China Development Bank vs Doha Bank Q.P.S.C on 20 December, 2024

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Bench: Pankaj Mithal, Abhay S Oka

2024 INSC 1029

REPORTABL

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 7298 OF 2022

China Development Bank … Appell

versus

Doha Bank Q.P.S.C. & Ors. … Responden

with

Civil Appeal No.7407 of 2022
Civil Appeal No.7615 of 2022
Civil Appeal No.7328 of 2022
and
Civil Appeal No.7434 of 2023

JUDGMENT

ABHAY S. OKA, J.

FACTUAL ASPECTS

1. These appeals take exception to the judgment dated 9th September 2022 of the National Company Law Appellate Tribunal, Principal Bench, New Delhi (for short, 'the NCLAT'). The appellants in this batch of appeals (for short, 'appellants'), except the appellant in Civil Appeal No.7434 of 2023, were parties to the appeals preferred by 1st to 4th respondents in Civil Date: 2024.12.20 Appeal No. 7298 of 2022.

17:57:19 IST Reason:

2. The issue involved in these appeals is whether the appellants can be classified as 'Financial Creditors' within the meaning of sub-section (7) of Section 5 of the Insolvency and Bankruptcy Code, 2016 (for short, 'the IBC'). Another issue may arise in the event it is held that the appellants are not 'Financial Creditors'. The issue will be whether the appellants can be classified as 'Secured Creditors' and paid commensurate to their security interest.

3. 1st respondent-Doha Bank claims to be a direct lender and secured Financial Creditor of Reliance Infratel Limited (for short, 'RITL' or 'the Corporate Debtor'). A Corporate Insolvency Resolution Process (CIRP) was initiated by the adjudicating authority (NCLT) in respect of RITL-Corporate Debtor at the instance of Ericsson India Private Limited, and the Interim Resolution Professional (IRP) was appointed. We are concerned in this case with Reliance Communications Infrastructure Ltd. (for short, 'RCIL'), Reliance Communications Ltd. (for short, 'RCom'), Reliance Telecom Ltd. (for short, 'RTL') and RITL. These companies are hereinafter collectively referred to as "RCom entities".

4. Public announcements were made under Section 15 of the IBC inviting claims from creditors. The appellants submitted their claims as Financial Creditors of the Corporate Debtor. While admitting the claim of the appellants, the Resolution Professional classified the appellants as Financial Creditors. Accordingly, the appellants were included in the Committee of Creditors (for short, 'the COC'). The 1st Respondent-Doha Bank, made applications before the NCLT to challenge the admission of the claims of the appellants (except the appellant in Civil Appeal No.7434 of 2023) as Financial Creditors. The contention of the 1st respondent-Doha Bank was that the said appellants were not direct lenders of the Corporate Debtor, and it was impermissible to admit them as Financial Creditors on the basis of various terms of the Deeds of Hypothecation.

5. During the pendency of 1st respondent-Doha Bank's Application, a Resolution Applicant submitted a Resolution Plan for the Corporate Debtor, which the CoC approved in its meeting held on 2nd March 2020. After that, the 5th respondent-RP filed an application for grant of approval to the Resolution Plan. By order dated 3rd December 2020, the NCLT approved the Resolution Plan. The approval was granted without deciding the pending application made by the 1st respondent-Doha Bank, filed for objecting to the status of the appellants as Financial Creditors. The 6th Respondent preferred an appeal before the NCLAT to challenge the approval of the Resolution Plan. By the order dated 19th January 2021, the NCLAT directed the NCLT to decide the application of the 1st Respondent-Doha Bank. The NCLAT disposed of the appeal by observing that depending on the outcome of the application of the 1st Respondent, the order approving the Resolution Plan could be reconsidered.

6. The appellants have relied upon the Deeds of Hypothecation dated 4th March 2011, 9th March 2011, 12th February 2012 and 15th September 2018 (collectively referred to as "the DoH"). The DoH were executed jointly by each of the Rcom entities (described therein as Chargors), including the Corporate Debtor (RCIL), to create a charge over their property for securing the repayment of the facilities advanced by the appellants. The RCom entities agreed to provide their assets as security and further undertook to pay any shortfall of debts owed by each of the RCom entities. All the RCom entities pooled their resources to provide security for the facilities availed by any of the entities,

ensuring that each entity was individually liable to pay the debt of all the entities. According to the case of the appellants, in terms of the DoH, if there is any default by any entity, all the RCom entities were liable to make good the shortfall in recovery of the amounts after realisation of hypothecated assets.

7. Thereafter, the NCLT heard the application of the 1st respondent and dismissed it, upholding the status of the appellants (except the appellant in Civil Appeal No.7434 of 2023) as the Financial Creditors. An appeal was preferred by 1st to 4th respondents against the said order. By the impugned judgment and order, the NCLAT held that the DoH is not a deed of guarantee. It was held that the only parties to the DoH were the Chargors and the Security Trustee. The only object of the DoH was to create a charge on the property of the Chargors. Therefore, the Chargors cannot be treated as guarantors. Hence, the NCLAT set aside the order passed by the NCLT and remanded the case to the NCLT for taking consequential actions resulting from de-recognising the first four appellants herein as Financial Creditors.

8. At this stage, we may note that as far as Civil Appeal No.7434 of 2023 is concerned, the appeal is preferred by a Bank that was not a party to the appeal before the NCLAT. However, the NCLT dealt with the issue of the appellant's qualification as a Financial Creditor.

SUBMISSIONS OF THE APPELLANTS Submissions in Civil Appeal No.7298 of 2022, Civil Appeal No.7615 of 2022 and Civil Appeal No.7434 of 2023

9. Very detailed submissions have been made by the learned counsel appearing for the parties. The learned senior counsel appearing for the appellants in some of the appeals firstly referred to the factual aspects of the case. He pointed out that the RCom entities entered into the Master Security Trustee Agreement (MSTA) with Axis Trustees Services Limited (security trustee). Pursuant to the MSTA, the Security Trustees executed the aforementioned four DoH on behalf of the appellants and other lenders whereunder, the RCom entities, including the Corporate Debtor, agreed to provide their common pooled assets as security for the loans availed by them. The DoH further provided that in the event of any default by the RCom entities, each of the RCom entities is liable to make a good shortfall in recovery of the amounts in default. The learned senior counsel submitted that this obligation to pay the shortfall is a promise to pay, which is in the nature of a guarantee.

