NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH (COURT-II)

Company Petition No. (IB)-39(ND)/2023

IN THE MATTER OF:

Bank of Baroda
Through its Senior Manager,
Zonal Stressed Assets Recovery Branch
Located at: 4th Floor, Rajendra Bhawan,
Rajendra Place New Delhi-110008 **... Petitioner/ Financial Creditor**

VERSUS

Cygnus Splendid Limited
Through its Managing Director
Registered Office:
1009, Arunachal Building, 19
Barakhamba Road Connaught Place,
New Delhi 110001 **...Respondent**

AND IN THE MATTER OF IA. NO. 2786/2023:

Cygnus Splendid Limited
Through its Managing Director
Registered Office:
1009, Arunachal Building, 19
Barakhamba Road Connaught Place,
New Delhi 110001 **... Applicant/Complainant**

VERSUS

1. Bank of Baroda
Through its Senior Manager,
Zonal Stressed Assets Recovery Branch
Located at: 4th Floor, Rajendra Bhawan,
Rajendra Place New Delhi-110008 **... Respondent No. 1**

2. Mr. Pawan Sharma
S/o Shri. P.C Sharma
Senior Manager,
Zonal Stressed Assets Recovery Branch
Located at: 4th Floor, Rajendra Bhawan,
Rajendra Place New Delhi-110008 **... Respondent No. 2**

AND IN THE MATTER OF IA. NO. 2787/2023:

Cygnus Splendid Limited
Through its Managing Director
Registered Office:
1009, Arunachal Building, 19
Barakhamba Road Connaught Place,
New Delhi 110001 **... Petitioner**

VERSUS

Bank of Baroda
Through its Senior Manager,
Zonal Stressed Assets Recovery Branch
Located at: 4th Floor, Rajendra Bhawan,
Rajendra Place New Delhi-110008 **...Respondent**

Section: 7 of IBC, 2016

Order Delivered on: 26.07.2023

CORAM

SH. ASHOK KUMAR BHARDWAJ, HON'BLE MEMBER (J)

SH. L. N. GUPTA, HON'BLE MEMBER (T)

PRESENT:

For the Petitioner : Adv. Kush Sharma, Adv. Asiya Khan

For the Respondent : Adv. NPS Chawla, Adv. Vibhor Kpaoor,
Adv. Sejal Sethi

ORDER

PER: SH. ASHOK KUMAR BHARDWAJ, MEMBER (J)

As can be gathered from the application filed by the Petitioner under Section 7 of the Insolvency and Bankruptcy Code 2016, read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, the Petitioner, Bank of Baroda, a banking company within the meaning of Section 5(c) of the Banking Regulation Act, 1949, constituted under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 sanctioned and disbursed, a term loan facility with a limit of Rs. 9.50 Crores and a Cash-Credit (hypothecation) facility with a limit of Rs. 3.64 Crores to the Respondent viz. 'M/s Cygnus Splendid', in terms of sanction letter Ref. No. SME/LF/DMR-I/2012 dated 11.10.2012. The Term Loan and the Cash-Credit (hypothecation) facility (ibid) were initially given at the request of the Partnership Firm, "M/s Cygnus Splendid" for its business purposes, against securities inter alia, the first charge of hypothecation over stocks, book-debts and other current assets, machineries, furniture, fixture & fittings, office equipment etc., joint and several personal guarantees as well as the first charge of equitable mortgage over immovable properties, belonging to/qua the Partnership Firm.

2. The Respondent i.e., Corporate Debtor is a Limited Company, incorporated and registered under the Companies Act, 1956, having its registered office at 1009, Arunachal Building, 19 Barakhamba Road, Connaught Place, New Delhi-110001. The Respondent is engaged in the

business of manufacturing non-woven fabric sheets and other packing materials etc. It was previously conducting the same business under a Partnership Firm in the name and style of "M/s Cygnus Splendid" till the change in its constitution to a limited company under the name and the style of "Cygnus Splendid Limited".

3. In or around January 2014, the partnership firm through its Partners informed the Petitioner that a public limited company in the name of "M/s Cygnus Splendid Limited" i.e., the Corporate Debtor/Respondent herein had been incorporated to take over the entire business including assets and liabilities of erstwhile partnership firms i.e., "M/s Cygnus Splendid". In the wake, the Petitioner revised/sanctioned the existing credit facilities in favour of the Respondent/Corporate Debtor on the terms and conditions mentioned in sanction letter no. PARLIA/ADV/2013-14 dated 18.02.2014. The Respondent decided to continue to avail the existing credit facilities by accepting the terms and conditions of sanction (ibid), vide its Board Resolution dated 13.03.2014 and further directed the Guarantors to continue their personal guarantee, to execute the security documents and create/extend securities of hypothecated assets and equitable mortgage of their immovable properties in favour of the Petitioner. The details of the loan facilities availed by the CD/Respondent against the execution of the loan documents dated 30.04.2014 as well as the creation of securities by hypothecation, equitable mortgage of immovable properties as also the debit balance as outstanding amount, as mentioned by the Applicant in the Brief Synopsis reads thus:

