

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

Company Appeal (AT) (Insolvency) No. 658 of 2022

In the matter of:

Mr. Rakshit Dhirajlal Doshi

(one of the suspended Directors)

Building No. 9-10, Sigma Corporate,
Off. S.G. Road, Bodakdev, Ahmedabad.
Gujarat – 380054.

... **Appellant**

Versus

IDBI Bank Ltd.

Having its office at:
IDBI Tower, W.T.C. Complex,
Cuffe Parade, Mumbai – 400005.

... **Respondent No. 1**

Fivebro International Private Limited

Represented by the Interim Resolution Professional

3/310, 3rd floor, Sun South Street,
Nr. Arohi Bungalows, B/h Sobos Center,
South Bopal, Ahmedabad-390054.

... **Respondent No. 2**

C.A Ramchandra Dallaram Choudhary

Reg No. IBBI/IPA-001/

IP-P00157/2017-2018/10326

Sun Resolution Professionals Pvt. Ltd.
9-B, Vardan complex,
Nr. Vimal House, Lakhudi Circle,
Navrangpura, Ahmedabad-380014.

... **Respondent No. 3**

Present

For Applicant: Ms. Vaishnavi Viswanathan, Advocate.

For Respondent: Mr. Akshat Khare Advocate

JUDGMENT
(Date: 15.11.2022)

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[Per.: Dr. Alok Srivastava, Member (Technical)]

The present appeal is filed under section 61 of the Insolvency and Bankruptcy Code, 2016 (in short 'IBC') by the Appellant assailing the order dated 10.5.2022 (hereinafter called 'Impugned Order') in CP (IB) No. 570/2018 passed by the Adjudicating Authority (National Company Law Tribunal, Ahmedabad). As a result of the Impugned Order, section 7 application under IBC filed by the Financial Creditor IDBI Bank Limited (in short 'IDBI Bank') has been admitted leading to initiation of Corporate Insolvency Resolution Process (in short 'CIRP') of the corporate debtor Fivebro International Private Limited (in short 'FIPL').

2. The facts of the case, as stated and argued by the Appellant, are that M/s. Doshion Veolia Water Solutions Private Limited (in short 'Doshion') took a loan in the year 2014 from a 'consortium of banks' led by Bank of Baroda and consisting of three other banks viz. Union Bank of India, Standard Chartered Bank and IDBI Bank Limited in the year 2014 and the corporate debtor FIPL signed a Deed of Guarantee on 27.6.2014 with IL&FS Trustee Company Limited as "Security Trustee" acting for and on behalf of the 'consortium of banks' with the names of the four participating

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banks included in the Schedule of Deed of Guarantee. The Appellant has further stated that a restructuring of the loan was undertaken by the 'consortium of banks', whereby an increase in debt amount upto Rs.422.11 crores was approved and actual disbursement of Rs.408.64 crores was made to the borrower Doshion. The Appellant has further stated that Standard Chartered Bank did not lend its share in the restructured loan to Doshion.

3. It is stated by the Appellant that the guarantee under restructuring package was given by the Appellant vide Deed of Guarantee dated 27.06.2014 and when there was a default in repayment of IDBI Bank's loan, it sent letter dated 20.9.2016 to Doshion recalling the loan facility and calling upon the borrower Doshion to pay to the Appellant IDBI Bank the demanded amount in respect of the individual loan disbursed by IDBI Bank within 15 days failing which the IDBI Bank shall take steps for enforcing the securities and realising its dues. He has further stated that thereafter, IDBI Bank sent letter dated 4.11.2016 addressed to FIPL stating that borrower Doshion has failed and neglected to pay the amount due to IDBI Bank and since FIPL had guaranteed the said loan and its repayment, FIPL should pay forthwith to IDBI Bank a sum aggregating to Rs.72.32 crores (which is due on

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20.9.2016), and in case of failure to make the said payment, the IDBI Bank shall take such steps against the Appellant as may be necessary for enforcing the guarantees and realising the dues.

4. The Appellant has further stated that since either the borrower Doshion or the guarantor FIPL failed to pay the demanded amount, an application under section 7 of the IBC was filed by the IDBI Bank on 11.10.2018, which was admitted by the Impugned Order.