10. He pointed out that the CIRP was initiated by the NCLT for RITL-Corporate Debtor, RTL and RCom. He pointed out that on 2nd March 2020, in their capacity as Secured Financial Creditors, the appellants, along with other Financial Creditors, unanimously approved the Resolution Plan submitted by Reliance Digital Platform and Project Services Ltd. He pointed out that the appellants by their letter dated 2nd March 2020 addressed to the RP, pointed out that there were voting in favour of the RP in their capacity as ‘Secured Financial Creditors’.

11. The learned senior counsel pointed out that under the DoH, the Corporate Debtor has undertaken a three-fold obligation under the DoH. Firstly, under clause 2 of the DoH, the Corporate Debtor, in its capacity as Chargor and Obligor, has covenanted to pay the appellants the amount due under the relevant facilities availed by RCom and RTL. Secondly, under clause 3 of the DoH, the

Corporate Debtor created a charge over its entire asset pool on a first-ranking pari passu basis for the benefit of the secured creditors, including the appellants and others. The learned senior counsel pointed out that the entire asset pool is the subject matter of the approved Resolution Plan. Thirdly, under sub-clauses (ii) and (iii) of clause 5 of the DoH, the Corporate Debtor unambiguously, unequivocally and expressly agreed to make good the shortfall in realisation of the outstanding debt to the appellants, in the event charged assets were not sufficient to satisfy the outstanding debts owed to the appellants. He submitted that the Corporate Debtor in its capacity as a Chargor, in addition to hypothecating its properties, has undertaken to pay the appellants the amounts due and payable under the relevant facilities granted to RCom and RTL, which amounts to a guarantee in terms of Section 5(8).

12. The learned senior counsel pointed out the findings recorded in paragraph 8 of the order made by the NCLT. Relying upon Section 126 of the Indian Contract Act, 1872 (for short, 'the Contract Act'), he submitted that a contract of guarantee is a contract to perform the promise or discharge the liability of a third person in case of a default. He submitted that since the Corporate Debtor undertook to pay the amounts due and payable by other RCom entities, it was a contract to perform or discharge the liability of a third party in the event of default by the original borrower. Moreover, clauses 5(iii) and 16(viii) of the DoH provided that upon the occurrence of an event of default, the Security Trustee was authorised to take steps against the Corporate Debtor without having any obligation to first proceed against the borrower.

13. The learned senior counsel rebutted the 1st respondent's contention that clause 5(iii) was a standard clause included in hypothecation deeds. He submitted that unlike the sample hypothecation deeds relied upon by the 1st respondent, where the borrower himself provides security, as per the DoH in the present case, the Corporate Debtor, being a third party, undertook to pay the shortfall amount. In that sense, the promise to pay is in the nature of a guarantee. Therefore, the appellants were entitled to file a claim as Financial Creditors. The learned senior counsel submitted that every word stated in the contract has to be given its due meaning, and no part of the contract and words used thereunder could be said to be redundant.

14. He submitted that there is a fallacy in the 1st respondent's submission that the appellants were not entitled to file a claim in Form-C since there was no default or the shortfall as on 20th May 2019. The learned senior counsel distinguished between a claim submitted pursuant to the public announcement under Section 15 of the IBC and the requirement of the existence of debt and default for the purposes of filing an application under Section 7 of the IBC. He submitted that the claim as defined under Section 3(6) of the IBC arises without any default taking place at the time of filing the claim.

15. He also dealt with the contention raised by the respondents that the appellants' rights as secured creditors under the MSTA and the DoH cannot survive after moratorium comes into force under Section 14 of the IBC. He urged that the moratorium only bars any action for recovery or enforcement outside the resolution process and therefore, there is a provision for filing claims to the RP. Once the CIRP commences, creditors cannot enforce any rights under the documents and are required to file their claims for outstanding dues with the RP.

16. He submitted that the definition of 'financial debt' under Section 5(8) of the IBC is inclusive and not exhaustive. He relied upon the decisions of this Court in the cases of Kotak Mahindra Bank Limited v. A. Balakrishnan1 and Orator Marketing Pvt. Ltd. v. Samtex Desinz Pvt. Ltd2. He submitted that the debt need not be directly disbursed to the Corporate Debtor. He relied upon another decision of this Court in the case of Maitreya Doshi v. Anand Rathi Global Finance Ltd. & Ors3. He submitted that the Security Trustee under the DoH is acting for the benefit of the secured lenders like the appellants who are the direct and intended beneficiaries under the DoH. He submitted that the beneficiary to a contract can enforce such a contract even when it is not a party to the same. He relied upon the decisions of this Court in the cases of M.C. Chacko v. State Bank of Travancore4 and Essar Steel Ltd. v. Gramercy Emerging Market Fund5.

17. The learned senior counsel submitted that the entire CIRP of the Corporate Debtor has proceeded on the basis that the appellants are Financial Creditors of the Corporate Debtor. They have participated and voted as Financial Creditors. Therefore, at this belated stage, when the proceeds of the approved Resolution Plan have been realised and are pending distribution, the entire process cannot be overturned, and the (2022) 9 SCC 186 : 2022 INSC 630 (2023) 3 SCC 753 : 2021 INSC 359 AIR 2022 SC 4595 : 2022 INSC 1004 (1969) 2 SCC 343 : 1969 INSC 151 2002 SCC OnLine Guj 319 appellants cannot be removed from the list of Financial Creditors.

18. In the alternative, the learned counsel contended that appellants are entitled to receive a payout commensurate to their security interest. The learned counsel submitted that the RP accepted that the appellants were secured Financial Creditors. Therefore, the security interest of the appellants cannot be extinguished during the CIRP of the Corporate Debtor, and the appellants ought to be paid at least the commensurate value as per the security interest held in the event their status as Financial Creditors is not accepted. He relied upon a decision of this Court in the case of Vistra ITCL (India) Ltd. & Ors. v. Dinkar Venkatasubramanian6 on the entitlement of the secured creditor.

