15th July, 2024

Bombay Stock Exchange Limited
P J Towers, Dalal Street
Mumbai 400 001

National Stock Exchange of India Ltd
Exchange Plaza, Bandra Kurla complex
Ex Bandra East
Mumbai 400 051

Dear Sir,

Sub: Intimation under Regulation 30 of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015

Ref: a) Intimation sent to exchanges on 12th July, 2024

b) BSE Scrip Code: 532708, NSE Scrip Code: GVKPIL

With reference to the above, please find attached herewith the NCLT order copy as received today i.e: 15th July, 2024 in the matter of Corporate Insolvency Resolution process between ICICI Bank Limited (Financial Creditor) V/s GVK Power & Infrastructure Limited (Corporate Debtor)

This is for your information and records.

Thanks & Regards

For GVK Power & Infrastructure Ltd

T Ravi Prakash
Company Secretary & Compliance Officer

GVK Power & Infrastructure Ltd.

GVK Power & Infrastructure Limited
Darshak Chambers, Plot No.32, Ground Floor
House No.1-8-303/48/32, Street No:1
Penderghast Road, Secunderabad-500003
Telangana, India
CIN: L74999TG2005PLC059013 www.gvk.com

ENERGY
TRANSPORTATION
HOSPITALITY
LIFE SCIENCES
REALTY
CSR

SL. No.5

NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH
COURT HALL NO: II

Hearing Through: VC and Physical (Hybrid) Mode

CORAM: SHRI. RAJEEV BHARDWAJ, HON'BLE MEMBER (J)
CORAM: SHRI. SANJAY PURI, HON'BLE MEMBER (T)

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL, HYDERABAD BENCH, HELD ON 12.07.2024 AT 10:30 AM

TRANSFER PETITION NO.	
COMPANY PETITION/APPLICATION NO.	**IA (IBC)/374/2024 in Company Petition IB/260/2022**
NAME OF THE COMPANY	**GVK Power & Infrastructure Ltd**
NAME OF THE PETITIONER(S)	**ICICI Bank Ltd**
NAME OF THE RESPONDENT(S)	**GVK Power & Infrastructure Ltd**
UNDER SECTION	**7 of IBC**

ORDER

Company Petition IB/260/2022

Orders pronounced, recorded vide separate sheets. In the result, the Company Petition is admitted.

IA (IBC)/374/2024

In view of the orders passed in CP(IB) No 260/7/HDB/2022 this IA is disposed of.

Sd/-
MEMBER (T)

Sd/-
MEMBER (J)

Vamsi

IN THE NATIONAL COMPANY LAW TRIBUNAL

HYDERABAD BENCH-II

CP (IB) No.260/7/HDB/2022

[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) to initiate Corporate Insolvency Resolution Process under the Insolvency and Bankruptcy Code, 2016.]

IN THE MATTER OF CORPORATE INSOLVENCY RESOLUTION PROCESS OF M/S GVK POWER & INFRASTRUCTE LIMITED

BETWEEN:

M/S.ICICI BANK LIMITED
Having its Registered Office at:
ICICI Bank Tower, Near Chakli Circle,
Old Padra Road, Vadodara, Gujarat – 390007,
Indian, Represented by its Authorised Person
Kolla Raghuram S/o K V N S S R K Prasad.

…Financial Creditor

AND

M/S.GVK POWER & INFRASTRUCTURE LIMITED
Having its Registered Office at:
Paigah House, 156-159 Sardar Patel Road,
Secunderabad, Telangana – 500003, India.

…Corporate Debtor

Date:12.07.2024

Coram:
Hon'ble Sri Rajeev Bhardwaj, Hon'ble Member (Judicial)
Hon'ble Sri Sanjay Puri, Hon'ble Member (Technical)

Counsel/Parties present:

For the Petitioner	:	Mr. Vivek Reddy, Adv, Ld. Senior Counsel with Mr. Siddharth Ranade, Advocate Mr. VVSN Raju, Advocate Ms. Nishi Bhankharia, Advocate Mr. Vishal Pathak, Advocate Ms. Aviva Jogani, Advocate
For the Respondent	:	Mr. Karthik Nayar, Adv, Ld. Senior Counsel with Mr. Krish Karla, Advocate Mr. Kashish Bansal, Advocate

Per: Rajeev Bhardwaj, Member (Judicial)

ORDER

1. This Application/Petition under Section 7 of the Insolvency Bankruptcy Code, 2016 ("**IBC**") has been filed by M/s. ICICI Bank Limited ("**Financial Creditor**") for initiating Corporate Insolvency Resolution Process ("**CIRP**") against M/s. GVK Power & Infrastructure Limited ("**Corporate Debtor**") who provided Corporate Guarantee for the repayment of loan facilities availed by M/s. GVK Coal Developers (Singapore) Pte Ltd. ("**Borrower**").

2. **FACTS OF THE CASE:**

I. Petition/Application:

a. M/s. ICICI Bank Limited (Dubai, Bahrain and Singapore branches) along with a syndicate of three other lenders, namely, Bank of Baroda (Ras Al Khaimah branch), Bank of India (London and Singapore branches) and Canara Bank (London branch) sanctioned a term loan facility of USD 1.00 billion and a letter of credit facility of USD 35.00 million vide agreement dated 17.09.2011 (hereinafter referred as "**Facility Agreement No-I**") to the Borrower for acquiring coal mines etc. in Australia. This loan facility agreement was further amended vide agreements dated 05.10.2011 and dated 05.12.2012.

b. The Corporate Debtor and M/s. GVK Natural Resources Private Limited are the Indian guarantors for the repayment of the loan Facility No-1.

c. The Corporate Debtor along with M/s. GVK Natural Resources Pvt Ltd, M/s. Black Gold Ventures Pte Ltd, M/s. Cool Water Ventures Pvt Ltd, M/s. Harmony Waters Private Limited, M/s. GVK Resources

(Singapore) Pte Ltd and M/s. GVK Coal Developers (Singapore) Pvt Ltd has entered into an Equity Subscription Agreement on 29.09.2011 with the Borrower to advance such sums or subscribe for such amount of shares so as to ensure that the Borrower receives sufficient funds in order to meet its obligations. The Corporate Debtor hypothecated its account vide hypothecation deed dated 28.09.2011 and further pledged its certain shareholdings in M/s. GVK Energy Pvt Ltd and M/s. GVK Transportation Pvt Ltd, as security for the loan facilities availed by the Borrower. The Corporate Debtor has also executed Agency Agreement dated 30.03.2012.

d. The Financial Creditor through its Bahrain branch, Bank of India, Canara Bank, Bank of Baroda and Indian Overseas Bank have sanctioned Term Loan Facility of USD 44.0 million vide Facility Agreement dated 26.03.2014 ("**Facility Agreement-II**") which was subsequently increased to USD 250 million as amended by the letters dated 05.09.2014, 25.09.2014, 26.03.2015 and 03.06.2016.

e. The Corporate Debtor and GVK Natural Resources Pvt Ltd have also provided Corporate Guarantee on 26.03.2015 and 29.06.2015 for the due repayment of Loan Facility-II. This facility was further secured by the securities provided by various group entities of the GVK Group in India, Singapore and Australia.

f. In March 2016, the Financial Creditor came to know that the GVK group was contemplating to sell its stake in the Bangalore International Airport Limited without the consent of the lenders in violation of the Facility Agreements and therefore injunction application was filed against the Borrower and others in April 2016 in the Commercial

Court, United Kingdom (UK), wherein the GVK filed an undertaking not to sell their stake in Bangalore International Airport Limited.

g. The accounts of the Borrower were classified as NPA around FY 2016-2017 and the lenders also entered into the Interim Solution Undertaking (ISU) on 23.03.2017, in pursuance of which the Financial Creditor along with other lenders of Facility Agreement–I and Facility Agreement –II received payment of a part of the loan amount.

h. In consequence of the non-payment of the loan amount, the lenders i.e., Bank of Baroda (Ras Al Khaimah branch), Bank of India (London branch), Canara Bank (London branch), ICICI Bank Limited (Bahrain, Dubai and OBU branches), Indian Overseas Bank (Large Corporate branch, India) and Axis Bank filed claim No. CL-2020-00729 before the Hon'ble High Court of Justice, King's Bench Division, Commercial Court ("**London Court"**) for an amount of USD 707,888,649.93 under Facility Agreement-I and for USD 148,004,202.77 under Facility Agreement-II and in alternative for damages.

i. During the pendency of the present Application, the Claim No.CL-2020-000729, titled as Bank of Baroda and others v. GVK Coal Developers (Singapore) Pte Ltd and others was decreed vide judgement dated 19.10.2023 by the London Court and this judgement, the fact about arising of fresh cause of action etc. were brought to the notice of this Authority by moving an IA No. 1925 which was allowed vide order dated 08.02.2024.

j. The Financial Creditor had invoked Corporate Guarantee by issuing notice dated 02.11.2020 to the Corporate Debtor and others demanding a sum of USD 530,879,100.35 and USD 89,100,000.00 with regard to

Facility-I and Facility-II, respectively. In reply, the Corporate Debtor vide letter dated 09.11.2020 showed its inability to honour the payments, however, committed to repay the same upon working a solution with the Adani Group and thereby requesting the Financial Creditor not to take any action.

k. The Corporate Debtor has acknowledged its liabilities and admitted the factum of Corporate Guarantee in its Annual reports for the FYs 2018-19, 2019-20 and 2020-21. As on 13.06.2022, the Borrower was liable to pay USD 1864,024,936.47/- comprising principal amount of USD 1132,450,591.19/-, interest of USD 731,574,345.28/- and agency fee of USD 144,000/-. The Corporate Debtor as on 13.06.2022 was liable to pay USD 855,892,852.70/- with regard to Facility Agreement-I and Facility Agreement -II.

l. The cause of action is stated to have arisen on 02.11.2020 when the Corporate Guarantee was invoked and thereafter on other dates when the Corporate Debtor assured to repay the liabilities and it is still continuing.

II. <u>Counter/Reply:</u>

The Corporate Debtor/Respondent by filing the counter has contested and contended the averments made in the Application/Petition by submitting:

a. There is no debt and default as contemplated under Section 7 of the Insolvency Bankruptcy Code and it has also been highlighted by Hon'ble Supreme Court in the decisions of ***Pioneer Urban Land and Infrastructure Limited v. Union of India 2019 SCC Online SC 1005, Innoventive Industries v. ICICI Bank, (2018) 1 SCC 407 and Swiss***

Ribbons Private Limited and Anr. v. Union of India and Ors. (2019) 4 SCC 17.

b. The present Application/Petition has been filed in violation of Section 10A of the IBC, as the debt alleged to have become due during the period of March 2020 to March 2021 when the Corporate Insolvency Resolution process could not be initiated.

c. This petition has been filed to recover the debts and not for insolvency and liquidation of the Corporator Debtor and therefore, hit by Section 65 IBC.

d. The debt has also not been crystalized because of pendency of this issue for adjudication before the London Court in claim No. CL-2020-00729 titled as ***Bank of Baroda and ors v. GVK and others (2023) EWHC 2662 (Comm.)***. In the said proceedings, the Financial Creditor has sought the following reliefs:

> *"AND THE FOURTH CLAIMANT CLAIMS:*
> *(1) USD 665,376,514.81 (or such other sum as is found due and owing to it) in debt, alternatively damages, pursuant to the 2011 Facility Agreement and/or its guarantee and indemnity, and/or the Equity Subscription Agreement;*
> *(2) USD 135,827,459.88 (or such other sum as is found due and owing to it) in debt, alternatively damages, pursuant to the 2014 Facility Agreement;*
> *(3) Indemnities for costs, claims, losses, expenses and liabilities;*
> *(4) Interest pursuant to contract or statute;*
> *(5) Costs, on the contractual basis or otherwise;*
> *(6) Further or other relief."*

e. Therefore, the present Petition is pre-mature and if the same is to be continued, there would be parallel proceedings and contradictory conclusions by two different forums. Reference has also been made to the decision of Hon'ble Supreme Court in ***Indus Biotech Private Limited v. Kotak India Venture (Offshore) Fund (2021) 6 SCC 436.***

f. The debt will be crystalized once there is decree from the London Court. In case a foreign decree is obtained without consideration of the Indian Law, the Corporate Debtor has a right to resist enforcement of the same under Section 13 of the Civil Procedure Code. As such, the Financial Creditor is not entitled to file application under Section 7 of the IBC until there is decree from the London Court. Reference has also been made to the decision of Hon'ble Apex Court in ***Paramjeet Singh Patheja v. ICDS Limited (2006) 13 SCC 322*** that the insolvency proceedings should be initiated on the basis of a foreign decree.

g. The financial facility was advanced for acquiring mining lease and the Borrower from time to time has apprised the lenders about the development relating to acquisition and finally it was informed at a meeting on 27.09.2019 that the GVK Group was not pursuing for the mining lease. Therefore, the lenders were aware of the alleged event of default since 31.12.2012 and alternatively since 2013. Accordingly, the lenders were having the discretion not only to refuse any request for a loan after 31.12.2012 but also to cancel the total commitments and accelerate the Borrower's liabilities under clause 22.28 of the Facility Agreement-I. Therefore, no event of default has been incurred warranting issuance of the purported acceleration notice 02.11.2020 and as such the demand, debt and default are non-est.

h. When the Borrower failed to discharge the liabilities, lenders entered into an agreement called the Interim Solution Undertaking (ISU) on 29.03.2017. The ISU contained certain binding and non-binding obligations which were based upon the negotiations between the parties. However, the lenders without the prior notice of 12 months served notice dated 02.11.2020 purporting to enforce the GVK Group's

payment obligations under the Facility Agreements I and II which are in violation with the terms of the ISU.

i. The Financial Creditor has also not properly calculated the default interest in view of clause 10.6 of the Facility Agreement-I which specifically provides that the Lenders are not automatically entitled to default interest and the same is payable on demand and therefore the interest cannot be claimed retrospectively which is due from date of demand.

j. The claim is in contravention of circulars dated 27.03.2020, 17.04.2020 and 23.05.2020 and further the Reserve Bank of India had deferred repayment of all loans with effective from 01.03.2020 until 31.08.2020. The Hon'ble Supreme Court in ***Small Scale Industrial Manufactures Association (Regd.) v. Union of India & Ors. (2021) 8 SCC 511*** directed all the banks, financial institutions, etc., not to charge any penal interest in case of non-payment of instalments during the deferment period and refund/adjust any interest that has been charged from the Borrowers. The said order was subsequently implemented by the RBI by issuing the Circular dated 07.04.2021. To the contrary, the Financial Creditor is levying penal interest during the deferment period in violation of the *Small-Scale Industries (Supra)* and the circulars of the RBI.

k. The Corporate Debtor cannot be held liable to pay an alleged outstanding debt which the Borrower itself is not obligated to pay. The Financial Creditor has admitted in the Petition that the Corporate Debtor is a guarantor to the extent of lower of either 53.9% of all principal amounts outstanding or USD 692,615,000 and that too in the event of a shortfall. The Corporate Debtor has quoted Para No.4 of the

Petition in this regard. Therefore, it is emphasized that the liability of the Corporate Debtor cannot be determined till the debt is crystalized and eventually a shortfall is determined by the court.

l. Before the London Court, the Financial Creditor and the other lenders had pleaded that the governing law of the entire transaction including the Facility Agreements is governed by English law, whilst, the Corporate Debtor case is that the transaction is governed by Indian law. By moving an I.A. 416 OF 2024 which was allowed vide order dated 21.02.2024 and the Corporate Debtor was permitted to add Para Nos. 79 to 93 after paragraph No. 79 of the counter/reply, pertain to proceedings before the London Court. The procedural defects in conducting the proceedings, non-appreciation of the violation of Indian law, judgment not on merits etc. have been highlighted by taking additional pleas.

m. Notwithstanding the original stand of the Corporate Debtor regarding the pendency of Claim No.CL-2020-000729 before the London Court, it has changed this stand a bit after passing of the judgment on 19.10.2023. The Corporate Debtor has not only brought on record Annexures 39 to 79 of the London Court's proceedings by way of IA No. 369 of 2024, but its IA No. 416 of 2024 to add Para Nos. 79 to 93 in the counter was also allowed by order dated 21.02.2024.

n. This is also case of the Financial Creditor that it has acted through its Dubai, Bahrain and OBU branch (based in Mumbai) and hence, the Financial Creditor cannot apply under the IBC as it is not incorporated or acted through its branches in India. Therefore, in view of the submissions of the Financial Creditor, this Authority is not having any territorial jurisdiction to entertain the present Petition.

o. The Covid-19 pandemic was an unforeseeable and constitutes force majeure event and accordingly supposed to suspend the liability of the Corporate Debtor. The force majeure event first occurred on 19.02.2020 and was declared as a pandemic on 11.03.2020 by the World Health Organisation. Subsequently, the Government of India vide notification dated 14.03.2020 declared Covid-19 as a "notified disaster". The Ministry of Road Transport and Highways, Government of India vide order dated 18.05.2020 recognized Covid-19 as a force majeure event. This tragedy has also been recognized force majeure event in ***MEP Infrastructure Developers Ltd. v. South Delhi Municipal Corporation and Others, 2020 SCC Online Del 2439*** and ***Mumbai International Airport Limited v. Airports Authority of India and Another, 2020 SCC Online Del 2088.*** However, the Financial Creditor has not taken into account the developments relating to Covid-19 pandemic.

p. The outstanding amounts have been calculated at an exorbitant interest rate and contrary to the terms of the agreement as well as section 3(1)(a) and 3(2) of the Usurious Loans Act, 1918, which provide that the rate of interest cannot be unfair and usurious. As per this Act, levy of compound interest or penal interest for any default incurred on account of Covid-19 is unfair and violative of the said Act. The Corporate Debtor has justified its stand from the decisions in ***Bikram Chatterji and Others v. Union of India, 2020 SCC Online SC 494*** and ***Small-Scale Industrial Manufactures Association (Regd.) v Union of India, (2021) 8 SCC 511.*** Hence, it is claimed that the debt alleged to be due is incorrect and contrary to law.

