IN THE NATIONAL COMPANY LAW TRIBUNAL MUMBAI BENCH-VI

CP (IB) No.984/MB/2023

WITH I.A. No.1085/2024

[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]

In the matter of:

INDOSTAR CAPITAL FINANCE LIMITED

[CIN: L65100MH2009PLC268160]

Off No.301, Wing A, CTS No.477

Silver Utopia, Chakala Road

Opp. Proctor and Gamble, Andheri (E)

Sahargaon, Mumbai-400099

Maharashtra.

…Financial Creditor/Respondent

Vs.

CCR LOGISTICS PRIVATE LIMITED

[CIN: U60231MH2012PTC231370]

25, Floor-2, 98, Mansur Building

Shamaldas Gandhi Marg, Lohar Chawl

Kalbadevi, Mumbai - 400002

Maharashtra.

...Corporate Debtor/Applicant

Pronounced: 24.02.2025

CORAM:

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

HON'BLE SHRI SANJIV DUTT, MEMBER (TECHNICAL)

Appearances: Hybrid

Financial Creditor: Adv. Maulik Choksi

Corporate Debtor: Adv. Harsh Kesharia and Adv. Pulkit Sharma

ORDER

[PER: SANJIV DUTT, MEMBER (TECHNICAL)]

1. BACKGROUND

1.1 This is an Application bearing C.P. (IB) No.984/MB/2023 (Main Application) filed on 16.09.2023 by Indostar Capital Finance Limited, the Financial Creditor under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "the Code") read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as "the AAA Rules") through Mr. Satish Rupwate, Legal Manager duly authorised in this behalf for initiating Corporate Insolvency Resolution Process (hereinafter referred to as "CIRP") in respect of CCR Logistics Private Limited, the Corporate Debtor**.**

1.2 India Infoline Finance Limited (hereinafter referred to as the "erstwhile Financial Creditor") had provided credit facilities in the form of commercial vehicle loans for an aggregate amount of Rs.34,78,76,850/- (Thirty-Four Crore Seventy-Eight Lakh Seventy-Six Thousand Eight Hundred and Fifty Rupees) from 29.12.2017 till 18.04.2020, by issuing various sanction letters to M/s. Cement Carriers, the Principal Borrower against hypothecation of vehicles. The Corporate Debtor is also a co-borrower along with M/s. Cement Carriers.

1.3 In the year 2019, the erstwhile Financial Creditor had transferred its vehicle finance business to the Financial Creditor through Slump Sale as per the provisions of the Income-tax Act, 1961 and entered into a Business Transfer Agreement dated 03.02.2019.

1.4 Owing to non-payment of outstanding dues, recall notices dated 07.01.2019 and 18.06.2021 were issued by the erstwhile Financial Creditor and the Financial Creditor respectively to the Corporate Debtor.

1.5 An *ex-parte* award was passed against the Corporate Debtor on 07.07.2022, in the Arbitration proceedings for overdue payment of the loans. However, the Corporate Debtor failed and defaulted in making the payment.

1.6 The date of default mentioned by the Financial Creditor is 07.01.2019, as per the supporting documents and NeSL Report filed by the Financial Creditor on 11.09.2021 and authenticated on 27.09.2021.

1.7 The total amount against the Corporate Debtor is claimed at Rs.31,27,47,528/- (Thirty-One Crore Twenty-Seven Lakh Forty-Seven Thousand Five Hundred and Twenty-Eight Rupees) including principal amount of Rs.22,55,10,196/-(Twenty-Two Crore Fifty-Five Lakh Ten Thousand One Hundred and Ninety-Six Rupees) and interest and other penal charges of Rs.8,72,37,332/- (Eight Crore Seventy-Two Lakh Thirty-Seven Thousand Three Hundred and Thirty-Two Rupees). Owing to the Corporate Debtor's inability to pay the Financial Creditor's dues, the latter has filed the present Application seeking initiation of CIRP in respect of the Corporate Debtor under Section 7 of the Code.

2. AVERMENTS OF FINANCIAL CREDITOR

2.1 The erstwhile Financial Creditor was an NBFC which had provided credit facilities by way of commercial vehicle loans to M/s. Cement Carriers, the Principal Borrower and the Corporate Debtor as the Co-Borrower against hypothecation

of vehicles. It had transferred its vehicle finance business to the Financial Creditor by entering into a Business Transfer Agreement dated 03.02.2019.

2.2 The total debt due is Rs.31,27,47,528/- inclusive of principal amount of Rs.22,55,10,196/- and interest and other penal charges of Rs.8,72,37,332/- (rounded off) as on 04.09.2023. The date of default as per Part-IV of the Application is 07.01.2019.