Submissions in Civil Appeal no. 7407 of 2022

19. The learned senior counsel appearing for the appellants in Civil Appeal No. 7407 of 2022 also made detailed submissions and pointed out the factual aspects of the case. The learned senior counsel pointed out that the appellants' claim as Financial Creditors was admitted by the RP in August 2019. He referred to the relevant portion of the minutes of the CoC meeting held on 2nd August 2019. He pointed out that the extracts of the minutes show that in response to the query made whether there was any deed of guarantee, the learned counsel appearing for the RP made it clear that while there was (2023) 7 SCC 324 : 2023 INSC 500 no deed of guarantee, there was a legal obligation in the DoH under which, the Corporate Debtor had undertaken to pay the shortfall. The learned senior counsel analysed clause 5(iii) of the DoH. He pointed out that the Chargors (including the Corporate Debtor) have agreed to accept the Security Trustee's account of the expenses, sales and realisation and to pay on demand by the Security Trustee any shortfall. He pointed out that Clause 2.15 of MSTA clarifies that the security created under the DoH is in addition to and independent of any other rights or remedies available to the appellants in law, equity or otherwise. More importantly, there is a personal covenant to pay on the part of the Chargors. He pointed out that clause 5(iii) of the DoH provides protection to the Security Trustee precisely

because there is an obligation on the Chargors to pay the shortfall/deficiency in payment of debt. When there are no recoveries from the sale of the charged properties, the entirety of the amount of default by RCom would be rendered in shortfall or deficiency and form part of the Corporate Debtor's liability to pay. He pointed out that in the present case, the Corporate Debtor has not merely provided security for RCom's dues but has also expressly undertaken to pay any shortfall or deficiency that may arise in the recovery of the amounts from RCom following the realisation from the sale of the security. Therefore, clause 5(iii) of the DoH contains the ingredients of a contract of guarantee under Section 126 of the Contract Act. Relying upon the definition of financial debt under Section 5(8) of the IBC, he submitted that the facility availed by RCom undoubtedly falls within the definition of financial debt and especially, clause (a) of sub-section (8) of Section 5 of the IBC.

Therefore, the guarantee provided by RITL-Corporate Debtor for such a financial facility would be a financial debt, which would entitle the appellant to be classified as a Financial Creditor.

20. He submitted that a sentence or term in a document is not determinative of the real nature of the document and obligations thereunder. He relied upon the decision of this Court in the case of B.K. Muniraju v. State of Karnataka & Ors.7, to state that the nature of the document or transaction between the parties to the contract is to be read as a whole and is not to be determined by the nomenclature/title of a contract. He submitted that the rights flow from the contents of the document. He submitted that as held by this Court in the case of Union of India v. D.N. Revri & Co. and Ors.8, a contract must be interpreted in such a manner so as to give efficacy to the contract between the parties rather than to invalidate the same. Moreover, a contract must be read as a whole and attempts should be made to harmonise the terms. He submitted that as held in the case of Maharashtra State Electricity Distribution Company Limited v. Maharashtra Electricity Regulatory Commission & Ors.9, the Court should not rewrite a contract in the guise of interpreting the terms thereof.

(2008) 4 SCC 451 : 2008 INSC 208 (1976) 4 SCC 147 : 1976 INSC 208 (2022) 4 SCC 657 : 2021 INSC 644

21. In reference to the argument regarding the extinguishment of the claim of the appellant due to the moratorium under Section 14 of the IBC, he submitted that Section 14 does not extinguish any right. The learned senior counsel also relied upon a decision of this Court in the case of Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta & Ors10. He submitted that the provisions of the IBC ensure that successful resolution applicant starts running the business of the Corporate Debtors on a fresh slate.

22. The learned senior counsel also refuted 1st respondent's submission that Clause 5(iii) of the DoH becomes an impossibility since moratorium prohibits enforcement of security interest under the DoH. He submitted that the guarantee under clause 5(iii) of the DoH is not contingent upon the enforcement of the security interest.

23. In the alternative, the learned counsel submitted that in any event, the appellant is entitled to retain the security interest and be classified as a secured creditor. He submitted that in the

Resolution Plan, other creditors include those creditors who have a claim against the Corporate Debtor but are neither Financial Creditors nor Operational Creditors. He submitted that while voting in favour of the Resolution Plan, the appellant made it clear that its approval was subject to the appellants being considered as Financial Creditors. Even while (2020) 8 SCC 531 : 2019 INSC 1256 approving the Resolution Plan, the NCLT permitted the distribution of the payment to the Financial Creditors including the appellants and stated that the same shall abide by and subject to the outcome of the application filed by the 1st Respondent.

24. The learned senior counsel also relied upon the decision of this Court in the case of Vistra ITCL (India) Ltd.6 to contend that IBC recognises the rights of secured creditors. He submitted that the requirement to relinquish the security interest is only during the liquidation process and not during the CIRP. Therefore, the question of whether the appellant has relinquished its security interest does not arise.

Submissions in Civil Appeal no. 7328 of 2022

25. The learned counsel appearing for the appellant in Civil Appeal No. 7328 of 2022 also made detailed submissions which are similar to the submissions made in Civil Appeal No. 7407 of 2022.

Submissions of 1st to 4th Respondents

26. On behalf of 1st to 4th respondents, it was submitted by the learned senior counsel that the DoH is only a simple document hypothecating certain properties of the borrowers (RCom entities) in favour of the appellants/third party lenders represented by the Security Trustee. The learned senior counsel submitted that in the present case, the DoH has only two parties: the Chargor (including the Corporate Debtor and three other RCom entities) and the Security Trustee. He submitted that without the presence of the three parties, namely the Guarantor, Principal Debtor and Creditor, a guarantee could not come into existence. Therefore, the DoH does not meet the requirement of Section 126 of the Contract Act. Reliance was placed on the decision of this Court in the case of Phoenix ARC Pvt. Ltd. v. Ketulbhai Ramubhai Patel11.

27. Our attention was invited to clause 5(iii) of the DoH. The learned senior counsel submitted that it only contains the process of enforcement of security by the Security Trustee. He submitted that the relevant part of clause 5(iii) of the DoH means that the Chargors have agreed to accept the Security Trustee's accounts of sales, realisation and expenses. The Chargors have agreed that upon demand of the Security Trustee, they will pay such shortfall or deficiency in the expenses. The learned senior counsel urged that the effect of a contract means as it reads, and it is not open for a Court to supplement or add to a contract since a contract is entered into on the basis of commercial decisions of the parties.