"i. Term Loan facility ('TL') sanctioned on 18.02.2014 for an amount of Rs. 9,02,50,000/- (Rupees Nine Crores Two Lakhs Fifty Thousand Only) payable to the Applicant on demand together with interest thereon @ 3.75% above Base Rate of the Bank plus 0.15% tenor premium, (Base Rate: 1 0.25% at the time of sanction) per annum with monthly rests or at such other rates as may prevail from time to time [Account No. 05860600004851];

ii) Cash Credit (Hypothecation) facility ('CC') sanctioned on 18.02.2014 for an amount of Rs.3,64,00,000/- (Rupees Three Crores Sixty-Four Lakhs Only) payable to the Applicant on demand together with interest thereon @ 3.25% above Base Rate of the Bank (Base Rate: 10.25% at the time of sanction) per annum with monthly rests or at such other rates as may prevail from time-to-time w.e.f. 30.04.2014 [Account No. 05860500000127]".

4. The Loan account in the name of the Respondent was not operated either in accordance with the banking norms or as per terms and conditions of sanction of short-term loan or credit facility. The Respondent failed to maintain financial discipline and defaulted to pay the instalments of loan amounts as also the interest due thereon in time. Thus, the term loan facility account as also cash credit facility account maintained qua such facilities extended to the Respondent/CD were classified as non-performing asset (NPA) with effect from 13.03.2017 in accordance with RBI guidelines.

5. In the backdrop, the Petitioner preferred O.A. No. 615 of 2017 dated 26.05.2017 against the Respondent/CD and its Guarantor for recovery of an aggregate amount of Rs.7,85,62,274/- along with interest. The O.A. is still pending before the Debt Recovery Tribunal. It is also the case of the Petitioner that it had issued a Demand Notice dated 06.05.2017 under

Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002, requiring the Respondent to discharge in full its liabilities to the Petitioner, failing which the Petitioner would be entitled to exercise the right under sub-section 4 of the Act. As the Respondent did not act in terms of the notice, the Petitioner proceeded to act in terms of the provision of Section 13(4) of the SARFAESI Act, 2002 and took symbolic possession of the secured immovable properties of the CD through possession notice dated 13.09.2017.

6. Subsequently, in terms of the OTS proposals dated 05.09.2019, 07.09.2019, 23.09.2019, 16.12.2019, 21.09.2020 and 03.11.2020, the Respondent/CD acknowledged its liabilities to pay the defaulted amount, qua which its loan had been declared by the Petitioner as NPA.

7. As on 08.10.2022, the aggregate amount of principal and interest defaulted to be paid by the CD/Respondent in respect of both the account nos. 05860600004851 and 05860500000127 of the Corporate Debtor was calculated as Rs.13,49,47,775.57/- (Rupees Thirteen Crores Forty Nine Lakhs Forty Seven Thousand Seven Hundred Seventy Five and Fifty Seven Paise only). The principal amount is Rs.7,42,68,945.27/- and the interest calculated thereon up to 08.10.2022 is Rs. 6,06,78,830.03/-. It is in this wake that the Petitioner has preferred the present petition seeking initiation of CIRP qua the Respondent/CD with all its consequences.

8. In the counter reply filed by it, the Respondent has raised the preliminary objection regarding the filing of the captioned petition through authorized representative. According to the Respondent, though the

Financial Creditor had authorized one Nidhi Kumar through a Power of Attorney dated September 1, 2021 to act on its behalf, but Ms. Nidhi Kumar nominated Mr. Pawan Sharma to be true and lawful Attorney of the Financial Creditor, thus the present petition is not maintainable being not filed by authorized representative of the Petitioner, for the reason that the Power of Attorney dated September 1, 2021 is not annexed with the application. The further pleas espoused in the reply affidavit filed on behalf of the CD are:- (i) the FC has failed to comply with Regulation 20(1A) of the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017, notified vide notification dated 14 June, 2022 , issued by the Insolvency and Bankruptcy Board of India; (ii) the Form-2 annexed with the application is not valid, as in terms of the Form, AFA is valid up to November 16, 2022; (iii) the alleged debt is not due and payable by the CD and the present petition is counterblast of certain civil and criminal proceedings instituted by the CD against the Financial Creditor before various forums, exposing the nefarious and illegal acts being committed by the Financial Creditor and its officers.