III. Rejoinder:

In the Rejoinder, the Financial Creditor has reaffirmed and reiterated the contentions made in the Petition/Application by submitting:

a. The Financial Creditor in the year 2011 along with other lenders sanctioned a loan of USD 500,000,000 which was to be repaid over 10 (ten) semi-annual instalments over a period of 5 (five) years along with interest. Under Facility Agreement I, the repayment instalment dates were 06.10.2017, 06.04.2018, 09.10.2018, 08.04.2019, 08.10.2019, 06.04.2020 and 30.09.2020.

b. Under the Facility Agreement –II, the Financial Creditor sanctioned a loan facility of USD 103,000,000 to be repaid in the instalments starting from 06.10.2017, 06.04.2018, 09.10.2018, 08.04.2019, 08.10.2019, 06.04.2020 and 30.09.2020.

c. The Corporate Debtor provided irrevocable and unconditional guarantee in favour of the Financial Creditor vide Guarantee Deeds dated 26.03.2015 and 29.06.2015 which were executed with respect to Facility Agreement-II. As per clause 17.2 of Facility Agreement-I and clause 19 of the 2015 Guarantees, these Corporate Guarantees are continuing guarantees, thereby making the Corporate Guarantor liable until "*all sums payable*".

d. In view of clause No. 22.2 of Facility Agreement-I and clause No. 21.2 of Facility Agreement-II, defaults started occurring sometime in 2015. The Borrower paid a part of outstanding interest on and prior to 2016 on 06.02.2017 and since then the Borrower has continuously failed to pay the outstanding amount and this default includes both principal amount as well as interest amount.

e. The Corporate Debtor has acknowledged its liabilities and admitted the factum of Corporate Guarantee in its annual reports filed with the Ministry of Corporate Affairs for the FYs 2018-19, 2019-20 and 2020-21 under the heading 'Corporate Guarantees' ("*Outstanding Dues*"). The outstanding debt was unequivocally acknowledged by the Corporate Debtor vide letter dated 09.11.2020 when the Corporate Debtor requested the Financial Creditor to refrain from taking any actions and assured repayment of the outstanding dues. The Borrower had partly paid the outstanding amount to the tune of USD 33,313,342.37/- from the proceeds of sale of Bangalore International Airport Limited in 2017.

f. The liability of the guarantor is co-extensive with that of the principal debtor in view of the Section 128 of the Indian Contracts Act, 1872. There is no contrary provision in the Facility Agreements. On the other hand, clause No. 17.1(a)(ii) of Facility Agreement-I and clause No. 3(a) of 2015 Guarantees expressly state that in the event of non-payment of dues by the Borrower, the guarantor shall pay the debt immediately. Therefore, the Corporate Debtor is liable to repay the outstanding financial debt.

g. The Financial Creditor is able to prove the essentials which are required under Section 7 of the IBC on the following basis:

   i. *Disbursement of debt by the Financial Creditor to the Borrower (GVK Coal Developers (Singapore) Pte Ltd);*
   ii. *Valid and subsisting guarantee given by the Corporate Debtor in relation to the debt advanced to the Borrower;*
   iii. *Existence of debt owned by the Corporate Debtor;*
   iv. *Occurrence of persistent defaults on the part of the Corporate Debtor in repayment of such debt; and*
   v. *The captioned Insolvency Application is complete.*

h. The Corporate Debtor has provided indemnity to the Financial Creditor as per the terms of the Facility Agreements and the 2015 Guarantees. Therefore, the Corporate Debtor is liable to repay the outstanding amount not only in the capacity of guarantor, but also as principal debtor.

i. The present Petition is also not hit by Section 10A of the IBC which provides for one-year suspension period on initiation of CIRP for any default arising between 25.03.2020 to 25.03.2021. However, this Section is not applicable because the default occurred before or after the suspension period. It is clarified that there is continuous default after 06.02.2017 and the same is still continuing and as a result there is no violation of the provisions of Section 10A of the IBC.

j. Clause No. 17.2 of Facility Agreement-I and clause No. 19 of the 2015 Guarantees provide that the guarantee is of continuing nature and it will continue until payment is made. The Corporate Debtor has also from time to time acknowledged its liabilities and the factum of Corporate Guarantee which is clear from the Annual Report of the Corporate Debtor for the Financial Years 2018-19, 2019-20 and 2020-21 and further the Corporate Debtor has also admitted on 27.05.2022 that the debt is outstanding, and that it is liable to repay the amount as per the terms of the Facility Agreements. Even as per clause No. 2.1 of the Equity Subscription Agreement (ESA), the liability of the Corporate Debtor under the ESA is in addition to the Corporate Guarantee provided under Facility Agreement-I. Therefore, the amounts claimed as due and payable by the Corporate Debtor are within this overall limit.

k. There is no force majeure event which made it impossible to the Corporate Debtor to pay the outstanding dues under the Facility Agreements, especially because such default was admitted by the Corporate Debtor prior to the Covid-19 period.

l. The initial default of payment of interest arose in 2015 and thereafter since 05.02.2017 continuous defaults have been committed.

m. The proceedings before the London Court have no bearing on the present adjudication because the financial debt became due and payable since 06.02.2017 till date and the Corporate Debtor has committed continuing default. Further, the London Court has not rendered any finding on the existence of debt and default, therefore, proceedings before the London Court are irrelevant for the adjudication of the present Petition.

n. The interest has been calculated as per clause No. 10.6 of Facility Agreement-I and clause No. 8.4 of Facility Agreement-II. The default took place on 06.02.2017 and only notice of default was sent on 02.11.2020. Accordingly, no question can be raised upon the legitimacy of calculation of interest by the Financial Creditor.

o. The quantum of claim is irrelevant for the admission of an Insolvency Application under Section 7 of the Code as long as the amount exceeds Rs 1 Crore. As of 13.06.2022, the Corporate Debtor is liable to pay approximately USD 855 million and therefore the petition meets the requirements of Section 4 IBC.

p. The claim is also not in contravention with the RBI Circulars dated 27.03.2020 and 23.05.2020. The Circulars specifically clarified that interest will continue to accrue on the outstanding portion of loans

during the moratorium period. Even the judgment of the Hon'ble Apex Court in ***Small Scale Industrial Manufacturers Association (Regd.) v. Union of India & Ors. (2021) 8 SCC 511*** has held that the RBI Circulars are not mandatory and left it to the discretion of each lending institution.

q. There is no waiver of default under the Interim Solution Undertaking as this has been expressly stated under clause No.18.2 that the terms of this ISU shall not be construed as acknowledgement or waiver by any Bank. Therefore, the arrangements/agreements under the ISU cannot be considered to be a waiver of default under the Facility Agreements and 2015 Guarantees.

r. This Tribunal has also jurisdiction to entertain the present application under Section 7 of IBC in view of clause No. 49.1(c) of Facility Agreement-I and clause No. 48.1(c) of Facility Agreement-II as both Indian and English Courts have concurrent jurisdiction.

s. It is well settled that Financial Creditor can approach the National Company Law Tribunal for recovery of its outstanding dues under the provisions of IBC as long as the Corporate Debtor has its registered office in India and has its major operations and management conducted within the territorial jurisdiction of the Adjudicating Authority. Therefore, without prejudice to the proceedings pending before the London Court, the present matter falls within the territorial jurisdiction of this Authority.

3. SUBMISSIONS OF THE FINANCIAL CREDITOR:

a. Mr. Vivek Reddy, Learned Senior Counsel appearing for the Financial Creditor has vehemently argued that the default in repayment of the

loan amount for the first time occurred on 06.02.2017 which is still continuing. Subsequently, when another default took place, invocation notice was issued on 02.11.2020. The next date of default is when loan amount was not paid as per the London Court judgement dated 19.10.2023. The Corporate Debtor has also replied to the notice dated 02.11.2020 that not to take any precipitative actions as negotiations were taking place with the Adani Group and further the Corporate Debtor has also acknowledged the debt as a Corporate Guarantor in its Annual Report for the FYs 2018-19, 2019-20, 2020-21, 2021-22 and 2022-23.

b. The question of limitation is governed by Article 137 in Schedule I of the Limitation Act, 1963 read with Section 238A of the IBC that an Application/Petition under Section 7 of the IBC can be filed within 3 years from the date of default. It is further submitted that Section 18(1) of the Limitation Act allows for extension of limitation period for filing a suit or application in case of a written acknowledgment of liability as exist in the present case. On this point, learned counsel has placed reliance on the decisions of Hon'ble Supreme Court in ***Asset Reconstruction Company (India) Limited v. Bishal Jaiswal & Anr., (2021) 6 SCC 366*** and ***Dena Bank v. C. Sivakumar Reddy (2021) 10 SCC 330*** and ***Ram Sarup Gupta v. Bishun Narain Inter College (1987) 2 SCC 555*** that when there is acknowledgment of liability the limitation period is extended.

c. Ld. senior counsel has submitted that a fresh cause of action arose because of the London Court's judgement. To buttress his argument, reliance has been placed on ***Dena Bank case*** *(supra)* that once a claim which fructifies into a final judgment/order/decree and it authorizes the creditor to realise its decretal dues, then a fresh right accrues to the

Financial Creditor to recover such decretal amount. Another judgement of ***Kotak Mahindra Bank Limited v. A. Balakrishnan & Anr. (2022) 9 SCC 186*** also says that a claim arising out of a recovery certificate would be a financial debt within the meaning of Section 5(8) of the IBC and the holder of such a recovery certificate would be a Financial Creditor. Similarly, the Hon'ble NCLAT in ***Assem Shrivastav v. ICICI Bank Limited Company Appeal (AT) (Ins.) No. 147 & 138 of 2021*** has held that there is built in provision for various dates of default in the Code itself.

d. Ld. senior counsel after relying upon the decision of the Hon'ble NCLAT in ***Bank of India Chennai Large Corporate Branch & Anr. v. Coastal Oil Gas Infrastructure Private Limited & Anr., 2020 SCC Online NCLAT 1095*** has argued that if the Adjudicating Authority comes to conclusion that there is an issue in relation to the date of default being incorrectly pleaded, it can ask the Financial Creditor to rectify the same.

e. The London Court judgement has been pronounced on merits by considering the evidence of both sides. The GVK group filed pleadings and led evidence, but refrained from appearing at the final hearing and therefore the said decree cannot be treated as ex-parte. The decision of NCLT, Chennai in ***M/s. Stanbic Bank Ghana Limited v. M/s. Rajkumar Impex Private Limited, CP (IB) No. 670 of 2017*** while dealing with a similar matter has held that courts need not go beyond a foreign decree. This decision was affirmed by the Hon'ble Supreme Court in ***M/s. Stanbic Bank Ghana Limited v. M/s. Rajkumar Impex Private Limited, Civil Appeal No.9980 of 2018***. Therefore, the decree passed by the London Court can be relied upon as what is due and

payable amount and default in making payment by the Corporate Debtor.

f. It is urged that there can be multiple dates of default and this is to be ascertained from the pleadings as held in the case of ***Malavika Hedge, Suspended Director of Coffee Day Global Limited, CA (AT) (ins) No.235/2023.*** The Hon'ble NCLAT also took note of multiple dates of default and ascertained that there was a date of default prior to Section 10A period.

g. The application under Section 7 can be admitted on the recovery certificate as it is a financial debt under Section 5(8) of the IBC. Reliance has also been drawn from decision in ***Kotak Mahindra Bank case supra and Totempudi Salalith v. SBI & anr., (2024) 1 SCC 24,*** where the Hon'ble Apex Court went a step ahead and upheld the right of a recovery certificate holder as a deemed decree holder to initiate proceedings under the Code. Further, as mentioned above, the Hon'ble NCLAT in ***Virigineni Anjaiah v. Prithvi Asset Reconstruction and Securitisation Company Limited, Company Appeal (AT) (Ins.) No. 147 and 378 of 2021*** held that a recovery certificate holder is a financial creditor and a recovery certificate is a financial debt.

h. Even the liability to pay interest is subsisting and Facility Agreements and the guarantees specifically obligate the Corporate Debtor to pay default interest when there is default debt. Section 5(8) of IBC defines financial debt as debt along with interest which is disbursed against the time value of money. Application under Section 7 can also be admitted solely for the interest component once the interest becomes due and is defaulted by the Corporate Debtor. Here reference is made to the decisions in ***Base Realtors Private Limited vs. Grand Realcon Private***

Limited CA(AT)(INS) No.882/2022, paragraph nos. 17-26 and State Bank of India vs. Raebareilly Allahabad Highway Private Limited CP (IB) No.130/PB/2023, paragraph nos.35-37.

i. The Corporate Debtor is not only Corporate Guarantor but has also undertaken to indemnify the Financial Creditor in view of the terms and conditions of the Facility Agreements. The Corporate Debtor has also defaulted on its indemnify obligations, therefore, it is argued that the present application is to be admitted on this ground as well.

j. The proceedings before the Hon'ble NCLAT are summary in nature and in sufficiency of stamp duty is not relevant for adjudicating an application under Section 7 of the IBC. This is also what has been held by Hon'ble NCLAT in its various decisions in ***Praful Nanji Sastra v. Vistra ITCL 2022 SCC Online NCLAT 336, Manish Pardasani and Ors. v. Atul Projects India Private Limited 2023 SCC Online NCLT 391 and Kotak Mahindra Bank Limited v. Hybro Foods Private Limited CP (IB) No.295 of 2022.***

k. The moratorium as per the circulars dated 27.03.2020 and 17.04.2020 of the RBI are not applicable because the exemptions are to be granted at the discretion of the lenders. These regulations have been discussed by the Hon'ble Supreme Court in ***Small Scale Infrastructure Association supra.***

l. This Authority has jurisdiction to entertain the application under Section 7 of the IBC against the Corporate Debtor in view of the clause 49.1(c) and clause 48.1(c) of the Facility Agreement-I and Facility Agreement-II, respectively.

m. Similarly, branches of the Bank are part of the same corporate entity and ld. counsel has made reference to Section 35(5) of the Banking Regulation Act, 1949 to say that the foreign branches fall within the definition of 'banking company'. It has also been clarified by Hon'ble High Court Bombay in ***ICICI Bank Limited v. M/s. Classic Diamonds (India) Limited, 2015 SCC Online Bom 6555*** that a foreign branch of the bank is considered as part of the same entity for the purpose of privity of contract and the head office/corporate office can file necessary proceedings on behalf of the foreign branch.

n. The Force Majeure Event is not applicable because the default under the Facility Agreements took place on 06.02.2017 which is recurring.

o. The interest amount has been calculated as per the terms and conditions of the Facility Agreements. In this regard, reference has been made to clause 10 and clause 8 of Facility Agreement-I and Facility Agreement-II, respectively. It is also stressed there is no waiver under the ISU and clause 18.2 of this agreement.

4. SUBMISSIONS OF THE CORPORATE DEBTOR:

a. The main focus of the Corporate Debtor is that the present Application has been filed within the moratorium period under Section 10A of IBC. learned senior counsel for the Corporate Debtor has vehemently argued that the Financial Creditor in the pleadings has submitted that cause of action arose on 02.11.2020 when the guarantee was invoked. The date of default as mentioned in the pleadings has not been changed/amended. This date was also mentioned in the notices dated 02.11.2020.

b. The proviso to Section 10-A has been interpreted by the Hon'ble Supreme Court in ***Ramesh Jymal v. Siemens Gamesa Renewable Power Private Limited (2020) 3 SCC 224*** that the intent of the legislature is to bar the institution of any application for the commencement of CIRP for any default which took place within the prohibited period. A similar question was raised before the Hon'ble NCLAT, Delhi in ***Yatra Online Limited v. Ezeego One Travel and Tours Limited through Resolution Professional CA(AT) (Ins.) No.387 of 2023)***, wherein it was held that the Financial Creditor cannot be allowed to bring a new date of default dehors the fact that another date of default is still existing in the pleadings which was filed at the inception of the litigation and has not yet been amended. Similar view was expressed in ***Ramdas Dutta v. IDBI Bank Limited & Anr Company Appeal (AT) (Ins) No. 1285 of 2022*** and ***Ramesh Kymal v. Siemens Gamesa Renewable Power Private Limited (2020) 3 SCC 224.***

c. The contention of the Financial Creditor that the date of default was also on 06.02.2017 has been countered by the learned senior counsel for the Corporate Debtor by submitting that the said default is in respect of Principal Borrower and not the guarantor. He has also referred to the decision of Hon'ble NCLAT in ***Pooja Ramesh Singh versus State Bank of India and Anr Company Appeal (AT) (Ins) NO.329 of 2023*** to bring home his point of view.