2.3 The erstwhile Financial Creditor had disbursed credit facilities in the form of commercial vehicle loans for an aggregate amount of Rs.34,78,76,850/- from 29.12.2017 to 18.04.2020, by issuing various sanction letters to the Corporate Debtor along with M/s Cement Carriers (who are the main borrowers) and Mr. Chintan Babaria. It is specifically mentioned in the loan agreements that they are the co-borrowers.

2.4 From time to time, the Financial Creditor made several follow-ups with the Corporate Debtor for the payment of the outstanding debt due and payable by the Corporate Debtor in respect of 198 accounts. The Financial Creditor issued a recall notice dated 10.08.2020, subsequent to which the director of the Corporate Debtor, Mr. Chintan Bababria had scheduled a meeting on 17.08.2020 and acknowledged the debt and assured the Financial Creditor that a definitive payment plan would be made in due time. A joint meeting was thereafter held on 20.10.2020, where the parties agreed to settle the said credit facility and the Corporate Debtor was required to pay Rs.18,00,00,000/- as full and final settlement of the dues payable. The Corporate Debtor acknowledged the debt on various occasions through emails. The Corporate Debtor made payments on various dates to the Financial Creditor amounting to Rs.5,97,55,174/-. The last

payment made by the Corporate Debtor was on 03.11.2022, and subsequently, there was continuous default in payment of the debt by the Corporate Debtor.

2.5 The Financial Creditor initiated arbitration proceeding against the Corporate Debtor under the provisions of the Arbitration and Conciliation Act,1996, in regard to 180 accounts. However, the Corporate Debtor failed to appear before the Arbitrator, and hence, the Arbitral Tribunal passed *ex-parte* Arbitration Awards.

2.6 The Corporate Debtor has nowhere disclosed specifically in its financial statements, though being a co-borrower, that it had availed loan from the erstwhile Financial Creditor. It has also not disclosed that the Financial Creditor has taken over the loan facilities and the same are due and payable to the Financial Creditor.

2.7 A recall notice was issued by the erstwhile Financial Creditor to the Corporate Debtor *vide* notice dated 07.01.2019 for the payment of debt which was due and payable by the Corporate Debtor. However, the Corporate Debtor failed to make any payment.

2.8 The Financial Creditor issued another recall notice dated 18.06.2021 for payment of Rs.26,67,63,014/-. In response to the notices issued to the Corporate Debtor, it agreed by email dated 01.02.2022 to settle the debt due and payable in three installments for an amount of Rs.13,50,00,000/-. However, till date, the Corporate Debtor had only paid an amount of Rs.5,97,55,174/-.

3. CONTENTIONS OF CORPORATE DEBTOR

3.1 The Corporate Debtor filed its Affidavit-in-Reply along with an Interlocutory Application bearing **IA No.1085/2024** (IA) on 04.03.2024 under Section 60(5) of the Code read with Rule 11 of NCLT Rules, 2016 challenging the maintainability of the present Application and seeking its dismissal. It is observed that the contentions/objections raised by the Corporate Debtor/Applicant in its Reply and IA are similar and the same are summarised below to avoid repetition.

3.2 In the present Application, the Financial Creditor has relied upon the loan recall notice dated 07.01.2019 and stated that the date of default as 07.01.2019. This notice was issued by the erstwhile Financial Creditor to the Principal Borrower viz. M/s. Cement Carriers; Co-Applicant viz., Mr. Chintan Babaria and Guarantor viz., CCR Logistics Private Limited i.e., the Corporate Debtor. The Financial Creditor has annexed an envelope addressed to M/s. Cement Carriers and not to the Corporate Debtor. The original loan recall notice dated 07.01.2019, does not bear the name of the Corporate Debtor and the same has not been served on the Corporate Debtor. The Financial Creditor had filed Application bearing CP (IB) No.46 of 2022 in respect of same alleged debt and the loan recall notice annexed therein did not bear the name of “CCR Logistics” and the same was withdrawn by the Financial Creditor after the reply of the Corporate Debtor was filed. In the present Application, the loan recall notice annexed bears the name of the Corporate Debtor. A comparison of the said letters shows an apparent contradiction and addition of the name of Corporate Debtor belatedly. The name of the Corporate Debtor has been added by the Financial Creditor in a *mala fide*

manner, as an afterthought, in order to claim the date of default as 07.01.2019 and to initiate CIRP against the Corporate Debtor.

3.3 Since the loan recall notice dated 07.01.2019 was not served on the Corporate Debtor, it cannot be said that the default was committed by the Corporate Debtor. The said loan recall notice is for a sum of Rs.21,71,036/-. If the Financial Creditor is terming the said loan recall notice as the date of default, then the same is in violation of Section 4 of the Code as the alleged default amount is below the prescribed threshold of Rs.1 Crore. Further, the Financial Creditor/Respondent has also initiated arbitration proceedings against the Principal Borrower and the Corporate Debtor herein in respect of the same alleged debt.