9. While referring to the proceedings instituted by the CD (ibid), the CD has mentioned about the OA No. 615 of 2017 filed before the DRT, Delhi for recovery of Rs.7,85,62,274/- qua which the CD preferred counter claim of Rs.45,00,00,000/-, on account of charging of abnormal and excessive interest, losses suffered due to not providing credit facilities as per assurance, theft, loss of business opportunities, aggravated damages, damages for loss of image, reputation, hardship and agony, exemplary

damages. According to the CD, the FC has concealed the aforementioned fact from this Adjudicating Authority. To take the plea regarding the pending disputes between the FC and CD further, the CD has also made reference to the Suit No. 28 of 2022, instituted by the CD before the Ld. Commercial Court at Alipore. A reference has also been made by the CD to the notice dated May 6, 2017 served by the FC upon CD under Section 13(2) of the SARFAESI Act, 2002 and the notice dated May 16, 2017, in terms of which the Financial Creditor sought to recall the loan facility. In the affidavit filed by it, the CD has also made reference to the proceedings under Section 13(4), 14 and 17 of the SARFAESI Act only to emphasis that the FC and the CD are litigating. To buttress the plea of litigation, dispute and the present proceedings be vindictive, the Petitioner has also referred to a complaint dated 12.04.2019 made by it to Kotwali Police Station.

10. Questioning the maintainability of the Petition, the CD has also raised the plea of limitation. According to the CD, the date of default in payment of debt being March 13, 2017, the present Petition preferred in the year 2022 is barred by limitation. Nevertheless, in Para C (page 26) of the reply affidavit, the Respondent has also stated that the CD could offer OTS to the FC. To buttress the plea of settlement, the CD has alleged that it has paid a sum of Rs.2,76,60,055/- to the Financial Creditor towards part satisfaction of the debt owed by the CD. According to the CD, though the FC never accepted the settlement expressly, but the conduct of the CD to acknowledge the aforementioned amount of Rs.2,76,60,055/- and appropriate the same amounts to acceptance of the settlement. It is the

contention put forth on behalf of the CD that the FC has instituted the present proceedings to recover the debt. The CD has finally contended that the loan/credit facility secured by the CD from the FC was against the securities pledged by the CD with the FC and the FC has already invoked the securities. The CD has also taken the plea of repayment/deposit of the amount of debt on different dates i.e., on 21/28 March, 2018 (Rs.1,00,49,391/-) and between March 28, 2018 to September 2018, September 3, 2018 (Rs. Rs.2,76,60,055/-) to settle the defaulted amount. It is also the case of the Respondent that it made continuous effort to settle the defaulted amount and had held meetings with the Senior Officials of the Bank. Paras 38 to 53 of the affidavit, where the reference to the settlements offered by the CD has been made reads thus: -

> *"38) On September 3, 2019, a meeting again took at the Kolkata Regional office of the Bank between Mr. K.K. Singhania, the father of Mr. Vijay Kumar Singhania and the Senior Bank Officials of the Financial Creditor including Mr. Subhasis Mishra, the Assistant General Manager, Mr. Arvind Lodhi, the General Manager, Mr. Biswarup Das the General Manager (CC), Mr. Rajneesh Sharma, the General Manager, Mumbai and Mr. B.K. Khandelwal, the Deputy General Manager via video conferencing.*
>
> *39) On the basis of the discussions held on September 5, 2019, the Corporate Debtor and its associate companies forwarded a combined settlement proposal of Rs.750 lacs for settling their accounts as full and final settlement after giving credit to the amount of Rs.36 1 lakhs along with interest accrued thereon. A copy of the proposal letter dated September 5, 2019 is annexed hereto and marked as **"R-49".***

*40) Such proposal was however illegally rejected by the Financial Creditor on September 9, 2019, copy whereof is annexed hereto and marked as **"R-50".***

*41) On September 7, 2019 a letter was sent to the Managing Director of Financial Creditor and a request was made therein to consider and pass necessary instruction for one time settlement taking realistic approach. A copy of the letter dated September 7, 2019 is annexed hereto and marked as **"R-51".***

*42) On the basis of the discussions held on September 3, 2019 and the settlement proposal dated September 5, 2019 and reply of the Bank dated September 9, 2019, the Corporate Debtor and its associate companies approached the Bank to consider the settlement proposal by taking humanitarian approach and resolve the issues. A copy of the letter dated September 23, 2019 is annexed and marked as **"R-52".***

*43) On December 5, 2019, the Bank sent an Email and asked to submit a compromise proposal along with upfront amount in terms of the letter dated September 7, 2019 addressed to the Managing Director and CEO of the Financial Creditor visit/ discussion held on October 11, 2019. A copy of Email dated December 5, 2019 is annexed hereto and marked as **"R53".***