5. We heard the arguments presented by the Learned Counsels for both the parties and perused the record.

6. The Learned Counsel for the Appellant has argued that the Adjudicating Authority has reproduced provisions of the Deed of Guarantee in the Impugned Order, and without discussing the arguments advanced by the corporate debtor and without providing any reason whatsoever for disregarding the contents of additional affidavit dated 18.10.2021 filed by FIPL, the Adjudicating Authority has mechanically endorsed the arguments of the Applicant IDBI Bank (Respondent No. 1 in the present appeal). She has further claimed that the Impugned Order does not refer to the relevant provisions in the Security Trustee

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Agreement and the Inter-se Agreement, though both were extremely relevant in adjudication of the section 7 application. She has further argued that Respondent No.1 IDBI Bank has no *locus standi* to invoke the guarantee given for the corporate loan, as the rights and liabilities of the borrower and lenders regarding invocation of guarantee are governed by the Deed of Guarantee and a perusal of the Deed of Guarantee would reveal that the guarantee was executed by FIPL in favour of the Security Trustee IL&FS Trust Company Limited. She has claimed that it is only the Security Trustee, who could invoke the guarantee in terms of clause 20 of the Deed of Guarantee read with clause 4 of the Security Trustee Agreement and clauses 7.1 and 7.3 of the Inter-se Agreement.

7. Further, the Learned Counsel for Appellant has argued that a conjoint reading of clause 4 of the Security Trustee Agreement and clause 7 of the Inter-se Agreement leads to inescapable conclusion that even if there is a default, the lender has to act through the Security Trustee in order to take enforcement action, and therefore, IDBI Bank does not have the requisite entitlement to independently file application under section 7 of IBC after declaring an Event of Default. To further buttress his argument regarding *locus standi* of IDBI Bank to invoke section 7, the *Company Appeal (AT) (Insolvency) No. 658 of 2022*

Learned Counsel for Appellant has strongly argued that IDBI Bank is a stranger to the Deed of Guarantee and only Security Trustee, who represents all the banks, could invoke the guarantee and consequently file application under section 7 of the IBC.

8. The Learned Counsel for Appellant has also argued that Standard Chartered Bank, which is a member of the Bank of Baroda Consortium of Banks (BOB Consortium), reneged on its commitment to disburse additional amount after restructuring of the debt and therefore, the restructuring package has not materialised. He has claimed that since the restructuring package did not materialise, a default in repayment of restructured debt cannot be said to have taken place. Moreover, he has contended, a default in repayment of debt, as claimed by the IDBI Bank for its own outstanding amount cannot be taken as default for all the consortium members, since the lending by the consortium members has been conceived as joint action and all the financing documents and security documents have been executed on the basis of the consortium lending to the borrower Doshion. She has also contended that the reliance of respondent IDBI Bank on clauses 4 and 7.5 of the Inter-se Agreement are completely misplaced as clause 7.5 does not envisage any individual lender to

take any decision or action for matters that are covered in the Inter-se Agreement.

9. The Learned Counsel for Appellant has strongly argued that a full reading of clause 7 of the Inter-se Agreement clarifies the procedure to be followed in the event that any lender/lenders proposes to take enforcement action and an incomplete reading of clause 7.5, and that too incorrectly, cannot provide any right to Respondent No. 1 IDBI Bank to take enforcement related action for invocation of guarantee provided by FIPL. She has further argued that under clause 4 of the Inter-se Agreement, the rights and obligations of each lender is joint and several, but a plain reading of this clause makes it clear that for enforcement of security by the Security Trustee, the provisions contained in the agreement shall override any provisions contained in or implied by the financing documents/security documents.

10. She has also claimed that since the loan restructuring exercise failed on account of Standard Chartered Bank not disbursing the amount post restructuring, the guarantor stands completely discharged since Doshion could not be resuscitated after going through an incomplete loan restructuring process.

11. Elaborating further, the Learned Counsel for Appellant has submitted that when a guarantee is given in respect of a single debt or specific transactions, it comes to an end when the guaranteed debt that is paid or the promise is duly performed. In the instant case, the guarantee was given in exchange of the promise that one single sum of Rs. 408.64 crores was going to be released to rejuvenate the borrower company and any amount less than the promised amount could not have rejuvenated the company and therefore, the guarantee that was given in exchange of single and indivisible transaction stood discharged.