3.4 Upon the occurrence of an Event of Default, a notice has to be issued by the lender as a pre-condition and without the said notice, no action can be initiated against the Borrower and/or the Guarantor as per the terms of the Credit Facility Agreement. As per the Deed of Guarantee, any demand made by the lender to the guarantor shall be conclusive evidence of the guarantor's liability under clause 2.3 of the Deed of Guarantee. Therefore, until demand is made by the lender i.e., the Financial Creditor, no default can be said to have been committed by the Guarantor i.e., the Corporate Debtor.

3.5 The Financial Creditor has relied upon the reminder notice dated 18.06.2021, perusal of which reveals that the default for the loan facilities provided to the Principal Borrower occurred on or about 10.08.2020. This date of default i.e., 10.08.2020 is covered under Section 10A of the Code and the Financial Creditor has purposely taken the date of default as 07.01.2019 which is the date on which the notice of default for a sum of Rs.21,71,036/- was served on the Principal

Borrower viz., M/s Cement Carriers. Thus, the Application is not maintainable as the very first default occurred somewhere on or about 10.08.2020, which falls within the prohibited period specified under Section 10A of the Code.

3.6 The loan recall notice dated 07.01.2019 is only for a sum of Rs.21,71,036/- and the Financial Creditor has annexed certificate generated from NeSL showing the default amount of Rs.26,67,63,014/- as on 07.01.2019. However, the Financial Creditor/Respondent has failed to produce any document or material to substantiate the default amount of Rs.26,67,63,014/- outstanding on 07.01.2019. Further, the same amount of Rs.26,67,63,014/- alleged to be in default on 07.01.2019 is also specified in the loan recall notice dated 10.08.2020 and reminder notice dated 18.06.2021. If the averments of the Financial Creditor are true, then, despite the loan having been defaulted by the Principal Borrower on 07.01.2019, there is no increase in the amount of interest from 07.01.2019 up to 18.06.2021. Thus, the documents furnished by the Financial Creditor are contradictory in nature.

3.7 The Financial Creditor has mentioned that the disbursals were made to the Principal Borrower from 29.12.2017 till 18.04.2020. If the default existed as on 07.01.2019, the Financial Creditor ought not to have disbursed more sums to the Principal Borrower after the alleged default. This only shows that there was no default by the Corporate Debtor on 07.01.2019. A financial institution shall disburse funds to the borrower only when its account is standard and not an NPA or under default. Therefore, the present Application is *mala fide* as no default had taken place on the alleged date of default as alleged by the Financial Creditor.

3.8 The Financial Creditor has alleged a default of principal sum of Rs.22,55,10,196/- but produced a Credit Facility Agreement dated 25.11.2017 of Rs.2,65,00,000/- which is inadequately stamped. Further, the repayment schedule attached to this Credit Facility Agreement is blank and it does not contain the period within which the debt had to be repaid. There are no other agreements referred by the Financial Creditor in order to substantiate the balance principal debt in default. An unsigned and unstamped Deed of Guarantee dated 25.11.2017 was relied upon by the Financial Creditor. As per the Schedule in the Deed of Guarantee, the name of the Guarantors is mentioned but the name of the Corporate Debtor is not reflected therein. It also fails to mention the date of the Facility Agreement and name and signature of the Corporate Debtor, the Principal Borrower, the Individual Borrower and IIFL viz., the Original Financial Creditor. Therefore, the said document cannot be treated as valid in law and an inference cannot be drawn against the Corporate Debtor.

3.9 There is no guarantee provided for any amounts other than Rs.2.65 crore which is less than Rs.31,27,47,528/- allegedly claimed under the Application. The Corporate Debtor cannot be liable for any other debt of M/s. Cement Carriers. The inadequately stamped Deed of Hypothecation includes the definition of ‘Secured Assets’ as it shall mean the assets of the hypothecator identified in the Schedule together with any additions or improvements. Since the vehicles were owned by the Principal Borrower i.e., M/s. Cement Carriers and the said Principal Borrower was the Hypothecator, the Corporate Debtor, being a Guarantor, was made to execute the said document too. The duty is cast upon this Tribunal and

all courts under Section 33 of the Maharashtra Stamp Act to see that the document relied upon by the parties is duly stamped.