*(44) Pursuant to the Email dated December 5, 2019, the Corporate Debtor and its associate companies by an Email dated December 13, 2019 gave a combined settlement proposal to settle the accounts at Rs.750 lakhs after adjusting and/or treating the amount of Rs.361 lakhs (approx) along with up to date interest accrued interest thereon as upfront settlement amount and further requested to consider the same as humanitarian grounds. A copy of the said email/proposal dated December 13, 2019 is annexed hereto and marked as **"R-54".***

45) By an email dated December 13, 2019, the Financial Creditor requested the Companies to settle its account to visit the Kolkata office and submit its offer/ proposal to enable them to take a view of the same. Copy of Email dated December 13, 2019 is annexed hereto and marked as ***"R-55".***

46) On December 16, 2019, a letter was issued on behalf of the Corporate Debtor and its associate companies to the Financial Creditor thereby stating that under current market scenario the Corporate Debtor and its associate companies will not be able to increase their offer of Rs.750 lakhs and requested the Bank to consider the matter as humanitarian ground and specially when they have paid almost entire principal amount and only interest is left and yet the Corporate Debtor and its associate companies are willing and ready to pay the same. A copy of the said letter dated December 16, 2019 is annexed hereto and marked as ***"R-56".***

47) By a email and letter dated December 18, 2019, the Financial Creditor informed that the offer of Rs.750 lakhs is not acceptable. A copy of said email and letter dated December 18, 2019 is annexed hereto and marked as ***"R-57".***

48) Thereafter diverse discussions took place between the father of ***Mishra, Assistant General Manager of the Financial Cre and other executives of the application Bank in Kolkata and also in Mumbai.***

49) ***Besides individual proposals, the Corporate Debtor and its associate companies on September 21, 2020 gave a combined proposal to the Financial Creditor for settlement of all accounts and increased their offer at Rs.8.00 crores after adjusting an amount of Rs.367.76 Lakhs deposited with the Bank after the date of NPA. It was stated in the said proposal letter that the Companies are ready with the Bank Drafts of Rs.45,00,000/- (Rupees Forty Five Lakhs only) for settlement.***

A copy of the combined settlement proposal dated September 21, 2020 is annexed hereto and marked as -"R-58".

50) ***On October 14, 2020, on behalf of the Companies an email was sent to Mr. Sanjiv Chadha, Managing Director & CEO of the Financial Creditor to consider the combined settlement proposal dated September 21, 2020 with a sympathetic view. A copy of the said email dated October 14, 2020 is annexed hereto and marked as "R-59".***

51) ***On October 19, 2020, Mr. S.K. Mohanty, Deputy General Manager of the Bank, asked to provide revised/ improved OTS proposal.***

52) ***As per telephonic discussion held, with Mr. Rajneesh Sharma, the then Chief General Manager, SAMV, BCC Mumbai, on November 3, 2020, further a combined settlement proposal was given on behalf of the Corporate Debtor and its associate companies to the Financial Creditor by increasing its offer from Rs.8.00 Crores to Rs.8.10 Crores after adjusting a sum of Rs.367.76 Lakhs (approx) deposited with the Bank after the date of NPA. Such proposal was also rejected by the Bank on November 12, 2020. Copy of the proposal letter dated November 3, 2020 and the rejection letter dated November 12, 2020 are annexed hereto and collectively marked as "R-60".***

53) ***The Companies also assert that the bank, insofar as safeguarding its commercial interests is concerned, had agreed at a settlement of Rs.8.00 crores on around September*** *3, 2020, but subsequently started demanding Rs.8.20 cr because their branch officers, by error (or perhaps by malicious design), took the initial down-payment of up-front money of Rs.20 lacs paid by the Companies on March 28, 2018 into the CC account of the Company, instead of keeping it in the Wo-lien account', as committed in the letters dated September 3, 2018 and September 5, 2018.*

11. We have heard the counsels for the parties and perused the record. As far as the plea of non-availability of the Power of Attorney dated 01.09.2021 is concerned, we find that the same has been enclosed at page nos. 7 to 18 of the written submissions dated 29.05.2022.

It is *stare decisis* that the pendency of the proceedings regarding recovery of the defaulted amount cannot stand in the way of admission of an application filed under Section 7 of IBC, 2016. Similarly, the pendency of the commercial suit or appeal before DRT (ibid) can be no ground to nix the present application. As far as the plea of offer of settlement and deposit of defaulted debt amount, in part is concerned, it is for the Petitioner to consider the proposal in this regard. It is not for this Adjudicating Authority to direct the Petitioner to consider or accept the settlement.

Regarding the plea of limitation, as can be seen from the averments made by the CD in its affidavit (Supra), as per its own admission, as late as on 03.11.2020 the CD had made an offer to CGM, SMAV, BCC, Mumbai to settle the defaulted amount by accepting Rs.8.10 Cr. The said settlement offer is an acknowledgment of the defaulted amount. Thus, the period of limitation would start from the said date. The present Petition could be preferred within 3 years from 03.11.2020, thus the present application is within the prescribed period of limitation and is not hit by delay. The CD has not raised the plea regarding its financial health. Thus, we may not delve into the same.