12. In support, the Learned Counsel for Appellant has cited the judgment of Hon'ble High Court of Bombay in the matter of **Keshavlal Harilal Setalvad vs. Pratapsing Moholabhai Sheth (1932), 34 BOMLR 167** to claim that the sureties made in response to an agreement were sureties for the original contract, and when there is a violation in the amount advanced, the sureties stood discharged, wherein it is held as hereunder:-

“when a contract is varied in a substantial particular, it is not for the Court to say that the surety who undertook the burden of the original contract must or ought to have undertaken the burden of the contract as subsequently varied No doubt the Court will not accept fanciful objections or trivial changes as justifying the surety in refusing to carry out his obligations. But there can be no

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doubt that in the present case the change is one of substance.”

13. Lastly, the Learned Counsel for Appellant has submitted that Inter-se Agreement between the four banks of the consortium dated 26.6.2014 was breached as one of the consortium members, namely, Standard Chartered Bank withdrew from the consortium and thereafter its share should have been offered to one or more new banks or to the existing banks of consortium, which was not done. She has specifically pointed to clause 7.6(e) of the Inter-se Agreement to point out that in case a lender proposes to opt out of the consortium or reduce its share of the facilities, it shall be entitled to opt out if the said lender has arranged with the borrower and ensure the substitution of the said lender replenishment of the facilities to the extent of the proposed reduction. She has argued that since this was not done by the Standard Chartered Bank, the fundamental terms of Inter-se Agreement have also been vitiated and since the Impugned Order relies on such a vitiated agreement, the Impugned Order should be set aside.

14. The Learned Counsel for Appellant has also cited the judgment of NCLT, Special Bench, New Delhi in the matter of **IDBI**

Bank Ltd. vs. Manoj Gaur [(IB-29) (PB) /2022 order dated 5.5.2022] wherein it is held that the lenders have to act in accordance with the provisions of Security Trustee Agreement, when such an agreement has been executed by the members of the banks consortium, and a single lender cannot act unilaterally to seek insolvency resolution under the IBC.

15. The Learned Counsel for Respondent IDBI Bank has argued that in the adjudication of an application under section 7 of IBC, NCLT is only required to only examine the existence of valid debt and valid default, and no further enquiry or examination of any objection or contractual clauses is permissible, as is held in the judgment of Hon'ble Supreme Court in the case of **Innoventive Industries Ltd. vs. ICICI Bank and Anr. (2018 1 SCC 407)**.

Regarding the question of *locus standi* of IDBI Bank to file an application under section 7 of IBC, the Learned Counsel for Respondent No. 1 has submitted that the contractual clauses of the Deed of Guarantee stipulate that the Security Trustee is to act on behalf of all the banks and financial institutions as their agent pursuant to the Security Trustee agreement dated 26.11.2013 but that is not a bar to any individual bank taking action under its own financing agreement. He has referred to the Security Trustee Agreement, particularly clauses 2.2.1.(iii) and 14 to maintain that

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the borrower is under obligation to perform all its duties under respective financing documents irrespective of anything written in the Security Trustee Agreement. He has further submitted that as per clause 8 of the Deed of Guarantee, the corporate debtor has given continuing guarantee to the borrower's debt and therefore the corporate debtor is under guarantee obligation till the borrower has satisfied the dues of repayment to all the lenders.

16. The Learned Counsel for Respondent IDBI Bank has further argued that the IDBI Bank has claimed default in debt for its own outstanding amount only and not for the debt of all the consortium members. He has added that after restructuring of the loan, the consortium member banks entered into an Inter-se Agreement dated 26.11.2013 wherein clause 4 stipulates that the rights and obligations of each lender would be joint and several and no lender would be liable for the obligation of any other lender. He has also added that clause 7.5 of Inter-se Agreement provides that any lender can take action without approval of other lenders at any matter, which is not expressly stated in the Inter-se Agreement. He has claimed that the argument of the Learned Counsel for Appellant that in view of the judgment in the matter of **IDBI Bank Ltd. vs. Manoj Gaur (supra)** applies in the present case by pointing out that the order in the matter was passed on an *Company Appeal (AT) (Insolvency) No. 658 of 2022*

application filed under section 95 of IBC, which is the case of personal insolvency against the personal guarantor of Jaypee Infratec Ltd., and on this ground it is distinguishable from the facts of the present case.

