NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 939 of 2023

[Arising out of Order dated 19.05.2023 passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench–IV), in I.A. No. 581/2023 in C.P. (IB) No. 107/MB-IV/2023]

IN THE MATTER OF:

IDBI Bank Limited
Having its registered office at:
IDBI Tower, W.T.C. Complex,
Cuffe parade, Mumbai – 400 005 **...Appellant**

Versus

Zee Entertainment Enterprises Limited
18th Floor, 'A' wing, Marathon Futurex,
NM Joshi Marg, Lower Parel,
Mumbai 400 013 **...Respondent**

Present:

For Appellant : Mr. R. Ventakraman (ASG), Mr. Diwakar Maheshwari, Ms. Pratiksha Mishra, Mr. Vishnu Sriram and Mr. Karan Bhootra, Advocates.

For Respondent : Mr. Arun Kathpalia & Mr. Abhijeet Sinha, Sr. Advocates with Mr. Aman Raj Gandhi, Mr. Vardaan Bajaj and Mr. Ojasni Sharma, Advocates.

J U D G M E N T

ASHOK BHUSHAN, J.

This appeal by IDBI Bank has been filed challenging the order dated 19.05.2023 passed by the adjudicating authority (National Company Law Tribunal, Mumbai Bench, Court – IV), rejecting Section 7 application filed by the appellant as barred by Section 10A of the Insolvency and Bankruptcy Code, 2016 (for short 'the Code' or 'the IBC'). Aggrieved by the order rejecting Section 7 application, this appeal has been filed.

2. Brief facts necessary to be noticed for deciding the appeal are:

i. IDBI Bank on request of Siti Networks Limited (borrower) sanctioned Working Capital – Cash Credit Facilities of upto ₹25 Crore in favour of the borrower vide sanction letter dated 24.11.2008.

ii. On 09.12.2009, IDBI sanctioned Working Capital Ltd. of ₹50 Crore in favour of borrower.

iii. On 29.05.2012, IDBI enhanced the Working Capital Facility up to ₹150 Crore comprising of fund base limit of ₹50 Crore and non-fund base limit of ₹100 Crore in favour of the borrower against first pari passu charge on the assets of the company.

iv. Loan agreement was entered on 17.07.2012 with borrower and IDBI Bank.

v. Pursuant to facilities granted to the borrower, a guarantee agreement was executed by corporate debtor, ZEE Entertainment Enterprises Limited in favour of IDBI Bank, guaranteeing the obligation of borrower to maintain the Debt Service Reserve Account (DSRA).

vi. Working Capital Facility was further enhanced in the year 2016.

vii. On request of borrower, the Working Capital Facilities were renewed from time to time.

viii. On 29.12.2019, account of borrower was declared as NPA by the IDBI Bank.

ix. On 18.02.2021, financial creditor recalled the facilities calling upon the borrower to pay a sum aggregating to ₹135,70,00,000/- approximately.

x. On 05.03.2021, financial creditor called upon the corporate debtor to pay a sum aggregating to ₹61,97,00,000/-.

xi. Corporate debtor sent a reply to the letter on 15.03.2021 denying its obligation to pay. In reply to the letter of corporate debtor dated 15.03.2021, financial creditor, respondent sent a response to the corporate debtor.

xii. On 19.06.2021, IDBI Bank issued notice under Section 13(2).

xiii. Financial creditor issued notice on 09.12.2022 to the corporate debtor calling upon the corporate debtor to maintain the DSRA.

xiv. A Section 7 application was filed by the IDBI bank against the corporate debtor on 13.12.2023, claiming default under the Working Capital Facilities, demanding amount of ₹149,60,69,763/-.

xv. It was pleaded that borrower defaulted in payment of payment obligation under the Working Capital Facility on 30.09.2019.

xvi. Financial creditor claimed to have been invoked the guarantee on 05.03.2021 and corporate debtor claim to be in continuous default in terms of the guarantee agreement dated 03.08.2012.

xvii. A reply to the Section 7 application was filed by the corporate debtor on 28.04.2023. In the reply, corporate debtor denied its obligation to pay the amount as claimed. It was pleaded in reply that application filed by

the IDBI Bank is barred by Section 10A of the IBC. The guarantee agreement dated 03.08.2012 was very specific and limited guarantee restricted only to ensuring that the credit balance required to be maintained by Siti Networks Ltd. in the DSRA account to the extent of identified scheduled payment is maintained at all times and to replenish the same in case of all default. Term loan taken by Siti Networks Ltd. was repaid. Entire facility having been recalled by the IDBI Bank. Requirement of maintaining DSRA, itself ceased. The notice dated 05.03.2021 invoking the DSRA guarantee fell within 10A period.

xviii. The corporate debtor filed an I.A.581/2023, in Section 7 petition, praying for rejection of Section 7 application as barred by Section 10A. The I.A. was replied by the financial creditor to which rejoinder was also filed. Adjudicating Authority after hearing the parties by impugned order has allowed the I.A.581/2023 and dismissed Section 7 application as barred by Section 10A.

xix. Aggrieved by the order 19.05.2023, this appeal has been filed.

3. We have heard learned Sr. counsel Mr. R. Venkataraman ASG with Ms. Pratiksha Mishra appearing for the appellant. Learned Sr. counsels Mr. Arun Kathpalia and Mr. Abhijit Sinha has appeared for the respondents.

4. Learned Sr. counsel Mr. N. Venkatraman submits that adjudicating authority committed error in rejecting Section 7 application as barred by 10A. It is submitted that there was default on the part of the corporate debtor since

September 2019, the amount in the DSRA was NIL post September 2019. Appellant had addressed a letter dated 02.03.2020 to the borrower, copy of which letter was also marked to the corporate debtor since DSRA amount was NIL since September 2019, no amount could be appropriated from the DSRA account to the loan account as a result of which borrower's account was declared NPA in December 2019. It is submitted that default on the part of the corporate debtor occurred prior to the 10A period i.e., prior to 25.03.2020. It is further pleaded that the default of corporate debtor continued even after the period specified under Section 10A, respondent never replenished the DSRA account and continuous to be in default. Notice has also been addressed by the appellant to the respondent on 09.12.2022.