As far as the plea of default being not recorded with the information utility is concerned, as can be seen from Section 7 (3)(a) of the IBC, 2016, along

with the application, the Financial Creditor may furnish the record of default recorded with the information utility or such other or record or evidence of default as may be specified. Besides, as can be seen from Regulation 2A of IBBI (Insolvency Resolution Process for Corporate Persons Regulations), 2016, for the purpose of Clause (a) of sub-section 3 of Section 7 of the Code (ibid), the Financial Creditor may furnish a certified copy of entries in the relevant account in Banker's Book as evidence of default. In the present case, the Petitioner has enclosed the copies of the statement of account in respect of Account Nos. 05860600004851 and 05860500000127 along with the interest calculation sheet and Certificate under Section 2(A) of Banker's Book Evidence Act, 1891, as Annexure-7 to the Petition, which is valid evidence in terms of the provisions of Regulation 2A(a) of IBBI (CIRP) Regulations, 2016. As far as the plea of Regulation 20(1A) of IBBI (Information Utilities) Regulations, 2017 is concerned, in terms of the said provision, before filing an application to initiate CIRP the creditor should file the information of default with the Information Utility and the IU shall process the information for the purpose of issuing record of default in accordance with Regulation 21 of the Regulations. The Regulation nowhere provides that the information of default recorded by IU can be the only evidence to be relied on while taking a decision regarding the admission of a Petition under Section 7 of IBC, 2016. Even otherwise also, neither the IBBI (IU) Regulations, 2017 nor the order issued by the Registrar, NCLT can have overriding effect qua the provisions of Regulation 7(3)(a) of the IBC, 2016. In the wake, we are unable to countenance the plea raised by the

Respondent i.e., in the absence of a record of default recorded by IU, an application filed under Section 7 of IBC, 2016 may not be admitted.

While, taking a decision regarding admission of an application under Section 7(5) of IBC, 2016, the Adjudicating Authority needs to be satisfied that a default has occurred, the application is complete and there is no disciplinary proceedings pending against the proposed RP. Apparently, the CD committed default in payment of the amount of loan against the aforementioned loan accounts. The application is complete and the RP suggested by the Petitioner has declared that he is not facing any disciplinary proceedings. **Being left with no other option, we admit the present Petition.**

12. **In the wake, moratorium as provided under Section 14 of IBC, 2016 is declared qua the CD and** as a necessary consequence thereof the following prohibitions are imposed, which must be followed by all and sundry:

> "(a) The institution of suits or continuation of pending suits or proceedings against the Respondent 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 Respondent 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 Respondent in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(d) The recovery of any property by an owner or lessor, where such property is occupied by or in the possession of the Respondent."

13. As proposed by the Petitioner, Mr. Sunil Kumar Gupta, having Registration No. IBBI/IPA-001/IP-P00 205/2017-18/10394 (Email: caskg82@gmail.com) is appointed as IRP, subject to the condition that no disciplinary proceeding is pending against him and disclosures as required under IBBI Regulations, 2016 are made by him within a period of one week from this Order. It is further ordered that:

> *"Mr. Sunil Kumar Gupta, IRP (Registration No. IBBI/IPA-001/IP-P00 205/2017-18/10394) shall take charge of the CIRP of the Corporate Debtor with immediate effect and would take steps as mandated under the IBC specifically under Section 15, 17, 18, 20 and 21 of IBC, 2016 read with extend provisions of IBBI (Insolvency Resolution of Corporate Persons) Regulations, 2016."*

14. The Petitioner is directed to deposit Rs. 2,00,000/- only with the IRP to meet the immediate expenses. The amount, however, will be subject to adjustment by the Committee of Creditors as accounted for by Interim Resolution Professional and shall be paid back to the Financial Creditor.

15. A copy of this Order shall immediately be communicated by the Registry/Court Officer of this Tribunal to the Petitioner /Financial Creditor, the Respondent/Corporate Debtor and the IRP mentioned above.

16. In addition, a copy of this Order shall also be forwarded by the Registry/Court Officer of this Tribunal to the IBBI for their records.

