IN THE NATIONAL COMPANY LAW TRIBUNAL HYDERABAD BENCH – 1 VC AND PHYSCIAL (HYBRID) MODE

ATTENDANCE CUM ORDER SHEET OF THE HEARING HELD ON 06-08-2024 AT 10:30 AM

CP(IB) No.69/7/HDB/2022

AND

IA (IBC) 595, 598, 560 & 651/2022 in CP(IB) No.69/7/HDB/2022

u/s. 7 of IBC, 2016

IN THE MATTER OF:

M/s. JC Flowers Asset Reconstruction Pvt Ltd

...Financial Creditor

AND

GVK Transportation Pvt Ltd

...Corporate Debtor

CORAM:-

DR. VENKATA RAMAKRISHNA BADARINATH NANDULA, HON'BLE MEMBER (JUDICIAL) SH. CHARAN SINGH, HON'BLE MEMBER (TECHNICAL)

ORDER

CP(IB) No.69/7/HDB/2022

Orders pronounced. **In the result, this Company Petition is allowed,** the Corporate Debtor is admitted into CIRP, IRP appointed and moratorium in terms of Section 14 Insolvency & Bankruptcy Code, 2016 imposed.

IA (IBC) 595/2022

Orders pronounced. This application is dismissed as not maintainable. No costs.

IA (IBC) 598/2022

Orders pronounced. This application is dismissed as not maintainable. No costs.

IA (IBC) 560 /2022

As the main company petition is admitted, this application is dismissed as not maintainable. No costs.

IA (IBC) 651/2022

Orders pronounced. In the result, this application is dismissed, with costs of Rs.25,000/- payable to the prime minister relief fund by the applicant.

Sd/-

Sd/-

MEMBER (T)

MEMBER (J)

NATIONAL COMPANY LAW TRIBUNAL HYDERABAD BENCH, HYDERABAD

CP (IB) No.69/7/HDB/2022

Under section 7 of the Insolvency & Bankruptcy Code, 2016 read with Rule 4 of the Insolvency & Bankruptcy (Application to the Adjudicating Authority) Rules, 2016.

IN THE MATTER OF:

J.C. Flowers Asset Reconstruction Pvt Ltd

Acting in its capacity as

Trustee of JCF YES Trust 2022-23/3-Trust

A company incorporated under

The Companies Act, 2013 and

Registered with the RBI as an

Asset Reconstruction Company

Under section 3 of the

Securitization & Reconstruction of

Financial Assets & Enforcement of

Security Interest Act, 2002, and

Having its registered office at:

CG House, 12th Floor

Dr. Annie Besant Road, Worli

Mumbai $-400\,030$.

.. Applicant Financial Creditor

VERSUS

GVK Transportation Private Limited

A company incorporated under he Companies Act, 1956 Having Registered Office at: Paigah House, 156-159 Sardar Patel Road Secunderabad – 500 003.

.. Respondent Corporate Debtor

Date of order: 6th August 2024

Coram:

DR. VENKATA RAMAKRISHNA BADARINATH NANDULA, HON'BLE MEMBER (JUDICIAL)

and

SHRI CHARAN SINGH HON'BLE MEMBER (TECHNICAL)

PRESENT:

For Petitioner : Mr. D.V. Seetaharam Murthy, Senior Counsel with

Mr. VVSN Raju and Mr. Srikant Rathi, Advocates.

For Respondent: Ms. Siva Praneetha Sreeramula, Advocate.

PER BENCH

ORDER

At the outset it is to be noted that this Tribunal vide order in IA (IBC) No.376 of 2023 dated 28.02.2023 has

permitted amendment of in CP (IB) No.69/7/ HDB/ 2022 by substituting the name of the Financial Creditor with Asset Reconstruction Company (ARC). However, the petitioner could not carry out amendment within a week as was directed by this Tribunal.

- This Tribunal vide order dated 08.12.2023 in IA
 (IBC) No.1425 of 2023 in CP
- (IB) No.69/7/ HDB/ 2022 has condoned the delay in carrying out amendment and directed the petitioner to carry out amendment within a week from the said day and file Neat Copy within two days thereafter. Accordingly, the petitioner has filed Neat Copy of the Company Petition on 14.12.2023. It is this Amended Company Petition, which is under consideration before us.

The petitioner:

Initially, this Company Petition was filed under section 7 of the I&B Code, 2016 by Yes Bank Limited in the capacity of Financial Creditor. Subsequently, by virtue of order dated 28.02.2023 in IA (IBC) No.376 of 2023, this Tribunal has allowed substitution of the petitioner/ Yes Bank Limited by JC Flowers Asset Reconstruction Private Limited, as an assignee, under section 5 of the Securitization and Reconstruction of Financial Assets Enforcement of Security Interest Act, 2002 and (SARFAESI Act). At this juncture, the assignee is before this Tribunal in its capacity as trustee of JCF YES Trust, 2022-23/3, a company incorporated under the Companies Act, 2013.

Said Trust is a company incorporated under the Companies Act 2013, having Corporate Identification

Number (CIN) U74999MH2015PTC264081 and registered with the Reserve Bank of India as an asset reconstruction company pursuant to section 3 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2022 and having its registered office at CG House, 12th floor, Dr. Annie Besant Road, Worli, Mumbai 400030, represented by Debasish Bose who is authorized vide Board Resolution dated December 23, 2022.

The respondent:

Respondent/ GVK Transportation Private Limited is a company registered under the Companies Act, 1956 with CIN: U63030TG2009PTC064808, having its Registered Office 'Paigah House', 156-159 Sardar Patel Road Secunderabad, Telangana 500003. The Corporate Debtor has executed two Deeds of Corporate Guarantee in

relation to the credit facilities availed by its wholly owned subsidiary/ principal borrower, namely, GVK Deoli Kota Expressway Private Limited.