3.10 The Financial Creditor has annexed an Authority Letter dated 30.01.2020 issued by Mr. Shailesh Shirali (Whole Time Director) and Mr. Prashant Joshi (Chief Operating Officer) in favour of Mr. Satish Rupwate who has filed the Application. Mr. Satish Rupwate cannot be termed to be authorised by the Financial Creditor as Mr. Shailesh Shirali and Mr. Prashant Joshi are no more holding any position with the Financial Creditor as per the Master Data annexed to the Application. Further, there is no Board Resolution of the Financial Creditor authorising Mr. Shailesh Shirali and Mr. Prashant Joshi to sub-delegate authority to its officers to file the present Application.

3.11 The Corporate Debtor has rightly not disclosed the debt availed by the Principal Borrower in its books of account as it has never received any disbursements from the Financial Creditor in its books of account. Merely being a co-borrower does not make the Corporate Debtor the principal borrower and the debts lent by the erstwhile Financial Creditor to the Principal Borrower cannot be listed in the financial statements of the Corporate Debtor who was merely a guarantor for the debts availed by the Principal Borrower. Mere emails by the representative of the Corporate Debtor, particularly the one dated 31.12.2020, do not establish that the payments mentioned therein were made by the Corporate Debtor.

3.12 Initiation of CIRP against the Corporate Debtor would be contrary to the scope and objective of the Code, as discussed by the Hon'ble Supreme Court in ***Vidarbha Industries Power Limited Vs. Axis Bank Limited [****(2022) 8 SCC 352****]***.

The Respondent is a solvent company and has never defaulted in any of its debts

before any Bank. The intent of the Code is to resolve the sick and distressed companies through CIRP and not to put fully functional and solvent companies into insolvency. This Tribunal is not a recovery forum. Hence, the instant Application is not maintainable and deserves to be dismissed.

3.13 In its written submissions, the Corporate Debtor assets that in view of the admission of the Financial Creditor in reply to the IA, it is established that no loan recall notice dated 07.01.2019 was served on the Corporate Debtor. Therefore, the purported loan recall notice and date of default ought not to be considered while adjudicating the present Application. Under clause 14 of the Credit Facility Agreement, in the event of occurrence of default, the lender was required to issue notice to the borrower before initiating action under the Code. The reminder notice dated 18.06.2021 was addressed to the Principal Borrower and the Corporate Debtor which was a reminder to default and loan recall notice dated 10.08.2020. The reminder notice dated 18.06.2021 reveals that the default in payment of loans provided to the Principal Borrower occurred on or about 10.08.2020, which falls within the prohibited period covered under Section 10A of the Code. Section 10A stipulates that no Application shall ever be filed for the initiation of CIRP for any default occurring during the period from 25.03.2020 to 24.03.2021. Therefore, the present Application is hit by Section 10A of the Code and is not maintainable at the very threshold.

3.14 Merely because Mr. Chintan Babaria held a meeting with the Financial Creditor on 17.08.2020 and acknowledged the debt, it would make no difference. As held by the Hon'ble NCLAT in the matter of ***SLB Welfare Association Vs. PSA Impex Private Limited and Anr. [(2022) ibclaw.in 890 NCLAT],*** the date of

default and acknowledgment of debt are two different events and the date of default is not dependent on acknowledgment of debt. The position will not change even if the Corporate Debtor made some part payments during the prohibited period covered by Section 10A. In the matter of ***IDBI Trusteeship Services Limited Vs. Direct Media Distribution Ventures Private Limited [CA (AT) (INS) No. 850 of 2023],*** the Hon'ble NCLAT has held that after issuance of notice during the prohibited period, subsequent realisation of part amount by sale of shares within the prohibited period cannot take the application under Section 7 out of prohibition under Section 10A.

3.15 There is no specific Board Resolution and/or Power of Attorney in favour of the Authorised Representative of the Financial Creditor due to which the present Application deserve to be dismissed. Further, it is submitted that that the NeSL certificate mentioning 07.01.2019 as the date of default is only *prima facie* evidence of default which is rebuttable by the corporate debtor, as held by the Supreme Court in ***Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors.*** **[(2019) (4) SCC 17].** The arbitration award relied upon by the Financial Creditor has been passed by the Arbitrator unliterally appointed by the Financial Creditor without giving any notice to the Corporate Debtor, and hence, such arbitration award is unenforceable ***[Perkins Eastman Architects DPC & Anr. Vs. HSCC (India) Limited [(2020) 20 SCC 760] and Kotak Mahindra Bank Ltd Vs. Narendra Kumar Prajapat (2023) SCC OnLine Del 3148].***

4. REPLY OF FINANCIAL CREDITOR/RESPONDENT TO IA No.1085 OF 2024

4.1 The Principal Borrower of the Corporate Debtor i.e., M/s Cement Carriers has submitted its income-tax returns to the Financial Creditor for the Assessment Year 2023-2024 which show that the Principal Borrower has booked an operational income of Rs.63,47,71,718/-. It is clear that the Corporate Debtor/ is having good running business operations. However, the Corporate Debtor is not ready to make payment of the debt which is in default.