IA-2786/2023

The captioned IA has been preferred by the Applicant (the Respondent in IB-39/ND/2023), espousing therein that as the affidavit in support of the petition filed under Section 7 of IBC, 2016 viz. IB-39/ND/2023 has been signed by Mr. Pawan Sharma claiming himself as an authorized representative of the Petitioner while the Power of Attorney dated September 1, 2021 in terms of which one Nidhi Sharma had authorized him to file the aforementioned petition under Section 7 of IBC, 2016 has not been placed on record, thus he committed an offence under Section 191, 193, 196, 197, 199, 200, 203, 207, 209, and 211 of IPC, 1860. The further allegations made in the application is that in the petition filed by it, the Petitioner has not disclosed the proceedings pending before various other judicial forums such as the appeal filed by the Applicant under Section 17 of the SARFAESI Act, 2002 before the Learned DRT-2, New Delhi being SA No. 200 of 2017 and the Civil Suit No. 28 of 2022 filed by the Applicant before Commercial Court at Alipore, Kolkata. It is also the case of the Applicant that the Bank which has filed (IB)-39(ND) of 2023, itself owes a huge sum of money to the Applicant. As far as the first plea is concerned, Mr. Pawan Sharma has made no averment in the affidavit regarding the person or authority, who authorized him to sign and file the application on behalf of the Financial Creditor. He has only claimed that he is the Authorized Representative of the Applicant Bank. The relevant excerpt of Para I of the Affidavit reproduced by the Applicant in its application reads thus: -

> *"1. I am the authorised representative of the Applicant bank abovenamed and am authorised to sign and file the accompanying Application."*

Having read the Affidavit (ibid), we do not find that Mr. Pawan Sharma has made any statement which is false. He has simply claimed himself as an Authorized Representative of the Applicant Bank, authorised to sign and file the application on its behalf. In order to constitute an offence under Section 191 of IPC 1860, the statement made on declaration should be false and should be believed so by the person making such statement. It is the case of the Applicant himself that vide Power of Attorney dated 01.09.2021, one Nidhi Sharma had authorised Mr. Pawan Sharma to file the petition. Mere non-filing of Power of Attorney before this Tribunal/Adjudicating Authority would not constitute the offence of giving false evidence.

2. The Applicant has also raised the issue of concealment of the fact of pendency of several judicial proceedings between the parties to the application. As can be seen from the synopsis filed by the Petitioner with the (IB)-39(ND) of 2023, the Petitioner could broadly disclose the proceedings under SARFAESI Act, 2002. Even otherwise also, as has been held by Hon'ble NCLAT in Company Appeal (AT) (CH) (Ins.) No. 130 of 2022 in the matter of **Mr. Amar Vora vs. City Union Bank Ltd. & Anr**. dated 11.05.2022, the pendency of proceedings under the SARFAESI Act, 2002 or any other proceedings do not come in the way of maintainability of the proceedings under Section 7 of IBC, 2016. The relevant excerpt of the Judgement reads thus: -

*"7. **Now we take up point no. (ii)***

It is the case of the Appellant that the financial Creditor issued notice under Section 13(2) of the SARFAESI ACT, 2002 for a default of Rs. 14,14,61,066/- for almost 12 accounts and the financial Creditor has also filed an application bearing OA No. 497 of 2019 before the DRT Madurai against the Appellant/Corporate Debtor for recovery of debts of Rs.19,73,47,599/- and filing the application before the Adjudicating Authority for default in loan amount to the tune of Rs. 8,04,86,434/- with interest for the very same loan facility would amount to forum shopping and hence initiation of CIRP by the Adjudicating Authority cannot be maintained. Further, the Ld. Counsel submitted that an application being IA 844 of 2021 filed before the Adjudicating Authority praying the Authority to keep abeyance till the matter in reference no. R-1929 of 2020 before the prohibition of Benami Property Transaction Act, 1988 is decided.

8. The IBC, 2016 is a special enactment and is an act to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate person, partnership firms and individual in a time bound manner for maximisation of value of assets of such persons, to promote entrepreneurship. As held by the Hon'ble Supreme Court the aim and object of the Code is not for recovery of debts but for Resolution of the Corporate Persons. In this regard Section 238 of I & B Code, 2016 deal with provisions of the Code to override other laws and the said provision reads as under:

> *"The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."*

3. Thus, it is not so that the Petitioner in (IB)-39/ND/2023 could have gained anything by not disclosing about the Judicial proceeding pending

before different forums between the parties to the captioned IA. As the Applicant itself could offer settlement dated 23.09.2019 inter alia, offering to pay Rs. 750 lakhs with interest, after adjusting the amount of Rs. 361.39 lakhs, it does not lie in its mouth that the Bank of Baroda i.e., the Petitioner in (IB)-39/ND/2023 owes to it any amount of money, particularly on account of any illegality, fraud, breach of trust, misappropriation of trust, theft, harassment, and cheating etc. The allegations made in the captioned application, do not satisfy the ingredient of any of the provisions of IPC referred to in Para 1 of the application. Even otherwise also, as has been held by Hon'ble Supreme Court in **Amarsang Nathaji Vs. Hardik Harshadbhai Patal & Ors.**, (Civil Appeal No. 11120 of 2016) (arising out of SLP (C) No. 13749 of 2016) decided on, 23 November, 2016, the mere fact that a person has made a contradictory statement in a judicial proceeding is not by itself always sufficient to justify prosecution and it must be shown that the defended has intentionally given a false statement at any stage of the judicial proceedings. Besides even after the above position emerges also, still the court has to form an opinion that it is expedient in the interest of justice to initiate an enquiry into the offences of false evidence. An offence is against public justice. Para 6 to 8 of the judgment reads thus: -