The principal borrower:

M/s. GVK Deoli Kota Expressway Private Limited, a company incorporated under the provisions of the Companies having Act, 1956 CIN: U45209TG2010PTC067999 with its registered office at 'Paigah House' 156-159 Sardar Patel Road Secunderabad TG 500003. The Principal Borrower was awarded work related to four-laning of a section of NH-12 in the State of Rajasthan. In pursuance of the said project, the Principal Borrower had availed financial aid from various lenders, viz. YES Bank Ltd., Indian Overseas Bank, Punjab National Bank, IIFCL vide Common Loan Agreement dated 05.01.2011 (ANNEXURE A/2).

3. The Claim:

The Company Petition is filed by the Financial Creditor alleging that the following amount is due and payable to the Petitioner/Financial Creditor:

Total Amount of Default : **Rs.1,04,44,78,073**/-

(Rupees one hundred four crore forty four lacs seventy eight thousand and seventy three only)

Plus interest thereon and other charges.

As on : 31^{st} January 2022

Date of default : **05.02.2020**

(the date on which Security Trustee issued Demand Certificate and the Corporate Debtor failed to repay).

4. The facts as narrated by the petitioner:

The principal borrower had approached Financial Creditor herein seeking sanction of credit facilities, to

pursue the project as stated above, in the form of Term Loan. The Financial Creditor herein had advised sanction of Term Loan of Rs. 1,75,76,00,000/-. The events unfolded thereafter are:

- O2.08.2010 Yes Bank has granted Long Term Loan Facility upto Rs.6587.6 million to GVK Deoli Kota Expressway Pvt Ltd to part-finance its National Highway project in Rajasthan vide Sanction Letter dated 02.08.2010 (ANNEXURE A/1).
- O5.01.2011 In furtherance of the said sanction, the principal borrower, the Consortium of Lenders and the Financial Creditor herein entered into Common Rupee Loan Agreement dated 05.01.2011 (ANNEXURE A/2).
- O5.01.2011 A Security Trustee was appointed vide Security
 Trustee Agreement dated 05.01.2011
 (ANNEXURE A/3) to act on behalf and under instructions of the Consortium Lenders including the Financial Creditor herein.
- 19.12.2011 Principal Borrower, Consortium Lenders and the Financial Creditor have executed necessary

loan documents, viz. Inter Creditor Agreement dated 19.12.2011, Lenders' Agreement dated 05.01.2011 and Share Pledge Agreement dated 01.10.2011. The Corporate Debtor has executed Sponsor Support Agreement dated 05.01.2011 (ANNEXURE A/4).

FIRST ENHANCEMENT OF CREDIT FACILITIES:

04.09.2014

Considering the request from the Principal Borrower for enhancement of the existing facilities to cover revised project cost, the Financial Creditor vide its Sanction Letter dated 04.09.2014 (ANNEXURE A/5) advised addendum to the existing facilities for an additional amount of Rs.40,61,00,000/-.

25.01.2015

In pursuance of the said addendum, the parties have executed necessary amendments to finance covenants, inter alia, Common Loan Agreement, Security Trustee Agreement. Besides, the Corporate Debtor has executed an unconditional and irrevocable Deed of Guarantee dated 24.01.2015 in favour of Security Trustee and the lenders to secure credit facilities sanctioned. Copy of First Amendment to Common Loan Agreement (Term Loan-II)

dated 24.01.2015 is at ANNEXURE A/6. Copy of First Amendment to Security Trustee Agreement (Term Loan-II) dated 24.01.2015 is at ANNEXURE A/7. Copy of Deed of Guarantee executed by the Corporate Debtor to Terma Loan-II is at ANNEXURE A/8.

SECOND ENHANCEMENT OF CREDIT FACILITIES:

29.12.2015

Considering the request from the Principal Borrower for further enhancement of credit facilities sanctioned in 2011 and 2015, the Financial Creditor vide its Sanction Letter dated 29.12.2015 (ANNEXURE A/9) had sanctioned an additional amount of Rs.80,18,00,000/-.

27.09.2016

In pursuance of the above Rupee Term Loan Agreement dated 27.09.2016, Share Pledge Agreement dated 27.09.2016 and Security Trustee Agreement dated 27.09.2016 were executed. Besides, the Corporate Debtor had executed Sponsor Support Agreement dated 27.09.2016; and unconditional and irrevocable Deed of Guarantee dated 27.09.2016 in favour of Security Trustee and lenders to secure the credit facilities. Copy of Rupee Loan

Agreement (Term Loan-III) dated 27.09.2016 is at ANNEXURE A/10. Copy of Security Trustee Agreement (Term Loan-III) dated 27.09.2016 is at ANNEXURE A/11. Copy of Sponsor Support Agreement (Term Loan-III) dated 27.09.2016 is at ANNEXURE A/12. Copy of Deed of Guarantee dated 27.09.2016 executed by the Corporate Debtor (Term Loan-III) is at ANNEXURE A/13.

ADJUSTMENT OF AMOUNT RECEIVED FROM NHAI.

The Financial Creditor has released loan amounts sanctioned from time to time in favour of principal borrower. However, NHAI has terminated the Concession Agreement dated 17.05.2010 (ANNEXURE-I of the respondent's Reply dated 07.04.2022) with the principal borrower in relation to the project and approved termination payments as under:

• Amount approved by NHAI Toward termination payments in favour of Consortium

Rupees in crores .. 497.67

Lenders.

- Amount released in favour of ... 249.77 Consortium lenders out of the above amount towards termination payment.
- Amount received by Financial Creditor .. 074.92 out of the said amount, which was adjusted to the loan account of the principal borrower.