d. According to the learned counsel for the Corporate Debtor, the liability of the guarantor depends upon the terms of the contract. Facility Agreement No-1, Facility Agreement-No. II and Deed of Guarantees dated 29.06.2015 make it clear that the liability of the Corporate Debtor

was limited guarantee and it covered only 53.9 per cent of the principal amount. These agreements specifically provide that the guarantee can be invoked by the Financial Creditor on demand made in writing, which was admittedly done on 02.11.2020. Regarding the guarantor's liability depending upon the terms of the contract, reference has been made to the decision of the Hon'ble Apex Court in ***Syndicate Bank v. Channaveerappa Beleri and Others (2006) 11 SCC 506*** and of Hon'ble NCLAT in ***J.C.Flowers Assets Reconstructions Private Limited v. Deserve Exim Private Limited, Company Appeal (AT) (Insolvency) No. 486 of 2023.*** Further, the date of default of guarantee shall be the date when the Corporate Guarantee has been invoked, as also held by the Hon'ble NCLAT in ***Mudhit Mundal Gupta v. Supreme Constructions and Developers Private Limited [Company Appeal (AT)(Ins) No.920 of 2023.*** The same view was also expressed by the coordinate bench of NCLT, Mumbai in ***IDBI Bank Limited v. Zee Entertainment Enterprises Limited, CP(IB) No.107/MB-IV/2023, VSJ Investments Private Limited (VSJIPL) v. Sri Khodiar Realtech Syndication Private Limited, CP (IB No.136/C-IV/2023)*** and ***Piramal Capital and Housing Finance Limited v. Township Developers India Limited, CP (IB) 556/MB/2023.***

e. There can also not be continuous default as claimed by the Financial Creditor as held by Hon'ble NCLAT in ***J.C.Flowers Asset Reconstruction Private Limited versus Deserve Exim Private Limited (supra).***

f. It is also argued that the London Court Judgement cannot be a premise to ratify the application filed prior to passing of the judgement and on this point the stand of the Financial Creditor by relying upon the

judgement in ***Dena Bank Case supra*** is misplaced. The documents in the said case were placed on record relating to a period prior to filing of application under Section 7 in the context of extending the limitation period and do not result in creation of a fresh and subsequent date of default.

g. On the question of the ex-parte judgement dated 19.09.2023 passed by the High Court of Justice King's Bench Division Commercial Court, UK in claim No.CL-2020-000729 titled as ***Bank of Baroda and Ors v. GVK Coal Developers (Singapore) PTE Ltd & Ors***, it is argued that this judgement has not obtained finality and accordingly is not recognized under prevailing law of India. Consequently, this judgement is inadmissible in evidence and cannot give rise to a fresh cause of action. Furthermore, the foreign judgement is not a valid judgement being violative of Section 13 of CPC and against Indian Public Policy. There are various judgements including ***Harpreet Singh Sekhon v. Rajwant Kaur, 2013 SCC Online P&H 4357, California Pacific Trading Corporation versus Kitply Industries Limited, 2011 SCC Online Gau 59, Shilpa Sachdev Adult versus Anand Sachdev Adult, 2017 SCC Online Bom 8972*** which ruled that foreign judgments are inconclusive under Section 13(f) of CPC when such foreign judgements were in breach of Indian law.

h. The notice of demand and acceleration dated 02.11.2020 are not valid because the CD was not given an opportunity to make good on the said demand/invocation issued notice. The Financial Creditor proceeded to invoke the Corporate Guarantees on the same day without allowing the CD even one business day to make good the said demand.

i. The notice dated 02.11.2020 is also contrary to the moratorium provided by the RBI vide notifications dated 27.03.2020 and 23.05.2020.

j. The judgement dated 19.09.2023 by the High Court of Justice King's Bench Division Commercial Court, UK in claim No.CL-2020-000729 was never decreed in favour of ICICI Bank Limited, but in favour of ICICI, Bahrain and Singapore branches which are separate legal entities under law. Therefore, the aforesaid judgement is misconceived and without any merit or basis.

k. Last but not the least, the documents relied upon by the Financial Creditor are also insufficiently stamped and therefore are inadmissible under Section 35 of the Indian Stamps Act. The alleged loans of USD 855.89 million claimed by the Financial Creditor is incorrect and contrary to the terms of Facility and Guarantee Agreements.

5. UNDISPUTED FACTS:

a. For the acquisition of coal mines etc. in Australia, the GVK Coal Developed (Singapore) Pte Ltd entered into Finance Facility Agreement -I dated 17.09.2011 **(Annexure no.2, Pg. no. 31, Volume-I of the application)** with a consortium consisting of Bank of Baroda (Ras Al Khaimah Branch), Bank of India (London and Singapore Bank Branch), Canara Bank (London Branch) and ICICIC Bank Limited (Bahrain, Dubai and Singapore Branch)**.**

b. The GVK Natural Resources Private Limited and GVK Power and Infrastructure Limited, present Corporate Debtor became the Indian Parent Guarantors to this Finance Facility Agreement–I **(Annexure no.2, Pg. no.31, Volume-I of the application).** As per Finance Facility

Agreement-I which was amended on 17.09.2011 and 05.12.2012, one billion USD term loan facility and 35 million USD letter of credit facility was extended. The share of the Financial Creditor in the total loan was USD 500 million which was subsequently reduced to USD 442 million**.** The Financial Creditor has also acted as an agent of the other lenders in the consortium under Facility Agreement-I.

c. The lenders also entered into an equity subscription agreement dated 29.09.2011**(Annexure no.3, Pg. no.296, Volume-II of the application)** with the Borrower, wherein the Corporate Debtor agreed to advance such funds or subscribe for such amounts of shares so as to ensure that the Borrower receives sufficient funds in order to meet any payments of obligations in any document.

d. The ICICI Bank Ltd (Bahrain Branch) further extended credit facility of USD 44 million which was subsequently increased to USD 250 million vide Facility Agreement–II dated 26.03.2024 **(Annexure no.17, Pg. no.545, Volume-III of the application).** As part of this agreement, the Financial Creditor disbursed USD 103 million. In view of clause 2.4 of the Facility Agreement-II, the Borrower also acted as an agent of the guarantor to this agreement.

e. Under Facility Agreement-II, the Corporate Debtor entered into two Corporate Guarantee Agreements dated 26.03.2015 **(Annexure no.5, Pg. no.173 of the Rejoinder)** and dated 29.06.2015 **(Annexure no.6, Pg. no.185 of the Rejoinder)** to provide guarantee for repayment up to USD 89,100,000/-**.**

f. The Borrower vide Interim Solution Undertaking (ISU) agreement dated 23.03.2017 **(Annexure no. 19, Pg. no 781, Vol. IV)** agreed to

provide certain concessions to the lenders and in pursuance thereof, the lenders of the Facility Agreement-I and Facility Agreement-II received a part of the loan amount.

g. When dispute arose between the parties, the Financial Creditor issued Notice dated 02.11.2020 (**Annexure no. 24, Pg. no. 1102, Vol-V of the application**) for the invocation of Corporate Guarantee of USD 1,522,229,227.75 under the Facility Agreement-I, Notice dated 02.11.2020 (**Annexure no. 23, Pg. no. 1096, Vol-V of the application)** for the invocation of the guarantee of USD 89,100,000 under the Facility Agreement-II**,** Notice dated 02.11.2020 (**Annexure no. 25, Pg. no. 1108, Vol-V of the application)** of default and acceleration of USD 1,522,229,227.75 under the Facility Agreement-I and Notice dated 02.11.2020 (**Annexure no. 26, Pg. no. 1112, Vol-V of the application)** of default and acceleration of USD 220,979,648.31 under the Facility Agreement-II**.**

h. For the recovery of the loan amount, Claim No. CL-2020-000729, titled as Bank of Baroda and others v. GVK Coal Developers (Singapore) Pte Ltd. and others was filed in London, which was allowed vide judgement dated 19.10.2023 **(Annexure-1 in IA No. 1925 of 2023).**

6. POINTS FOR CONSIDERATION:

On the basis of the pleadings and the arguments of learned counsels for the parties, the following points arise for determination:

i. Effect of Foreign Judgment on the present application.
ii. Nature of guarantee
iii. Date of initial default.
iv. Whether date of default can be changed.
v. Applicability of Section 10-A IBC.
vi. Payment of stamp duty

vii. Filing of Application/Petition on behalf of foreign branch.
viii. Territorial jurisdiction
ix. Indemnification of the Financial Creditor.
x. RBI Moratoriums

7. FINDINGS:

I. Foreign judgement/decree:

a. On account of non-payment of loan amount, the Borrower ICICI Bank approached this Authority against the Indian guarantor, i.e., Corporate Debtor in the present Application/Petition while Bank of Baroda (Ras Al Khaimah branch), Bank of India (London branch), Canara Bank (London branch), ICICI Bank Limited (Bahrain, Dubai, and OBU branches), Indian Overseas Bank (Large Corporate branch, India) and Axis Bank invoked the jurisdiction of the Hon'ble Court of Justice, King's Bench Division, Commercial Court London against the Principal Borrower, GVK Coal Developers (Singapore) Pte Ltd. and others by filing a Claim No.CL-2020-000729, titled as Bank of Baroda and others v. GVK Coal Developers (Singapore) Pte Ltd and others, which was allowed vide judgement dated 19.10.2023 **(Annexure-1 in IA No. 1925 of 2023).** The defendants in that claim were held liable to pay the principal amount of USD 1,132,450,591.19/- and interest of USD 1,058,358,139.92 under Facility Agreements-I and II.

b. Before adverting to the question of the admission of judgment dated 19.10.2023 in the present proceedings, it is apt to refer to relevant clauses in the agreements. Clause Nos. 18.18, 48 and 49 of the Facility Agreement-1 provide:

> ***18.17 Jurisdiction/governing law***
> *Subject to any general principles of law limiting the obligations of each Obligor and referred to in any legal opinion required under this Agreement:*
> *1.*

(i) Irrevocable submission to the jurisdiction of the courts of the governing law of the Finance Document to which it is a party;

(ii) Agreement that each Finance Document is governed by the law listed in that Finance Document to which it is a party; and

(iii) Agreement not to claim any immunity to which it or its assets may be entitled, are legal, valid and binding under the laws of its Relevant Jurisdiction; and

48. GOVERNING LAW

This Agreement and any non-contractual obligations arising out of or in connection with it are governed by English Law.

49. ENFORCEMENT

49.1 Jurisdiction

(a) Except to the extent expressly provided otherwise in a Finance Document, the English courts have non-exclusive jurisdiction to settle any dispute including a dispute relating to any non-contractual obligation arising out of or in connection with any Finance Document.

(b) Except to the extent expressly provided otherwise in a Finance Document, the English courts are the most appropriate and convenient courts to settle any such dispute in connection with any Finance Document. Each obligor agrees not to argue to the contrary and waives objection to those courts on the grounds of inconvenient forum or otherwise in relation to proceedings in connection with any Finance Document.

(c) This Clause is for the benefit of the Finance Parties and Secured Parties only. To the extent allowed by law, a Finance Party or a Secured Party may take;

(i) proceedings in any other court; and

(ii) concurrent proceedings in any number of jurisdictions.

(d) References in this Clause to a dispute in connection with a Finance Document includes any dispute as to the existence, validity or termination of the Finance Document.

c. Similar provisions are also in the Facility Agreement-II. In the guarantee deeds also, it is provided in clause No.24 that the guarantee shall be governed by the Indian Law. In para 16 of the London Court's judgement, it has been observed that the insolvency proceedings are governed by Indian Law. It is thus clear that the London Court invoked its jurisdiction in accordance with the agreements to decide the claim against the Borrower.

d. Section 44-A read with section 13 of the CPC governs the recognition and enforcement of foreign judgments and decrees in India. Foreign

judgments may be recognized based on bilateral or multilateral treaties or understandings, or unilaterally without an express international agreement. India has executed bilateral treaties with many countries including UK.

e. Section 2 of Code of Civil Procedure defines "Foreign Court" and "Foreign Judgement" as: -

> Section 2 of the CPC, 1908
>
> *(5) "foreign Court" means a Court situate outside India and not established or continued by the authority of the Central Government;*
> *(6) "foreign judgment" means the judgment of a foreign Court;*

f. According to Section 13 of the CPC, a foreign judgment will be inconclusive if it:

> *a) is pronounced by a court that was not of competent jurisdiction;*
> *b) is not given on the merits of the case;*
> *c) appears to be founded on an incorrect view of international law or a refusal to recognize Indian law (where applicable);*
> *d) violates principles of natural justice;*
> *e) is obtained by fraud; or*
> *f) sustains a claim founded on a breach of Indian law.*

g. Section 14 of the Code of Civil Procedure, which deals with the presumption as to foreign judgments, reads thus:

> *14. Presumption as to Foreign Judgment. -The Court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction.*

h. Section 44-A provides a mechanism for execution of a foreign decree which is different from the legal regime for the execution of a domestic decree.

> **44A. Execution of decrees passed by Courts in reciprocating territory**
>
> *(1)Where a certified copy of a decree of any of the superior Courts of any reciprocating territory has been filed in a District Court, the decree may be executed in India as if it had been passed by the District Court.*

(2)Together with the certified copy of the decree shall be filed a certificate from such superior Court stating the extent, if any, to which the decree has been satisfied or adjusted and such certificate shall, for the purposes of proceedings under this Section, be conclusive proof of the extent of such satisfaction or adjustment
(3)The provisions of Section 47 shall as from the filing of the certified copy of the decree apply to the proceedings of a District Court executing a decree under this Section, and the District Court shall refuse execution of any such decree, if it is shown to the satisfaction of the Court that the decree falls within any of the exceptions specified in clauses (a) to (f) of Section 13
Explanation I.-"Reciprocating territory" means any country or territory outside India which the Central Government may, by notification in the Official Gazette, declare to be a reciprocating territory for the purposes of this Section; and "superior Courts", with reference to any such territory, means such Courts as may be specified in the said notification.
Explanation II.-"Decree" with reference to a superior Court means any decree or judgment of such Court under which a sum of money is payable, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty, but shall in no case include an arbitration award, even if such an award is enforceable as a decree or judgment.

i. From a plain reading of these provisions, it is clear that Section 13 of the Civil Procedure Code makes a judgment conclusive as to any matter directly adjudicated between the same parties or between the parties under whom they or any of them claim litigating under the same title unless it is barred by any of the disqualifications under clauses (a) to (f) of Section 13. Besides, there is a presumption about the competency of the court. This presumption however is rebuttable.

j. The Financial Creditor does not want execution of the London Court judgment, but to take note for the purpose of fresh cause of action against the Corporate Debtor. Section 44-A is meant to give effect to the policy contained in the Foreign Judgments (Reciprocal Enforcement) Act, 1933. It is a part of the arrangement under which on one part decrees of Indian Courts are made executable in United Kingdom and on the other part, decrees of Courts in the United Kingdom and other notified parts of Her Majesty’s dominions are made

executable in India. ***(See Alcon Electronics (P) Ltd. v. Celem S.A. of France (2017) 2 SCC 253)***

k. Examining the London Court's Judgment on the touchstone of the Section 13 of the CPC, it is to be noted that the main contention of ld. counsel for the Corporate Debtor is that the judgement dated 19.10.2023 is ex-parte and therefore cannot be relied upon.

l. A judgment rendered against a party who had been duly served and placed on notice of the proceedings can neither be regarded as ex parte nor can it be invariably considered to be a judgment otherwise than "on merits". This position stands duly recognised in the decisions of our Hon'ble Supreme Court in ***International Woollen Mills v. Standard Wool (U.K.) Ltd. (2001) 5 SCC 265 and Alcon Electronics (P) Ltd. v. Celem S.A. of France (2017) 2 SCC 253.***

m. It is a well-settled principle of law that even such a judgment would be a judgment given on merits if evidence is adduced on behalf of the plaintiff and judgment is based on appreciation of the evidence. About the admissibility of ex parte foreign decree in Indian court, with reference to Section 13(b) and Section 44-A of the Code of Civil Procedure, 1908, the Hon'ble Supreme Court in the case of ***International Woollen Mills (supra)*** held:

> 22. Reliance was also placed upon the case of Ram Chand vs. John Bartlett reported in Vol. III Indian Cases 523. In this case it has been held as follows:
>
> "The next contention that has been raised for the appellant to show that the respondent's suit on the foreign judgment did not lie, is that the said judgment was not passed on the merits, and that, therefore, it cannot be enforced by the Indian Courts. In my opinion this contention has no force. The writ of summons issued by the High Court in English was, it is admitted duly served on the appellant is this country, but the latter did not, within the time allowed for that purpose, enter an appearance and deliver a defence. The respondent has (under the rules of procedure that govern the Supreme Court) the right at the expiration of the prescribed period, to enter final judgment for the amount claimed, with

costs. The writ aforesaid was especially endorsed with the statement of claim, containing all the necessary particulars, and there is nothing to show that the application for leave to serve the writ was not supported by affidavit or other evidence stating the several particulars required by Order XI, rule 4. In Short, the proceedings held in the high Court of England appear to have been strictly in accordance with the existing rules of procedure, which are not shown to be in any way contrary to the fundamental principles of justice and fair play; and the judgment passed against the defendant on the facts of the case must be considered as one passed on the merits. It does not proceed on any preliminary point, i.e., a point collateral to the merits of the case but is based on the merits as disclosed by the pleadings before the Court, if the defendant did not, in spite of notice of action choose to appear and defend it, the judgment passed by the Court in plaintiff's favour was not the less a judgment on the merits, because it was not founded upon detailed evidence which the plaintiff might have produced had the defendant entered an appearance and contested the claim. The position to my mind is the same as if the defendant had appeared and confessed judgment, In support of his contention that the judgment in question cannot be considered as one passed on the merits, the appellant's counsel has relied on the following passage in Sir William Pattigan's Private International Law (0895) at pages 234-235:

> "It would seem to be equally plain that, if, for instance, it should happen that by the law of a foreign country, a plaintiff was entitled to judgment simply on the non-appearance of a defendant who had been duly served, and without adducing any evidence whatever in support of his claim , or if the wrong-headiness of a foreign Judge should induce him to so decide, the plaintiff would not be entitled in an English Court to sue upon a judgment of a foreign Court would, at all events, be so contrary to the fundamental principles of the Law of England as, for this reason alone, to be incapable of receiving any effect in a British Court."