> *"6. The mere fact that a person has made a contradictory statement in a judicial proceeding is not by itself always sufficient to justify a prosecution under Sections 199 and 200 of the Penal Code, 1860 (45 of 1860) (hereinafter referred to as "IPC"); but it must be shown that the defendant has intentionally given a false statement at any stage of the judicial proceedings or fabricated false evidence for the purpose of using the same at any stage of the judicial proceedings. Even after the above position has emerged also, still the court has to form an opinion that it is*

expedient in the interests of justice to initiate an inquiry into the offences of false evidence and offences against public justice and more specifically referred to in Section 340(1) CrPC, having regard to the overall factual matrix as well as the probable consequences of such a prosecution. (See K.T.M.S. Mohd. V. Union of India). The court must be satisfied that such an inquiry is required in the interests of justice and appropriate in the facts of the case.

7. In the process of formation of opinion by the court that it is expedient in the interests of justice that an inquiry should be made into, the requirement should only be to have a prima facie satisfaction of the offence which appears to have been committed. It is open to the court to hold a preliminary inquiry though it is not mandatory. In case, the court is otherwise in a position to form such an opinion, that it appears to the court that an offence as referred to under Section 340 CrPC has been committed, the court may dispense with the preliminary inquiry. Even after forming an opinion as to the offence which appears to have been committed also, it is not mandatory that a complaint should be filed as a matter of course. (See Pritish Vs. State of Maharashtra).

8. In Iqbal Singh Marwah V. Meenakshi Marwah, a Constitution Bench of this Court has gone into the scope of Section 340 CrPC. Para 23 deals with the relevant consideration: (SCC pp. 386-87)

"23. In view of the language used in Section 340 CrPC the court is not bound to make a complaint regarding commission of an offence referred to in Section 195(1)(b), as the section is conditioned by the words "court is of opinion that it is expedient in the interests of justice". This shows that such a course will be adopted only if the interest of justice requires and not in every case. Before filing of the complaint, the court may hold a preliminary enquiry and record a finding to the effect that it is expedient in the interests of justice that enquiry should be made into any of the offences referred to in Section 195(1)(b). This expediency will normally be judged by the court by weighing not the magnitude of injury suffered by the person affected by such forgery or forged document, but

having regard to the effect or impact, such commission of offence has upon administration of justice. It is possible that such forged document or forgery may cause a very serious or substantial injury to a person in the sense that it may deprive him of a very valuable property or status or the like, but such document may be just a piece of evidence produced or given in evidence in court, where voluminous evidence may have been adduced and the effect of such piece of evidence on the board concept of administration of justice may be minimal. In such circumstances, the court may not consider it expedient in the interest of justice to make a complaint."

4. Also, in **Ved Prakash Yadav vs. Sanjay Kumar** (Criminal Appeal No. 866/2015 decided on 30.08.2017), Delhi High Court ruled that when the Appellant did not intend to stake any claim over the money which was deposited in the trial court, there could be no cause to initiate proceedings u/s 340 of Cr.P.C. relevant excerpt of the judgment read thus: -

"11. It has been submitted on behalf of the appellant that the statement made in the suit regarding the ownership and possession of the property in question being in the hands of the appellant was not incorrect. It was meant for the purposes of obtaining permanent/mandatory injunction against the respondent for not causing any interference in the peaceful enjoyment of the said property. True it is that the property was conveyed to one Mr. Shailesh Kumar Awasthi but the possession still remained with the appellant. The property in question was not conveyed to the respondent only on the ground that the balance consideration amount was not paid."

XXXX

In Chajoo Ram v. Radhey Shyam, (1971) 1 SCC 774 : AIR 1971 SC 1367, the Supreme Court has held as hereunder:-

"7. The prosecution for perjury should be sanctioned by courts only in those cases where the perjury appears to be deliberate and conscious

and the conviction is reasonably probable or likely. No doubt giving of false evidence and filing false affidavits is an evil which must be effectively curbed with a strong hand but to start prosecution for perjury too readily and too frequently without due care and caution and on inconclusive and doubtful material defeats its very purpose. Prosecution should be ordered when it is considered expedient in the interests of justice to punish the delinquent and not merely because there is some inaccuracy in the statement which may be innocent or immaterial. <u>There must be prima facie case of deliberate falsehood on a matter of substance and the court should be satisfied that there is reasonable foundation for the charge.</u>

