars issued by the IBBI.

VI. During the CIRP Period, the management of the CD shall vest in the IRP or, as the case may be, the RP in terms of Section 17 of the IBC. The officers and managers of the CD shall provide all documents in their possession and furnish every information in their knowledge to the IRP

within a period of one week from the date of receipt of this Order, in default of which coercive steps will follow.

VII. In exercise of the powers under Rule 11 of the NCLT Rules, 2016, we order the FC to deposit a sum of Rs.5,00,000/- (Five Lakh Rupees) with the IRP to meet the initial CIRP cost, if demanded by the IRP to fund initial expenses on issuing public notice and inviting claims, etc. The amount so deposited shall be interim finance and paid back to the FC on priority upon the funds available with IRP/RP. The expenses, incurred by IRP out of this fund, are subject to approval by the Committee of Creditors (CoC).

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

IX. The Registry is directed to immediately communicate this Order to the FC, the CD and the IRP by way of e-mail and WhatsApp, not later than two days from the date of this Order.

X. **Compliance report of the order by Designated Registrar is to be submitted today.**

Sd/-
SANJIV DUTT
MEMBER (TECHNICAL)

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

// LRA Akshata //