5. Learned counsel for the appellant referring to the account statements of Siti Networks Ltd. submitted that on 30.09.2019, the corporate debtor was obligated as per the corporate guarantee to fund an amount of ₹6.66 Crore in the DSRA account being interest payable in the two quarters i.e., quarter two and quarter three of financial year 2019-20. Respondent was on default on 30.09.2019. Learned counsel for the appellant relying on the recent judgment of the Hon'ble Madras High Court in the matter of ***'Dharamshi K. Patel & Anr.' Vs. 'Indian Bank & Ors.'*** reported in ***Writ Petition (C) 712/2024*** decided on 23.01.2025 submits that in event the default continuous beyond the 10A period, Section 7 application cannot be held to be not maintainable. It is submitted that judgment of the Hon'ble Supreme Court in ***'Ramesh Kymal' Vs. 'Siemens Gamesa Renewable Power (P) Ltd.,'*** reported in ***(2021) 3 SCC 224,*** cannot be made applicable in the facts of the present case,

since in the present case, default has continued beyond the period prescribed under Section 10A. It is submitted by learned counsel Mr. Venkataraman that as per Clause 25 of the DSRA, notice to borrower is notice to the guarantor also and when on 03.03.2020 borrower was informed to replenished the amount in the DSRA, which letter was also copied to the corporate debtor, default has been committed by the corporate debtor also. Learned Sr. Counsel Mr. Venkatraman has referred to Clause 25 of the guarantee deed dated 03.08.2022 to support his submissions.

6. Learned counsel Mr. Arun Kathpalia appearing for the respondent refuting the submissions of the appellant contends that corporate debtor has given only limited and restricted guarantee to the IDBI Bank to maintain the necessary amount in the DSRA. Notice dated 05.03.2021 was first notice demanding payment from the corporate debtor. Demand notice dated 05.03.2021 is a notice invoking the guarantee dated 03.08.2012 and demanding amount from corporate debtor calling upon the corporate debtor to pay amount of ₹61,97,33,612/- demanding the payment forthwith thus default as alleged on corporate debtor, being on 05.03.2021 i.e., the period covered under 10A, application under Section 7 was clearly barred by time and has rightly rejected by the adjudicating authority. It is submitted that the various clauses of guarantee agreement dated 03.08.2012 indicates namely clauses 7, 9, 10, 11 & 27 that DSRA guarantee is on demand guarantee. The liability of the corporate debtor who has given limited guarantee is to arise only when guarantee is invoked and demand is made. It is submitted that prior to 05.03.2021 guarantee was never invoked by the

appellant so as to create any default on the part of the corporate debtor. Existence of debt is not sufficient for filing a Section 7 application unless default is also committed by the corporate debtor. The reliance of counsel for the appellant on Clause 25 is misplaced. The clauses of the guarantee i.e., Clauses 7, 9, 10 & 11 clearly contemplate invocation of guarantee and making a demand from the corporate debtor. The said clauses cannot be nullified relying on Clause 25 only. It is well settled that terms of an agreement have to be read in a manner to give effect to the relevant Clauses, and each Clauses should be interpreted in the manner that harmonised with the rest of the agreement ensuring the coherent and consistent construction. The application under Section 7 was filed on the basis of invocation of guarantee on 05.03.2021, which fell during 10A period. The submission of the appellant that default continuous hence the application is maintainable is without any basis. Application under Section 7 was not based on any default subsequent to 10A period. The appellant has made extraordinary claims against the corporate debtor against the guarantee dated 03.08.2012.

7. We have considered the submissions of the counsel for the parties and perused the records.

8. We need to first notice the pleadings and materials contained in Section 7 application filed by the IDBI Bank Limited. In the synopsis of the application after giving details while referring to the guarantee deed dated 03.08.2012, it was pleaded that the corporate debtor agreed and guaranteed the borrowers obligation to maintain credit balance in the DSRA, which at all times was equivalent to two quarter interest and one quarter interest principal

amount of the term loan facility. In para 9 of the synopsis following has been pleaded:

> *"9 On 3 August 2012, the Corporate Debtor (also, the guarantor) agreed and guaranteed the Borrower's obligation to maintain credit balance in the Debt Service Reserve Account (**DSRA**) at all times equivalent to 2 Quarters interest payable for the Working Capital Facility and 60 CR Term Loan Facility (from the date of first disbursement) and 1 Quarter principal amount of the Term Loan Facility (DSRA Amount). The obligation of the Borrower and Guarantor (i.e. the Corporate Debtor) to maintain the **DSRA Amount** is till the repayment of the Facilities. A copy of the guarantee agreement dated 03 August 2012 is annexed hereto and marked as "**Annexure-E**"."*

9. There is no dispute between the parties that term loan stood repaid and the Section 7 application confines to Working Capital Facilities only. It was pleaded that borrower continued to default in his obligation and consequently the account of the borrower was classified as NPA on 29.12.2019. IDBI by recall letter dated 18.02.2021 issued to the borrower recalled the entire facility. In paragraph 20, it was pleaded that on 05.03.2021, the financial creditor invoked the guarantee provided by the corporate debtor. Paragraphs 18, 19 and 20 of the synopsis of Section 7 is as follows:

> *"18. The Borrower and the Corporate Debtor continued to default in their obligations and consequently, the account of the Borrower was classified as Non-Performing Asset (NPA) from on 29 December 2019:*
>
> *19. The Borrower defaulted in its obligations under the Facilities and accordingly, the Financial Creditor recalled the entire Facility and demanded and called upon the Borrower to pay Rs 135,70,32.574.77 (out of which Rs 118,71,87,498.16 is towards the Working Capital Facility) within 15 days. The Financial Creditor did not receive any response from the Borrower to this. A copy of the recall letter dated 18 February 2021 is annexed hereto and marked as "**Annexure-N";***

*20. On 05 March 2021, the Financial Creditor invoked the guarantee provided by the Corporate debtor and called upon the Corporate debtor to pay Rs 61,97,33,612.80 together with further interest from 18 February 2021. A copy of the demand notice dated 5 March 2021 is annexed hereto and marked as "**Annexure-O**".”*

10. Now we need to notice Part IV of the application. Entire Part IV of the Section 7 application filed by the IDBI is to the following effect:

“PART – IV

PARTICULARS OF FINANCIAL DEBT		
1.	*TOTAL AMOUNT OF DEBT GRANTED DATE(S) OF DISBURSEMENT*	***A. Details of Debt Working Capital Facilities of Rs. 150 Crores on the terms and conditions set out in:*** *1. Sanction letter dated 24 November 2008* *2. Sanction letter dated 09 December 2009* *3. Sanction letter dated 9 March 2011* *4. Sanction letter dated 29 May 2012* *5. Sanction letters dated 15 October 2013* *6. Sanction letters dated 10 November 2014* *7. Sanction letter dated 11 February 2016* *8. Sanction letter dated 19 July 2017* *9. Sanction letter dated 19 December 2018* ***[Note: The Financial Creditor reserves its right to***

		bring on record facility agreement or any other document] ***B. Details of Disbursement*** *The Working Capital Facility of Rs. 150 crore was utilized by the Borrower on various dates.*
2.	*AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED (ATTACH THE WORKINGS FOR COMPUTATION OF AMOUNT AND DAYS OF DEFAULT IN TABULAR FORM)*	***A. Facilities*** *The total amount of default under the Working Capital Facility of Rs 150 crore is Rs. 149,60,69,763.39 (Rupees One Hundred Forty Nine Crore Sixty Lakh Sixty Nine Thousand Seven Hundred Sixty Three and Thirty Nine Paisa Only) as on 08 December 2022 together with the applicable interest, penal interest, premia, charges etc. thereon at the contractual rates upon the footing of compound interest until payment/ realization to the satisfaction of Financial Creditor.* *The Borrower defaulted in payment of its obligations under the Working Capital Facility on 30 September 2019 and the account of the Borrower was classified as a Non-Performing Asset on 29 December 2019 in*

		accordance with the existing guidelines of Reserve Bank of India. *The Financial Creditor invoked the guarantee on 5 March 2021 and the Corporate Debtor is in continuous default in terms of the guarantee agreement dated 03 August 2012.* *A tabular computation of amount in default and days of default is annexed herewith as* ***"Annexure AG".***

11. Before we proceed further, we need to notice relevant Clauses of the guarantee agreement executed by corporate debtor in favour of the IDBI Bank. Guarantee agreement dated 03.08.2012 has been filed as Annexure A-8 to the appeal. Recital 2 of the deed notice the condition for the grant of loan i.e., borrower shall maintain DSRA. Recital 2 to 4 are as follows:

> *"2. One of the conditions for the grant of the Loan is that the Borrower shall maintain a Debt Service Reserve account (DSRA) wherein the credit balance at all times till the repayment of the Loan shall be equal to two quarters' interest for Term Loan portion and Working Capital Portion (to be maintained from the date of 1" disbursement of the Loan) and a further amount equal to one quarter principal installment (to be maintained one quarter prior to commencement of servicing of principal installments).*
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> *3. After commencement of principal installment payments, the credit balance to be maintained would be the sum total of the interest component and principal component as aforesaid.*

4. The Guarantor has agreed to guarantee that the Borrower shall maintain the credit balance in the DSRA as more fully specified in recital 2 above.

12. The terms and conditions of guarantee as witnessed by the deed are captured in Clauses 1 to 27. Clauses 2 to 4 of the guarantee deed are as follows:

"2. The Borrower shall open and maintain the credit balance as per the terms more fully specified in recital 2 above or as modified from time to time by the Lender and shall perform and comply with all other terms, conditions and covenants contained in the Loan Agreement.

3. The Guarantor agree and confirm that interest / additional Interest shall be charged on the Borrower in case the Borrower fails to maintain the Credit Balance in the DSRA opened in respect of the Loan at such rate(s) as may be determined by the Lender from time to time in accordance with the provisions of the Loan Agreement as also the Sanction letters issued by the Lender from time to time.

4. The Guarantor hereby confirm, agree and guarantee that the "Debt Service Reserve Account" opened to be opened by the Borrower with the Lender shall have a credit balance at all times equivalent to 2 (Two) Quarters Interest payable for the Term Loan portion and Working capital portion of the Loan (servicing to commence from the date of 1 disbursement) and 1 (One) Quarter Principal Installment for Term Loan portion (to be maintained one quarter prior to commencement of servicing of principal installments). After commencement of principal installment payment of Term Loan portion, the credit balance to be maintained in the DSRA shall be the sum total of the interest component and principal installment as aforesaid."