The above passage does not, however, as I read it, support the present appellant's positional as it cannot, in my opinion, be affirmed in this case the plaintiff has obtained judgment from the High Court in England "simply on the non-appearance of the defendant without adducing any evidence whatever in support of his claim." Under Order XI, rule 4 the plaintiff's application for leave to serve the writ of summons out of the jurisdiction must be supported by affidavit or other evidence stating that the plaintiff has a good cause of action * * * * and the grounds upon which the application is made and leave can only be granted if the Court or Judge is satisfied that the case is a proper one for the service prayed for. The necessary procedure must be presumed to have been followed in this case, and it has not been shown by the appellant that it was not so followed. The affidavit filed by the present plaintiffs-respondents in pursuance of the above rule, would, in my opinion, constitute "evidence in support of the claim" within the purview of the principle laid down in the passage quoted above and the judgment obtained after service of the writ on the defendant as required by the rules of the Supreme Court would, I think, be a judgment on the merits. If, however, the passage relied upon does not bear the construction i have placed upon it, if, that is to say, it means that

there can be no judgment on the merits, unless , after the service of the writ on the defendant in the regular way the plaintiff has adduced some evidence, oral or documentary, in support of his claim, such as he would have produced if the defendant had appeared and contested the claim, then , with all possible respect for the learned author of that passage, I venture to think that the rule laid down by him is expressed in too wide language, and I should be reluctant to follow it unless it were supported by clear authority. I can discover no such authority either in Dicey's "Conflict of Laws" (p. 411), or in any other standard text-book on the subject; and I do not think that the maxim enunciated by Sir William Rattigan himself as the one applicable in such cases, viz., that the judgment passed must not contravene the fundamental principles of a rational system of law, support the wide proposition, which it has been urged, is laid down in the passage quoted above."

23. In our view the passage in Sir William Rattigan's Private (SIC) International Law (1895) page 234-235 reproduced above, (SIC) states the correct law. With great respect to the learned Judges concerned the restricted interpretation sought to be given cannot be accepted. With greatest of respect to the learned Judges we are unable to accept the broad proposition, that any decree passed in absence of Defendant, is a decree on merits as it would be the same as if Defendant had appeared and confessed Judgment. We also cannot accept the proposition that the decree was on merits as all documents and particulars had been endorsed with the statement of claim. With the greatest of respect to the learned Judges they seem to have forgotten at stage of issuance of writ of summons the Court only forms, if it at all does, a prima-facie opinion. Thereafter Court has to be consider the case of merits by looking into evidence led and documents proved before it, as per its rules. It is only if this is done that the decree can be said to be on merits.

(own emphasis)

n. Explaining the concept of a judgment on merits, the Hon'ble Supreme Court in ***Alcon Electronics*** **(supra)** held as follows: -

"14. A plain reading of Section 13 CPC would show that to be conclusive an order or decree must have been obtained after following the due judicial process by giving reasonable notice and opportunity to all the proper and necessary parties to put forth their case. When once these requirements are fulfilled, the executing court cannot enquire into the validity, legality or otherwise of the judgment.

15. A glance on the enforcement of the foreign judgment, the position at common law is very clear that a foreign judgment which has become final and conclusive between the parties is not impeachable either on facts or law except on limited grounds enunciated under Section 13 CPC. In construing Section 13 CPC we have to look at the plain meaning of the words and expressions used therein and need not look at any other factors. Further, under Section 14 CPC there is a presumption that the foreign court which passed the order is a court of competent jurisdiction which of course is a rebuttable presumption. In the present case, the appellant does not dispute the jurisdiction of the English Court but its grievance is, it is not executable on other grounds which are canvassed before us.

16. The appellant contends that the order of the English Court is not given on merits and that it falls under Section 13(c) CPC as a result of which it is not conclusive and therefore unexecutable. We cannot accept such submission. A judgment can be considered as a judgment passed on merits when the court deciding the case gives opportunity to the parties to the case to put forth their case and after considering the rival submissions, gives its decision in the form of an order or judgment, it is certainly an order on merits of the case in the context of interpretation of Section 13(c) CPC.

17. Applying the same analogy to the facts of the case on hand, we have no hesitation to hold that the order passed by the English Court is an order on merits. The appellant who has submitted itself to the jurisdiction of the Court and on its own requested the Court to assess Neutral Citation Number is 2023:DHC:2336 EX.P. 37/2021 Page 47 of 49 the costs summarily. While passing a reasoned order by dismissing the application filed by the appellant, English Court granted the costs against the appellant. Had it been the case where appellant's application was allowed and costs were awarded to it, it would have as well filed a petition for the execution of the order. Be that as it is, the appellant did not prefer any appeal and indeed sought time to pay the costs. The appellant, therefore, cannot be permitted to object the execution. It cannot be permitted to blow hot and cold at the same time. In our opinion, it is a pure abuse of process of law and the courts should be very cautious in entertaining such petitions.

18. In International Woollen Mills v. Standard Wool (UK) Ltd. [International Woollen Mills v. Standard Wool (UK) Ltd., (2001) 5 SCC 265 : AIR 2001 SC 2134], this Court observed: (SCC p. 280, para 29)

> 29. … 17. … Even where the defendant chooses to remain ex parte and to keep out, it is possible for the plaintiff to adduce evidence in support of his claim (and such evidence is generally insisted on by the courts in India), so that the Court may give a decision on the merits of his case after a due consideration of such evidence instead of dispensing with such consideration and giving a decree merely on account of the default of appearance of the defendant.

18. In the former case the judgment will be one on the merits of the case, while in the latter the judgment will be one not on the merits of the case. Thus, it is obvious that the non-appearance of the defendant will not by itself determine the nature of the judgment one way or the other. That appears to be the reason why Section 13 does not refer to ex parte judgments falling under a separate category by themselves. '[Ed.: As observed in Govindan Asari Kesavan Asari v. Sankaran Asari Balakrishnan Asari, 1957 SCC OnLine Ker 151, paras 17-18.] ‖ 19. The principles of comity of nation demand us to respect the order of English Court. Even in regard to an interlocutory order, Indian Courts have to give due weight to such order unless it falls under any of the exceptions under Section 13 CPC. Hence, we feel that the order in the present case passed by the English Court does not fall under any of the exceptions to Section 13 CPC and it is a conclusive one. The contention of the appellant that the order is the one not on merits deserves no consideration and therefore liable to be rejected. Accordingly, issue (i) is answered.

(own emphasis)

o. Thus, the rule to be applied is as to whether upon due consideration of the evidence laid before the foreign court, it came to conclusion that the claim was liable to be granted or it merely dispensed with the aforesaid obligation simply on account of the absence of the defendants. The defendants before the London Court were duly served and represented through their counsel, but in the middle of case they were set ex-parte and therefore, it can't be said that they were denied the right of natural justice. Because of non-attendance of the representative of the defendants on 11.10.2023, the court proceeded to take on record the evidence of the claimants. The London Court even took evidence of the defendants both in relation to the expert evidence on Indian Law and accounting evidence.

p. The London Court has dealt with the dispute on merits and upon taking into consideration the evidence that was placed before it. Finally, the London Court decided the case on 19.10.2023. The judgment in any way does not rest upon an unproven, unsubstantiated or unverified claim.

q. There is no procedural lapse in deciding the case and moreover, the Borrowers have also not challenged the said judgement till date and hence it becomes final between the parties. This is not based on incorrect interpretation of India or International law. Hence, the judgment of the London Court is conclusive as far as the proceedings relating to claim between the lenders and Borrower are concerned. The said judgement is by a court competent and it has also directly adjudicated the matter.

r. We also agree with the contention of the learned senior counsel for the Financial Creditor who has placed reliance on the decision of the

coordinate bench in ***M/s. Stanbic Bank Ghana Limited v. M/s. Rajkumar Impex Pvt. (2018) ibclaw.in 46*** which was upheld by the Hon'ble NCLAT in judgment reported at ***(2018) ibclaw.in 60 NCLAT*** and further dismissal of the appeal by the Hon'ble Supreme Court against the NCLAT judgment, reported at ***(2018) ibclaw.in 64 SC*** that there is no bar in taking cognizance of the foreign decree and admitting an application under Section 7.

s. For the aforesaid reasons, we come to the conclusion that the judgement of the London Court is admissible in evidence in the present proceedings, particularly when the said judgement arises from the same contract. Accordingly, this point is decided in favour of the Financial Creditor.

II. <u>Nature of Guarantee:</u>

a. An agreement between the guarantor and creditor is separate and collateral contract distinct from the contract of debt between the principal debtor and creditor. The contractual terms dictate the nature and magnitude of said liability. Hence, the creditor may initiate legal proceedings against both the corporate debtor and its personal guarantor simultaneously, or separately. Proceedings against the personal guarantor may be either to recover the entire amount, or the remaining amount. Here, we also rely upon the judgment of the Hon'ble Supreme Court in ***Ansal Engineering Projects Limited v. Tehri Hydro Development Corporation Limited and Another 1996 (5) SCC 450***, wherein it was held:

> 4. <u>It is settled law that bank guarantee is an independent and distinct contract between the bank and the beneficiary and is not qualified by the underlying transaction and the validity of the primary contract between the person at whose instance the bank guarantee was given and the beneficiary</u>. Unless fraud or special equity exists, is pleaded and prime facie established by strong evidence as a triable issue, the

beneficiary cannot be restrained from encashing the bank guarantee even if dispute between the beneficiary and the person at whose instance the bank guarantee was given by the Bank, had arisen in performance of the contract or execution of the Works undertaken in furtherance thereof. The Bank unconditionally and irrevocably promised to pay, on demand, the amount of liability undertaken in the guarantee without any demur or dispute in terms of the bank guarantee. The object behind is to inculcate respect for free flow of commerce and trade and faith in the commercial banking transactions unhedged by pending disputes between the beneficiary and the contractor.

(own emphasis)

b. It is the terms and conditions of the guarantee agreements which will determine the liabilities of the Corporate Debtor. The Facility Agreement-I **(Annexure no.2, Pg. no. 31, Volume-I of the application)** contains the following relevant clauses:

17.1 ***Guarantee and indemnity***

(b) Subject to Sub-clause 17.9 below, each of GVK PIL and GVK NRL severally and irrevocably and unconditionally:

1. *guarantees to each Finance Party punctual performance by the Company of all its obligations under the Finance Documents;*
2. *undertakes with each Finance Party that, whenever the Company does not pay any amount when due under or in connection with any Finance Document, GVK PIL and GVK NRL must each, immediately on demand by the Facility Agent, pay that amount as if it were the principal obligor in respect of that amount; and*
3. *agrees with each Finance Party that if, for any reason, any amount claimed by a Finance Party under this Clause is not recoverable from it on the basis of a guarantee then GVK PIL or GVK NRL (as applicable) will be liable as a principal debtor and primary obligor to indemnify that Finance Party in respect of any loss it incurs as a result of GVK PIL or GVK NRL failing to pay any amount expressed to be payable by it under a Finance Document on the date when it ought to have been paid. The amount payable by each of GVK PIL and GVK NRL under this indemnity will not exceed the amount it would have had to pay under this Clause had the amount claimed been recoverable on the basis of a guarantee.*

17.2 ***Continuing guarantee***

This guarantee is a continuing guarantee and will extend to the ultimate balance of all sums payable by a Guarantor under the Finance Documents, regardless of any intermediate payment or discharge in whole or in part.

17.9 Limitations – Parent Guarantors
(a) In this Sub-clause:

GVK PIL Limit *means the lower of:*

i. 53.9% of all principal amounts outstanding under the Finance Documents (including, but not limited to, the total amount of all Credits); and

ii. US$692,615,000 (or its equivalent in other currencies).

GVK PIL Limit *means the lower of:*

i. 56.1% of all principal amounts outstanding under the Finance Documents (including, but not limited to, the total amount of all Credits); and US$720,885,000 (or its equivalent in other currencies),

In each case, subject to the maximum amount of the guarantee which is permitted in accordance with the ODI Regulations, calculated based on a net worth excluding the net worth of the Group.

ODL Investments *means in relation to any person incorporated in India any contribution to the capital of, the provision of any loan to, the issuance of any guarantee, in respect of any indebtedness of or any other investments by that person in any other person incorporated or otherwise formed outside of India.*

(c) Without prejudice to the nature of the guarantee given under this Clause as a continuing guarantee of all liabilities (Actual or contingent) under the Finance Documents:

(i) the liability of GVK PIL as a Parent Guarantor under the Finance Documents shall not exceed the GVK PIL Limit; and

(ii) the liability of GVK NRL as a Parent Guarantor under the Finance Documents shall not exceed the GVK PIL Limit; and

Without prior approval from the RBI.

(d) Notwithstanding the other provisions of this Clause, the liability of GVK PIL and GVK NRL under this guarantee shall be limited to the extent specified above.

*(e) The guarantee provided by each of GVK PIL and GVK NRL will expire on the earlier of (i) the date that falls six months after and including the Final Maturity Date and (ii) the date on which the Facility Agent notifies each of GVK PIL and GVK NRL that is satisfied (in its sole discretion) the all amounts due and payable in respect of the Finance Documents have been fully, finally, unconditionally and irrevocably discharged, and no Finance Party is under any obligation to any Obligor under the Finance Documents (**Expiry Date**). If any claim or demand is made by the Finance Parties under this guarantee on or prior to the Expiry Date, the obligations of each of GVK PIL and GVK NRL under the terms of this guarantee shall continue to bind each of GVK PIL and GVK NRL even after the Expiry Date notwithstanding anything to the contrary including if GVK PIL or GVK NRL has filed to make payment under such claim or demand prior to the Expiry Date.*

18.18 Guarantees by GVK PIL and GVK NRL

(b) Guaranteeing the obligations and liabilities of the Company under the Finance Documents (up to the limit specified in Clause 17.9 (Limitations-Parent Guarantors) would not cause any limits on guarantees, inter-corporate borrowings or investments or other similar limit binding on GVK PIL or GVK NRL to be exceeded.

c. In case of Facility Agreement-II, clause No. 16 is similar to clause No. 17 of Facility Agreement-1. Relevant clauses of Guarantee Agreements **(Annexure no.5 dated 26.03.2015, Pg. no.173 of the Rejoinder)** and **(Annexure no.6 dated 29.06.2015, Pg. no.185 of the Rejoinder)** are 3, 17 and 19:

3. (a) In the event of any default on the part of the Borrower in payment/repayment of any of the moneys referred to Clause 2 above, or in the event of any default on the part of the Borrower to comply with or perform any of the terms, conditions and covenants contained in the Facility Documents, the Guarantors shall, upon demand to the Guarantors, forthwith pay to the Bank without demur all/part of the amounts as demanded by the Bank payable by the Borrower under the Facility Documents. Any such demand made by the Bank on the Guarantors shall be final, conclusive and binding notwithstanding any difference or any dispute between the Bank and the Borrower/arbitration or any other legal proceedings, pending before any court, tribunal, arbitrator or any other authority. The enforcement of this Guarantee in part by the Bank, for any reason whatsoever, shall not amount to discharge of the obligations of the Guarantor under this Guarantee to the extent of the balance (unenforced) amount(s) of the Guarantee.

3. (b) In the event of failure by the Guarantors to make payment as stated above, the Guarantors shall pay default interest at the same rate/s as specified in relation to the Facilities for the Borrower till receipt of the aforesaid amounts by the Bank to its satisfaction.

17. 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 Bank as provided in Clause 23 hereof shall be sufficient notice to or demand on the Guarantors.