RECALL NOTICE:

- O8.01.2020 Financial Creditor was constrained to issue Recall Notice dated 08.01.2020 (ANNEXURE A/14) for the facilities sanctioned to the principal borrower.
- O5.02.2020 Since the principal borrower failed to discharge its obligation, the Financial Creditor had instructed the Security Trustee to invoke Corporate Guarantee given by the Corporate Debtor. Accordingly the Security Trustee had invoked the Guarantee vide Demand Certificate dated 05.02.2020 (ANNEXURE A/15).
- 5. The petitioner submits that despite issuance of Demand Certificate dated 05.02.2020 the Corporate

Debtor has failed to repay the outstanding amount. As such Rs.1,04,44,78,073/- is due and recoverable from the effective Debtor with interest Corporate from 01.02.2022. Copy of CRILC Report of the principal borrower is at ANNEXURE A/16. Copy of Financial Statement of Accounts of the principal borrower is at ANNEXURE A/17. Copy of Independent Auditor's Report of the principal borrower dated 31.08.2021 is at Statement of Accounts of the ANNEXURE A/18. principal borrower as on 31.01.2022 is at ANNEXURE A/19.

6. <u>CAUSE OF ACTION:</u>

• Cause of action arose when the Corporate Debtor has executed an unconditional and irrevocable Deed of Guarantee dated 24.01.2015; and also executed

Sponsor Support Agreement dated 27.09.2016; and unconditional and irrevocable Deed of Guarantee dated 27.09.2016 in favour of Security Trustee and lenders.

- Cause of action further arose on 08.01.2020 when the Principal Borrower failed to discharge its obligation in terms of the Recall Notice dated 08.01.2020.
- Cause of action further arose on 05.02.2020 when the Security Trustee issued a Demand Certificate to the Corporate Debtor who failed to repay the outstanding dues.

Thus, cause of action is continuing and still subsisting in nature. Therefore, the instant petition is filed within three years from the date of cause of action.

The petitioner has relied on Clause 2.7 of the Deed of Guarantee dated 27.09.2016 (ANNEXURE A/13), which provides that:

"The Guarantor hereby agrees and undertakes that the issue of Demand Certificate by the Security Trustee (on behalf of the secured parties) to the Guarantor shall be conclusive evidence that the Guarantor's liability hereunder has accrued and that the extent of Guarantor's liability is the amount shown therein. Such Demand shall be made by delivery of Demand Certificate by the Security Trustee."

The petitioner submitted that despite the said undertaking in Clause 2.7 of the Deed of Guarantee (ANNEXURE A/13) and despite issuance of Demand Certificate dated 05.02.2020 (ANNEXURE A/15), the Corporate Debtor failed to repay the outstanding amount.

7. RESPONDENT/ CORPORATE DEBTOR HAS FILED REPLY DATED 07.04.2022. Gist of contentions are as under:

7.1 The respondent/ Corporate Debtor has narrated the following facts:

17.05.2010 NHAI has awarded the principal borrower the work of four-laning of the highway in question in Rajasthan on Build, Finance, Operate and Transfer basis vide Concessions Agreement dated 17.05.2010 (ANNEXURE-I of this Reply).

D5.01.2011 In pursuance of the above, the principal borrower had availed financial aid from various lenders, viz. YES Bank Ltd., Indian Overseas Bank, Punjab National Bank, IIFCL vide Common Loan Agreement dated 05.01.2011 (ANNEXURE A/2) and achieved financial closure.

O5.01.2011 Financial closure of the project had occurred on O5.01.2011 and the said date was declared by NHAI as 'Appointed date'.

03.07.2013 By 910th day from the appointed date, viz. on or before 03.07.2013, the concessionaire was required to complete the construction.

As per the terms of the Concession Agreement, NHAI was required to hand over 80% of the land, free of all encumbrances and grant Right of Way (RoW) to the concessionaire for execution of the project on or before the appointed date. However, only 42.12.% of the project site was made available to the concessionaire on the appointed date.

- 15.03.2012 After much delay, NHAI has handed over 80% of the project site to the concessionaire on 15.03.2012, viz. 435 days from the appointed date.
- 7.2 The Corporate Debtor submitted that the above circumstances led to additional time, cost overruns.

 Consequently, the borrower was required to avail

additional financial assistance. Claim Statement of the borrower/ concessionaire filed before the Hon'ble Arbitral Tribunal is at ANNEUXRE-II of this Reply (Volume-II).

7.3 LEGAL CONTENTIONS raised by the respondent/ Corporate Debtor:

Contention I (para 21 of the Counter)

Termination payment payable to the principal borrower is not finally ascertained.

(a) Essentially this is an allegation made by the Corporate Debtor against NHAI. The Corporate Debtor relies on Clause 37.3 of the Concession Agreement, which casts an obligation on NHAI to make a Termination Payment to the concessionaire. The Corporate Debtor submits that as per the agreement:

- in the event of termination on account of default of NHAI, then the concessionaire is entitled to Termination Payment to the debt due plus 150% of the adjusted equity.
- The debt due would be the principal amount of debt provided by the Senior Lenders, but excluding any part of the debt that became due two years prior to transfer date and the accrued interest, fees, charges payable on such debt.
- (b) The Corporate Debtor contends that the Concession Agreement specifically provides mechanism for covering dues payable to Senior Lenders in case of termination due to default of NHAI. However, NHAI has partly accepted the claim of the borrower in relation to Termination Payment and credited an amount of Rs. 249.77 crores to borrower's account. The remaining claim of Termination

Payment is currently pending adjudication before the Hon'ble Arbitral Tribunal.

(c) The Corporate Debtor further contends that concession agreement provides for payment of a sum equal to debt due by NHAI on account of Termination.