13. The guarantor's agreement and guarantees are further captured in Clause 7, which provided "the guarantor agree and guarantee to replenish the DSRA immediately at the request of the lender so as to ensure that balance requirement as stated in recital 2 are maintained at all times". The Clause

further notice that guarantee can be invoked any number of time so as to confirm to DSRA terms till the loan is repaid. Clause 7 of the guarantee deed is as follows:

> *"7. The Guarantor hereby confirm and agree that in the event of the failure or default of the Borrower in repayment of any single installment amount or other interests, charges and monies due under the loan agreement, sanction letter(s) and other security documents to "the Lender", the said due amount shall be adjusted from the DSRA along with such other incidental and other charges as agreed between "the Borrower" and "the Lender" and the Borrower shall immediately replenish the balance in the DSRA so as to conform to the balance requirements as more fully specified in recital 2 above. To the extent that the Borrower shall be unable to maintain the credit balance as required in recital 2, the Guarantor agree and guarantee to replenish the DSRA Immediately at the request of the Lender so as to ensure that the balance requirements as stated in recital 2 are maintained at all times. It is being understood and agreed by the parties that this guarantee can be invoked any number of times so as to conform to DSRA terms till the loan is repaid in full to the satisfaction of the Lender by the Borrower."*

14. Clause 9 further provide that on default committed by borrower, the lender shall be at liberty to invoke the guarantee and require the amount as become due from the borrower from the guarantor. Clause 9 is as follows:

> *"9. The Guarantor hereby confirms, agree and guarantee that in the event of the failure of the Borrower to maintain the DSRA or the terms specified from time to time, the Lender shall be at liberty to invoke this guarantee and recover the amount as become due from the Borrower from the guarantor along with all ancillary and incidental cost."*

15. Clause 10 further provides that guarantor confirms and agree that immediately on receipt of notice/invocation letter from the lender, the

guarantor shall credit deposit, repay such amount as maybe directed by the lender to meet the deficit in the DSRA. Clause 10 is as follows:

> *"10. The Guarantor hereby confirms and agrees that immediately on receipt of a notice/invocation letter from the Lender that the amount lying in the DSRA has been utilized towards the dues of the Lender as aforesaid, the Guarantor shall credit/ deposit/ repay such amount, as may be directed by the Lender to meet the deficit in the DSRA as stipulated herein above (herein after it will be called as "the Principle due")."*

16. Clause 11 further states that guarantee is continuing in nature and can be invoked from time to time. Clause 11 is as follows:

> *"11. The Guarantor hereby confirm, agree and guarantee that this deed of guarantee shall be continuing in nature, can be invoked from time to time (without any restriction on the number of times the same can be invoked) and cover every default of the Borrower made in respect to the maintenance of the DSRA with the Lender. Any payment or part payment by the Borrower towards any due or claim of the Lender shall not discharge the Guarantor from its liability. This deed of guarantee shall remain in force till repayment of the entire loan or assistance by the Borrower to the Lender. The Guarantor shall be discharged only upon a certificate issued to that effect by the Lender."*

17. The above Clauses of the guarantee given by the corporate debtor clearly stipulates that the guarantor is giving a guarantee for maintaining the necessary amount in the DSRA as stipulated in recital 2 at all time and the guarantor is obliged to remit deposit the defaulted amount immediately on request of the lender and lenders are at liberty to invoke the guarantee from time to time. The above Clauses thus clearly indicates that lender has to make a demand and invoke the guarantee requiring the guarantor to deposit the amount in the DSRA as required by the lenders. The conclusion is

inescapable that guarantee has to be invoked by the lender. In the above reference, we may also notice judgment of this Tribunal in ***'Pooja Ramesh Singh' Vs. 'State Bank of India & Anr.'*** in ***Comp. App. (AT) (Ins.) No.329/2023,*** which was a case filed by the suspended director of the corporate debtor (corporate guarantor) challenging the order of admission of Section 7 application. One of the questions framed was as to whether notice dated 01.10.2020 issued by the bank can be treated to be notice on demand as contemplated in the guarantee and whether the guarantee on demand, where this Tribunal held that for default being committed within Section 3(12) of the IBC, the amount should be payable and is not paid by the debtor or corporate debtor and date of default of the principal borrower as guarantor shall depend on the contract of guarantee. In paragraph 24 following was held:

> *"24. The scheme of I&B Code clearly indicate that both the Principal Borrower and the Guarantor become liable to pay the amount when the default is committed. When default is committed by the Principal Borrower the amount becomes due not only against the Principal Borrower but also against the Corporate Guarantor, which is the scheme of the I&B Code. When we read with as is delineated by Section 3(11) of the Code, debt becomes due both on Principal Borrower and the Guarantor, as noted above. The definition of default under Section 3(12) in addition to expression 'due' occurring in Section 3(11) uses two additional expressions i.e "payable" and "is not paid by the debtor or corporate debtor". The expression 'is not paid by the debtor' has to be given some meaning. As laid down by the Hon'ble Supreme Court in* ***"Syndicate Bank vs. Channaveerappa Beleri & Ors." (supra),*** *a guarantor's liability depends on terms of his contract. There can be default by the Principal Borrower and the Guarantor on the same date or date of default for both may be different depending on the terms of contract of guarantee. It is well settled that the loan agreement*

with the Principal Borrower and the Bank as well as Deed of Guarantee between the Bank and the Guarantor are two different transactions and the Guarantor's liability has to be read from the Deed of Guarantee.