17. Regarding the inability of Standard Chartered Bank to disburse the amount in accordance with the restructured loan, the Learned Counsel for Respondent IDBI Bank has argued that there is no variation of IDBI Bank's financial contract on the basis of non-disbursement of additional loan by the Standard Chartered Bank and the corporate debtor cannot claim to be discharged from the entire guarantee obligation. He has clarified that IDBI Bank has disbursed an enhanced amount of Rs. 110.13 crores after restructuring of debt and now the corporate debtor cannot escape from its obligations of guarantee in respect of IDBI Bank loan, since IDBI Bank had completed its commitment in the debt restructuring package.

18. The Learned Counsel for Respondent IDBI Bank has clarified that the concept of variation with reference to section 133 of the Indian Contract Act would only apply in case Standard Chartered Bank were to file claim for enhanced amount, but by no stretch of imagination the corporate debtor can be said to be

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discharged from its guarantee obligation as there has been no change of condition qua the sanctioned and disbursed amount by the IDBI Bank. He has added that under section 128 of the Indian Contract Act, the corporate debtor has co-extensive liability with that of principal borrower as such a guarantee is a continuing guarantee in terms of the section 129 of the Indian Contract Act.

19. The Learned Counsel for Respondent IDBI Bank has distinguished the facts in the matter of **Keshavlal Harilal Setalvad (supra)** from the present case, by stating that the former is a case of private mortgage between the two private parties and not consortium lending under financial system, as is the case in the present matter. He has also referred to the admission order passed by NCLT, Chennai dated 6.2.2019 in CP 989/IB/2018, by which the corporate guarantee given by another group company, namely, Thomson Lusa Metal Private Limited, which had also given corporate guarantee for the restructured amount, has been initiated, and claimed that the FIPL and M/s. Thomson Lusa Metal Private Limited are both group companies of the same group having common promoters and therefore, the same principle will apply in the present case too. He has submitted that the issue of corporate guarantee and continuing liability under IBC is no longer *res integra* as per the settled legal position held by the Hon'ble *Company Appeal (AT) (Insolvency) No. 658 of 2022*

Supreme Court in the matter of **State Bank of India vs. V. Ramakrishnan & Ors. (AIR 2018 SC 3876)**.

20. In the facts of the present case except for the fact that the amount advanced is varied, because Standard Chartered Bank did not carry out its obligations post restructuring of the loan, there are no objection or material changes insofar as the loan of IDBI Bank is concerned. Therefore, the judgment of the Hon'ble Bombay High Court in the matter of **Keshavlal Harilal Stealvad (supra)** is distinguishable in light of the facts of the present matter.

21. The two issues that arise in this appeal relate: –

- (i) The *locus standi* of IDBI Bank for filing application under section 7 of IBC and whether IDBI Bank alone could have filed the petition for the insolvency resolution; and
- (ii) Whether non-disbursement by Standard Chartered Bank of the additional amount after restructuring of debt has materially changed the restructuring package and consequently the guarantee stands discharged?

22. The three agreements that are relevant for examining the above stated issues are -

- (i) Inter-se Agreement between the participating banks of the consortium (attached at pps. 463-490 of Appeal paperbook, Vol.II);
- (ii) Deed of Guarantee (attached at pp. 147-152 of the Appeal paperbook, Vol.I); and
- (iii) The Security Trustee Agreement (attached at pp. 496-509 of the appeal paperbook, Vol. II)

23. We reproduce the relevant portions of the above stated three agreements which are relevant for examination of the issues stated earlier: -

I. INTER-SE AGREEMENT

“THIS INTER SE AGREEMENT executed at Ahmedabad on this 26th day of November, 2013 between Bank of Baroda.... And Union Bank of India.....And Standard Chartered Bank.....And IDBI Bank Limited.....

WHEREAS

XX XX XX XX

“E. *The Consortium of Lenders have agreed to enter into this Inter-se Agreement for the purpose of co-ordinating the exercise of their rights, powers and ranking and sharing of securities crated in favour of the Security Trustee and remedies and fulfilment of their obligations under the transaction documents.*”

Xx xx xx xx

“5. Coordinated approach

Xx xx xx xx

5.1 All the Lenders shall act in the spirit of the ‘Consortium’ and as far as possible in the best interests of the consortium having due regard to the interest of each of the Lenders.