Liability of the Corporate Debtor would only arise once Termination Payment payable by NHAI is finally determined.

Contention II (para 24 of the Counter) **Restricted liability of the Corporate Debtor:**

The Corporate Debtor submitted that since inception of Concession Agreement and sanction of Rupee Term Loan-I, intention of parties was to avail Corporate Guarantee to cover any shortfall in amounts due and payable to the lenders. In support of the said contention

the respondent/ Corporate Debtor relied on the following documents:

- (i) Clause 4.2.16 of Common Loan Agreement dated 05.01.2011 (ANNEXURE A/2 of the Company Petition).
- (ii) Sponsor Support Agreement dated 05.01.2011 (Annexure A/4 of the CP).
- (iii) Clause 36(ix) of Sanction Letter for RTL-II dated 04.09.2014 read with terms of First Amendment to Common Loan Agreement dated 24.01.2015.
- (iv) Clause e.1 (viii) Rupee Terms Loan-III

 Agreement dated 27.09.2016 and Clause 3.2 of
 the Sponsor's Support Agreement dated
 27.09.2016.

Contention III (para 25-28 of the Counter)

Rupee Lenders have alternative remedy of drawing equities contributed by corporate debtor:

Common Loan Agreement dated 05.01.2011 provides that in the event of default, remedy available to lender as against sponsor is that Rupee Lenders have right to call on undrawn/ unsubscribed base equity as per Sponsors Agreement.

By virtue of the above agreements, the respondent submits that terms of Guarantee Agreement and Sponsor's Undertaking impose a liability on the Corporate Debtor only to cover the 'shortfall' in amounts due and payable to the lenders. Meaning of 'shortfall' can be derived from subclause (v) of Clause 4.2.16 of Common Loan Agreement, which reads as under:

Common Loan Agreement dated 05.01.2011: Article-4
Conditions precedent
Conditions precedent:

4.2.16 Sponsor Support:

- "The borrower shall have caused the sponsor to execute the Sponsor Support Agreement wherein the Sponsor undertakes (or, in the case of multiple sponsors, the sponsors jointly and severally undertake) to, inter alia, do the following in a form and manner satisfactory to the Rupee Lenders:
- (v) ensure that the Sponsor cover the shortfall in the repayment of Rupee Loans in the event of termination of the Concession Agreement during Construction Period for an event of default by the Concessionaire (as defined in the Concession Agreement) under the Concession Agreement."
- 7.4 The respondent/ Corporate Debtor alleges that the Financial Creditor seeks to initiate CIRP without Termination Payment being determined ultimately. Therefore, the Company Petition is premature and is not maintainable. Claims of concessionaire are a part of the arbitration ongoing proceedings the between concessionaire and NHAI. Action of the Financial Creditor is illegal and mala fide. Financial Creditor seeks to pressurize the Corporate Debtor to pay such illegal claim amounts in priority to other lenders of the concessionaire. The respondent submits that the said

arrangement of guarantee and the termination payment are parts of record of the Financial Creditor and the same cannot be denied for want of knowledge.

- 7.5 The respondent/ Corporate Debtor submits that it is a going concern. Grave injury will be caused to the Corporate Debtor if this Company Petition is admitted and the same would be in contravention of the rights of the Corporate Debtor since the Corporate Debtor is not liable to pay the entire debt amount.
- 8. The petitioner/ Financial Creditor has filed REJOINDER AFFIDAVIT dated 24.05.2022 submitting that:
- 8.1 In response to paras 1 to 15 of the Reply of the respondent/ Corporate Debtor the petitioner states that the respondent has executed irrevocable and unconditional guarantee undertaking to discharge repayment

obligations of the principal borrower. Hence it cannot evade liability on any pretext. The respondent is merely seeking sympathy of this Tribunal by narrating irrelevant and unnecessary facts.

In response to paras 16 to 19 of the Reply of the 8.2 respondent/ Corporate Debtor the petitioner vehemently resists the contention of the respondent that the liability of the Corporate Debtor does not arise unless the Termination Payment is determined fully. The petitioner further submits that in terms of various finance covenants enclosed to the Company Petition it is amply clear that liability of the respondent is independent of the principal borrower and that it is appropriate for the Financial Creditor to demand repayment of outstanding from the respondent without resorting to any security at all. Hence the Financial Creditor has all the rights to proceed against the respondent/ Corporate Debtor. The petitioner further contends that filing of claims and prosecution of arbitral proceedings by the principal borrower has no relevance to the liability of the Corporate Debtor.

8.3 In response to paras 20 to 29 of the Reply of the respondent/ Corporate Debtor the petitioner answers three contentions raised by the respondent as under:

Contention I as raised by the respondent (para 21 of the Counter)

Termination payment payable to the principal borrower is not finally ascertained.

In reply to the above contention the petitioner submits that the contents of the Concession Agreement have no relevance to the factual matrix of the instant Company Petition. Credit facilities sanctioned by the Financial Creditor are strictly in terms of the finance documents and the debt has become due and payable accordingly. It

is illogical to say liability of the Corporate Debtor would only arise upon determination of Termination Payment by NHAI. None of the finance documents has any provision to that effect. Liability of the principal borrower under the finance documents would arise when instalments or entire facility becomes due and payable. Entire facility became due and payable on occurrence of various events of defaults, inter alia, termination of project. The petitioner relied on the following clauses:

- 10.3.2 Enforcement of security.
- 10.3.6 Other rights

It is therefore, appropriate for the Financial Creditor and the Security Trustee to demand and recover the dues from the respondent.