18. The various Clauses of the guarantee deed was extracted in the above case. One of the clauses required bank to serve notice on guarantor requiring payment of the amount. Paragraph 25 of the order various Clauses of the guarantee in the said case has been extracted, which are as follows:

> *"25. Now we come to the Deed of Guarantee dated 17.05.2019 which has been brought on record. The relevant clauses of the Deed of Guarantee which has been relied by learned counsel for the Appellant are clause 1, 13, 14 and 20, which are to the following effect:*
>
> > *"1. If at any time default shall be made by the Borrower in payment of the principal sum (not exceeding Rs.186,60,00,000/- (Rupees One Hundred Eighty Six Crore Sixty Lacs Only) together with Interest, costs, charges, expenses and/or other monies for the time being due to the Bank in respect of or under the aforesaid credit facilities or any of them the Guarantors shall forthwith on demand pay to the Bank the whole of such principal sum (not exceeding Rs.186,60,00,000/- (Rupees One Hundred Eighty Six Crore Sixty Lacs Only) together with interest, costs, charges, expenses and/or any other monies as maybe then due to the Bank in respect of the aforesaid credit facilities and shall indemnify and keep indemnified the Bank against all losses of the said principal sum, interest or other monies due and all costs charges and expenses whatsoever which the Bank may incur by reason of any default on the part of the Borrower.*
> >
> > *13. The Guarantors shall forthwith on demand made by the Bank deposit with the Bank such sum or security or further sum or security as the Bank may from time to time specify as security for the due fulfillment of their obligations under this Guarantee and any security of deposited with the*

Bank may be sold by the Bank after giving to the Guarantors a reasonable notice of sales and the said sum or the proceeds of sale of the securities may be appropriated by the Bank in or towards satisfaction of the said obligations and any liability arising out of nonfulfillment thereof by the Guarantors.

14. The Guarantors hereby agree that notwithstanding any variation made in the terms of the said Agreement of loan and / or any of the said security documents including reallocation/ interchange of the individual limits within the principal sum variation in the rate of interest, extension of the date for payment of the instalments, if any, or any composition made between the Bank and Borrower to give time to or not to sue the Borrower, or the Bank parting with any of the securities given by the Borrower, the Guarantors shall not be released or discharged of their obligation under this Guarantee provided that in the event of any such variation or composition or agreement the liability of the Guarantors shall not withstanding anything herein contained be deemed to have accrued and the Guarantors shall be deemed to have become liable on the date or dates on which the borrower shall become liable to pay the amount/ amounts due under the said Agreement of Loan and/ or any of the said security documents as a result of such variation or composition or agreement.

20. The Guarantors agree that amount due under or in respect of the aforesaid credit facilities and hereby guaranteed shall be payable to the Bank on the Bank serving the Guarantors with a notice requiring payment of the amount and such notice shall be deemed to have been served on the Guarantors either by actual delivery thereof to the Guarantors or by despatch thereof by Registered Post or Certificate of Posting to the Guarantors address herein given or any other address in India to which, the Guarantors may by written intimation give to the Bank or request that communication addressed to the Guarantors be despatched. Any notice despatched by the Bank by Registered Post or Certificate of Posting to the address to which it is required to be despatched under this clause shall he deemed to have been duly served on the Guarantors four days after the

date of posting thereof, and shall be sufficient if signed by any officer of the Bank and in proving such service it shall be sufficient if it is established that the envelope containing such notice communication or demand was properly addressed and put into the post office."

19. Noticing the various Clauses and guarantee in the above case, it was held that default on the part of guarantor shall accrue only when notice is issued to the guarantor. In paragraphs 27 and 32, following has been held:

"27. In view of the clear stipulation in the Deed of Guarantee, default on the part of the Guarantor cannot be treated to be on 05.09.2019, when it is alleged that the Principal Borrower committed default, nor the default on the part of the Guarantor can be on date of NPA i.e. 05.12.2019 for the purpose of present case. In the present case, admittedly, the Bank has issued notice dated 01.10.2020 to the Principal Borrower as well as to the Guarantor - Essel Infraprojects Ltd. Notice dated 01.10.2020 which has been brought on the record indicate that notice is addressed to the Principal Borrower and to Guarantors. In Para 8 of the notice following has been stated:

"8. Our Clients states that, You Nos.2 to 4, executed Deed of Guarantee on respective dates inter alia agreeing to pay on demand and without demur to our clients alongwith interest, cost, charges, expenses and/or other money due thereon from time to time in terms of the Agreement of Loan for overall limits, Agreement of Hypothecation of Goods and Assets and Supplemental Agreements."

32. In view of the foregoing discussion, we arrive at following conclusions:

(i) The Corporate Guarantee Deed dated 17.05.2019 is on demand guarantee deed and the default shall arise on the part of the Guarantor only when demand notice is issued as contemplated in the Deed of Guarantee. When the State Bank of India invoked the guarantee vide notice dated 01.10.2020, demand on the part of the Corporate Guarantee shall arise only subsequent to the notice dated 01.10.2020 i.e.

non-payment of the amount within seven days i.e. default arise on 08.10.2020.

(ii) Default on the part of the Guarantor having arisen on 08.10.2020 i.e. within the period which is covered as prohibited period under Section 10A, application under Section 7 was clearly barred by Section 10A. Issues No. II, III and IV are answered accordingly.

(iii) The Adjudicating Authority in the impugned order has not adverted to the relevant clauses of the Deed of Guarantee as noted above. The date of default on part of the Guarantor being subsequent to 01.10.2020 when guarantee was invoked, the application was barred by Section 10A and the Adjudicating Authority committed error in admitting the Section 7 application."

20. To the same effect, another judgment of this Tribunal in ***Comp. App. (AT) (Ins.) No.920/2023, 'Mudhit Madanlal Gupta' Vs. 'Supreme Constructions & Developers Private Limited',*** where it was held that when the debt invoking the guarantee falls between the 10A period application is barred. In paragraphs 7 and 8, following was held:

"7. When the Financial Creditor has invoked the corporate guarantee of the corporate guarantor by the notice dated 16.10.2020 and asked the corporate guarantor to make the payment within seven days from the receipt of the notice, the default has occurred during the 10A period and the default dated 02.07.2019 which is default alleged against the Principal Borrower can not be put to a default for corporate guarantor. Liability of corporate guarantor although is coextensive of the Principal Borrower but when the Guarantee requires invocation of the guarantee deed, default on the guarantor shall be the date when corporate guarantee has been invoked.

8. We thus do not find any error in the Order of the Adjudicating Authority dismissing Section 7 Application as barred by time. We make it clear that dismissal of Section 7 Application shall not preclude the Appellant to take other recourse in accordance with law. The Appeal is dismissed."