28. The learned counsel submitted that even assuming that a portion of clause 5(iii) of the DoH is a separate agreement, it is manifestly a contingent contract as per Section 32 of the Contract Act. The contingency would have arisen only when the hypothecated properties were sold, expenses were incurred, and there was a shortfall in realisation. He relied upon a (2021) 2 SCC 799 : 2021 INSC 59

decision of the Bombay High Court in the case of Western Coalfields Limited & Anr. v. Rajesh s/o Nandlal Biyani12. His submission is that the contingent contract ceased to exist when the moratorium was declared under Section 14 of the IBC with effect from 15th May 2018, since after the moratorium, hypothecated property could not be sold either in fact or in law. As the hypothecated property could not be sold, there was no question of sale or realisation. As there would not be a shortfall, the question of meeting the shortfall would not arise.

29. The learned counsel further submitted that the enforcement of security is left out of the domain of CIRP as it focuses on revival of a Corporate Debtor as opposed to the process of liquidation. After the moratorium applies, the enforcement of security becomes impossible.

30. The learned senior counsel submitted that the DoH does not contain any promise by the Corporate Debtor to discharge the liability of any of the borrowers to any other lender. As there are no third parties to the document, it cannot be termed as a guarantee. He submitted that clause 5(iii) of the DoH is found in every standard draft of a deed of hypothecation.

31. He submitted that there are other clauses in the DoH, such as clauses 2, 3, 5 and 9, which indicate that the Corporate Debtor has merely created a security in favour of the Security Trustee, which represents the lenders. The Corporate Debtor has not agreed to discharge the obligations of any borrower.

2011 SCC OnLine Bom 1217 : (2012) 2 Mah LJ 394 The mere security interest created by hypothecation or mortgage does not constitute a financial debt as held by this Court in the case of Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited v. Axis Bank Limited & Ors13.

32. The learned counsel submitted that when financial debt is intact, a lender would remain a Financial Creditor and can make a claim before the RP. However, when the claim made by the Financial Creditor is based on a contingent event, a lender cannot become a Financial Creditor until the contingent event has happened and the debt is crystalised/accrued. In the facts of the case, a contingent event has never happened, and therefore, financial debt has not been crystallised.

33. He submitted that MSTA did not require a guarantee to be executed in favour of the Security Trustee. In fact, the recitals in the MSTA clearly indicate that the requirement on Obligors was to hypothecate property as security for due repayment of the secured facilities availed by each Obligor. It was submitted that the appellants are contract lenders of the three RCom entities and not the Corporate Debtor since the Corporate Debtor has not availed any loans or facilities from the appellants.

34. The learned senior counsel submitted that the Corporate Debtor in its financial statement before and after commencement of the CIRP had not treated the MSTA and the (2020) 8 SCC 401 : 2020 INSC 227 DoH as a guarantee. It is submitted that the Corporate Debtor had not provided any guarantee under the MSTA or the DoH. The learned senior counsel submitted that a perusal of Form- C filled in by the appellants shows that no guarantee was provided to the appellants/third

party lenders. This position was further clarified in the minutes of the CoC meeting dated 2nd August 2019. Even the RP accepted that there was no deed of guarantee. The learned senior counsel submitted that the IBC cannot be used for recovery as it is a mechanism to rehabilitate and revive the Corporate Debtor. He urged that the appellants are attempting to use the CIRP as a mode of recovery of their loans from the RCom entities. He submitted that if the DoH is treated as a guarantee, all such hypothecation deeds creating security interest will have to be construed as a guarantee in order to qualify as financial debt.

35. He submitted that the Resolution Plan has been passed in compliance with Sections 13(2) and 13(4) of the IBC and once a Resolution Plan is approved, it cannot be challenged before the forum.

36. The appellants voted and approved the Resolution Plan which extinguished their security while their status as Financial Creditors was under challenge in the pending application filed by the 1st Respondent-Doha Bank. Now, the appellants cannot be permitted to turn back and rewrite the Resolution Plan. The learned senior counsel urged that allowing any member of the CoC to agree to the Resolution Plan by unilaterally reserving its right to seek amendment, would run contrary to fundamental principles of the IBC and set a dangerous precedent.

37. The learned senior counsel submitted that even if the CoC accepts the appellants as Financial Creditors, the same would have no consequence on the CIRP of the Corporate Debtor or the Resolution Plan since the plan has been duly approved by 100 per cent majority of the CoC in conformity with Section 30(2) of the IBC. The learned senior counsel submitted that once the Resolution Plan has been approved by this Court, the appellants cannot be allowed to challenge the same. He submitted that while voting in favour of the Resolution Plan, the appellants opted to take an approach of forgoing the benefit of their security.

38. The learned senior counsel dealt with the submission of the appellant in Civil Appeal No. 7298 of 2022 that the Resolution Plan was approved by the CoC with pay outs to be made to secured Financial Creditors and there was no separate clause of secured creditors at the stage of approval by the CoC. He submitted that the said argument is suggestio falsi. He submitted that the appellant in Civil Appeal No. 7298 of 2022 exercised its commercial wisdom and was conscious of the fact that it was forgoing its security as the Financial Creditor and this would tantamount to forgoing security even as a Secured Creditor. It was submitted that if the appellants' right to revise the agreed Resolution Plan was recognised, it would lead to another classification of the secured and unsecured Financial Creditors. The appellants voted and approved the Resolution Plan based on the pari passu distribution to the Financial Creditors, which extinguished its security. In fact, the CoC, in its commercial wisdom, made a conscious decision not to distinguish between the secured and the unsecured Financial Creditors of the Corporate Debtor with the objective of reviving the Corporate Debtor. The learned counsel for the respondents submitted that the appeals, therefore, are required to be dismissed.

CONSIDERATION OF SUBMISSIONS

39. The entire controversy revolves around the DoH. Before we deal with DoH, it is necessary to consider the relevant clauses of MSTA.