19. This Guarantee shall be a continuing one and shall remain in full force and effect till such time the Borrower repays/ pays in full the Facilities together with all interest, commission, costs, charges, expenses and all other monies including any increase as a result of revaluation/ devaluation/ fluctuation or otherwise in the rates of exchange of foreign currencies involved, whatsoever stipulated in or payable under the Facility Documents.

d. From the perusal of the guarantee agreements, it becomes clear that the guarantee is continuing and the liability of the guarantor under the

Facility Agreement-I is limited by clauses 17.9 and 18.17. In case of continuing guarantee deed, like in the present case, it is Section 128 of the Contract Act which is applicable. It says that the liability of the surety is co-extensive with the principal debtor, unless it is otherwise provided for by the contract. However, there is difference between the continuing guarantee and ordinary guarantee. This has been aptly explained by the Hon'ble Supreme Court in ***Syndicate Bank v. Channaveerappa Beleri and ors. (2006)11 SCC 506*** about the liability attached with these two forms of guarantee in the following manner:

> 9. A guarantor's liability depends upon the terms of his contract. A 'continuing guarantee' is different from an ordinary guarantee. There is also a difference between a guarantee which stipulates that the guarantor is liable to pay only on a demand by the creditor, and a guarantee which does not contain such a condition. Further, depending on the terms of guarantee, the liability of a guarantor may be limited to a particular sum, instead of the liability being to the same extent as that of the principal debtor. The liability to pay may arise, on the principal debtor and guarantor, at the same time or at different points of time. A claim may be even time-barred against the principal debtor, but still enforceable against the guarantor. The parties may agree that the liability of a guarantor shall arise at a later point of time than that of the principal debtor. We have referred to these aspects only to underline the fact that the extent of liability under a guarantee as also the question as to when the liability of a guarantor will arise, would depend purely on the terms of the contract.
>
> 10. Samuel (supra), no doubt, dealt with a continuing guarantee. But the continuing guarantee considered by it, did not provide that the guarantor shall make payment on demand by the Bank. The continuing guarantee considered by it merely recited that the surety guaranteed to the Bank, the repayment of all money which shall at any time be due to the Bank from the Borrower on the general balance of their accounts with the Bank, and that the guarantee shall be a continuing guarantee to an extent of Rs. 10 lakhs. Interpreting the said continuing guarantee, this Court held that so long as the account is a live account in the sense that it is not settled and there is no refusal on the part of the guarantor to carry out the obligation, the period of limitation could not be said to have commenced running.

e. No doubt, the obligation of the guarantor is co-extensive and coterminous with that of the Principal Borrower to defray the debt, as explained in Section 128 of the Contract Act, but the liability of the principal debtor and surety are separate although arising out of the same transaction and even the liability of surety does not also, in all cases,

arise simultaneously. We may profitably refer to the decision of the Hon'ble Supreme Court in ***State Bank of India v. Index Port Registered and ors (1992)3 SCC 159,*** wherein it was held:

> *16. "In Halsbury's Laws of England Forth Edition paragraph 159 at page 87 it has been observed that "it is not necessary for the creditor, before proceeding against the surety, to request the principal debtor to pay, or to sue him, although solvent, unless this is expressly stipulated for."*
>
> *17. In Hukamchand Insurance Co Ltd. Versus Bank of Baroda, AIR (1977) Kant 204, a Division Bench of the High Court of Karnataka had an occasion to consider the question of liability of the surety vis-à-vis the principal debtor. Venkatachaliah, J. (as His Lordship then was) observed: -*
>
> *"The question as to the liability of the surety, its extent and the manner of its enforcement has to be decided on first principles as to the nature and incidents of surety ship. The liability of a principal debtor and the liability of a surety which is co-extensive with that of the former are really separate liabilities, although arising out of the same transaction. Notwithstanding the fact that they may stem from the same transaction, the two liabilities are distinct. The liability of the surety does not also, in all cases, arise simultaneously."*
>
> *18. It will be noticed that the guarantor alone could have been sued, without even suing the principal debtor. so long as the creditor satisfies the court that the principal debtor is in default."*
>
> *(own emphasis)*

f. The Lordships of the Hon'ble Supreme Court in ***Industrial Finance Corporation of India Ltd. v. Cannanore Spinning and Weaving Mills and others (2002) 5 SCC 54*** have observed:

> 33. "Adverting to the contract of guarantee be it noted that though it is not a contract regarding a primary transaction: but it is an independent transaction containing independent and reciprocal obligations. It is on principal to principal basis and by reason wherefore the Statute has provided both the creditor and the guarantor some relief as specified in this Chapter of Contract Act (between Sections 130 to 141). Section 141 thus involves an issue of a deliberate action on the part of the creditor and not a mere fortuitous situation beyond the control of the creditor. It is in this context strong reliance was placed on a decision of the Privy Council in China and South Sea Bank Ltd. v. Tan (1989 (3) All ER 839), wherein Lord Temple man speaking for the Council stated the law as below: - (All ER p. 842 c-h)
>
> "In the present case the security was neither surrendered nor lost nor imperfect nor altered in condition by reason of what was done by creditor. The creditor had three sources of repayment. The creditor could sue the debtor, sell the mortgage securities or sue the surety. All these remedies could be exercised at any time or times simultaneously or contemporaneously or successively or not at all. If the creditor

chose to sue the surety and not pursue any other remedy, the creditor on being paid in full was bound to assign the mortgage securities to the surety. If the creditor chose to exercise his power of sale over the mortgage security, he must sell for the current market value but the creditor must decide in his own interest if and when he should sell. The creditor does not become a trustee of the mortgaged securities and the power of sale for the surety unless and until the creditor is paid in full and the surety, having paid the whole of the debt is entitled to a transfer of the mortgaged securities to procure recovery of the whole or part of the sum he has paid to the creditor. The creditor is not obliged to do anything. If the creditor does nothing and the debtor declines into bankruptcy the mortgaged securities become valueless and if the surety decamps abroad the creditor loses his money. If disaster strikes the debtor and the mortgaged securities but the surety remains capable of repaying the debt then the creditor loses nothing. The surety contracts to pay if the debtor does not pay and the surety is bound by his contract. If the surety, perhaps less indolent or less well protected than the creditor, is worried that the mortgaged securities may decline in value then the surety may request the creditor to sell and if the creditor remains idle then the surety may bustle about, pay off the debt, take over the benefit of the securities and sell them. No creditor could carry on the business of lending if he could become liable to a mortgagee and to a surety or to either of them for a decline in value of mortgaged property, unless the creditor was personally responsible for the decline. Applying the rule as specified by Pollock CB in Watts v. Shuttleworth (1860) 5 H&N 235 at 247-248: 157 ER 1171 at 1176, it appears to their Lordships that in the present case the creditor did not act injurious to the surety, did not act inconsistent with the rights of the surety and the creditor did not omit any act which his duty enjoined him to do. The creditor was not under a duty to exercise his power of sale over the mortgaged securities at any particular time or at all."

g. Hon'ble Supreme Court in ***Margaret Lalita Samuel v. The Indo Commercial Bank Ltd. AIR 1979 SC 102*** has observed that cause of action in case of continuing guarantee arises when the breach is committed by the guarantor to the guarantee given. It was held:

We may first consider the question of limitation. As already mentioned by us, the submission of Shri Bal was that every item of an overdraft account was an independent loan, limitation for the recovery of which was determined by Article 57 of the schedule to the Limitation Act, 1908. Limitation, according to the learned Counsel, started to run from the date of each loan. He relied on Basante Kumar Mitra v. Chota Nagpur Banking Association Ltd: AIR 1948 Pat 18, Brajendra Kishore Ray Chowdhury v. Hindustan Cooperative Insurance Society Ltd. I.L.R.44 Cal. 979 National and Grindlays Bank Ltd. v. Tikam Chand Daga and Anr. AIR1964Cal358, and Uma Shankar Prasad v. Bank of Bihar Ltd. and Anr. A.I.R. 1942 Patna 201. In our view it is unnecessary for the purposes of the present case to go into the question of the nature of an overdraft account. The present suit is in substance and truth one to enforce the guarantee bond executed by the defendant. In order to ascertain the nature of the liability of the defendant it is necessary to refer to the precise terms of the guarantee bond rather than

embark into an enquiry as to the nature of an overdraft account. Exhibit 57 is the guarantee bond executed by the defendant and her husband on 23rd October, 1944. It is addressed to the Indo-Commercial Bank Ltd., Madras, and is in the following terms:

Dear Sirs,

In consideration of your having agreed to allow overdraft accommodation upto Rs. 10,00,000/- (Rupees Ten Lakhs only) to the Modern Hindustan Food Products Ltd., Poona, we, C.B. Samuel and M.L. Samuel, the undersigned do hereby jointly and severally guarantee to you, the Indo-Commercial Bank Limited the repayment of all money, which shall at any time be due to you from the said Modern Hindustan Food Products Ltd., on the general balance of their accounts with you or on any account whatever (such balances to include all interest, charges, commission and other expenses which you may charge as bankers) and also the due payment at maturity of any promissory note or other negotiable instrument on the security or in respect of which any credit or advance shall be made.

And we hereby declare that this guarantee shall be a continuing guarantee to the extent at any one time for Rs. 10,00,000/- (Rupees Ten Lakhs only) and shall not be considered wholly or partially satisfied by the payment at any one tune or at different times of any sums of money due on such general balance of account but shall extend and cover and be a security for every and all further sums at any time due to you thereon. And we further declare that you may grant to the Modern Hindustan Food Products Ltd., any indulgence without discharging our liability.

The guarantee is seen to be a continuing guarantee and the undertaking by the defendant is to pay any amount that may be due by the company at the foot of the general balance of its account or any other account whatever. In the case of such a continuing guarantee, so long as the account is a live account in the sense that it is not settled and there is no refusal on the part of the guarantor to carry out the obligation, we do not see how the period of limitation could be said to have commenced running. Limitation would only run from the date of breach, under Article 115 of the schedule to the Limitation Act, 1908. When the Bombay High Court considered the matter in the first instance and held that the suit was not barred by limitation, J.C. Shah, J., speaking for the Court said:

On the plain words of the letters of guarantee it is clear that the defendant undertook to pay any amount which may be due by the Company at the foot of the general balance of its account or any other account whatever. We are not concerned in this case with the period of limitation for the amount repayable by the Company to the bank. We are concerned with the period of limitation for enforcing the liability of the defendant under the surety bond....We hold that the suit to enforce the liability is governed by Article 115 and the cause of action arises when the contract of continuing guarantee is broken, and in the present case we are of the view that so long as the account remained a live account, and there was no refusal on the part of defendant to carry out her obligation, the period of limitation did not commence to run.

We agree with the view expressed by Shah, J. The intention and effect of a continuing guarantee such as the one with which we are concerned in this case was considered by the Judicial Committee of the Privy Council in Wright and Anr. v. New Zealand Farmers

> Co-operative Association of Canterbury Ltd. [1939] A.C. 439. The second clause of the guarantee bond in that case was in the following terms:
>
> "This guarantee shall be a continuing guarantee and shall apply to the balance that is now or may at any time hereafter be owing to you by the William Nosworthy and Robert Nosworthy on their current account with you for goods supplied and advances made by you as aforesaid and interest and other charges as.

h. Therefore, we hold that the liability of a principal debtor and the liability of a surety i.e., Corporate Debtor are separate liabilities although arising out of the same transaction and that the liability of surety did not arise simultaneously, but on demand for repayment of loan amount as is clear from clause No. 17 of **Annexure no.2, Pg. no. 31, Volume-I of the application** under the Facility Agreement No.-I, clause No. 16 of the Facility Agreement–II **(Annexure no.17, Pg. no.545, Volume-III of the application)** and clause Nos. 3(a) and 3(b) of the **Annexure no.5 dated 26.03.2015, Pg. no.173 of the Rejoinder** and **Annexure no.6 dated 29.06.2015, Pg. no.185 of the Rejoinder.** Accordingly, the Financial Creditor by issuing notices dated 2.11.2020 (**Annexure no. 24, Pg. no. 1102, Vol-V of the application**) under the Facility Agreement-I and (**Annexure no. 23, Pg. no. 1096, Vol-V of the application)** under the Facility Agreement-II asked the Corporate Debtor to pay the debt amount. However, the liability of the Corporate Debtor is limited by clause 17.9 of the Facility Agreement-I.

i. As such, this point is accordingly decided.

III. <u>Date of initial 'Default':</u>

a. Existence of debt and default is sine qua non for the admission of application under Section 7 of the IBC. A debt becomes due when it is not paid by the Financial Creditor and because of default a right accrues to the Financial Creditor to file an application under Section 7 of the

IBC. Before dwelling with the issue, it is appropriate to mention relevant Sections 3(12), 6 and 7, which are reproduced below:

> ***Section 3(12) "default"*** *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 repaid by the debtor or the corporate debtor, as the case may be;*
>
> ***Section 6****. Where any corporate debtor* ***commits a default****, a financial creditor, an operational creditor or the corporate debtor itself may initiate corporate insolvency resolution process in respect of such corporate debtor in the manner as provided under this Chapter.*
> ***Section 7 (1)*** *A financial creditor either by itself or jointly with other financial creditors may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.*
> *Explanation. —For the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor*

b. The Financial Creditor has to file Application under Section 7(2) r/w Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 in Form-1, which comprises Part-I to V. Part IV and V consist of particulars of financial debt and date of default.

c. The ambit and scope of Section 7 of IBC came up for consideration before the Hon'ble Supreme Court in several landmark cases, such as, ***Innoventive Industries Ltd. v. ICICI Bank (2018)1 SCC 407, Swiss Ribbons (P) Ltd. v. Union of India (2019)4 SCC 17 and E.S. Krishnamurthy and Ors. v. Bharath Hi Tech Builders Pvt. Ltd (2022)3 SCC 1612.*** It was held that the Adjudicating Authority, considering an application under Section 7 of the IBC is only required to see if there is existence of a debt and default. Any dispute with regard to the quantum of debt is immaterial. In ***Innoventive Industries Limited supra,*** it was observed:

> 28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor - it

> need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made Under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in part III, particulars of the financial debt in part IV and documents, records and evidence of default in part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.
>
> 30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise.
>
> (own emphasis)

d. Thus, the ‘Adjudicating Authority’ on receipt of application under sub-section (2) to Section 7 is required to ascertain existence of default from the records of Information Utility or on the basis of other evidence furnished by the Financial Creditor under sub-section (3). Under sub-Section 5 of Section 7, the ‘Adjudicating Authority’ is required to satisfy:

a. *Whether a default has occurred;*
b. *Whether an application is complete; and*
c. *Whether any disciplinary proceeding is against the proposed Insolvency Resolution Professional.*

e. In compliance with the provisions of law, the Financial Creditor in Para Nos. 14, 15, 21 and Part IV of the Application has specifically mentioned that default took place on 02.11.2020 when the corporate guarantee was invoked. One more date has been mentioned in Part IV is 06.02.2017 when the initial default took place. In Para No. 14 of the rejoinder, it is pleaded that defaults started occurring sometime in 2015 and the Borrower made last payment on 06.02.2017 and thereafter there is continuous default. Therefore, the stand of the Financial Creditor is that default took place not only when the notice invoking the guarantee was issued but also prior to 02.11.2020 and which is still continuing after the filing of this Application.

f. There is no dispute on this point of law that there can be different dates of default in case of Borrower and the guarantor. This depends upon the terms & conditions of the agreement. Here, we may profitably refer to the decision in ***Syndicate Bank v. Channaveerappa Beleri and Others (2006) 11 Supreme Court Cases 506,*** wherein it was observed in Para Nos. 9 and 11.

> "9……. The parties may agree that the liability of a guarantor shall arise at a later point of time than that of the principal debtor. We have referred to these aspects only to underline the fact that the extent of liability under a guarantee as also the question as to when the liability of a guarantor will arise, would depend purely on the terms of the contract.
>
> 11. But in the case on hand, the guarantee deeds specifically state that the guarantors agree to pay and satisfy the bank on demand and interest will be payable by the guarantors only from the date of demand. In a case where the guarantee is payable on demand, as held in the case of Bradford (supra) and Hartland (supra), the limitation begins to run when the demand is made and the guarantor commits breach by not complying with the demand."
>
> (own emphasis)

g. To the same effect is the decision of the Hon'ble NCLAT in ***Mudhit Mundal Gupta v. Supreme Constructions and Developers Pvt. Ltd. (Company Appeal (AT)(Insolvency) No.920 of 2023*** that the default date shall be when the corporate guarantee is invoked. The relevant Para 7 is:

> "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 cannot 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."
>
> (own emphasis)

h. There can be no difficulty till the corporate guarantee is alive or till the time period for making the payment under the guarantee deed has expired. The important point is when the guarantee was invoked. Under the Facility Agreement-I **(Annexure no.2, Pg. no. 31, Volume-I of the application),** the corporate guarantee can be revoked by giving demand notice as per clause 17.

i. Similar provision is there in the Guarantee Agreements **(Annexure no.5 dated 26.03.2015, Pg. no.173 of the Rejoinder)** and **(Annexure no.6 dated 29.06.2015, Pg. no.185 of the Rejoinder).**

> *3. (a) In the event of any default on the part of the Borrower in payment/repayment of any of the moneys referred to Clause 2 above, or in the event of any default on the part of the Borrower to comply with or perform any of the terms, conditions and covenants contained in the Facility Documents, the Guarantors shall, upon demand to the Guarantors, forthwith pay to the Bank without demur all/part of the amounts as demanded by the Bank payable by the Borrower under the Facility Documents. Any such demand made by the Bank on the Guarantors shall be final, conclusive and binding notwithstanding any difference or any dispute between the Bank and the Borrower/arbitration or any other legal proceedings, pending before any court, tribunal, arbitrator or any other authority. The enforcement of this Guarantee in part by the Bank, for any reason whatsoever, shall not amount to discharge of the*

obligations of the Guarantor under this Guarantee to the extent of the balance (unenforced) amount(s) of the Guarantee.