21. At this juncture, we may notice Clause 25 of the guarantee on which much reliance has been placed by the appellant. Clause 25 of the guarantee deed provides as follows:

> *"25. This Guarantee shall be irrevocable and the obligations of the Guarantors hereunder shall not be conditional on the receipt of any prior notice by the Guarantors or by the Borrower and the demand or notice by the Lender to the Borrower, shall be sufficient notice to or demand on the Guarantors."*

22. We have already noticed Clauses of the guarantee deed Clauses 7, 9 & 11, which clearly contemplate invocation of guarantee by the lenders and invocation of guarantee from time to time with respect to the maintenance of the DSRA with the lender. Clause 25 is a general clause where the obligations of the guarantor are not conditional on the receipt of any prior notice by the guarantors of the borrower. Demand notice by the lender to the borrower shall be sufficient notice to on the Demand of the guarantors. We may notice the judgment of the Hon'ble Supreme Court in ***'Bank of India & Anr.' Vs. 'B.K. Mohan Das & Ors.'*** reported in ***(2009) 5 SCC 313,*** where Hon'ble Supreme Court has occasion to consider general principle of construction of a contract. In paragraph 31 of the judgment, following was laid down:

> ***"31.*** *It is also a well-recognised principle of construction of a contract that it must be read as a whole in order to ascertain the true meaning of its several clauses and the words of each clause should be interpreted so as to bring them into harmony with the other provisions if that interpretation does no violence to the meaning of which they are naturally susceptible. (North Eastern Railway Co. v. Lord Hastings [1900 AC 260 : (1900-03) All ER Rep 199 (HL)])"*

23. In event, we accept the interpretation put by learned counsel for the appellant with respect to Clause 25 to mean that no notice or invocation of

guarantee is required to be done by lender with respect to the guarantee dated 03.08.2012, the said interpretation runs contrary to not one Clause of the agreement, but several Clauses i.e., 7, 9 & 11. From the guarantee deed, the recital has been noted above, clearly provides that financial creditor has granted facilities to the borrower on the condition when borrower shall maintain credit balance as per the terms more fully specified in recital 2 above. Clause 2 of the agreement is as follows:

> *"2. The Borrower shall open and maintain the credit balance as per the terms more fully specified in recital 2 above or as modified from time to time by the Lender and shall perform and comply with all other terms, conditions and covenants contained in the Loan Agreement."*

24. Guarantor has guaranteed that borrower shall maintain the necessary credit balance at all times as provided in recital 2 notice above and even borrower does not maintain the necessary credit balance. Lender can immediately ask the guarantor to credit deposit and repay such amount. The above is clearly provided in Clauses 7, 8, 9, 10 & 11 as noted above. Thus, default on the part of guarantor can only arise when guarantee is invoked as per the explicit clauses of the guarantee deed 7 to 11 as noticed above. Clause 25 cannot be read in manner to make Clauses 7 to 11 unworkable and redundant.

25. At this juncture, we may also notice submission of the appellant that prior to 10A period by an email dated 02.03.2020 sent to the borrower the borrower was informed that there is overdue in the account as on 02.03.2020 towards the principal as well as the interest. It is useful to notice the email

dated 03.03.2020 sent to the borrower, copy of which was also sent to one official of corporate debtor. The email 02.03.2020 is as follows:

> *"From: Shilpa Chaporkar ankushe.shilpa@idbi.co.in*
>
> *Sent: Monday, March 02, 2020 11:05 AM*
>
> *To: Gulshan Khandelwal Gulshan.Khandelwal@siti.esselgroup.com*
>
> *Cc: Sanjay Berry Sanjay.Berry@siti.esselgroup.com; 'Sumit Pamecha' sumit.pamecha@esselgroup.com; 'Chetan Sharma' Chetan.Sharma@Infra.Esselgroup.com; 'Shubham Shree' Shubham.Shree@esselgroup.com; Shikhar Ranjan Shikhar.Ranjan@zee.esselgroup.com; am.shinde@idbi.co.in; 'Rahul Sinha' rahulsinha@idbi.co.in; M Saravanan m.saravanan@idbi.co.in*
>
> *Subject: RE: Restructuring of debt facilities*
>
> *Importance: High*
>
> *Dear Sir,*
>
> *The restructuring plan/presentation and letter forwarded by you on 28.02.2020 does not specify clearly about the treatment of IDBI's facilities.*
>
> *In this regard, request you to provide clarity on your proposal with regard to our facilities and also arrange to clear overdue in your account. As Mr. Sanjay Berry (CFO) and you had confirmed that there would not be any restructuring of IDBI's debt.*
>
> *Please reply on the proposal immediately, otherwise we will be forced to initiate action against the borrower and guarantor company*
>
> *The total overdues in the account as on 02.03.2020, are as under;*
>
> ***Term Loan***
>
> ***Principal:***
>
> *Rs.10,41,00,000/- Due on September 30, 2019*
>
> *Rs.10,49,00,000/- Due on December 31, 2019*
>
> ***Interest:***
>
> *Rs.25,84,874/- Due on September 30, 2019*

Rs.23,42,431/- Due on October 30, 2019

Rs.22,84,554/- due on November 30, 2019

Rs.23,41,734/- due on December 31, 2019

CC limit (Interest Servicing)

Rs.1,03,37,249/- Due on October 1, 2019

Rs.1,10,71,191/- Due on November 1, 2019

Rs.1,07,91,205/- due on December 1, 2019

Rs.1.10 crore (approx.) due on January 1, 2020

Please note that interest for January and February 2020 on both the facilities are not included in the above statement.