Shortfall in repayment:

The respondent has admitted that it is liable to cover the shortfall repayment. The petitioner submits that the debtor has paid certain principal instalments. Compensation received from NHAI properly loan appropriated. However, shows accounts an outstanding amount of Rs.1,04,44,78,073/on 31.03.2022. As per finance covenants and in terms of dictionary, it is a shortfall. Hence the respondent/ Corporate Debtor has to make it good.

The petitioner submitted that liability of the Corporate Debtor is neither contingent upon any event nor pending arbitral proceedings. In support of the above the petitioner relies on Clauses 9.1 and 19.1(viii) of the Deed of Guarantee dated 27.09.2016 executed by the Corporate Debtor - Term Loan-III (Annexure A/13):

Clause 9 Principal Debtor:

"9.1 The obligations of the guarantor under this guarantee are independent of the obligations of the borrower. Notwithstanding anything contained in this guarantee or any other financing documents, the guarantor shall deemed (sic.) as the primary obligor and principal debtor to the secured parties and not merely as surety, and the guarantor hereby agrees and undertake, on a full indemnity basis, to indemnify the secured parties in relation to any amounts payable by the borrower under the Rupee Loan Agreement or under any of the other financing documents, for any reason whatsoever, irrespective of whether such reason or any other related fact or circumstance was known or ought to have been known to the secured parties or any of their officers, employees, agents or advisers."

Clause 19.1 (viii)

"Immunity: The guarantor has no immunity and the waiver of immunity by the guarantor herein is legal, valid, binding and enforceable and the guarantor is not entitled to claim for itself or any of its assets any right of immunity from suit, execution, attachment prior to judgment, attachment in aid of execution or any other legal process with respect to their obligations under the guarantee in any jurisdiction, including without limitation, the guarantor's country of incorporation."

Contention II as raised by the respondent (para 24 of the Counter)

Restricted liability of the Corporate Debtor:

In reply to the above contention the petitioner submits that it is false to say that the intent of the parties was to avail corporate guarantee only upon determination of Termination Payment by NHAI. The petitioner explains the terms of Term Loan Agreements as under:

- Termination of concession: event of default.
- Enforcement of security : consequence of an event of default.

Thus, intent of the parties is clear that once the project is terminated the security/ guarantee can be enforced.

the respondent on Clause 4.2.16 of the Common Loan Agreement dated 05.01.2011 as misplaced and misleading. The petitioner submits that out of overall money due and payable by the principal borrower and the respondent from time to time and after due adjustment of the amounts paid and compensation received, a shortfall of Rs.1,04,44,78,073/- is due and recoverable from the

Corporate Debtor as on 31.01.2022 from the Corporate Debtor.

Contention III as raised by the respondent in paras 25-28 of the Counter.

Rupee Lenders have alternative remedy of drawing equities contributed by corporate debtor:

In reply to the above contention the petitioner submits that the reference made by the respondent/ Corporate Debtor to the terms of Common Loan Agreement dated 05.01.2011 and Sponsors' Support Agreements dated 05.01.2011 & 27.09.2016 is misplaced. The petitioner submits that in the event of default one of the reliefs available to the lenders is right to call undrawn/ unsubscribed base equity. However, it is completely misleading to imply that such right to call is in derogation or otherwise in any limitation, to the right to enforce the guarantee. The respondent failed to show how presence

of one obligation has an effect of discharging it of other obligations. The petitioner reiterated that various obligations of the respondent/ Corporate Debtor as promoter, sponsor, guarantor, etc. are distinct and independent of each other.

As regards the contention of the respondent/ Corporate Debtor that the Company Petition is premature the petitioner submits that the claims of the Financial Creditor are separate and independent of the private claims of the concessionaire against NHAI. Said project documents and the loan documents constitute two separate and independent transactions involving separate set of rights and obligations. Further, enforcement of one set of rights under one agreement could not suspend enforcement of another set of rights originating from

entirely separate agreements unless a specific limitation is stipulated and consented by all the parties.

- 9. The respondent/ Corporate Debtor has filed ADDITIONAL REPLY dated 03.11.2022 submitting that:
- 9.1 The respondent states that this Additional Reply is necessitated in light of the judgment in Vidarbha Industries Power Ltd v. Axis Bank Ltd., (2022) 8 SCC 352, as upheld by Axis Bank Ltd. v. Vidarbha Industries Power Ltd., 2022 SCC OnLine SC 1339.
- 9.2 The respondent/ Corporate Debtor relied on Clause 2.15.2 (Mandatory pre-payment) of Common Rupee Term Loan Agreement dated 05.01.2011 and submitted that the said clause reveals that there was a clear understanding between the parties to the Agreement that

once mandatory prepayment amount as defined therein, which included termination payment from NHAI is received by the principal borrower, then Rupee Lenders including Financial Creditor shall made a demand to the principal borrower for the purpose of making mandatory prepayment to the Rupee Lenders and as such the occasion to demand any such money could arise only after receipt of Termination Payment and that event has not arisen yet. Thus, in any event it cannot be said there is any 'default'. Thus, the present petition deserves dismissal on that ground alone.

9.3 The respondent/ Corporate Debtor also questioned the unilateral appropriation of the said amounts without intimation to the principal borrower in violation of the obligations cast on Rupee Lenders under Rupee Loan Agreements and was in direct violation of

the rights available to the principal borrower and the Corporate Debtor / guarantor.