4.2 The date of default i.e., 07.01.2019 was not based on the loan recall notice issued by the erstwhile Financial Creditor, as presumed by the Corporate Debtor but it was based on the continuous default of the Corporate Debtor. It was categorically mentioned that the said loan recall notice was based on Loan Agreement No.1000162654. In the loan agreement, the name of the Guarantor is Mr. Chintan Babaria who is the authorised representative of the Corporate Debtor, whereas the Corporate Debtor is the Co-Borrower.

4.3 The Corporate Debtor is correct in stating that the erstwhile Financial Creditor never served the copy of the original loan recall notice dated 07.01.2019 on the former. The Financial Creditor had taken over the business from the erstwhile Financial Creditor on 03.02.2019 which was after the service of the loan recall notice to the Principal Borrower. The Corporate Debtor has referred to the loan recall notice sent by the erstwhile Financial Creditor on 07.01.2019 but not to the one sent by the Financial Creditor on 18.06.2021 where the name of the Corporate Debtor was mentioned and the debt was acknowledged by the Corporate Debtor by email on several occasions and payments of Rs.5,97,55,174/- were made from 29.10.2020 till 11.03.2022.

4.4 There were in total 15 hearings which took place from 01.03.2022 to 15.06.2023, in which on various occasions, both the Counsel mentioned that the parties were into settlement talks. The Corporate Debtor was only buying time in repayment of its debt and on those grounds, the Counsel for the Financial Creditor had to finally appear on 15.06.2023 and had to withdraw the Application with liberty to file a fresh Application. Hence, the Corporate Debtor has raised a frivolous ground that the name of the Corporate Debtor was wrongly added subsequently in the loan recall notice by the Financial Creditor.

4.5 The Corporate Debtor has not objected to the said date of default i.e., 07.01.2019 when the record of financial information was filed with NeSL on 11.09.2021. Thereafter, NeSL had sent official reminders on the email address of the Corporate Debtor registered with the MCA Portal but no response was received from the Corporate Debtor. The record of default was thus deemed to be authenticated on 27.09.2021. The Financial Creditor had served a recall notice on 18.06.2021. Pursuant thereto, the Corporate Debtor had not only paid its debt which it had defaulted from time to time till 11.03.2022 but also acknowledged the debt. Further, the Corporate Debtor had agreed to pay the debt due in three instalments to the tune of Rs.13,25,00,000/- as evident from internal email of the Financial Creditor dated 01.02.2022. Hence, the Financial Creditor is relying on the sanction letters where the Corporate Debtor is a co-borrower/co-applicant and other documents like the hypothecation deed, loan recall notice sent by the Financial Creditor to the Corporate Debtor in order to prove that there existed a debt of Rs.31,27,47,528/-, which includes principal amount of Rs.22,55,10,196/- and interest and other penal charges of Rs.8,72,37,332/-. It is pertinent to note

that the Applicant has repaid part of its debt till 11.03.2022 and from that date, the default continues till the present date.

4.6 There is no condition under Section 7 of the Code to issue any notice before initiating CIRP by the Financial Creditor against Corporate Debtor when the Corporate Debtor has itself acknowledged the debt and has partly paid its debt on various occasions. The deed of guarantee will be applicable to the personal guarantor i.e., Mr. Chintan Babaria and not to the Corporate Debtor who is the Co-Borrower. Hence, the contention raised by the Corporate Debtor that a notice was to be issued by the Financial Creditor if there is any default committed by the Corporate Debtor is false and frivolous.

4.7 It has been mentioned in the vehicle loan application form, credit facility agreement and its relevant schedules that the Corporate Debtor was the Co-Borrower along with M/s. Cement Carriers. The director of the Corporate Debtor, Mr. Chintan Babaria, has signed the necessary forms at the time of availing the loan from the erstwhile Financial Creditor. However, today the Corporate Debtor who has signed the initial forms for availing the said credit facility from the erstwhile Financial Creditor in the capacity of the Co-borrower is stating that the Corporate Debtor is not a Co-Borrower but a guarantor.