Regards

Shilpa Chaporkar"

26. When we read the said email, the said email mentioned about the total overdue in the amount as on 02.03.2200 and on 01.01.2020, amount of ₹1.10 Crore was towards interest in C.C. Limit. The said email cannot be read as invocation of guarantee deed dated 03.08.2012. It is true that said email was forward to one official of corporate debtor, but email did not contain any direction to guarantor to deposit the outstanding amount.

27. In any view of the matter as noted, we have already noticed the pleadings in Section 7 application which was made by the IDBI Bank. IDBI bank in his Section 7 application has clearly pleaded that **"on 05.03.2021, financial creditor invoked the guarantee provided by the corporate debtor and called upon the corporate debtor to pay ₹61,97,33,612/-".** Further in Part IV Serial No. 2 again following was pleaded **"financial creditor invoked the guarantee on 05.03.2021 and the corporate debtor is in continuous default in terms of the guarantee agreement dated 03.08.2012".** When the appellant financial creditor has come with the

categorical case that guarantee was invoked only on 05.03.2021, there cannot be any occasion to treat any other date as date for invocation of guarantee. The letter dated 05.03.2021 is also brought on the record as Annexure–31. Letter dated 05.03.2021 has been addressed to the corporate debtor. Para 6 of the notice provided as follows:

> *"6. In the premises, we hereby call upon you and demand from you to pay forthwith to IDBI Bank at IDBI Tower, 8th floor, "D" Wing, WTC Complex, Cuffe Parade, Mumbai 400 005 sums aggregating Rs. 61,97,33,612.80/- (Rupees Sixty one crore, ninety seven lakh, thirty three thousand six hundred & twelve and paisa eighty only), as per details given in* ***Annexure II*** *of this letter, together with further interest thereon with effect from 18.02.2021 at the given contractual rates, upon the footing of compound interest until payment/realisation. In case, you fail to make the payments as aforesaid, IDBI Bank, shall be constrained to take such steps against you as may be necessary for enforcing the guarantees and realising the dues at your own risk as to the costs and consequences thereof."*

28. The said notice called upon the corporate debtor and made demand from corporate debtor to pay forthwith to IDBI Bank, sum aggregating to ₹61,97,33,612/-. The above is thus letter of invocation of guarantee which clearly fell between the 10A period. Adjudicating authority thus cannot be said to have committed any error in coming to the conclusion that Section 7 application filed by the corporate debtor is barred by Section 10A. Adjudicating authority also in paragraphs 7.4 & 7.5 has come to the conclusion that demand notice dated 05.03.2021 was a first notice demanding payment from the corporate debtor. In paragraphs 7.4 and 7.5 following has been held:

"7.4. This Bench finds that the Financial Creditor has in its demand notice dated 05.03.2021 stated the following:-

> *"3. The Borrower has failed and neglected to maintain the DSRA Account, as mentioned in the Corporate Guarantee executed by you on August 3, 2012…"*
>
> *"4. The Borrower has failed and neglect to pay the dues of IDBI Bank as per its above letter…"*
>
> *"6. In the premises, we hereby call upon you and demand from you to pay forthwith to IDBI Bank …sums aggregating Rs. 61,97,33,612.80/- …"*

7.5. It follows from the language of said demand notice that it was the first notice demanding payment from the Corporate Debtor under the guarantee. Though, it is undisputed facts that the Corporate Debtor had the knowledge of default at the end of the principal borrower, this Bench feels that such knowledge implies existence of an obligation on the part of Corporate Debtor and such obligation is a debt under Section 3 (11) of the Code. This Bench further notes that Section 3(12) defines default to "means 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". In other words, the debt and default are two distinct propositions. Mere existence of debt, which undoubtedly came into being at each incidence of failure to maintain DSRA balance, cannot be equated with existence of default. In the present case, it is undisputed facts that the first demand notice was addressed to the Corporate Debtor on 05.03.2021 to pay an amount of Rs.61,97,33,612.80/- upon receipt of the notice, accordingly, the default qua Corporate Debtor took place on the date when the demand notice dated 05.03.2021 was served upon it. The Financial Creditor has not claimed that the service of the demand notice was complete on after 24.03.2021. Accordingly, this Bench is of the considered view that the Corporate Debtor committed the default in relation to its obligation to maintain two quarter interest in the principal borrower DSRA account during the period specified in Section 10A of the Code. As per the provisions of Section 10A of the Code, no application for initiation of corporate insolvency resolution process can be filed in respect of a default that has occurred on or after 25th

March, 2020 till 24th September, 2020. By a notification dated 24th September 2020 the applicability of Section 10A was extended for a further period of three months till 25th December, 2020. Thereafter, by a notification dated 22nd December, 2022 the applicability of section 10A was further extended by a period of three months till 25th March, 2021. Thus, Section 10A bars absolutely and forever, the filing of any application under Sections 7, 9 and 10 of the Code, for defaults committed on or after 25th March, 2020 upto 25th March, 2021."

29. Learned counsel for the appellant has contended that even after 10A period came to an end on 25.03.2021, no payments have been made by borrower or the corporate debtor and default is continuing. It is submitted that in view of the fact that default is continuing, the application under Section 7 was clearly maintainable. It is further submitted that in Part IV of Section 7 application date of default was mentioned as 30.09.2019, when borrower defaulted in payment of its obligation under the Working Capital Facilities. There can be no dispute to the fact that borrower defaulted on 30.09.2019, but the default on the part of the guarantor has been noticed in the very next sentence, when the financial creator has pleaded that "financial creditor invoked, the guarantee on 05.03.2021 and the corporate debtor is in continuous default thus 05.03.2021 was the first date on which default on the part of the guarantor was pleaded". Default on the part of the borrower and guarantor are different dates as per the terms of the contract between the guarantor and the lender.