9.4 With regard to exercise of discretion in admitting the Company Petition under section 7 of the I&B Code, the multitude of factors as laid down by the Hon'ble Supreme Court in Vidarbha Industries Power Ltd v. Axis Bank Ltd., (2022) 8 SCC 352 are required to be taken into consideration, which are as under:

"79. As observed above, the financial strength and nature of business of Financial Creditors and Operational Creditors being different, as also the tenor and terms of agreements/contracts with financial creditors and operational creditors, the provisions in the IBC relating to commencement of CIRP at the behest of an Operational Creditor, whose dues are undisputed, are rigid and inflexible. If dues are admitted as against the Operational Creditor, the Corporate Debtor must pay the same. If it does not, CIRP must be commenced. In the case of a financial debt, there is a little more flexibility. The Adjudicating Authority (NCLT) has been conferred the discretion to admit the application of the Financial Creditor. If facts and circumstances so warrant, the Adjudicating Authority can keep the admission in abeyance or even reject the application. Of course, in case of rejection of an application, the Financial Creditor is not denuded of the right to apply afresh for initiation of CIRP, if its dues continue to remain unpaid.

Paras 80 to 85

- 86. Even though Section 7 (5)(a) of the IBC may confer discretionary power on the Adjudicating Authority, such discretionary power cannot be exercised arbitrarily or capriciously. If the facts and circumstances warrant exercise of discretion in a particular manner, discretion would have to be exercised in that manner.
- 87. Ordinarily, the Adjudicating Authority (NCLT) would have to exercise its discretion to admit an application under Section 7 of the IBC and initiate CIRP on satisfaction of the existence of a financial debt and default on the part of the Corporate Debtor in payment of the debt, unless there are good reasons not to admit the petition."
- 9.5 The respondent averred that certain dispute arose between NHAI and the principal borrower under the Concession Agreement. Principal borrower had invoked dispute resolution clause, viz. Clause 44 of the Concession Agreement. The issue is under consideration before an Arbitral Tribunal, known as, Deoli-Kota Arbitration. Before the Hon'ble Arbitral Tribunal claims enumerated in para 19 of this Additional Reply, numbered as claims 'A' to 'R', aggregating to Rs.6012.9

crores, are under consideration. The respondent/
Corporate Debtor voiced grievance that –

- Claims against the Principal .. Rs.6012.9 crores Borrower.
- Default as claimed by the FC .. Rs.1,04,44,78,073/-

Thus, the principal borrower has receivables and claims 57 time more than the alleged default.

AMENDED REPLY dated 14.08.2023 to the application filed by the applicant/ Financial Creditor under section 7 of the I&B Code, 2016. In response thereto the petitioner/ Financial Creditor has filed ADDITIONAL REJOINDER dated 05.01.2024. Gist of the contentions and counter contentions exchanged between the Financial Creditor and Corporate Debtor in these documents is as under:

• Para 3 of the Amended Reply:

The Company Petition suffers from serious infirmities and is not maintainable.

Response of the Financial Creditor in Addl Rejoinder:

There are no infirmities in the petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("I & B Code, 2016") and the petition is very well maintainable.

• Para 3A of the Amended Reply:

Liability of any guarantor is co-extensive with the borrower. There cannot by any liability on the guarantor till the liability of the borrower is established and the borrower has been held liable for sums.

Response of the Financial Creditor in Addl Rejoinder:

Liability of the Principal Borrower arose when the repayment instalments were defaulted. As the liability of

the guarantor is co-extensive with the principal borrower, the liability of the guarantor arose on the event of default in the instant matter. The petitioner relied on clause 14.1 (vi) of the Deed of guarantee dated 27.09.2016, which reads as follows:

"14. Liability not affected.

(vi) any dispute or disagreement whatsoever under the Rupee Loan Agreement between the Rupee Lenders and the Borrower and/or the Guarantor whether raised or pending before the court (s), tribunal(s) or arbitrator (s) and the Guarantor shall remain liable under these presents notwithstanding any orders passed therein; or"

Hence contention of the Corporate Debtor that there cannot be default is untenable.

• Para 3B. Paras 3(a) to 3(h) of the Amended Reply.

Claim of the Financial Creditor is in contravention with the RBI Circulars.

Response of the Financial Creditor in Addl Rejoinder:

Claim of the Financial Creditor is in contravention with RBI Circulars, in relation to the same. This Application under section 7 of I& B Code,2016 is filed for the debt of an amount of Rs. 1,04,44,78,073 as on 31.01.2022 and the date of default is 05.02.2020. Hence, the requirements of Section 7 are complied with inasmuch as there is existence of the debt and default. Therefore, the allegations of the Corporate Debtor that the claim of the Financial Creditor is in contravention of the RBI Circulars are of no relevance.

• Para 3C. Paras 3(h) to 3(n) of the Amended Reply.

Default of the Financial Creditor is barred by limitation.

Term Loan II Agreement and Term Loan III Agreement were dated 24.01.2015 and 27.09.2016 respectively. The Company Petition is filed in 2022. The Financial Creditor

cannot institute insolvency proceedings at a belated stage.

Default of the Financial Creditor is premature as time period for payment of alleged default has not expire.

Response of the Financial Creditor in Addl Rejoinder:

Contents are denied as false and misleading as this instant Application is not hit by Limitation. The respondent tries to protrude that Article 19 of Schedule to the Limitation Act,1963 applies in this case and the period of limitation to claim any sum lent has expired on 27.09.2019 at the latest. The petitioner submitted that Limitation Act,1963 is not applicable in the instant proceedings.

Even it is assumed that Article 113 of Schedule 1 of the Limitation Act,1963 applies, the period of limitation is three years from the period when the right to sue accrues. It is submitted that the Financial Creditor has recalled the credit facilities by issuance of a recall notice dated

08.01.2020 and the Corporate Guarantee was invoked by issuance of a Demand Certificate dated 05.02.2020. This Application has been filed on 24.02.2022 before this Hon'ble Tribunal.