5.2. It is the objective of the Lenders to have a coordinated approach to taking of all action under the Financing Documents, the other Transaction Documents and this Agreement, unless otherwise specifically provided in this Agreement including the taking of an Enforcement Action.”

Xx xx xx xx

“7. Actions under the Transaction Documents

7.1 Any decision/action (whether in the nature of authorisation, direction, approval, waiver or consent or otherwise) in relation to the matters set out below shall be taken by the Lenders or the Lead Bank or consultation with the Lenders in the matter set out below:-

Xx xx xx xx

b) declaring an Event of Default under the Financing Documents and/or recall of the Facilities.

Xx xx xx xx

7.2 Any Lender/s proposing to take any decision / action in connection with the aforesaid matters shall intimate the Security Trustee about such action by a written notice and the Security Trust shall inform the same to the other Lenders within a day of receipt of such notice of such proposed decision / action by such Lenders. The Lead Bank shall, within 15 (fifteen) days of receipt of such notification from the Security Trustee convene a meeting of the Consortium of Lenders for deciding / determining the course of action to be taken on the proposal received. Decision as taken at such meeting by unanimously or by the Majority Lenders holding more than 66.66% of the total amount of credit facilities sanctioned by members of BOB consortium shall be

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communicated to the Security Trustee and the Borrower by the Lead Bank within the period decided at the aforesaid meeting and shall be binding on all the Lenders. A copy of the aforesaid communication shall be marked by the Lead Bank to all the Lenders. All the Lenders shall take such action as is decided at the aforesaid meeting of the Consortium of Lenders.

- 7.3 *In the event it is decided to enforce any or all the said Securities, the Security Trustee shall enforce the Securities as per the Security Trustee Agreement on behalf of all the Lenders and as instructed by the Majority Lenders.*

Xx xx xx xx

- 7.5 *Decision / action on any other matter (other than as expressly stated in this Agreement) may be taken by any Lender/s as it/they deem fit and no approval of any other Lender / Lead Bank will be required. However, written intimation of such decision / action will be provided by the aforesaid Lender/s to other Lenders, the Security Trustee and the Lead Bank.*

Xx xx xx xx

- 7.6 *e) Any Lender (the “said Lender”) which proposes to opt out of the ‘Consortium’ or reduce its share of the Facilities, shall be entitled to opt out or reduce its Facilities only after the said Lender has arranged with the Borrower and ensured the substitution of the said Lender replenishment of the Facilities to the extent of the proposed reduction. The other Lenders in the consortium shall be entitled to substitute the said Lender or take up the share of the Facilities proposed to be reduced.”*

II. Deed of Guarantee

“THIS DEED OF GUARANTEE made on the 27th day of June, 2014 by M/S FIVEBRO INTERNATIONAL PRIVATE LIMITED.....in favour of IL & FS TRUST COMPANY LIMITED.....

Xx xx xx xx

“AND WHEREAS one of the conditions specified and contained in the said Agreements of Loan is that the Company Appeal (AT) (Insolvency) No. 658 of 2022

Borrower shall procure and furnish to the Security Trustee a guarantee guaranteeing due payment by the Borrower of the said principal sum (not exceeding Rs. 408.64 crores) more particularly described in the Annexure attached hereto together with interest costs charges expenses and/or other money due to the BOB consortium in respect of or under the above-mentioned credit facilities or any of them on demand by the BOB consortium.

AND WHEREAS the guarantor has at the request of the Borrower and in consideration of the BOB Consortium having agreed to grant /granted at the request of guarantor the abovementioned credit facilities in the Borrower have agreed to execute the guarantee in favour of the Security Trustee on the terms an in the manner hereinafter appearing.”

Xx xx xx xx

- 1. If at any time default shall be made by the Borrower in payment of the principal sum (not exceeding Rs. 408.64 crores) together with interest, costs, charges, expenses and/or other moneys for the time being due to the BOB Consortium in respect of or under the abovementioned credit facilities or any one of them the Guarantor shall forthwith on demand pay to the BOB Consortium the whole of such principal sum (not exceeding Rs. 408.54 crores) together with interest, costs, charges expenses and/or other money as may be due to the BOB Consortium in respect of the abovementioned credit facilities.*

Xx xx xx xx

- 7. In order to give effect to the Guarantee herein contained the BOB Consortium shall be entitled to act as if the Guarantor were principal debtors to the BOB Consortium for all payments guaranteed by them as aforesaid to the BOB Consortium.*

Xx xx xx xx

- 20. The Guarantor agrees that the loans hereby guaranteed shall be payable to the BOB Consortium on the BOB Consortium serving the Guarantor with a notice requiring payment of the amount and such notice shall*
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be deemed to have been served on the “Guarantor either by actual delivery thereof to the Guarantor or by dispatch thereof by Registered Post or Certificate of posting to the Guarantor address herein given or any other address in India.....”