MASTER SECURITY TRUSTEE AGREEMENT (MSTA)

40. The DoH has been executed by the Security Trustee acting on behalf of the Appellants, by the authority vested in it by MSTA. Therefore, before coming to the DoH, we must consider the MSTA executed on 4th March 2011 by and between the RCom entities described therein as "Original Obligors", "Original Lenders" and the Security Trustee. The MSTA defines "Original Lenders" as collectively the persons listed in Schedule I. The appellants are the Original Lenders. Under the agreement, an "Acceding Lender" is defined as a person who accedes to the MSTA by way of the lender's deed of accession. "Secured Lenders" are defined as collectively the Original Lenders and each acceding lender or syndicate of the lenders. Therefore, all the Original Lenders are described as Secured Lenders, and each acceding lender becomes a Secured Lender.

41. Clause 2.1 of the MSTA provides that each Original Obligor appoints the Security Trustee who acts as a trustee for the benefit of the secured parties and their permitted successors, etc. "Secured Parties" are defined to include the Security Trustee, Secured Lenders and any other persons named as Secured Parties. Therefore, the Security Trustee is appointed by each original Obligor, the RCom entities, to act for the benefit of the Secured Parties, the appellants.

42. Clause 2.2 of the MSTA is relevant. Under the said clause, the Secured Lenders authorised and directed the Security Trustee to act for the benefit of the secured parties, including the Secured Lenders. The authority conferred by clause 2.2 includes the authority to execute and take delivery of the secured documents and to accept the security and all related deeds and documents. It also authorises the Security Trustee to enforce the security in accordance with the provisions of the MSTA. To that extent, the Security Trustee acts on behalf of the appellants, who are Original Lenders.

DEEDS OF HYPOTHECATION (DOH)

43. Then comes the DoH, to which RCom entities are shown as "Chargors". The Chargors have executed the DoH in favour of the Security Trustee. The DoH refers to the entities availing the secured facilities mentioned in Schedule I as "Obligors" for that specific secured facility. The recitals mention that the Obligors have availed of the security facilities mentioned in Schedule I. There are sixteen security facilities mentioned therein, out of which eleven have been availed by RCom, one by RTL and four by RITL-Corporate Debtor. As mentioned in Schedule-I, one of the facilities was extended to RCom by the appellant in Civil Appeal No. 7298 of 2022.

44. Clause 2 of the DoH provides that each of the Chargors covenanted with Security Trustee that each Obligor (RCom entities) shall repay the secured facilities availed by it together with the interest, liquidated damages, premia of prepayment, etc. In pursuance of the aforesaid, Clause 3 of the agreement provides for hypothecation of the Chargors' assets for the purpose of securing the facilities. The relevant part of Clause 3 read thus:

> "3. Charge In pursuance of the aforesaid, each of the Chargors does hereby hypothecate as he by way of a first ranking pari passu charge to the Security Trustee, acting in trust for and for the benefit of the Secured Parties, for the purpose of securing the due discharge by the Obligors of all their obligations in connection with the Secured Facilities, all of its following assets: .. .." The properties hypothecated by Chargors have been described as "charged properties".
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> 45. Clause 5 contains the Chargor's covenants, representations and warranties. Sub-clause (iii) of Clause 5 is material, which reads thus:
>
> "5. Chargor's Covenants, Representations and Warranties .. ..

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(iii) In the event that an Event of Default has occurred under a Facility Document the Security Trustee or its nominees shall, on receiving instructions from the Secured Lender/s, in accordance with Section 4 of the Security Trustee Agreement and after providing 7 (seven) Business Days notice to any of the Chargors and without assigning any reasons and at the risk and expense of the Chargors and if necessary as attorney for and in the name of the Chargors, be entitled to take charge and/or possession of, seize, recover, receive and remove them and/or sell by public auction or by private contract, dispatch or consign for realisation or otherwise dispose of or deal with all or any part of the Hypothecated Property (including by way or through the exercise of its powers and rights specified in Section 6 hereof) and to enforce, realise, settle, compromise and deal with any rights or claims relating thereto, without being bound to exercise any of these powers or be liable for any losses in the exercise or non-exercise thereof and without prejudice to the Security Trustee's rights and remedies of suit or otherwise. Notwithstanding any pending suit or other proceeding, each of the Chargors undertakes to give possession to the Security Trustee or its nominees or the Receiver within 7 (seven) Business Days of a notice of demand from the Security Trustee and/ or the Receiver the Charged Property and to transfer and to deliver to Security Trustee and/ or the Receiver all related bills, contracts and securities. Each of the Chargors further agrees to accept the Security Trustee's account of sales and realisations as sufficient proof of amounts realised and relative expenses and to pay on demand by the Security Trustee and/ or the Receiver any shortfall or deficiency thereby shown.

Provided however, the Security Trustee Or the Receiver shall not be in any way liable or responsible for any loss, damage or depreciation that the Hypothecated Property may suffer or sustain on any account whatsoever whilst the same are in possession of the Security Trustee or the Receiver or by reason of exercise or non-exercise of rights and remedies available to the Security Trustee or the Receiver as aforesaid and that all such loss, damage or depreciation shall be wholly debited to the account of the relevant Chargor howsoever the same may have been caused, except where such loss, damage or depreciation is caused by any negligence or wilful default of the Security Trustee or the Receiver." (emphasis added) In these appeals, we are called upon to interpret clause 5(iii) of the DoH and decide whether the clause creates any guarantee in favour of the appellants. Therefore, we

need to analyse the said clause.

GUARANTEE AS FINANCIAL DEBT

46. The question is whether the Corporate Debtor is a guarantor who has guaranteed the repayment of the loan amount by the borrowers of the appellant. As far as the appellant -China Development Bank is concerned, under five different agreements, it has advanced financial facilities to RCom and RTL. So far as the appellant, Asset Care and Reconstruction Enterprises Limited, is concerned, there is one agreement under which finance has been extended to RCom. The same is the case with Shubh Holdings Pte. Ltd. Regarding the Export Import Bank of China, four agreements were executed under which facilities were granted to RCom. In the case of the Industrial Commercial Bank of China, there is one agreement under which finance was provided to RCom. The appellants have not advanced any facilities to the Corporate Debtor.