3. (b) In the event of failure by the Guarantors to make payment as stated above, the Guarantors shall pay default interest at the same rate/s as specified in relation to the Facilities for the Borrower till receipt of the aforesaid amounts by the Bank to its satisfaction.

j. When the loan liability was not discharged by the Borrower, the Financial Creditor invoked the guarantees by issuing Notice dated 02.11.2020 (**Annexure no. 24, Pg. no. 1102, Vol-V of the application**) under the Facility Agreement-I and Notice dated 02.11.2020 (**Annexure no. 23, Pg. no. 1096, Vol-V of the application)** under the Facility Agreement-II. The demand notices have been issued as per the terms and conditions of the agreement.

k. One of the contentions of the learned senior counsel for the Financial Creditor is that there is continuous default for the interest amount. Here we may refer to clause No.10(6)(a) of the Facility Agreement-I and clause No. 8(4)(a) of the Facility Agreement-II which provide that interest on the overdue amount becomes immediately payable only upon demand by the Facility Agent. However, the Financial Creditor has not furnished any document specifically demanding the interest component. In the demand/invocation notice dated 02.11.2020, the debt amount includes interest component. Therefore, there is no reason to consider both principal and interest components separately for the event of default. The decision of the Hon'ble NCLAT in ***Base Realators Private Limited v. Grand Realcon Private Limited, Company Appeal (AT) (Ins) No. 882 of 2022, decided on 15.11.2022*** is not going to help the Financial Creditor as it was held that an application under Section 7 IBC can be filed and maintained in respect of interest component which has become due and payable without

asking for the principal amount which has not yet become due and payable. Here, the Financial Creditor has filed the application claiming both interest and principal amount.

l. In a case of continuing guarantee, the period of limitation would start to run from the date the cause of action would arise with the breaking of the contract for continuing guarantor which would be the date of refusal on the part of the party to carry out the obligation under the agreement. Thus, the cause of action against the guarantor will start to run when the guarantee deed was invoked and the guarantor commits breach by not complying with the demand i.e. 02.11.2020. This is the actual date of default.

m. The Financial Creditor has also taken the plea that date of default was not only when the guarantee was invoked but also when the loan amount was not paid on 06.02.2017 which is still continuing. It is already discussed that date of default may be different for the surety and Principal Borrower in accordance with the terms of the contract. In case of the Corporate Debtor, the date of default was when the corporate guarantee was invoked. The limitation for initiating action against the Corporate Debtor will also start from this date.

n. The period of limitation for filing applications for initiation of insolvency proceedings would be three years from the date of default under Article 137 of the Limitation Act [See ***B.K. Educational Services (P) Ltd. versus Parag Gupta & Associates AIR 2018 SC 560***]. The Hon'ble Supreme Court in ***Trustee's Port Bombay versus The Premier Automobile 1981 AIR 1982*** held that the starting point of limitation is the accrual of the cause of action. In ***K. Shashidhar versus Indian***

Overseas Bank (2019) 12 SCC 150, wherein the Hon'ble Supreme Court undoubtedly restated principles laid down in ***B.K. Educational Services*** supra and reaffirmed that the right to sue under the IBC accrues on the date when default occurs and if the default occurred 3 years prior to the date of filing of the Application, the same would not amount to debt due and payable under the Code.

o. Once limitation starts, it can be extended only under the Limitation Act. In ***Jignesh Shah and Another versus Union of India and another (2019) 10 SCC 750,*** the Hon'ble Supreme Court has held that "when time begin to run, it can only be extended in the manner prescribed in the Limitation Act". The law declared by the Hon'ble Supreme Court is explained clearly in Para 21 of the said judgment, which reads as follows:

> "Para 21. The aforesaid judgments correctly hold that a suit for recovery based upon a cause of action that is within limitation cannot in any manner impact the separate and independent remedy of a winding-up proceeding. In law, when time begins to run. It can only be extended in the manner provided in the Limitation Act. For example, an acknowledgement of liability under Section 18 of the Limitation Act would certainly extend the limitation period, but a suit for recovery, which is a separate and independent proceeding distinct from the remedy of winding up would, in no manner, impact the limitation within which the winding-up proceeding is to be filed, by somehow keeping the debt alive for the purpose of the winding-up proceeding".

p. There is acknowledgement of debt by the Corporate Debtor in the Annual Statements for the years 2018-19 **(Annexures 37, Pg.1241 Vol. VI of the Application)**, 2019-20 **(Annexures 38, Pg.1445 Vol. VII of the Application)** 2020-21 **(Annexures 39, Pg.1649 Vol. VIII of the Application)** and 2021-22 **(Annexures 7, Pg. 200 of the Rejoinder**) or in reply **(Annexure 27, Pg. 115 and Annexure 28, Pg. 1118, Vol. V of the Application)** to the demand notices dated 02.11.2020. The acknowledgement was made before or after the filing of the

Application/Petition. Section 18 of the Limitation Act would come into play every time when there is acknowledgement of the liability before the expiration of the prescribed period of limitation (See ***Laxmi Pat Surana v. Union of India & anr. (2021)8 SCC 481)***. Therefore, the limitation is extended under Section 18 of the Limitation Act from the date of acknowledgement, though the Application is already within limitation period.

q. One more plea of the Financial Creditor is that there is also another date of default because of the judgment dated 19.10.2023 of the London Court in Claim No.CL-2020-000729, titled as Bank of Baroda and others v. GVK Coal Developers (Singapore) Pte Ltd and others. The consequences of foreign judgment have been taken under the heading 'Whether date of default can be changed'.

r. As a result, the initial cause of action arose on 02.11.2020 when the guarantee was invoked and the present Application has been filed within the limitation period.

s. Hence, this point is accordingly decided.

IV. <u>Whether date of default can be changed:</u>

a. It is well settled law that the loan agreement with the Principal Borrower and the bank as well as guarantee between the bank and the guarantor are two different transactions and the guarantor's liability has to be decided from the deed of guarantee. Thus, 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. The Hon'ble Supreme Court ***Syndicate Bank case (supra)***

has explicitly explained this principle. This judgment was relied upon by the Hon'ble NCLAT in ***Pooja Ramesh Singh v. State Bank of India and Anr. (2023) ibclaw.in 280 NCLAT*** and it has been 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. <u>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</u>. 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.
>
> 33.Issue No. III: <u>The Notice dated 01.10.2020 issued by the State Bank of India to Guarantor has to be treated to be notice on demand as contemplated in the guarantee and the default on the part of the Guarantor shall be only after notice dated 01.10.2020 i.e., during period of Section 10A.</u>
>
> Issue No. IV: The Application filed by the Bank under Section 7 was barred by Section 10A.
>
> 34. We, thus, are of the view that the application under Section 7 filed by the Bank being barred by Section 10A could not have been admitted. In result, the Appeal is allowed. The impugned order dated 01.03.2023 is set aside."
>
> (own emphasis)

b. The judgement in ***Pooja Ramesh Singh v. State Bank of India (supra)*** has been relied upon in ***J.C. Flowers Asset Reconstruction Pvt.*** *v.* ***Deserve Exim Pvt. Ltd., Company Appeal (AT) (Insolvency) No.486 of 2023, decided on 03.05.23*** that default on the part of the Corporate Guarantor shall be held to have been committed only when guarantee was invoked, when deed of guarantee itself mentions issue of demand notice by the Bank. Even the indemnity clause like in the present case

will not change the date of default. It has categorical held in Para No. 29 that when the bank has given time to the guarantor to make payment on 01.10.2020 by invoking the guarantee deed, there can be no default on the part of the guarantor on any earlier date.

c. The inability to pay-off debts and committing default are two different aspects which are required to be adjudged on equally different parameters. Inability to pay debt has no relevance for admitting or rejecting an application for initiation of CIRP under the IBC.

d. We are of the view that for determining the date of default, the provisions of Sections 3(12), 6, 7 and Form-I and the agreements executed between both the parties are to be seen. On the basis of the Facility Agreement-I **(Annexure-2, Pg. no. 31, Volume-I of the application)**), Facility Agreement-II (**Annexure no.17, Pg. no.545, Volume-III of the application)**), Guarantee Agreement (**Annexure no.5, Pg. no.173 of the Rejoinder)** and Guarantee Agreement (**Annexure-6, Pg. no.185 of the Rejoinder**), it becomes clear that the Corporate Debtor is liable to pay the loan amount once demand was issued by the Financial Creditor. The demand was made by the Financial Creditor by sending notices dated 02.11.2020 **(Annexure-23 Pg. no. 1096, Vol-V of the application**) and (**Annexure-24 Pg. no. 1102, Vol-V of the application**). By virtue of these notices, the Financial Creditor has invoked the guarantee deeds on 02.11.2020.

e. Thus, once the guarantee deeds have been invoked, the default takes place. The Financial Creditor cannot time and again revoke the guarantee deeds. This is also the ratio of the judgement of the Hon'ble Supreme Court in ***Syndicate Bank (Supra).*** The Hon'ble NCLAT in ***Mudhit Mundal Gupta v. Supreme Constructions and Developers***

Private Limited (Company Appeal (AT)(Insolvency) No.920 of 2023) has held that liability of the corporate guarantor although is coextensive with the Principal Borrower but the guarantee requires invocation of the guarantee deed, default on the guarantor shall be the date when corporate guarantee has been invoked.

f. The decision of the coordinate bench on which the learned senior counsel for the Financial Creditor has placed reliance in ***Indus Ind Bank Limited v. M/S Coffee Day Global Limited, CP (IB) No. 132/bb/2022 decided on 20.07.2022*** and further challenge of this decision in appeal before the Hon'ble NCLAT, ***Malavika Hegde, Suspended Director of Coffee Day Global Limited CA (AT)(Ins)) No. 235/2021, dated 11.08.2023*** is not relevant because date of default related to four loans and there the question of invocation of guarantee was not involved. The Financial Creditor has not even filed the latest order passed in the said appeal which was allowed in pursuance of settlement between the parties vide order dated 13.09.2023.

g. Notwithstanding all this, the only relevant and important contention of the Financial Creditor is whether the judgement of the London Court on 19.10.2023 in Claim No.CL-2020-000729, titled as Bank of Baroda and others v. GVK Coal Developers (Singapore) Pte Ltd and others, can be treated as fresh cause of action.

h. Generally, both cause of action' and 'default' are used interchangeably in the context of the Insolvency and Bankruptcy Code. However, there is small distinction between cause of action' and 'default'. Default is defined under Section 3(12) IBC and this term has been used in different provisions in IBC. On combined reading of these provisions, we think that the default refers to the failure of the debtor to repay a

debt beyond the threshold limit of Rs. one crore when it becomes due and payable. Therefore, it is the actual non-payment which triggers the right to file an application. Cause of action has not been defined under the IBC, but in common parlance it means the bundle of facts or circumstances that give a person the right to initiate legal action against another (**See *A.B.C. Laminart Pvt. Ltd v. A.P. Agencies (1989)2 SCC 163***). For the purpose of filing of application under Section 7 IBC, this may include existence of debt, occurrence of default, entitlement to file such application.

i. The limitation period for any suit, appeal, or application begins from the date of default when the actual right to sue first accrues. A subsequent acknowledgment or promise related to the debt, or a decree of recovery under any special circumstances only is an extension of the limitation period. The Hon'ble NCLAT in ***Yogeshkumar Jashwantlal Thakkar v. Indian Overseas Bank and anr. [2020] ibclaw.in 78 NCLAT*** held that an acknowledgement is to be an 'acknowledgement of debt' & must involve an admission of subsisting relationship of debtor and creditor; and an intention to continue it. An acknowledgement does not create a new right.

j. In an illuminating discussion on the reach of Section 18 of the Limitation Act, including whether acknowledgement gives fresh cause of action, the Hon'ble Supreme Court in ***Khan Bahadur Shapoor Fredoom Mazda v. Durga Prosad Chamaria and ors AIR 1961 SC 1236***, after referring to Section 19 of the Limitation Act, 1908, which corresponds to Section 18 of the 1963 Act, held:

> 6. It is thus clear that acknowledgement as prescribed by Section 19 merely renews debt; it does not create a new right of action. It is a mere acknowledgement of the liability in respect of the right in question; it need not be accompanied by a promise to pay either expressly or even by implication. The

> statement on which a plea of acknowledgement is based must relate to a present subsisting liability though the exact nature or the specific character of the said liability may not be indicated in words. Words used in the acknowledgement must, however, indicate the existence of jural relationship between the parties such as that of debtor and creditor, and it must appear that the statement is made with the intention to admit such jural relationship. Such intention can be inferred by implication from the nature of the admission, and need not be expressed in words. If the statement is fairly clear then the intention to admit jural relationship may be implied from it. The admission in question need not be express but must be made in circumstances and in words from which the court can reasonably infer that the person making the admission intended to refer to a subsisting liability as at the date of the statement. In construing words used in the statements made in writing on which a plea of acknowledgement rests oral evidence has been expressly excluded but surrounding circumstances can always be considered. Stated generally courts lean in favour of a liberal construction of such statements though it does not mean that where no admission is made one should be inferred, or where a statement was made clearly without intending to admit the existence of jural relationship such intention could be fastened on the maker of the statement by an involved or far-fetched process of reasoning. Broadly stated that is the effect of the relevant provisions contained in Section 19, and there is really no substantial difference between the parties as to the true legal position in this matter.
>
> (Own emphasis)

k. Hence, the acknowledgement of debt and admission of the liability by the Corporate Debtor in response of the Notice 02.11.2020 are not fresh cause of action but only due to supervening factors, the limitation period is extended because there is renewal of debt.

l. Coming to the judgment dated 19.10.2023, it is to be noted that the proceedings in the Claim No.CL-2020-000729 were pending before the London Court when the present Application/Petition was filed. Regarding these proceedings, both the parties have already pleaded in detail about their stand to those proceedings. During the pendency of the Application/Petition when the judgment was pronounced on 19.10.2023, the Financial Creditor has furnished the judgement passed in the London Court along with the affidavit and these were allowed to be taken on record vide order dated 08.02.2024 in IA No. 1925 of 2023. In the affidavit, the Financial Creditor has also given intimation that in

pursuance of the said judgment, payment was demanded by issuing notice dated 6.12.2023 to the Corporate Debtor and others and therefore, a fresh default has occurred. Thereafter, the Corporate Debtor by filing IA No.369 of 2024 has filed Annexures 39 to 79 pertaining to London Court proceedings and this IA was allowed vide order dated 14.02.2024. The Corporate Debtor has also amended the counter by filing IA No. 416 of 2024 which was allowed vide order dated 21.02.2024 by adding Para Nos. 79 to 93. By way of both the IAs, the Corporate Debtor has taken every possible defence which it could have taken to attack the validity of the foreign judgement. Therefore, we can judge the contention of the Financial Creditor about fresh date of default on the basis of pleadings and documents as also held by the Hon'ble Supreme Court in ***Dena Bank v. C.Shivkumar Reddy and anr (2021)10 SCC 33***0.

m. In ***Dena Bank case supra***, the Hon'ble Supreme Court had occasion to deal with the amendment of pleadings and filing of documents during the pendency of an Application/Petition under Section 7 IBC. It was held that such application cannot be compared with a plaint in a suit and pleadings can be amended. Similarly, there is no bar for filing of documents before the disposal of the Application/Petition. Since this ruling has far-reaching repercussion on the present case, therefore for understanding and knowing the true implications, it is necessary to have the background of the case. On 9.01.2019, the Appellant Dena Bank filed an I.A. No. 27/2019 for permission to place on record additional documents, including the final judgment and order dated 27.03.2017 of the DRT in OA No. 16/2015 and the Recovery Certificate No. 2060/2017 dated 25.05.2017 issued by the DRT. By an order dated 4.01 2019, this IA was allowed by the Adjudication Authority and the

Appellant Bank was directed to file an amended petition enclosing the documents referred to in the Application being I.A. No. 27/2019. On or about 5th March 2019, the Appellant Bank filed another I.A. No. 131 of 2019 for permission to place on record additional documents, including the letter dated 03.03.2017 of the Corporate Debtor to the Appellant Bank proposing a One Time Settlement, the Annual Report of the Corporate Debtor for the year 2016-2017, the Financial Statement of the Corporate Debtor for the period from 1st April 2016 to 31st March 2017 and the Financial Statement of the Corporate Debtor, for the period from 1st April 2017 to 31st March 2018. By an order dated 6.03.2019 in I.A. No. 131 of 2019, the Appellant Bank was permitted to file the documents. In these circumstances, the Hon'ble Supreme Court held:

> 128. In effect, this Court speaking through Nariman J., approved the proposition that an application Under Section 7 or 9 of the IBC may be time barred, even though some other recovery proceedings might have been instituted earlier, well within the period of limitation, in respect of the same debt. However, it would have been a different matter, if the applicant had approached the Adjudicating Authority after obtaining a final order and/or decree in the recovery proceedings, if the decree remained unsatisfied. This Court held that a decree and/or final adjudication would give rise to a fresh period of limitation for initiation of the Corporate Insolvency Resolution Process.
>
> 129. It is true that the finding of Patna High Court in Ferro Alloys Corporation Limited v. Rajhans Steel Limited (supra) was rendered in the context of Section 434(1)(b) of the Companies Act 1956, which provided that a company would be deemed to be unable to pay its debts if execution or other process issued on a decree or order of any Court or Tribunal in favour of a creditor of the company was returned unsatisfied in whole or in part.
>
> 130. We see no reason why the principles should not apply to an application Under Section 7 of the IBC which enables a financial creditor to file an application initiating the Corporate Insolvency Resolution Process against a Corporate Debtor before the Adjudicating Authority, when a default has occurred. <u>As observed earlier in this judgment, on a conjoint reading of the provisions of the IBC quoted above, it is clear that a final judgment and/or decree of any Court or Tribunal or any Arbitral Award for payment of money,</u>

if not satisfied, would fall within the ambit of a financial debt, enabling the creditor to initiate proceedings Under Section 7 of the IBC.

131. It is not in dispute that the Respondent No. 2 is a Corporate Debtor and the Appellant Bank, a Financial Creditor. The question is, whether the petition Under Section 7 of the IBC has been instituted within 3 years from the date of default. 'Default' is defined in Section 3(12) to mean "non-payment' of a debt which has become due and payable whether in whole or any part and is not paid by the Corporate Debtor".

132. It is true that, when the petition Under Section 7 of IBC was filed, the date of default was mentioned as 30th September 2013 and 31st December 2013 was stated to be the date of declaration of the Account of the Corporate Debtor as NPA. However, it is not correct to say that there was no averment in the petition of any acknowledgment of debt. Such averments were duly incorporated by way of amendment, and the Adjudicating Authority rightly looked into the amended pleadings.

133. As observed above, the Appellant Bank filed the Petition Under Section 7 of the IBC on 12th October 2018. Within three months, the Appellant Bank filed an application in the NCLT, for permission to place additional documents on record including the final judgment and order/decree dated 27.3.2017 in O.A. 16/2015 and the Recovery Certificate dated 25.5.2017, enabling the Appellant Bank to recover Rs. 52 crores odd. ***The judgment and order/decree of the DRT and the Recovery Certificate gave a fresh cause of action to the Appellant Bank to initiate a petition Under Section 7 of the IBC.***

134. On or about 5th March 2019, the Appellant Bank filed another application for permission to place on record additional documents including inter alia financial statements, Annual Report etc. of the period from 1st April 2016 to 31st March 2017, and again, from 1st April 2017 to 31st March 2018 and a letter dated 3rd March 2017 proposing a One Time Settlement. This application was also allowed on 6th March 2021. The Adjudicating Authority, took into consideration the new documents and admitted the petition Under Section 7 of the IBC.

135. Even assuming that documents were brought on record at a later stage, as argued by Mr. Shivshankar, the Adjudicating Authority was not precluded from considering the same. The documents were brought on record before any final decision was taken in the Petition Under Section 7 of IBC.