4.8 The Corporate Debtor has mentioned that the Covid period was from 25.03.2020 to 24.03.2021 and it is also mentioned that a recall notice was issued on 18.06.2021 for notifying the default. However, the Corporate Debtor has failed to point out that the Director of the Corporate Debtor, Mr. Chintan Babaria had scheduled a personal meeting on 17.08.2020, wherein he had acknowledged the default and assured the Financial Creditor that the definitive payment plan would

be made in due time. The record of default was also recorded by the Financial Creditor on 11.09.2021, when there were three reminders sent by the NeSL to the Corporate Debtor on 15.09.2021, 19.09.2021 and 23.09.2021 respectively to which the Corporate Debtor had failed to respond. Subsequently, the said status of default was deemed to be authenticated on 27.09.2021. Hence, there were multiple reminders that were sent by the Financial Creditor and the application was filled much after the COVID period. Therefore, the contention raised by the Corporate Debtor that the date of default was taken as 07.01.2019 in order to avoid Section 10A is false and frivolous.

4.9 The authority letter was given by the authorised representatives *vide* Resolution passed at the meeting of the Board of Directors of the Financial Creditor held on 08.08.2019, as mentioned in the Authorisation annexed to the Application. In view of above, it is submitted that the IA filed by the Corporate Debtor should be dismissed.

4.10 In its written submissions, the Financial Creditor has reiterated that the loan recall notice dated 07.01.2019 was only in relation to one loan agreement bearing No.1000162654 whereas the Corporate Debtor has availed loans to the tune of Rs.34,78,76,850/- under 188 accounts approximately from the erstwhile Financial Creditor. The Financial Creditor had relied upon various sanction letters issued by erstwhile Financial Creditor and not merely on one sanction letter having reference No.1000162654. In the loan recall notice dated 18.06.2021, it was specifically mentioned that an amount of Rs.26,67,63,014/- was due and payable by the Corporate Debtor. Finally, it is submitted that when 07.01.2019 was filed as the date of default with the NeSL on 11.09.2021 and the same was

deemed to be authenticated on 27.09.2021, the Corporate Debtor had not raised any objection.

5. ANALYSIS AND FINDINGS

5.1 Upon careful perusal of the pleadings and documents on record and hearing both the Ld. Counsel for the Financial Creditor and the Corporate Debtor, our findings are as under:-

5.2 It is well-settled that while considering an Application filed under Section 7 of the Code for initiating CIRP against a corporate debtor, the primary condition is that a default ought to have occurred in repayment of the debt in question. Section 3(12) of the Code defines “default” as non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be. The onus to prove that the corporate debtor has committed a default lies on the financial creditor who has to adduce relevant and credible evidence in this regard.

5.3 In the present case, it is observed from the record that the erstwhile Financial Creditor extended credit facilities amounting to Rs.34,78,76,850/- by way of commercial vehicle loans against hypothecation of vehicles from 29.12.2017 to 18.04.2020 in as many as 199 accounts to M/s.Cement Carriers, the Principal Borrower, while the Corporate Debtor and Mr.Chintan Pankaj Babaria acted as the Co-Borrowers. Subsequently, the erstwhile Financial Creditor *vide* Business Transfer Agreement dated 03.02.2019 transferred its vehicle finance business to the Financial Creditor through slump sale. The present Application has been filed by the Financial Creditor seeking initiation of CIRP in respect of the Corporate

Debtor on account of alleged default in payment of the outstanding loans. On the other hand, the Corporate Debtor has filed IA No.1085/2024 challenging the maintainability of the said Application on various grounds as brought out in Paras 3.1 to 3.15 above.

5.4 The Financial Creditor has declared 07.01.2019 as the date of default in Part-IV of the Application and claimed a sum of Rs.31,27,47,528/- (rounded off) to be in default including principal debt of Rs.22,55,10,196/- (rounded off) and interest and other penal charges of Rs.8,72,37,332/- (rounded off). The Financial Creditor has also annexed to the Application record of default in Form D issued by the Information Utility/NeSL showing the date of default as 07.01.2019; principal amount outstanding as Rs.25,11,93,711/- (rounded off) and the default amount as well as the total outstanding amount at Rs.26,67,63,014/- (rounded off). The status of authentication is described as “deemed to be authenticated” in view of absence of response from the Corporate Debtor.

5.5 It is now proposed to examine whether the Financial Creditor and the Respondent (in IA) has been able to adduce necessary evidence in order to establish the occurrence of default on the part of the Corporate Debtor and the Applicant (in IA). It is observed from the record that the Financial Creditor has annexed to the Application a few specimen Commercial Vehicle Loan Agreements/ Term Sheets showing that these loans were in the nature of term loans against hypothecation of vehicles financed and involved payment of equated monthly instalments (EMIs) for a period of 57 months. The Financial Creditor has also furnished copy of Credit Facility Agreement dated 25.11.2017, in respect of commercial vehicle loan of Rs.2.26 Crore in 10 accounts. Under