47. The answer to the question of whether the appellants are the Financial Creditors depends upon the answer to the question of whether the appellants are the guarantors. Therefore, we are adverting to the relevant provisions of IBC. Sub-section (6) of Section 3 of the IBC defines "claim" which reads thus:

> "3. Definitions:-
>
> .. .. (6) "claim" means – (a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured, or unsecured; (b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;" Sub-section (11) of Section 3 of the IBC defines "debt" which reads thus:
>
> "3. Definitions:-
>
> .. ..
>
> (11) "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;"

48. It is necessary to refer to the definitions of 'Financial Creditor' and 'financial debt' under sub-sections (7) and (8) of Section 5 of the IBC respectively, which read thus:

> "5.Definitions:-
>
> .. ..

(7) “Financial Creditor” means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;

(8) “financial debt” means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes–

(a) money borrowed against the payment of interest;

(b) any amount raised by acceptance under any acceptance credit facility or its dematerialised equivalent;

(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

(e) receivables sold or discounted other than any receivables sold on non-recourse basis;

(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

Explanation. -For the purposes of this sub-clause,-

(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

(ii) the expressions, “allottee” and “real estate project” shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clause (a) to (h) of this clause.” (emphasis added) In

terms of sub-section (11) of Section 3, debt is a liability or obligation in respect of a claim which is due from any person and includes a financial debt or operational debt. As noted earlier, a claim is a right to payment whether or not, such right is reduced to judgment and whether it is disputed or undisputed. The right to payment can be legal, equitable, secured or unsecured. Therefore, if there is a liability or obligation in respect of a payment which is disputed, it still becomes a claim. Once there is a liability or obligation in respect of a claim, it becomes a debt. Once there is a financial debt, the person to whom a debt is owed, becomes a Financial Creditor.

49. The appellants are claiming that their case is covered by clause (i) of sub-section (8) of Section 5 of the IBC. Under clause (i), the amount of any liability in respect of any guarantee of the items referred to in clauses (a) to (h) becomes a financial debt. Therefore, when clause (i) of Section 5(8) is applicable, it is not necessary that the Financial Creditor actually tenders any amount to the Corporate Debtor. In this case, the appellants are claiming that the amount of liability covered by clause (i) is in respect of money borrowed by the RCom entities (excluding the Corporate Debtor) against payment of interest under the facility agreements. There is no dispute that facilities were granted by the appellants to RCom entities. The amount of any liability in respect of any of the guarantees for money borrowed against the payment of interest is a financial debt under Section 5(8) of the IBC.

50. “Guarantee” is defined under Section 126 of the Contract Act, which reads thus:

> “126. “Contract of guarantee”, “surety”, “principal debtor” and “creditor”.—A “contract of guarantee” is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the “surety”; the person in respect of whose default the guarantee is given is called the “principal debtor”, and the person to whom the guarantee is given is called the “creditor”. A guarantee may be either oral or written.” A contract becomes a guarantee when the contract is to perform the promise or discharge the liability of a third person in case of default. Thus, when a person enters into a contract to perform or discharge the liability of a third party, the contract becomes a contract of guarantee.

51. Section 127 of the Contract Act reads thus:

> “127. Consideration for guarantee.- Anything done, or any promise made, for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee.
>
> Hence, any promise made or anything done for the benefit of principal debtor may be sufficient consideration to the surety for giving guarantee.
>
> EFFECT OF CLAUSE 5(iii) OF DOH READ WITH MSTA Relevance of nomenclature of DoH

52. If we go by the title, DoH is a Document creating hypothecation. In short, hypothecation means the process of using an asset as collateral for a loan. It acts as a protection to the lender when the borrower does not repay the loan.

53. Only the title of a document cannot be a decisive factor in deciding the nature of the document or the transactions affected by the document. In the case of C.C., C.E. and S.T. Bangalore (Adjudication) & Ors. v. Northern Operating Systems Pvt. Ltd.14, in paragraphs 53 to 55, this Court held thus:

> "53. From the above discussion, it is evident, that prior to July 2012, what had to be seen was whether a (a) person provided service, (b) directly or indirectly, (c) in any manner for recruitment or supply of manpower, (d) temporarily or otherwise. After the amendment, all activities carried out by one person for another, for a consideration, are deemed services, except certain specified excluded categories. One of the excluded category is the provision of service by an employee to the employer in relation to his employment.

54. One of the cardinal principles of interpretation of documents, is that the nomenclature of any contract, or document, is not decisive of its nature. An overall reading of the document, and its effect, is to be seen by the courts. Thus, in State of Orissa v. Titaghur Paper Mills Co.

Ltd. [State of Orissa v. Titaghur Paper Mills Co. Ltd., 1985 Supp SCC 280] it was held as follows : (SCC p. 371, para

120) "120. It is true that the nomenclature and description given to a contract is not determinative of the real nature of the document or of the transaction thereunder. These, however, have to be determined from all the terms and clauses AIR 2022 SC 2450 : 2022 INSC 598 of the document and all the rights and results flowing therefrom and not by picking and choosing certain clauses and the ultimate effect or result as the Court did in the Orient Paper Mills case [State of M.P. v. Orient Paper Mills Ltd., (1977) 2 SCC 77]." This principle was reiterated in Prakash Roadlines (P) Ltd. v. Oriental Fire & General Insurance Co. Ltd. [Prakash Roadlines (P) Ltd. v. Oriental Fire & General Insurance Co. Ltd., (2000) 10 SCC 64]

55. The task of this Court, therefore is to, upon an overall reading of the materials presented by the parties, discern the true nature of the relationship between the seconded employees and the assessee, and the nature of the service provided — in that context — by the overseas group company to the assessee." (emphasis added) As held in the case of B.K. Muniraju v. State of Karnataka & Ors.7, a sentence or a term in a contract does not determine the real nature of the contract. It is true that the Courts should not rewrite the contract while making an attempt to interpret it. However, in the case of D.N. Revri & Co.8, in paragraph 7, this Court held thus:

> "7. It must be remembered that a contract is a commercial document between the parties and it must be interpreted in such a manner as to give efficacy to the contract rather than to invalidate it. It would not be right while interpreting a contract,

entered into between two lay parties, to apply strict rules of construction which are ordinarily applicable to a conveyance and other formal documents. The meaning of such a contract must be gathered by adopting a common sense approach and it must not be allowed to be thwarted by a narrow, pedantic and legalistic interpretation.