136. A final judgment and order/decree is binding on the judgment debtor. Once a claim fructifies into a final judgment and order/decree, upon adjudication, and a certificate of Recovery is also issued authorizing the creditor to realize its decretal dues, ***a fresh right accrues to the creditor to recover the amount of the final judgment and/or order/decree and/or the amount specified in the Recovery Certificate.***

137. The Appellant Bank was thus entitled to initiate proceedings Under Section 7 of the IBC within three years from the date of issuance of the Recovery Certificate. The Petition of the Appellant Bank, would not be barred by limitation at least till 24th May, 2020.

138. While it is true that default in payment of a debt triggers the right to initiate the Corporate Resolution Process, and a Petition Under Section 7 or 9 of the IBC is required to be filed within the period of limitation prescribed by law, which in this case would be three years from the date of default by virtue of Section 238A of the IBC read with Article 137 of the Schedule to the Limitation Act, the delay in filing a Petition in the NCLT is condonable Under Section 5 of the Limitation Act unlike delay in filing a suit. Furthermore, as observed above Section 14 and 18 of the Limitation Act are also applicable to proceedings under the IBC.

139. Section 18 of the Limitation Act cannot also be construed with pedantic rigidity in relation to proceedings under the IBC. This Court sees no reason why an offer of One Time Settlement of a live claim, made within the period of limitation, should not also be construed as an acknowledgment to attract Section 18 of the Limitation Act. In Gaurav Hargovindbhai Dave (supra) cited by Mr. Shivshankar, this Court had no occasion to consider any proposal for one time settlement. Be that as it may, the Balance Sheets and Financial Statements of the Corporate Debtor for 2016-2017, as observed above, constitute acknowledgement of liability which extended the limitation by three years, apart from the fact that a Certificate of Recovery was issued in favour of the Appellant Bank in May 2017. The NCLT rightly admitted the application by its order dated 21st March, 2019.

140. To sum up, in our considered opinion an application Under Section 7 of the IBC would not be barred by limitation, on the ground that it had been filed beyond a period of three years from the date of declaration of the loan account of the Corporate Debtor as NPA, if there were an acknowledgement of the debt by the Corporate Debtor before expiry of the period of limitation of three years, in which case the period of limitation would get extended by a further period of three years.

141. Moreover, a judgment and/or decree for money in favour of the Financial Creditor, passed by the DRT, or any other Tribunal or Court, or the issuance of a Certificate of Recovery in favour of the Financial Creditor, *would give rise to a fresh cause of action for the Financial Creditor, to initiate proceedings Under Section 7 of the IBC for initiation of the Corporate Insolvency Resolution Process, within three years from the date of the judgment and/or decree or within three years from the date of issuance of the Certificate of Recovery, if the dues of the Corporate Debtor to the Financial Debtor, under the judgment and/or decree and/or in terms of the Certificate of Recovery, or any part thereof remained unpaid.*

> 142. There is no bar in law to the amendment of pleadings in an application Under Section 7 of the IBC, or to the filing of additional documents, apart from those initially filed along with application Under Section 7 of the IBC in Form-1. In the absence of any express provision which either prohibits or sets a time limit for filing of additional documents, it cannot be said that the Adjudicating Authority committed any illegality or error in permitting the Appellant Bank to file additional documents. Needless however, to mention that depending on the facts and circumstances of the case, when there is inordinate delay, the Adjudicating Authority might, at its discretion, decline the request of an applicant to file additional pleadings and/or documents, and proceed to pass a final order. In our considered view, the decision of the Adjudicating Authority to entertain and/or to allow the request of the Appellant Bank for the filing of additional documents with supporting pleadings, and to consider such documents and pleadings did not call for interference in appeal.
>
> 143. For the reasons discussed above, the impugned judgment and order is unsustainable in law and facts. The appeal is accordingly allowed, and the impugned judgment and order of the NCLAT is set aside.
>
> (own emphasis)

n. Therefore, it becomes settled that strict rule for amending pleadings are not applicable under the IBC. Even Hon'ble Apex Court in ***Asset Reconstruction Company (India) Limited v. Bishal Jaiswal & anr. (2021)6 SCC 366*** went to the extent of allowing the Financial Creditor to amend the pleadings when it noticed certain discrepancy regarding acknowledgement of liability during the challenge against the order of the Hon'ble NCLAT. It was held:

> 44. There can be no doubt whatsoever that the Appellant has been completely remiss and deficient in pleading acknowledgement of liability on the facts of this case. However, given the staggering amount allegedly due from the Respondents, we afford one further opportunity to the Appellant to amend its pleadings so as to incorporate what is stated in the written submissions filed by it before the NCLAT, subject to costs of Rs. 1,00,000/- to be paid by the Appellant to the Respondents within a period of four weeks from today.

o. Hon'ble Supreme Court after relying upon ***Dena Bank Case supra*** in ***Kotak Mahindra Bank Limited v. Kew Precision Parts Private Limited and Ors. (2022)9 SCC 364*** has reiterated that additional affidavit would also be treated as pleadings. It was observed:

> 61. The judgment in Babulal Vardharji Gurjar (supra) was rendered in the facts and circumstances of that case where there were no pleadings at all. As held by this Court in Dena Bank (supra), an application Under Section 7 of the IBC in statutory form which requires filling in of particulars cannot be judged by the same standards as a plaint or other pleadings in a court of law. Additional affidavits filed subsequent to the filing of the application, by way of additional affidavits or applications would have to be construed as pleadings, as also the documents enclosed with or relied upon in the application made in the statutory format. Furthermore, pleadings can be amended at any time during the pendency of the proceedings.

p. In civil matters, the object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. If any factual or legal issue, despite having merit, has not been raised by the parties, the Court should not decide the same as the opposite counsel does not have a fair opportunity to answer the line of reasoning adopted in that regard. Such a judgment may be violative of the principles of natural justice. (***See Ram Sarup Gupta v. Bishun Narain Inter College (1987) 2 SCC 555 and Kalyan Singh Chouhan v. C.P. Joshi (2011) 11 SCC 687***).

q. No doubt, strict rules of pleading may not apply in the IBC, however, there must be sufficient material in the petition/application on the basis of which the date of default can be deciphered. The pleadings should receive a liberal and not pedantic approach as meant to ascertain the substance and not form. Both the parties proceed to trial fully knowing the rival case and relied upon documents not only in support of their contentions but in refutation thereof by the other side. In such an eventuality, it would not be permissible for a party to submit that there has been a mistrial and the proceedings stood vitiated.

r. When every relevant document relating the judgement of the London Court has been filed, this Authority is able to determine as to whether

there is fresh cause of action. This is also spirit of the judgement in ***Dena Bank case.*** Hence, the judgment of the London Court dated 19.10.2023 in Claim No.CL-2020-000729, titled as Bank of Baroda and others v. GVK Coal Developers (Singapore) Pte Ltd and others will give fresh cause of action to file an application under Section 7 IBC.

s. From another angle, the judgment of the London Court is a financial debt within the meaning of Section 5(8) of the IBC and the person in whose favour the judgement is passed is the Financial Creditor. We may also draw support in this regard from the rulings in ***Dena Bank v. C.Shivkumar Reddy and anr. supra, Kotak Mahindra Bank Limited v. A.Balakrishnan & anr supra and Totempudi Salalith v. SBI & anr. supra.***

t. Thus, it is held that there may be different cause of action against the Principal Borrower and surety and intention is to be gathered from the contract between the parties. The guarantee was invoked when the demand notice was given. The Financial Creditor sent demand notice vide **Annexure no. 23** and **Annexure no. 24 on 02.11.2020** calling the Corporate Debtor to pay the guaranteed amount. The default has occurred due to failure of the Corporate Debtor to honour such demand. We may refer to the decisions in ***Syndicate Bank (supra) and Edelweiss Asset Reconstruction Company Ltd. v. Orissa Manganese and Minerals Ltd. & ors 2019 SCC OnLine NCLAT 764.*** Accordingly, the Financial Creditor in view of the requirements of law has also mentioned the date of default in the Application/Petition. Therefore, the date of default is 02.11.2020. However, another cause of action has arisen because of judgment in the London Court i.e. 19.10.2023 in

Claim No.CL-2020-000729, titled as Bank of Baroda and others v. GVK Coal Developers (Singapore) Pte Ltd and others.

u. As a sequel, it is held that the date of default can be allowed to be changed in the circumstances as narrated above.

V. Applicability of Section 10-A IBC:

a. Section 10-A was inserted by Insolvency & Bankruptcy Code (Second Amendment) Act, 2020 w.e.f. 5.6.2020. This provision reads as under:

> *"Suspension of initiation of corporate insolvency resolution process.*
>
> *10A. Notwithstanding anything contained in Sections 7,9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020 for a period of six months or such further Company Appeal (AT) (Ins) No. 448 of 2022 13 of 20 period, not exceeding one year from such date, as may be notified in this behalf:*
>
> *Provided that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period.*
>
> *Explanation-For the removal of doubts, it is hereby clarified that the provisions of this Section shall not apply to any default committed under the said Sections before 25th March, 2020.]"*

b. The Ministry of Corporate Affairs has extended the suspension period for 3 months from 25.09.2020 vide Notification No. S.O. 3265(E) dated 24.09.2020 and for further for 3 months from 25.12.2020 vide Notification No. S.O. 4638(E) dated 22.12.2020.

c. The intendment in bringing this amendment was the extra ordinary situation because of Covid-19 pandemic which has not only seriously affected the day-to-day life but also businesses as a whole.

d. Section 10A mandates that no application for initiation of CIRP can be filed in respect of default that has occurred between 25.03.2020 to 25.03.2021. This prohibition is in relation to default which occurs during the 10A period, but not in cases where the default has taken

place prior to or post the 10A period. There is no scope of any interpretations except that CIRP cannot be initiated under Section 7 of IBC if the default has taken place during the said period. The Hon'ble Supreme Court has explicitly held this in ***Ramesh Kymal versus Siemens Gamesa Renewable Power Private Limited (supra)*** as how the main provision of Section 10A is to be interpreted with first proviso and the explanation. We want to refer para Nos. 27 and 29 which are reproduced below:

> 27. Adopting the construction which has been suggested by the Appellant would defeat the object and intent underlying the insertion of Section 10A. The onset of the Covid-19 pandemic is a cataclysmic event which has serious repercussions on the financial health of corporate enterprises. The Ordinance and the Amending Act enacted by Parliament, adopt 25 March 2020 as the cut-off date. The proviso to Section 10A stipulates that "no application shall ever be filed" for the initiation of the CIRP "for the said default occurring during the said period". The expression "shall ever be filed" is a clear indicator that the intent of the legislature is to bar the institution of any application for the commencement of the CIRP in respect of a default which has occurred on or after 25 March 2020 for a period of six months, extendable up to one year as notified. The explanation which has been introduced to remove doubts places the matter beyond doubt by clarifying that the statutory provision shall not apply to any default before 25 March 2020.
>
> 28. The substantive part of Section 10A is to be construed harmoniously with the first proviso and the explanation. Reading the provisions together, it is evident that Parliament intended to impose a bar on the filing of applications for the commencement of the CIRP in respect of a corporate debtor for a default occurring on or after 25 March 2020; the embargo remaining in force for a period of six months, extendable to one year. Acceptance of the submission of the Appellant would defeat the very purpose and object underlying the insertion of Section 10A. For, it would leave a whole class of corporate debtors where the default has occurred on or after 25 March 2020 outside the pale of protection because the application was filed before 5 June 2020.
>
> 29. We have already clarified that the correct interpretation of Section 10A cannot be merely based on the language of the provision; rather it must take into account the object of the Ordinance and the extraordinary circumstances in which it was promulgated. It must be noted, however, that the retrospective bar on the filing of applications for the commencement of CIRP during the stipulated period does not extinguish the debt owed by the corporate debtor or the right of creditors to recover it.
>
> (own emphasis)

e. When the legislature intention is plain and clear that CIRP can't be initiated on the basis of default period during Section 10A period, we can't on our own add or subtract anything to change the meaning. It will be apposite to refer to the decision of the Hon'ble Supreme Court in ***Md. Shahabuddin vs. State of Bihar and Ors. (2010)4 SCC 653***

> 179. Even otherwise, it is a well-settled principle in law that the court cannot read anything into a statutory provision which is plain and unambiguous. The language employed in a statute is a determinative factor of the legislative intent. If the language of the enactment is clear and unambiguous, it would not be proper for the courts to add any words thereto and evolve some legislative intent, not found in the statute. Reference in this regard may be made to a recent decision of this Court in Ansal Properties & Industries Ltd. v. State of Haryana (2009) 3 SCC 553.

f. This judgment was relied upon in ***Kotak Mahindra Bank Limited v. A.Balakrishnan and another (2022)9 SCC 186*** that it is more than well settled that when the language of a statutory provision is plain and unambiguous, it is not permissible for the court to add or subtract words to a statue or read something into it which is there. It can't rewrite or recast legislation. In ***Nemai Chandra Kumar vs. Mani Square Ltd. (2015) 14 SCC 203***, it was clarified that the golden rule of interpretation is to resort to the plain/literal meaning of the words used in the statute.

g. About the change of default date, learned counsel for the Corporate Debtor has relied upon ***Ramesh Kymal case supra*** that it would infringe the provisions of Section 10A. In the said case the date default was mentioned as 23.03.2020, which the appellant tried to shift during arguments that actual date of default was 21.01.2020 when the letter of resignation was tendered and further the second date of default was 23.03.2020 when the 60 days' notice period from the letter of resignation submitted by the appellant was concluded. But these dates were neither pleaded nor mentioned in the notice under Section 8(1)

IBC. However, in the present case there are pleadings about fresh cause of action from the date of judgement of the London Court and further an application under Section 7 IBC also does not require issuing of notice.

h. In ***J.C. Flowers Asset Reconstruction Pvt. v. Deserve Exim Pvt. Ltd., Company Appeal (AT) (Insolvency) No.486 of 2023, decided on 03-05.23***, the guarantee was invoked during Section 10-A period like in the present case. The Hon'ble NCLAT held that when the invocation of the bank guarantee is admittedly within the period of 10A, the application which is based on invocation of guarantee is clearly barred by Section 10A. Same is the ratio of the decision in ***Vikram Kumar v. Aranca (Mumbai) Private Limited Company Appeal (AT) (Insolvency) NO. 836 of 2023 decided on 14 September, 2023*** that since the deed of guarantee was invoked on 25.08.2020, CIRP cannot be initiated for default in repayment as the default arises in the period excluded by provisions of section 10A of IBC, 2016. However, both these cases are distinguishable from the present one because another date of default occurred during the pendency of the application, when the Claim No.CL-2020-000729, titled as Bank of Baroda and others v. GVK Coal Developers (Singapore) Pte Ltd and others was decided on 19.10.2023 and accordingly both the parties have amended the pleadings.

i. There is one more judgment of Hon'ble NCLAT on which reliance has been placed by the learned senior counsel for the Corporate Debor is ***Yatra Online Limited v. Ezeego One Travel and Tours Limited (supra)*** where it was held that the new date of default dehors the fact that another date of default is still existing in the pleadings which has not yet been amended, cannot be allowed. In that case, date of default

in the application and notice under Section 8 was mentioned as 30.10.2020, but the appellant tried to change the date of default to the month of July, 2019. It was held that this date can't be changed unless there is amendment. However, in the present case the original date of default is i.e.02.11.2020 but due to subsequent events during the pendency of the present application there is fresh cause of action for filing an application under Section 7 IBC because of judgment dated 19.10.2023 of the London Court and for this both the parties have filed additional pleadings.

j. Hence, we are of the opinion that the date of default of 02.11.2020 is hit by Section 10-A, but this provision is not applicable to subsequent default on account of judgement dated 19.10.2023 as the prohibited period does not extinguish the debt owed by the Corporate Debtor or the right of the Financial Creditor to recover it.