Section 1(vii) of the Agreement, default means (a) an Event of Default; and (b) an event or circumstance set out in Section 13 (Events of Default) which, with the expiry of grace period, the giving of notice or the making of any determination under a Finance Document or any combination of them, would be an Event of Default. Non-payment of any amount payable on the due date is obviously treated as Event of Default under Section 13 of the Agreement. As per Section 5 of the Agreement, the Borrower shall make repayment of the principal and the interest amount as per the Repayment Schedule II annexed with the Agreement. However, a perusal of the said Repayment Schedule II reveals that all its columns are left blank and consequently, no repayment schedule is specified therein. Section 14 of the Agreement deals with the consequences of events of default, which, *inter alia,* provides that the Financial Creditor may, by notice, declare all amounts payable in respect of the facilities to be due and payable immediately, thereby recalling the entire outstanding loans. Thus, it emerges that no action under Section 7 of the Code could have been initiated by the Financial Creditor/Respondent without issuing an “Event of Default or Loan Recall notice” to the Principal Borrower and Co-Borrowers.

5.6 In order to prove the existence of default, the Financial Creditor initially placed heavy reliance on the Recall Notice dated 07.01.2019 issued by the erstwhile Financial Creditor to the Corporate Debtor for payment of the outstanding debt. A perusal of the said Recall Notice reveals that it was a standard computer generated notice addressed to M/s.Cement Carriers as Borrower/Applicant and Mr.Chintan Pankaj Babaria as Co-Applicant (with name of the Corporate Debtor written by hand thereon) intimating them about the default in repayment of EMIs

under Loan Agreement No.1000162654 and calling upon them to pay the overdue amount of Rs.21,71,036/- within 7 days from the date of this notice. However, the Corporate Debtor produced along with the IA copy of the original loan Recall Notice dated 07.01.2019 which did not bear its name. Further, the Corporate Debtor pointed out that the original Recall Notice had been annexed by the Financial Creditor in the previous CP(IB) No.46 of 2022 in respect of same debt which was later withdrawn after considering the objection of the Corporate Debtor. Realising that production of the original Recall Notice dated 07.01.2019 (not addressed to the Corporate Debtor) was likely to give rise to the allegation of interpolation and put the Financial Creditor in a tight spot, it admitted in the reply to the IA that the erstwhile Financial Creditor had never served copy of the original Recall Notice on the Corporate Debtor.

5.7 However, the Financial Creditor/Respondent now came out with the specious plea that the ascertainment of 07.01.2019 as the date of default was “based on the continuous default” by the Corporate Debtor/Applicant but the former could not place on record relevant documentary evidence in support of its contention. Further, it is pertinent to note that in spite of the alleged default on 07.01.2019, the Financial Creditor continued to disburse vehicle loans to the Principal Borrower over the next fifteen months till 18.04.2020, which does not appear to be in the ordinary course of business, especially when the Financial Creditor has not offered any explanation to the same. In these circumstances, it can by no means be said that the Corporate Debtor committed default on 07.01.2019.

5.8 Once it is found that the loan Recall Notice dated 07.01.2019 was never addressed to the Corporate Debtor at all, as agreed upon between the Financial

Creditor and the Corporate Debtor, the record of default filed by the Financial Creditor based on the said date of default with the IU/NeSL can no longer be treated as authentic or reliable. It is well-settled that the IU/NeSL record of default is not conclusive of the default under the Code and that the same at best raises a rebuttable presumption. We find that the Corporate Debtor in the present case has thus been able to effectively refute the presumption (of default having occurred on 07.01.2019) sought to be raised by the Financial Creditor. Merely because the Corporate Debtor did not object to the said date of default during the process of authentication undertaken by NeSL, it is not precluded from doing so while filing its reply to the main Application before the Adjudicating Authority. We also find that the Financial Creditor does not have a consistent and coherent stand with regard to the amount claimed to be in default. For example, the loan recall notice dated 07.01.2019 only speaks of overdue amount of Rs.21,71,036/- in respect of just one Loan Agreement No.1000162654 whereas the Financial Creditor has declared the default amount on 07.01.2019 at Rs.26,67,63,014/- in the IU/NeSL record of default which is found to be the same as reflected in the loan Recall Notice dated 18.06.2021. We find merit in the Corporate Debtor's contention that the Financial Creditor has failed to furnish any concrete materials or documents to substantiate the default amount of Rs.26,67,63,014/- as on 07.01.2019.