.. .." (emphasis added) Therefore, the name of the document is not a decisive factor. Only because the title of the document contains the word hypothecation, we cannot conclude that guarantee is not a part of this document.

Parties to the DoH

54. Before we go to the clauses in the DoH, we must again go back to the MSTA. Under the said agreement, the Security Trustee has been appointed to act as trustee for the benefit of secured parties which include Secured Lenders. Under clause 2.2.1 of the MSTA, the Secured Lenders have authorised and directed the Security Trustee to execute and deliver security documents to which, the Security Trustee is to be a party and to accept the security, all related deeds and documents as may be required to be submitted by the Obligors for the benefit of secured parties. Under sub-clause (c) of clause 2.2.1 of MSTA, it is the duty of the Security Trustee to enforce the security in accordance with the provisions of the agreement and to receive and apply all money in accordance with the security documents. Therefore, the Secured Lenders have authorised the Security Trustee to accept the security on their behalf.

55. In light of this discussion, we turn to the DoH. We have already quoted the relevant portion of the DoH. The RCom entities, including RITL-Corporate Debtor, are described as Chargors in the DoH. Clause 2 of the DoH reads thus:

"2. Covenant to Pay:

In pursuance of the Secured Facilities and the Facility Documents and in consideration of the Secured Lenders having made available the Secured Facilities to the Obligors for the purposes and subject to the terms and conditions set out in the Facility Documents and/or the other Security Documents, each of the Chargors does hereby covenant with the Security Trustee that each Obligor shall repay the Secured Facilities availed by it together with interest, liquidated damages, premia on prepayment, financing charges, remuneration payable to the Security Trustee, fees payable to any Secured Party, costs, charges expenses and all other monies stipulated in the relevant Facility Documents in the manner set out therein and shall duly observe and perform all the terms and conditions of the relevant Facility Documents and/or the other Security Documents." Clause 2 refers to Secured Lenders and Obligors. As noted earlier, the appellants are Secured Lenders within the meaning of the MSTA. The two RCom entities, namely RCom and RTL, are the obligors being the borrowers of the appellants.

> Therefore, as per clause 2, the appellants had made available the secured facilities to RCom and RTL, who undertook to repay the secured facilities availed by it together with the interest, liquidated damages, premia of prepayment, financing charges, etc., including the remuneration payable to the Security Trustee. As noted earlier, the appellants are Secured Lenders within the meaning of the MSTA. Therefore, as per clause 2, Secured Lenders had made available the secured facilities to the Obligors. It provides that Obligors shall repay the secured facilities availed by it together with the interest, liquidated damages, premia of prepayment, financing charges, etc., including the remuneration payable to the Security Trustee. As stated earlier, two RCom entities, namely RCom and RTL, are the borrowers of the appellants. Thus, these two companies are Obligors who covenanted to repay the secured facilities availed by it together with interest, liquidated damages, etc.

56. We have already quoted the first part of clause 5(iii) of the DoH. The effect of the clause is that all the four RCom entities, including the Corporate Debtor, hypothecated their assets by way of first ranking pari passu charge to the Security Trustee, who was acting in trust and for the benefit of the secured parties for the purpose of securing due discharge of the Obligor's obligations in connection with secured facilities. The Security Trustee acted on behalf of the appellants by accepting the security of hypothecation. Therefore, the DoH is a document executed on behalf of the appellants. The effect of clause 5(iii) is that for the discharge of liabilities of the RCom entities, all four RCom entities hypothecated their properties for securing repayment of the facilities extended by the appellants to RCom and RTL. In short, the parties to the DoH are Security Trustees acting on behalf of the present appellants, the Corporate Debtor who is not the borrower of the appellants and the other three RCom entities. Therefore, there are three parties to the DoH.

Promise to discharge the Liability of third party

57. Sub-clause (i) of clause 3 of the DoH is a clause which is normally found in hypothecation agreements. Then comes sub-clause (iii) of clause 5 of the DoH, which we have already quoted. It provides that in the event of default committed by the borrowers (in the case of the appellants, the borrowers are RCom and RTL), the Security Trustee is entitled to take charge and/or possession of, seize, recover, receive and remove the hypothecated goods and/or sell by public auction or private contract, dispatch or consign for realisation or otherwise dispose of or deal with any part of the hypothecated property. It is obvious that this action of realisation is to be done by the Security Trustee in terms of sub-clause (c) of clause 2.2.1 of the MSTA. Thus, the security of hypothecation can be enforced by the Security Trustee on behalf of the appellants.

58. Sub-clause (iii) of clause 5 of the DoH further provides that each of the Chargors agree to accept the Security Trustee's account of sales and realisation as sufficient proof of the amount realised and relative expenses and to pay on demand by the Security Trustee and/or receiver any shortfall or deficiency thereby shown. Under the DoH, even the Corporate Debtor hypothecated its goods. The last part of sub-clause (iii) of clause 5 means that if after the sale of hypothecated assets, there is any shortfall in the discharge of the liabilities of RCom or RTL, the Corporate Debtor is under an obligation to pay the shortfall or deficiency. Therefore, the latter part of clause 5(iii) of the DoH

indicates that RITL-Corporate Debtor, who is not the borrower of the appellants, agreed to discharge the liability of the third parties (RCom and RTL) to the appellants in the case of default of RCom or RTL. Therefore, the second part of clause 5(iii) of the DoH amounts to a guarantee provided by the Corporate Debtor to the appellants in terms of Section 126 of the Contract Act.

59. In the case of Phoenix ARC Pvt. Ltd.11, in paragraphs 24 and 25, this Court held thus:

> "24. Chapter VIII of the Contract Act, 1872 deals with "Of Indemnity and Guarantee". Section 124 defines "Contract of indemnity" and Section 126 defines "Contract of guarantee".