III. Security Trustee Agreement

“THIS SECURITY TRUSTEE AGREEMENT (“this Security Trustee Agreement”) is made at Ahmedabad on 26th day of November, Two Thousand and Thirteen by and among,

1) DOSHION VEOLIA WATER SOLUTIONS PRIVATE LIMITED,
.....OF THE FIRST PART

AND

2) BANK OF BARODA,.....acting in its capacity as the Lead Bank for and on behalf of the Banks as provided in Schedule-I.....of the SECOND PART

AND

3) IL&FS TRUST COMPANY LIMITED..... of the THIRD PARTY

xx xx xx xx

WHEREAS

xx xx xx xx xx

xx xx xx xx xx

(3) *At the request of the member Banks of BOB consortium and the Borrower, IL&FS Trust Company Limited has agreed to act as Security Trustee in respect of the credit facilities granted/to be granted by BOB consortium to the Borrower under the working Capital Agreement. It is hereby agreed that the Security Trustee shall act as Trustee specifically provided in the Financing Documents, Security Documents and as provided hereinafter.*

1. Definitions and Interpretation

xx xx xx xx

“Event of Default” shall have the meaning ascribed to it in the Financing documents.

Xx xx xx xx

2. Appointment and Rights of the Security Trustee

2.1 Appointment of Security Trustee

Xx xx xx

“2.1.2 The Borrower shall, in accordance with the Agreements, create or cause to be created in favour of the Security Trustee the security, who shall hold the same for the benefit of the Secured Parties entitled to such Security.

Xx xx xx xx

2.2.5 As to matters not expressly provided for in this Security Trustee Agreement or in any other Financing documents to which the Lenders are party, the Security trustee may refrain from exercising any right, owner or discretion, unless and until specifically instructed in writing by the Lenders, and the Security Trustee shall not be responsible for any consequences arising as a result of the Security Trustee not acting or taking any action pursuant to such instructions, which shall be binding on the Lenders, if they had been in receipt of written intimation from the security Trustee of its inability to take such action.”

Xx xx xx xx

“4. Enforcement of Security and Actions under the Financing Documents

Any Lender/s proposing to take any decision / action in connection with the aforesaid matters shall intimate the Security Trustee about such action by a written notice and the Security Trustee shall inform the same to the other Lenders within a day of receipt of such notice of

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such proposed decision / action of such Lender/s. The Lead Bank shall, within 15 (fifteen) days of receipt of such notification from the Security Trustee convene a meeting of the consortium of Lenders for deciding / determining the course of action to be taken on the proposal received. Decision as taken at such meeting by unanimously or by the Majority Lenders holding more than 66.66% of the total amount of credit facilities sanctioned by members of BOB consortium shall be communicated to the Security Trustee and the Borrower by the Lead Bank within the period decided at the aforesaid meeting and shall be binding on all the Lenders. A copy of the aforesaid communication shall be marked by the Lead Bank to all the Lenders. All the Lenders shall take such action as is decided at the aforesaid meeting of the Consortium of Lenders.

It is hereby agreed by and between the Parties hereto that the provisions contained in or implied by the Financing Documents/Security Documents shall be read and construed in conjunction with these presents, however for enforcement of Securities by the Security Trustee only the provisions contain these presents shall override any provisions contained in or implied by the financing Documents/Security documents to the extent to which the same are inconsistent with or repugnant to the provisions herein contained.”