The petitioner relied on Sabarmati Gas Limited Vs Shah Alloys Limited (2023) ibclaw.in 02 SC which is as follows:

"21. The decision in B.K. Educational Services Private Limited (supra) would thus reveal that Articles 137 and 5 of the Limitation Act, 1963 are applicable to applications filed under Sections 7 and 9 of IBC. It be so, the position is that the period of limitation is three years from the right to apply accrues but the delay is condonable on sufficient grounds. It is to be noted that the third column in Article 137 of the Limitation Act posits that time runs when the 'right to apply accrues'. In the decision in Babulal Vardharji Gurjar v. Veer Gurjar Aluminium Industries Private Limited and Anr. this Court considered the question as to when 'right to apply would accrue?' Paragraph 32 of the said decision, in so far as it is relevant for the purpose of this case reads thus:-

"32. When Section 238-A of the Code is read with the above noted consistent decisions of this Court in Innoventive Industries [Innoventive Industries Ltd. v. ICICI Bank, (2018) 1 SCC 407], B.K. Educational Services [B.K. Educational Services (P) Ltd. v. Paras Gupta & Associates, (2019) 11 SCC 633], Swiss Ribbons [Swiss Ribbons (P) Ltd. v. Union of India, 5 (2020) 15 SCC 1 (2019) 4 SCC 17], K. Sashidhar [K. Sashidhar v. Indian Overseas Bank, (2019) 12 SCC 150], Jignesh Shah [Jignesh Shah v. Union of India, (2019) 10 SCC

- 750], Vashdeo R. Bhojwani [Vashdeo R. Bhojwani v. Abhyudaya Coop. Bank Ltd., (2019) 9 SCC 158], Gaurav Hargovindbhai Dave [Gaurav Hargovindbhai Dave v. Asset Reconstruction Co (India) Ltd., (2019) 10 SCC 572] and Sagar Sharma [Sagar Sharma v. Phoenix ARC (P) Ltd., (2019) 10 SCC 353] respectively, the following basics undoubtedly come to the fore:
- (a) that the Code is a beneficial legislation intended to put the corporate debtor back on its feet and is not a mere money recovery legislation;
- (b) that CIRP is not intended to be adversarial to the corporate debtor but is aimed at protecting the interests of the corporate debtor;
- (c) that intention of the Code is not to give a new lease of life to debts which are time-barred;
- (d) that the period of limitation for an application seeking initiation of CIRP under Section 7 of the Code is governed by Article 137 of the Limitation Act and is, therefore, three years from the date when right to apply accrues;
- (e) that the trigger for initiation of CIRP by a financial creditor is default on the part of the corporate debtor, that is to say, that the right to apply under the Code accrues on the date when default occurs;
- (f) that default referred to in the Code is that of actual non-payment by the corporate debtor when a debt has become due and payable; and
- (g) that if default had occurred over three years prior to the date of filing of the application, the application would be time-barred save and except in those cases where, on facts, the delay in filing may be condoned; and

(h) an application under Section 7 of the Code is not for enforcement of mortgage liability and Article 62 of the Limitation Act does not apply to this application."

Further, the Clause 13.1 of the Deed of Guarantee dated 27.09.2016 states that the Guarantee is irrevocable and the obligations of the Guarantor arise on the demand or notice by the Security Trustee as provided in Clause 16 of the said Deed of Guarantee shall be sufficient notice to or demand on the Guarantor. The Security Trustee has issued a Demand Certificate on 05.02.2020 for outstanding dues, which suffices as a demand on the Guarantor which the Corporate Debtor has failed to discharge its obligations. Therefore, the instant petition is well within the period of limitation and the said contentions of the Respondent does not form any valid ground for rejection of the instant petition."

• Para 3D. (paras 3(o) to 3(p) of the Amended Reply.

Default of the Financial Creditor is premature as the time period for payment of default has not expired.

Response of the Financial Creditor in Addl Rejoinder:

Said contentions are denied as totally irrelevant, and illogical. It is humbly submitted that, as per clause 2.7 of the deed of guarantee, the issue of demand certificate by the security trustee on behalf of the secured parties to the Guarantor shall be conclusive evidence that the

Guarantor's liability has accrued. Even, clause 10.1.1 of Rupee Term Loan Agreement-I, II, and III clearly states that even if one repayment instalment is defaulted and has not been remedied within 7 days, it would be considered as an Event of Default. Said clause is reproduced below:

"10.1 EVENTS OF DEFAULT

Each of the following events and occurrence shall, after the expiry of the respective notice periods specified herein, constitute an Event of Default for the purposes of this Agreement.

10.1.1 Non-Payment

- (i) Non-Payment of Principal by Borrower
 The Borrower defaults in the payment, when due, to
 the Rupee Lenders of any Repayment Instalment and
 such default has not been remedied to the satisfaction
 of the Rupee Lenders within Seven (7) days of the date
 of occurrence.
- (ii) Non-Payment by Sponsor

 The Sponsor defaults in payments under the Sponsor

 Support Agreement and such default has not been
 remedied to the satisfaction of the Rupee Lenders
 within seven (7) days of the date of occurrence."

Further, Clause 2.2 of the deed of Guarantee dated 24.01.2015 and 27.09.2016 clearly states that all the amounts payable by the Borrower would become liable to be paid by the Guarantor in the event of default. Thus, the

Corporate Debtor being a Guarantor herein cannot allege that the default is premature.

• Para 3E. (Paras 3(r) to 3(w) of the Amended Reply.

Present application under section 7 is in violation of section 10A of the Code.

The respondent/ Corporate Debtor has relied on section 10A of the I&B Code, which reads that:

"10A. Suspension of Initiation of corporate insolvency resolution process.

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 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."

The respondent/ Corporate Debtor submits that the present Company Petition is in violation of the above section.