Section 126 which is relevant for the present case is as follows:

> "126. "Contract of guarantee", "surety", "principal debtor" and "creditor".—A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor". A guarantee may be either oral or written."
>
> 25. As is clear from the definition a "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The present is not a case where the corporate debtor has entered into a contract to perform the promise, or discharge the liability of borrower in case of his default. The pledge agreement is limited to pledge 40,160 shares as security. The corporate debtor has never promised to discharge the liability of the borrower. The facility agreement under which the borrower was bound by the terms and conditions and containing his obligation to repay the loan security for performance are all contained in the facility agreement. A contract of guarantee contains a guarantee "to perform the promise or discharge the liability of third person in case of his default". Thus, key words in Section 126 are contract "to perform the promise", or "discharge the liability", of a third person. Both the expressions "perform the promise" or "discharge the liability" relate to "a third person"." In this case, from the last part of clause 5(iii) of the DoH, it is very clear that the Corporate Debtor has undertaken to discharge the liability of the RCom and RTL, the borrowers of the appellants. RCom and RTL are third parties as far as Corporate Debtor is concerned.

60. Reliance was placed on the formats of hypothecation provided in the books authored by M.Tijoriwala and J.M. Diwekar by contending that clause 3 of the DoH is a regular boilerplate clause. These formats provided in the books have no relevance as we have to interpret clause 5(iii) of the DoH as it is.

REQUIREMENT OF OCCURRENCE OF 'DEFAULT'

61. There is an argument canvassed before us that default under the DoH has not occurred. We have already quoted the definition of 'financial debt' under Section 5(8) of the IBC. There is no requirement incorporated therein that a debt becomes financial debt only when default occurs. Under Section 5(7) of the IBC, any person to whom financial debt is owed becomes a Financial Creditor even if there is no default in payment of debt. Therefore, this argument deserves to be rejected.

62. On this aspect, we may also note that under Section 3(12), 'default' has been defined. This definition of 'default' becomes relevant only while invoking the provisions of Section 7(1) of the IBC when the CIRP is sought to be initiated by the Financial Creditor. Section 7(1) provides that a Financial Creditor can initiate CIRP against the Corporate Debtor when there is a default on the part of the Corporate Debtor. There is no requirement under Section 5(8) of the IBC that there can be a debt only when there is a default. The moment it is established that the financial debt is owed to any person, he/she becomes a Financial Creditor. In this case, we are concerned with the claim made by the appellants. A public announcement of CIRP under Section 15(1) must contain the last date of submission of claims as may be specified. Thus, if a person has a claim within the meaning of Section 3(6), he can submit it on public announcement contemplated by Section 15 being made. A Financial Creditor has a claim as explained earlier. Therefore, for submitting the claim by a Financial Creditor, there is no requirement of actual default.

EXTINGUISHMENT OF CONTINGENT CLAIM ON IMPOSITION OF MORATORIUM

63. Arguments have been canvassed that clause 5(iii) of the DoH is a contingent contract wherein the contingent event is the shortfall between realisation and expenses. The clause applies to the shortfall in the total liability of the borrower after necessary amount is realised from the hypothecated assets. It is contended that the contract has become impossible, since owing to the moratorium imposed, the hypothecated properties could not be sold and the shortfall could not arise. Reliance is placed on Section 14(1) of the IBC, which reads thus:

> "14. Moratorium.— (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:
>
> (a) 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;
>
> (b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
>
> (c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

Explanation.—For the purposes of this sub-section, it is hereby clarified that 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, concession, clearances or a similar grant or right during the moratorium period;" Section 14(1) imposes an embargo or prohibition on certain acts. However, it does extinguish the claim. If the argument that the claims of all the creditors of the Corporate Debtor are extinguished once the moratorium comes into force is accepted, no creditor would be able to file a claim. For example, if money advanced is secured by a promissory note or a negotiable instrument, a suit for recovery based on the said documents will not lie once a moratorium comes into force. But, the liability under the documents will continue to exist. In fact, after moratorium, no creditor can recover any dues from the Corporate Debtor. But still, there is a provision for making a claim. Hence, the argument based on moratorium deserves to be rejected. The DoH will continue to be valid. However, on the basis of the DoH, something which is prohibited by Section 14, cannot be done. Therefore, Section 14 will be of no assistance to the 1st respondent-Doha Bank.

64. When we are on the interpretation of DoH, we must refer to sub-clause (vi) of clause 16 of the DoH, which provides that every provision contained in the deed shall be severable and distinct from every other such provision. It goes to the extent of stating that if any one or more of the provisions of the DoH are invalid, illegal and unenforceable, the same will not affect the remaining provisions. Therefore, the last part of clause 5(iii) of the DoH is severable from the main transaction of the hypothecation.

65. Another argument was canvassed based on the definition of 'claim' under Section 3(6) of the IBC. If the right to payment exists or if a breach of contract gives rise to a right to payment, the definition of 'claim' is attracted. Even if that right cannot be enforced by reason of the applicability of the moratorium, the claim will still exist. Therefore, whether the cause of action for invoking the guarantee has arisen or not is not relevant for considering the definition of 'claim'.

66. Much capital was made of the fact that the CoC, including the appellants as well as the third-party lenders, have voted for the Resolution Plan. At this stage, we may note that the NCLAT has not held against the appellants on the ground that if the case of the appellants is accepted, it will amount to modification of the Resolution Plan. We may note here that in Company Appeal (AT) (Insolvency) No.19 of 2021 by the order dated 19th January 2021, the NCLAT, while deciding the challenge to the Resolution Plan, noted that the application challenging the status of the appeals made by the 1st respondent-Doha Bank was pending. The NCLAT observed that the Resolution Plan was rightly approved, subject to the disposal of the pending application. In fact, in paragraph 7, the NCLAT observed that depending upon the outcome of the applications, if the Resolution Plan

requires to be reconsidered, the adjudicating authority will do so after hearing the parties. This order has become final.

67. As we have accepted the main contention of the appellants, the alternative contention of the appellants becoming secured creditors is not gone into.

CONCLUSION

68. The sum and substance of the above discussion is that the impugned judgment and order dated 9th September 2022 passed by the NCLAT cannot be sustained, and the order dated 2nd March 2021 of the NCLT deserves to be upheld.

Accordingly, the impugned order of the NCLAT is quashed and set aside, and the order dated 2nd March 2021 passed by the NCLT, Mumbai Bench (adjudicating authority) is restored. The appeals are, accordingly, allowed.

.....J. (Abhay S Oka) .....J. (Pankaj Mithal) New Delhi;

December 20, 2024.