VI. <u>Payment of stamp duty:</u>

a. The unstamped or insufficiently stamped documents are not void. Sections 33, 35 and 38 of the Indian Stamps Act provide procedure as how unstamped documents should be impounded and what is admissibility of the said document.

b. The Corporate Debtor by placing reliance on the decision in ***M/s. NN Global Mercantile Private Limited v. M/s. Indo Unique Flame Limited & Ors. 2023 SCC Online SC 495*** has argued that the said documents are null and void and cannot be relied upon.

c. On the question of admissibility of such document after the payment of the stamp duty, the ld. counsel for the Corporate Debtor submitted that as this Authority is not competent to determine the quantum of stamp

duty chargeable on an instrument, therefore, the same is to be done by an appropriate Revenue Authority and on this point, he has referred to the decisions in ***Santosh Anant Raut v. Pukharaj Chogmal Rathod 2010 SCC Online BOM 505***. Even the High Court has not such power as held in ***Black Pearl Hotels Private Limited v. Planet M. Retail Limited (2017) 4 SCC 498.*** The rationale behind this is stated to be determination of the true nature of document for levying correct stamp duty as explained in ***Shiv Kumar Saxsena v. Manishchand Sinha, LPA No. 798 of 2003 decided on 02.08.2004 by the Hon'ble Delhi High Court and Joginder Kumar Goyal v. Govt. (NCT of Delhi) 2006 SCC OnLine Delhi 311***

d. The Corporate Debtor has given a long list of the documents in Para No. 13 of the I.A 374 of 2023 which have either been unstamped or insufficiently stamped.

e. On the other hand, the contention of the Financial Creditor is that the issue of stamp duty sufficiency raised by the Corporate Debtor is beyond the scope of the summary proceedings under section 7 of the IBC. To buttress his point, learned senior counsel for the Financial Creditor has relied on the decisions in ***Praful Nanji Sastra v. Vistra ITCL, Manish Pardasani v. Atul Projects India Private Limited, and Kotak Mahindra Bank Ltd. v. Hybro Foods (P) Ltd***. that the insufficiency of stamp duty does not affect the determination of financial debt and default in these proceedings.

f. With due respect to the submissions of the learned senior counsel for the Financial Creditor, there no denying the fact that that proceedings under the IBC are summary in nature and the role of the NCLT is limited to the extent of ascertaining final debt and default of the

Corporate Debtor. Here, we may also profitably refer to the decision in ***Innoventive Industries Ltd. v. ICICI Bank & anr. (2018) 1 SCC 407,*** wherein Hon'ble Supreme Court has held as follows:

> "30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise."

g. However, there is no exception that Indian Stamp Act is not applicable to the proceedings under the IBC. When a document is not duly stamped, the decision is to be taken by the authority who is supposed to receive such evidence. Section 33 of the Indian Stamp Act is explicit in this regard, which provides:

> *33. Examination and impounding of instruments.*
> *(1) Every person having by law or consent of parties authority to receive evidence, and every person in charge of a public office, except an officer of police, before whom any instrument, chargeable, in his opinion, with duty, is produced or comes in the performance of his functions, shall, if it appears to him that such instrument is not duly stamped, impound the same*

h. However, we don't agree with the argument of learned counsel for the Corporate Debtor that such document is void by making reference to the decision in ***N.N. Global Mercantile Pvt. Ltd. v. Indo Unique Flame Ltd. and ors (2021)4 SCC 379***.

i. It is relevant to note that in the curative petition in ***N.N. Global Mercantile Pvt. Ltd supra,*** a seven-judge bench headed by Hon'ble Chief Justice, Dr. D.Y. Chandrachud vide judgement reported as ***2023 SCC OnLine SC 1666*** held that the Stamp Act does not say that unstamped or insufficiently stamped documents are void. It is a curable defect, and the Stamp Act provides a structured procedure to rectify this defect. After going through various provisions of the Indian Stamp Act in the context

of Arbitration and Conciliation Act, 1996, it has been held in para No. 234***:***

> 234. The conclusions reached in this judgment are summarised below:
> a. Agreements which are not stamped or are inadequately stamped are inadmissible in evidence under Section 35 of the Stamp Act. Such agreements are not rendered void or void ab initio or unenforceable;
> b. Non-stamping or inadequate stamping is a curable defect;
> c. An objection as to stamping does not fall for determination under Sections 8 or 11 of the Arbitration Act. The concerned court must examine whether the arbitration agreement prima facie exists;
> d. Any objections in relation to the stamping of the agreement fall within the ambit of the arbitral tribunal; and
> e. The decision in NN Global 2 (supra) and SMS Tea Estates (supra) are overruled. Paragraphs 22 and 29 of Garware Wall Ropes (supra) are overruled to that extent

j. No doubt, execution of these documents have not been disputed and the Corporate Debtor is a party to most of them, but for the admissibility of these documents, the Financial Creditor is required to pay the stamp duty. The decisions in ***Praful Nanji Sastra v. Vistra ITCL 2022 SCC Online NCLAT 336, Manish Pardasani and Ors. v. Atul Projects India Private Limited 2023 SCC Online NCLT 391 and Kotak Mahindra Bank Limited v. Hybro Foods Private Limited CP (IB) No.295 of 2022*** are not applicable because of the clear law on the point and judgement of the ***N.N. Global Mercantile Pvt. Ltd supra*** which is squarely applicable in the present case.

k. Therefore, the defect of insufficiency stamp duty can be cured by the Financial Creditor. The deficiency of stamp duty has also been given by the Corporate Debtor in the table in para-No. 13 of I.A 374 of 2023, which is as per law and accordingly, the Financial Creditor is directed to pay the stamp duty.

VII. Filing of Application/Petition on behalf of foreign branch:

a. The loan was granted by the Dubai, Bahrain and Singapore branches of the Financial Creditor amongst others. The Financial Creditor is incorporated under the Companies Act having its registered at ICICI Bank Limited at ICICI Bank Tower, Near Chakli Circle, Old Padra Road, Vadodara, Gujarat – 390007.

b. The contention of the Corporate Debtor is that the present Application cannot be filed by the Financial Creditor because the loan was granted by its foreign branches and not by itself. Even foreign branches also fall in the definition of the banking company as per Explanation to Section 35(5) of the Banking Regulations Act, 1949. This provision runs as below:

> *"Explanation – For the purposes of this Section, the expression "banking company" shall include-*
>
> *(i) In the case of a banking company incorporated outside India, all its branches in India; and*
>
> *(ii) In the case of a banking company incorporated in India-*
>
> *(a) all its subsidiaries formed for the purpose of carrying on the business of banking exclusively outside India; and*
>
> *(b) **All its branchers whether situated in India or outside India."***

c. There is also judgement in Hon'ble Bombay High Court in ***ICICI Bank Limited v. M/s. Classic Diamonds (India) Limited, 2015 SCC Online Bom 6555*** that the foreign branch of the bank is considered as part of the same entity for the purpose of privity of the contract and the head office/corporate office can file necessary proceedings on behalf of the foreign branch.

d. In this case, the foreign branches of the Financial Creditor granted loan and the Financial Creditor being the principal office is competent to file the present case here. There is also no bar under the Facility

Agreement-I, Facility Agreement-II, and Guarantee Agreements 2015 barring the jurisdiction of this Authority.

e. This point is accordingly decided against the Corporate Debtor.

VIII. Territorial jurisdiction:

a. The rationale behind introducing the concept of jurisdiction is that a court should adjudicate only those matters which falls within the territorial or pecuniary limits of its authority. The jurisdiction of civil court is determined on the basis of nature of the case, pecuniary value of the suit and the territorial limitation of the court. In case of this Authority, it is Section 60(1) Insolvency and Bankruptcy Code which confers jurisdiction:

> *(1) The Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the National Company Law Tribunal having territorial jurisdiction over the place where the registered office of the corporate person is located.*

b. When the Corporate Debtor registered office is at Hyderabad within the jurisdiction of this Authority and the Borrower's company is registered in Singapore, the question comes as to whether Financial Creditor is supposed to proceed against the Corporate Debtor in London Court where the claim relating to loan amount has been decided. Relevant it would be to quote with advantage Section 20 of CPC which deals with the jurisdiction of the civil court and this provision reads as under:-

> *"20. Other suits to be instituted where defendants reside or cause of action arises. Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction-*
>
> *(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or*

(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises.

Explanation. A corporation shall be deemed to carry on business at its sole or principal office in or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place."

c. Thus, the civil court has jurisdiction where principal office of the company is situated. The Explanation applies to a corporation which term includes even a company such as the Corporate Debtor in the instant case. The first part of the Explanation applies only to such a corporation which has its sole or principal office at a particular place. In that event the courts within whose jurisdiction the sole or principal office of the defendant is situated will also have jurisdiction inasmuch as even if the defendant may not be actually carrying on business at that place, it will "be deemed to carry on business" at that place because of the fiction created by the Explanation.

d. To determine the territorial jurisdiction of this Authority, we also apart from Section 60(1) IBC, need to have a look at agreements executed between both the parties. Clause Nos. 48 and 49 of the Facility Agreement-1 provide:

48. GOVERNING LAW
This Agreement and any non-contractual obligations arising out of or in connection with it are governed by English Law.
49. ENFORCEMENT
49.1 Jurisdiction
(a) Except to the extent expressly provided otherwise in a Finance Document, the English courts have non-exclusive jurisdiction to settle any dispute including a dispute relating to any non-contractual obligation arising out of or in connection with any Finance Document.
(b) Except to the extent expressly provided otherwise in a Finance Document, the English courts are the most appropriate and convenient courts to settle any

such dispute in connection with any Finance Document. Each obligor agrees not to argue to the contrary and waives objection to those courts on the grounds of inconvenient forum or otherwise in relation to proceedings in connection with any Finance Document.
(c) This Clause is for the benefit of the Finance Parties and Secured Parties only. To the extent allowed by law, a Finance Party or a Secured Party may take;
(i) proceedings in any other court; and
(ii) concurrent proceedings in any number of jurisdictions.
(c) References in this Clause to a dispute in connection with a Finance Document includes any dispute as to the existence, validity or termination of the Finance Document.

e. There are identical provisions bearing clause Nos. 47 and 48 in the Facility Agreement-II.

f. Therefore, it is clear that the Financial Creditor has the discretion to approach the court of concurrent jurisdiction subject to the condition that the agreement and non-contractual obligations arising out of the Facility Agreement-I and Facility Agreement-II will be governed by English Law. In this regard also, there is an exception in the Clause 24 of the Guarantee Agreements **(Annexure no.5 dated 26.03.2015, Pg. no.173 of the Rejoinder)** and **(Annexure no.6 dated 29.06.2015, Pg. no.185 of the Rejoinder).**

24. This Guarantee shall be governed by and construed in accordance with the laws of India.

g. These agreements give concurrent jurisdiction to the Indian Courts in insolvency proceedings against the Corporate Debtor. In this regard, we also want to refer to the decision in ***A.B.C.Laminart Pvt. Ltd. and anr. v. A.P.Agencies, Salem, 1989(2) SC 163***, wherein it was held that if one or more courts have territorial jurisdiction to entertain and try a suit, parties can confine to the jurisdiction of one court, by an agreement. However, to oust the jurisdiction of a court, clause should

be specific in indicating that parties had confined to the jurisdiction of a particular court to the exclusion of other court.

h. Their Lordships of the Hon'ble Supreme Court in ***Globe Transport Corporation v. Triveni Engineering Works and another, (1983)4 SCC 707*** have held that the parties can by agreement opt for jurisdiction of courts at one particular place of suing excluding other places which are otherwise open to them for suing. Their Lordships have held as under:

> "2. This appeal by special leave is directed against an order made by the High court of Allahabad rejecting the revision application preferred by the appellant against an order made by the court of Civil Judge, Allahabad holding that it had jurisdiction to entertain the suit filed by the respondents against the appellant claiming damages for the loss suffered by them in respect of the goods carried by the appellant. The goods were entrusted by the consignor to the appellant for carriage at Baroda and under the consignment note issued by the appellant, the goods were to be carried to Naini. It appears that the truck in which the goods were carried met with an accident, as a result of which the goods were damaged and since the goods were delivered to the first respondent who were the endorsees of the consignment note, in damaged condition, the respondents filed a suit claiming damages for the loss suffered by the first respondent. The consignment note contained various terms and conditions of the carriage and one of the terms and conditions was that set in Clause 17 which provided that "The court in Jaipur City alone shall have jurisdiction in respect of all claims and matters arising (sic) under the consignment or of the goods entrusted for transportation". Notwithstanding this term of the Contract of Carriage, the suit was filed by the respondents in the court of the Civil Judge, Allahabad which had jurisdiction over Naini, being a place where goods were to be delivered and were in fact delivered to the first respondent. The appellant, therefore, raised an objection before the court of the Civil Judge, Allahabad contending that the court had no jurisdiction to entertain the suit since the court in Jaipur City alone had jurisdiction by reason of the term embodied in Clause 17 of the Contract of Carriage. The answer made by the respondents to this preliminary objection was that a part of the cause of action had arisen in Naini which was within the jurisdiction of the court of Civil Judge, Allahabad and that court had, therefore, jurisdiction to entertain the suit and Clause 17 did not have the effect of ousting the jurisdiction of the court of Civil Judge, Allahabad, because the court in Jaipur City had no jurisdiction to entertain the suit and it was not competent to the parties by agreement to confer on the court jurisdiction which it did not possess. The court of Civil Judge, Allahabad rejected the preliminary objection of the appellant and held that since a part of the cause of action had arisen in Naini, the court had jurisdiction to entertain the suit. The appellant being aggrieved by this order made by the Civil Judge, Allahabad preferred a revision application in the High court, but the High Court agreed with the view taken by the court of Civil Judge, Allahabad and held that since no part of the cause of action had arisen in Jaipur, the Civil court in Jaipur had no jurisdiction

> to entertain the suit and hence Clause 17 of the Contract of Carriage was ineffectual. The appellant thereupon preferred the present appeal by special leave obtained from this Court."

i. Thus, it is not only that the Financial Creditor can approach this Authority against the Corporate Guarantor in view of the terms of the agreements between the parties and further that the guarantee will be interpreted in accordance with the Indian Law, the London Court has also accepted that the insolvency proceedings are governed by Indian Law. This is also true as the Corporate Guarantor is registered in India. The territorial jurisdiction of the NCLT to decide a case under the Insolvency and Bankruptcy Code, 2016 cannot be taken away by Facility Agreements between the parties. Here we may refer to the decision of the Hon'ble NCLAT in ***Anil Kumar Malhotra v. Mahindra & Mahindra Financial Services Ltd., 2022 SCC OnLine NCLAT 200, decided on 19-04-2022***, wherein it was held:

> "In view of the Section 60(1) read with Section 238 of the Code, the Appellant cannot rely on clause 24.12 to the Facility Agreement which provides jurisdiction to the Mumbai Courts. For filing Application under Section 7 of the Code, the provisions of Section 60(1) read with Section 238 of the Code shall be overriding clause 24.12 of the Facility Agreement to the above extent."

j. Therefore, we come to the conclusion that insolvency and bankruptcy proceedings against the Corporate Guarantor can be initiated only before this Authority.

IX. <u>Indemnification of the Financial Creditor:</u>

a. Guarantees and indemnities are used by Borrowers to protect themselves from the risk of debt default, which means being unable to fulfil its obligations under a loan agreement. The clause No. 17.1(b)(iii) of Facility Agreement-I and clause No.16.1(b)(iii) of Facility Agreement-II provide about the indemnity clause when the loan

amount is not recoverable on the basis of guarantee. This clause is reproduced below:

> *(iii) agrees with each Finance Party that if, for any reason, any amount claimed by a Finance Party under this clause is not recoverable from it under the basis of a guarantee then GVK PIL or GVK NRL (as applicable) will be liable as a principal debtor and primary obligor to indemnify that Finance Party in respect of any loss it incurs as a result of GVK PIL or GVK NRL failing to pay any amount expressed to be payable by it under a Finance Document on the date when it ought to have been paid. The amount payable by each of GVK PIL and GVK NRL under this indemnity will not exceed the amount it would have had to pay under this clause had the amount claimed been recoverable on the basis of a guarantee."*

b. Thus, guarantee and indemnity are two differing types of contract and will come into effect at different times of the contractual relationship. The agreement indicates that the indemnity clause will come into the picture when the debt is not recoverable on the basis of guarantee clause. The indemnification clause protects the indemnified party in the event of losses or damages. An indemnity agreement will come into effect when the lender causes a damage or loss, irrespective of the failure of the Borrower to fulfil its obligations under the loan agreement. This essentially means that the indemnifier is promising to compensate the indemnified party for any loss or damage that they may suffer. Hence, it is to be held first that the Financial Creditor is not able to recover the amount on the basis of guarantee and further it is in respect of loss which may be caused to the Financial Creditor because of non-payment of the due amount.

c. It is not proved that the debt cannot be recovered and at the same time what loss has been caused to the Financial Creditor. Accordingly, this point is decided against the Financial Creditor.

X. <u>RBI Moratoriums:</u>

a. The RBI Circulars dt 27.03.2020 (**Annexure X, Pg.741 of the Counter**) and dt 23.05.2020 (**Annexure XI, Pg744 of the Counter**)

have been relied upon by the Corporate Debtor to claim certain concessions in payments of loan amount because of extraordinary situation due to Covid-19. However, granting of any relief was left to the discretion of the lending institutions as held by the Hon'ble Supreme Court in ***Small Scale Industrial Manufacturers Association v. Union of India(2021) 8 SCC 511***

b. The RBI circulars were also considered by the London Court at length after taking into account the expert's advice tendered by both the parties. It was observed that it was not only the discretion of the lending institutions, but the defendants also did not respond to the offer and further the acceleration notice was given after the end of the moratorium period i.e., 02.11.2020.

c. We also reject the contentions of the Corporate Debtor that the Financial Creditor was bound to provide reliefs as claimed.

8. <u>FINAL ORDER:</u>

Based on the aforesaid discussion, we admit the Application/Petition under Section 7 of IBC, subject to the conditions that the Financial Creditor shall pay the stamp duty as per table in Para No.13 of IA 374/2023 within 15 days. The moratorium is declared for the purposes referred to in section 14 of the Code, with the following directions: -

i. There will be prohibition to the institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any court of law, Tribunal, arbitration panel or other authority; transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein; any action to foreclose,

recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002); the recovery of any property by an owner or lessor where such property is occupied by or in possession of the Corporate Debtor.

ii. Notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concessions, clearances or a similar grant or right during the moratorium period.

iii. The supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.

iv. The provisions of sub-section (1) of section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

v. The order of moratorium shall have effect from the date of this Order till the completion of the Corporate Insolvency Resolution Process or until this Authority approves the Resolution Plan under Sub-Section (1)

of section 31 or passes an order for liquidation of Corporate Debtor under section 33, whichever is earlier.

vi. The Financial Creditor has proposed the name of MR. SATISH KUMAR GUPTA as Interim Resolution Professional and he has given his consent in Form-2 and as per IBBI website and his authorisation for assignment is valid upto 30.06.2025. Accordingly, we appoint MR. SATISH KUMAR GUPTA as Interim Resolution Professional, having Registration No. IBBI/IPA-001/IP-P00023/2016-2017/10056, e-mail id: satishg19@outlook.com, Mobile No. 9967011108, Interim Resolution Professional.

vii. The Public announcement of Corporate Insolvency Resolution Process shall be made immediately as specified under Section 13 of the code.

viii. Registry to send a copy of this order to the Registrar of Companies, Hyderabad for appropriately changing the status of Corporate Debtor herein on the MCA-21 site of Ministry of Corporate Affairs.

Sd/-

SANJAY PURI
MEMBER (TECHNICAL)

Sd/-

RAJEEV BHARDWAJ
MEMBER (JUDICIAL)

Apoorva