30. Learned counsel for the appellant has placed reliance on the judgment of the Hon'ble Madras High Court in ***'Dharamshi K. Patel & Anr.' (Supra).*** In the above case, NCLT has passed an order admitting a company petition filed against the corporate debtor Evershine Wood Packaging Private Limited,

challenging the said order, writ petition was filed in the High Court. It was contended before the High Court that Section 7 application is not maintainable as default is committed between 25.03.2020 and 24.03.2021, hence, the petition was not maintainable. High Court after extracting Section 10A has also noticed the judgment of the Hon'ble Supreme Court in ***'Ramesh Kymal' (Supra)*** and thereafter has noted the issue in paragraph 14, which is as follows:

> *"(14) The only issue that arise for consideration in this writ petition is whether the petition filed before NCLT is maintainable in view of Section 10-A of IBC, 2016. In other words, the question arise for consideration in this writ petition is whether NCLT has jurisdiction to entertain CP[IB].No.13/2023."*

31. In paragraphs 19, 20 & 21, Hon'ble Madras High Court made following observations:

> *"(19) Learned Senior counsel then relied upon the order of NCLT at Chennai in a Company Petition arising out of the order passed by the Adjudicating Authority namely, NCLT, Hyderabad dated 08.08.2023 in CA.[AT][CH][Ins].No.124/2022* ***[Carissa Investments LLC, Mauritius Vs. Indu Techzone Pvt Ltd and Others].*** *The NCLT, in the said order, relying upon the judgment of Hon'ble Supreme Court in* ***Ramesh Kymal case [cited supra],*** *has held as follows:-*
>
> > *"15. The Hon'ble Apex Court concluded that the embargo in Section 10-A must receive a purposive construction which will advance the contention of the learned Senior counsel for respondent No.2 that though the date of default is on 31.03.2020, Section 10-A will not be applicable is unsustainable in the light of the observations made by the Hon'ble Apex Court in the aforenoted judgment."*
>
> *(20) The Tribunal, in the said case, also considered the case where the alleged default had occurred on 31.03.2020 and hence, initiation of CIRP on the basis*

of default is held to be in direct contravention of Section 10A.

(21) The learned Senior counsel then relied upon another order dated 09.09.2024 passed by NCLT, Principal Bench, New Delhi in similar matter ***[Company Appeal [AT] [Insolvency] No.1725/2024],*** *wherein it has been held as follows:-*

> *"The mere fact that the observation of the Hon'ble Supreme Court that debt owed by the Corporate Debtor is not extinguished is the law declared by the Hon'ble Supreme Court, but their being clear prohibition for filing an application under Sections 7, 9 and 10 for default occurring in 10A period there is apparent case. The language of the statute provides no application for initiation of Corporate Insolvency Resolution Process of a Corporate Debtor shall be filed for any default arising on or after 25.03.2020. The provision cannot be read to mean that after the period is over the application can be filed. If such interpretation is accepted, the whole purpose and object shall be defeated. The purpose and object of introduction of Section 10A was to give relief to Corporate Debtor who committed default during the period which is covered by Section 10A. The debt is not wiped out is only for the purpose that other proceedings are not prohibited but Sections 7, 9 and 10 applications are clearly barred. No application can be filed, even after the expiry of the period under Section 10A for the default which occurred during the 10A period."*

32. Ultimately, the Hon'ble High Court took the view that there is no jurisdiction to entertain by passing an effective alternate remedy. In paragraphs 22 & 23, following was laid down:

> *"(22) Since proviso to Section 10-A mandate that no application shall ever be filed for initiation of CIRP of the Corporate Debtor for the default occurring during the moratorium period, the above judgment relied upon by the learned Senior counsel is in tune with the statutory provision. However, the proviso cannot be extended to cases where the default is continued beyond the moratorium period. Therefore, there is no*

jurisdictional error to entertain a writ bye-passing an effective alternative remedy.

(23) Both sides relied upon a few judgments on the maintainability of the writ petition under Article 226 of the Constitution of India in view of the alternative remedy available. This Court in exceptional cases can entertain a writ petition under Article 226, as there are several exceptions carved out by this Court and Hon'ble Supreme Court to entertain a writ petition under Article 226 despite there is an alternative remedy. However, we find no extraordinary situation or circumstance warranting this Court to entertain a writ petition when there is an effective alternative remedy. Therefore, this Court finds no merit in this writ petition."

33. The above was case where High Court did not entertain the writ petition challenging an order passed by the NCLT admitting Section 7 application. The High Court only noticed the observation of the NCLT that default had occurred on 21.03.2020. The above case thus only reflect that High Court refused to entertain the writ petition challenging order of NCLT admitting Section 7 application. The above judgment in no manner help the appellant in the facts of the present case.

34. Much emphasis has been given by the learned counsel for the appellant that corporate debtor is continuing with the default even after 10A period which was also even pleaded in Part IV where it was pleaded that financial creditor invoked the guarantee of 05.03.2021 and the corporate debtor is in continuous default in terms of the guarantee agreement. As noted above, the application under Section 7 was filed on the basis of invocation of guarantee on 05.03.2021, which period fell during the 10A period. A reading of the application does not indicate that Section 7 application is founded on any default which is subsequence to the 10A period.

35. In the facts of the present case, we are of the view that although order impugned of the adjudicating authority needs to be affirmed, but liberty need to be given to the appellant, if so, advised to file a Section 7 application for default of corporate debtor subsequent to 10A period i.e., a default subsequent to 24.03.2021.

36. In view of the forgoing discussions and conclusions, we dispose of the appeal in following manner:

i. The order impugned passed by the adjudicating Authority dated 19.05.2023, dismissing Section 7 application as barred by Section 10A is upheld.

ii. There shall be liberty to the appellant to file a fresh Section 7 application for any default on the part of the corporate debtor subsequent to 10A period, if so advised.

Parties shall bear their own costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

NEW DELHI

07th April, 2025

himanshu