24. To examine the first issue, whether Respondent IDBI Bank can independently declare an event of default and whether it is entitled to file application under section 7 against the corporate debtor after the event of default has occurred, we look at the Security Trustee Agreement, wherein the Lead Bank Bank of Baroda representing the consortium of banks has entered an agreement with Doshion and the Security Trustee IL&FS Trust Company. This Security Trustee Agreement was executed on *Company Appeal (AT) (Insolvency) No. 658 of 2022*

26.11.2013 after the consortium banks had decided to provide loans to the borrower Doshion. In the 'Definition and Interpretation' section of the Security Trustee Agreement, an 'Event of Default' has been stated as having the meaning ascribed to in the financing documents. Further, clause (4) of the Security Trustee Agreement, which is regarding enforcement of security and actions under the financing documents, any Lender proposing to take any decision/action in connect with the matters contained in clause (3) of the Security Trustee Agreement has to intimate the Security Trustee about such action by a written notice and the Security Trustee should then inform the same to other Lenders within a day on receipt of such notice of such proposed decisions/actions by the Lender. The action of declaring an Event of Default is also an action wherein this procedure was to be followed. Thus, it is clear that the 'Event of Default' cannot be declared by an individual bank under the individual financing documents of the participating banks in the Bank of Baroda consortium and recourse must be taken to the Security Trustee Agreement and the Inter-se Agreement.

25. We also note that a similar procedure has been established in the Inter-se Agreement regarding actions under the transaction documents, which can be seen in clause 7 of this agreement.

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Clause 7.1 (b) states that in relation to declaration of an event of default under the financing documents/recall of the facilities, action shall be taken by the Lender or the Lead Bank in consultation with the Lenders. Clause 7.2 of the Inter-se Agreement makes it clear that any Lender proposing to take any decision/action in the declaration of 'Event of Default' as per Clause 7.1 has to intimate the Security Trustee about such action by a written notice and the Security Trustee shall then inform the same to the other Lenders within a day of receipt of such notice of such proposed decisions/actions by such lenders, whereupon the Lead Bank shall, within 15 days of receipt of such notification from the Security Trustee convene a meeting of the consortium of Lenders for deciding/determining the course of action to be taken on the proposal received. It is thus, clear that clause 7.2 of the Inter-se Agreement sets out a clear procedure by which an Event of Default can be declared by any an individual lender belonging to the Bank of Baroda consortium and this procedure is quite akin to the procedure set out in clause (4) of the Security Trustee Agreement regarding declaration of an 'Event of Default'.

26. In the context of the stipulation of an Event of Default under Clause 7.2 of the Inter-se Agreement and clause (4) of the Security Trustee Agreement, we examine the action taken by IDBI Bank
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regarding declaration of 'Event of Default' and thereafter recall of the loan. We note that a letter dated 4.11.2016 was sent by IDBI Bank (attached at pp.114-122 of reply filed by the IDBI Bank) addressed to the Managing Director of FIPL stating that Doshion has failed and neglected to pay IDBI Bank an amount Rs.72.32 crores and therefore, the guarantor FIPL is called upon to pay the IDBI bank an amount Rs.7.32 crores. Prior to the issue of this letter to FIPL, a letter dated 20.9.2016 was sent by IDBI Bank to the borrower Doshion (attached at pp.95-113 of the reply filed by the IDBI Bank) stating that since an Event of Default had taken place since the borrower Doshion has failed to service the principal and interest amount payable to IDBI Bank on the due dates, the original loan including restructured loan were being recalled. We find that the recall notice to Doshion and thereafter, a letter to FIPL dated 4.11.2016 were sent by IDBI Bank without any reference or intimation to the Lead Bank i.e. Bank of Baroda or the Security Trustee.

27. Thus, it is clear that even though clause 7.2 of the Inter-se Agreement stipulated that even if an individual bank wanted to declare an 'Event of Default', it had to follow the procedure set out in clause 7.2 of the Inter-se Agreement (as well as Clause 4 of the Security Trustee Agreement) and intimates the Security Trustee of

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its intention to declare default, it has clearly not been done by Respondent IDBI Bank. The Respondent IDBI Bank has not made any averments that it had communicated its intention of declaring an 'Event of Default' to the Security Trustee or the Lead Bank Bank of Baroda. Thus we find that the 'Event of Default' declared by the Respondent IDBI Bank has not been declared in accordance with the Inter-se Agreement entered into between participating banks of the Bank of Baroda consortium and the Security Trustee Agreement, and therefore cannot be called a valid 'Event of Default'.