5.9 This brings us to consideration of the subsequent loan Recall Notice dated 18.06.2021 sent to both M/s.Cement Carriers and the Corporate Debtor. A perusal of the said Recall Notice reveals that it was issued by the Financial Creditor as a "reminder to Default and Recall of Loan Notice dated 10.08.2020"

notifying “defaults by the Borrower and Co-Borrower under the Commercial Vehicle Loans Agreements”. Since the aforesaid Recall of Loan Notice dated 10.08.2020 was not found to be placed on record by the Financial Creditor, the matter was listed for clarification on 25.10.2024, when the Financial Creditor was called upon to furnish copy of the said notice. However, the Financial Creditor did not tender the same stating that they did not have the copy of the same. The non-furnishing of the loan recall notice dated 10.08.2020 issued by the Financial Creditor to the Corporate Debtor itself indicates that the said document has been deliberately held back so as to suppress a vital piece of evidence supporting the Corporate Debtor’s case and that production thereof would not have been favourable to the Financial Creditor’s own case.

5.10 It is pertinent to note that the loan recall notice dated 10.08.2020 is required to ascertain the date as well as quantum of defaults occurring on or around 10.08.2020 notified by the Financial Creditor to the Corporate Debtor, which would fall within the suspension period covered under Section 10A of the Code. The Financial Creditor having acquired the commercial vehicle loan business of the erstwhile Financial Creditor under the Business Transfer Agreement dated 03.02.2019 cannot legitimately come out with the plea that it does not have the said document dated 10.08.2020 to produce before this Tribunal. In these circumstances, we are of the view that the loan recall notice dated 10.08.2020 referred by the Financial Creditor in its reminder notice dated 18.06.2021 falls under the 10A period and if it was produced before this Tribunal, the Main Application would not be maintainable on this ground.

5.11 Section 10A of the Code imposes a bar against filing of applications under Sections 7, 9 or 10 for initiation of CIRP in relation to defaults committed between 25.03.2020 and 24.03.2021. The date of 25.03.2020 coincides with the date on which the National Lockdown was declared due to the onset of the COVID-19 Pandemic which caused widespread distress and had serious repercussions on the financial health of the corporate enterprises. The proviso to Section 10A stipulates that no application shall ever be filed for initiation of CIRP of a corporate debtor for the said default occurring during the said period.

5.12 In the instant case, we are of the considered view that the default in respect of payment of alleged debt occurred neither on 07.01.2019 nor on 18.06.2021 but on or around 10.08.2020 which falls within the prohibited period specified under Section 10A of the Code. Mere acknowledgement of debt by representative of the Corporate Debtor on 17.08.2020 or payments made or settlement proposed by the Corporate Debtor during the prohibited period will not cure the defect of default of the Corporate Debtor having occurred on or around 10.08.2020, which is statutorily hit by Section 10A of the Code, and hence, the present Application cannot be entertained, as brought out in the judgments of Hon'ble NCLAT cited in Para 3.14 above. As the default took place on or around 10.08.2020 falling within the suspension period, the reliance of the Financial Creditor on the loan Recall Notice dated 18.06.2021, which is much after the expiry of the suspension period will also be of no avail, because the subsequent notice dated 18.06.2021 was only a reminder to the earlier loan recall notice dated 10.08.2020 dealing with default occurring within the suspension period for which no application could

ever be filed for initiation of CIRP of the Corporate Debtor in terms of the proviso to Section 10A of the Code.

5.13 The Hon'ble Supreme Court in ***Innoventive Industries Ltd. Vs. ICICI Bank*** **[(2018) 1 SCC 407]** laid down the guiding principles to admit or reject an application filed under Section 7 of the Code. In order to admit an application, the Adjudicating Authority is to be satisfied that a default in respect of a financial debt has occurred. Where the Adjudicating Authority is not satisfied that a default has occurred, the Main Application cannot be admitted. In the present case, we find that the Financial Creditor has failed to discharge the onus of establishing the occurrence of default by the Corporate Debtor, which is the *sine qua non* for admitting an application under Section 7 of the Code. The Financial Creditor has not placed on record cogent and credible evidences and materials to substantiate the occurrence of default in repayment of alleged debt by the Corporate Debtor. In this background, we do not deem it necessary to deal with the other contentions and counter-arguments of the parties on other issues like lack of proper authority to file the Application, non-stamping or inadequate stamping of loan documents, etc.

5.14 In view of aforesaid discussions, we are of the considered view that IA No.1085/2024 deserves to be allowed and the Main Application is not maintainable and is liable to be rejected.

ORDER

In view of the aforesaid findings, **I.A No.1085/2024** is **allowed** and consequently the Main Application bearing C.P.(IB) No.984/MB/2023 filed under Section 7 of

the Code by Indostar Capital Finance Limited, the Financial Creditor, for initiating CIRP in respect of CCR Logistics Pvt Ltd, the Corporate Debtor is hereby **rejected**.

However, the rejection of the Main Application shall not cause any prejudice to the right of the Financial Creditor to pursue such other remedies as may be available in accordance with law.

Sd/-
SANJIV DUTT
MEMBER (TECHNICAL)

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

Vani & JNK