16. Similarly, in Iqbal Singh Marwah Vs Meenakshi Marwah, (2005) 5 SCC 370 : AIR 2005 SC 2119, the Supreme Court has further reiterated:-

"23. In view of the language used in Section 340 CrPC the court is not bound to make a complaint regarding commission of an offence referred to in Section 195(1)(b), as the section is conditioned by the words 'court is of opinion that it is expedient in the interest of justice'. This shows that such a course will be adopted only if the interest of justice requires and not in every case. Before filing of the complaint, the court may hold a preliminary enquiry and record a finding to the effect that it is expedient in the interest of justice that enquiry should be made into any of the offences referred to in Section 195(1)(b). <u>This expediency will normally be judged by the court by weighing not the magnitude of injury suffered by the person affected by such forgery or forged document, but having regard to the effect or impact, such commission of offence has upon administration of justice.</u>"

5. Also, in **Seema Thakur vs. Union of India & Ors.** (Crl. M.A. 19647/2012 decided on 16th February, 2017) Hon'ble Delhi High Court viewed that to impute criminality, an element of mens rea need to be

present. In the present case, there is no element of mens rea qua Mr. Pawan Sharma in filing a petition on behalf of a public bank.

6. It is trite that to impute criminality, an element of mens rea has to be found. It is also well settled that it is sine qua non for initiation of criminal action by the court under Section 340 Cr.P.C. that satisfaction as to the expediency of such course is reached {Iqbal Singh Marwah vs. Meenakshi Marwah, (2005) 4 SCC 370}.

7. In **Indian Structural Engineering Company Private Limited vs. Pradip Kumar Saha & Ors.**, a Division Bench of Hon'ble Calcutta High Court ruled that the court has to take a very cautious approach in dealing with application u/s 340 of the Cr. P.C. and should initiate the proceedings only if it is absolutely necessary to preserve the purity and dignity of the judicial system.

8. In view of the aforementioned, we do not find it expedient to order an inquiry regarding the allegations made in the captioned application. **The IA is found misconceived and devoid of merits, thus the same is dismissed.**

IA-2787/2023

The salient plea espoused in the captioned application filed by the Applicant is that the IB-39(ND) of 2023 could be preferred by the Petitioner in gross suppression of a series of facts and documents after the date of alleged default. According to the Applicant, the interest charged by the

Petitioner in IB-39 (ND) of 2023 on the principal amount is exorbitant. In Para 7 (aa) of the application, the Petitioner has alleged that the agents qua the LIC policies to the tune of Rs. 15 lacs, which the Applicant was compelled to take by the officers of the Petitioner in the main petition were related to the Bank Manager and other Officers who were handling the loan account of the Applicant herein. There are a series of allegations made by the Applicant regarding the various affairs of the Petitioner in the main petition. We cannot be oblivious of the fact that the prayer made in the application is for initiating action against the Petitioner in the main petition under Section 65 of the Insolvency and Bankruptcy Code, 2016. As can be seen from the language of the said provision contained in the statute/code, the Adjudicating Authority may impose a penalty upon a person if he initiates the Insolvency Resolution Process or Liquidation fraudulently or with malicious intent for any purpose other than for Resolution of Insolvency or Liquidation as the case may be. While examining a petition under Section 7 of IBC, 2016, what the Adjudicating Authority needs to satisfy itself before admitting the petition is, whether the default has occurred and the application is complete. Another element which the Adjudicating Authority needs to ensure is that there is no disciplinary proceeding pending against the proposed RP. Default means non-payment of debt when the whole or any part or instalment of the amount of debt is due and payable is not paid by the Debtor or the Corporate Debtor as the case may be. In the present case, as can be seen from the settlement, offered by the Applicant in IA to Mr. Subhash Mishra, Assistant General Manager, Bank of Baroda viz. the Petitioner herein, by letter dated 05.09.2019, the CD

had offered to pay Rs. 750 Lakhs to FC and it was still prepared to pay the said amount after adjusting the amount of Rs. 361.39 Lakhs. Apparently, the CD has defaulted to pay the amount of debt procured by it from the FC and it has offered to settle the defaulted amount with the officer of FC. The defaulted amount in any case is more than Rs. 1 Crore i.e., the threshold limit for filing a petition under Section 7 of IBC, 2016. Once, the Applicant (CD) has procured the debt from the FC and has defaulted to pay the same, we do not find any fraudulent or malicious intent of the FC in filing the petition under Section 7 of IBC, 2016. **The IA is misconceived and devoid of merits, and thus deserves to be dismissed. Ordered accordingly.**

Sd/-
(L. N. GUPTA)
MEMBER (T)

Sd/-
(ASHOK KUMAR BHARDWAJ)
MEMBER (J)