28. We note that in the Impugned Order the Adjudicating Authority has relied on clause 7.5 of the Inter-se Agreement to hold that any lender is at liberty to take any decision or action on any other matter and is not required to take any approval from any other lender. We find that clauses 7.1 and 7.2 of the Inter-se Agreement clearly lay down that an 'Event of Default' is covered under the actions for which the provisions are made in the Inter-se Agreement and the modality of taking such action is clearly set out in clause 7.2. Even for the enforcement of securities, clause 7.3 of the Inter-se Agreement clearly provides that the enforcement of any or all of the securities, shall be done by the Security Trustee

as per provisions of the Security Trustee Agreement on behalf of all the lenders and as instructed by the majority lenders. Therefore, clause 7.5 has to be read conjointly with clauses 7.1, 7.2 and 7.3 of the Inter-se Agreement. If that is done, we find that the action taken by the IDBI Bank in declaring 'Event of Default' is not in consonance with the provisions of Inter-se Agreement. We, therefore, conclude that the Adjudicating Authority has committed an error by placing reliance on a faulty interpretation and understanding of clause 7.5 of the Inter-se Agreement.

29. From the above discussion, it is clear that the Respondent IDBI Bank was not entitled to act independently in declaring an 'Event of Default' in respect of its individual loan and recalling the loan advanced by it to the borrower Doshion and seeking repayment of the said loan from the guarantor FIPL. We are, therefore, of the view that the *locus standi* of the Respondent IDBI Bank in taking unilateral action for declaring an 'Event of Default' in the repayment of the loan advanced by it is not established as the IDBI Bank being a participating bank of the Bank of Baroda consortium was bound to act under the clauses/provisions of the Inter-se Agreement and the Security Trustee Agreement.

30. We also consider the argument of the Appellant that Article 7.6 (e) of the Security Trustee Agreement stipulates that any lender which proposes to opt out of the consortium or reduce its share of facilities, shall be entitled to opt out and reduce its facilities only after the said lender has arranged with the borrower and ensure the substitution of the said lender, replenishment of facilities to the extent of the proposed reduction. We find strength in the argument of the Appellant that Standard Chartered Bank, a participant of the Bank of Baroda consortium, did not honour its promise for restructuring of the loan and therefore, the restructured loan package did not materialise. We are of the opinion that this issue is not relevant in the adjudication of section 7 application and would like to leave this issue at this stage only. We also feel that the arguments of the Learned Counsel for Appellant regarding the applicability of sections 129 and 133 of the Indian Contract Act in the present case would not be relevant in so far as adjudication of application 7 is concerned.

31. We note the order of NCLT in the matter of **IDBI Bank vs. Manoj Gaur (supra)** wherein it is held that if the Security Agreement lays down that the lenders shall act collectively then IDBI Bank could not have acted on behalf of all the lenders, without obtaining their formal consent and substituting itself in
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place of the Security Trustee. We also take note of the judgment of Hon'ble Supreme Court in the matter of **State Bank of India vs. V. Ramakrishnan (supra)** wherein the Hon'ble Apex Court has held that the continuing liability under IBC for corporate guarantees is not *res-integra* and shall be operative for individual guarantors. Both these judgments are, in our opinion, applicable in the present case.

32. On the basis of detailed discussion in the aforementioned paragraphs, we are of the clear opinion that, in view of the stipulations and provisions in the Inter-se Agreement of which the Respondent IDBI Bank was a signing party, and the provisions of the Security Trustee Agreement entered into between the Bank of Baroda (as a Lead Bank of the consortium) and the guarantor FIPL and IL&FS Trustee Company Limited, the IDBI Bank could not have acted unilaterally in either declaring an 'Event of Default' regarding repayment its loan facilities granted to the borrower Doshion and later seeking repayment of the loan from the guarantor Fivebro International Private Limited.

33. We thus, find the Adjudicating Authority has committed gross error in not examining the provisions in the Inter-se Agreement, Security Trustee Agreement and the Deed of
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Guarantee, by which the four participating banks of the Bank of Baroda consortium have bound themselves while considering their effect in the adjudication of the section 7 application filed against the guarantor FIPL and thereafter admitting it. We, therefore, set aside the Impugned Order and as a consequence the corporate debtor Fivebro International Private Limited is freed from the rigours of CIRP and moratorium and other related provisions of IBC.

34. There is no order as to costs.

(Justice Ashok Bhushan)
Chairperson

(Dr. Alok Srivastava)
Member (Technical)

(Mr. Barun Mitra)
Member (Technical)

New Delhi

15th November, 2022

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