11. <u>Response of the Financial Creditor in Addl</u> <u>Rejoinder:</u>

Above provision provides that no Application shall ever be filed for initiation of the CIRP of any Corporate Debtor for any default arising on or after 25th March 2023 for a period of six months and the same was extended up to a period of one year. It is pertinent herein to take into consideration the explanation to the said Section 10A of the I&B Code, 2016 which further clarifies that the provision of the said section shall not apply to any default committed under the said Sections before 25th March 2020. In the instant case, the date of default is 25.02.2020

which is much prior to the date as notified by the Central Government. Therefore, the contention that the Instant Application is hit by the provisions of Section 10A of the Insolvency and Bankruptcy Code, 2016 is untenable.

- 12. The petitioner has filed Written Submissions dated 24.07.2023. The petitioner has also filed Written Submissions to the additional documents taken on record vide IA No.436 of 2024, dated 29.02.2024. Both the Written Submissions are reiteration of what has been submitted during oral arguments.
- 13. In the light of the contest aforementioned the only point that arises for consideration is:

Point:

• Whether financial debt of a sum exceeding Rs.one crore is due and payable by the respondent to the petitioner exists?

If so, whether the respondent committed default in payment of the same?

14. We have heard Mr. D.V. Seetaharam Murthy, learned Senior Counsel appearing with Mr. VVSN Raju and Mr. Srikant Rathi, learned advocates; and Ms. Siva Praneetha Sreeramula, learned advocate for the respondent.

Point:

 Whether financial debt of a sum exceeding Rs.one crore is due and payable by the respondent to the petitioner exists?
 If so, whether the respondent committed default in payment of the same?

The submissions

15. Mr. D.V. Seetaharam Murthy, learned Senior Counsel for the applicant/ financial creditor, would submit that, M/s. GVK Deoli Kota Expressway Private Limited, a wholly-owned subsidiary of the Corporate

Debtor (CD), approached the applicant/Financial Creditor herein, seeking sanction of credit facilities in the form of a Term Loan, and pursuant thereto the applicant/Financial Creditor considered the request favorably and advised sanction of Term Loan of INR 1,75,76,00,000/ - towards part financing of the four-laning of Deoli to Kota stretch on NH- 12 Project

Ld. Senior Counsel further contends that, in 16. furtherance of the sanction as above, the Principal Borrower, the Consortium Lenders, and the Financial Creditor herein, have entered into a 'Common Rupee Loan Agreement' dated 05.01.2011, along with 'Inter Creditor Agreement' dated 19.12.2011, **'Lenders** Agent Agreement' dated 05.01.2011, and 'Share Pledge Agreement' dated 01.10.2011. In addition, the Corporate Debtor also executed a 'Sponsors Support Agreement'

dated 05.01.2011. It is further submitted that a Security Trustee was also appointed vide 'Security Trustee Agreement' dated 05.01.2011, to act on behalf and under the instructions of the Consortium Lenders, including the Financial Creditor herein.

Ld. Senior Counsel also submits that, the 17. Principal Borrower approached again the applicant/financial creditor herein seeking enhancement of the existing facilities to cover the revised project cost, and pursuant thereto, vide its Sanction Letter dated 04.09.2014, additional amount of INR **40,61,00,000/-** has been advised. In this regard, necessary amendments to finance covenants, inter alia, the Common Loan Agreement and the Security Trustee Agreement were executed by the parties, and in addition, the Respondent/Corporate Debtor herein has also executed an unconditional and irrevocable deed of guarantee dated 24.01.2015, in favor of the Security Trustee and the Lenders securing the due repayment of the credit facilities sanctioned and availed by the principal borrower.

18. Ld. Senior Counsel, further submits that, the respondent/corporate debtor as per, the above Guarantee agreement dated 24.01.2015, undertook that-

"In the event of any default on the part of the Borrower in payment/repayment and in reimbursement of any of the Dues referred to above and in 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 Financing Documents with respect to the RTL-II Facility, the Guarantor shall, upon demand by the secured Parties, forthwith pay to the secured parties or such other person as the secured Parties may determine, without protest or demur, all the amounts payable by the Borrower to the secured parties in relation to the RTL-II facilities under or in terms of the Common Rupee Term Loan Agreement or such other financing Document,"

19. Ld. Senior Counsel submits that, upon due execution of the documents as mentioned above, the applicant/financial creditor herein released the loan amounts subject to terms of the sanction, from time to time, in favour of the Principal Borrower, the receipt of

which was duly acknowledged by the principal borrower.

20. Ld. Senior Counsel states that while things stood thus, the National Highway Authority of India ("the NHAI") terminated the 'Concession Agreement' with the Principal Borrower, and approved an amount of INR 497.67 Crores towards "termination payments" which an amount of INR 249.77 Crores was released in favour of the consortium lenders towards "termination" payment in relation to Rupee Term Loan - I. and said amount was distributed among the consortium members. Ld. Senior Counsel submits that the Applicant herein has received an amount of INR 74.92 Crores towards Rupee Term Loan - I, which was duly adjusted to the loan accounts of the Principal Borrower. However, the debt in relation to the Rupee Term Loan - II & Rupee Term Loan

- III is still remained due and payable and there has been a "default" in repayment of the same by the principal borrower.
- 21. Ld. Senior Counsel submits that, in view of the default the applicant/financial creditor issued a notice recalling the facilities, supra, sanctioned to the Principal Borrower, vide its 'recall' notice dated 08.01.2020 and also instructed the Security Trustee to invoke the Corporate Guarantee given by the Corporate Debtor herein. Pursuant thereto the Security Trustee invoked the Guarantee vide Demand Certificate dated 05.02.2020 and demanded the respondent/ guarantor to pay the amount within three days. However, the Corporate Debtor even though acknowledged the receipt of the same, has willfully, abstained from paying the amount. Hence, the instant application is filed claiming the outstanding amount of Rs. 1,04,44,78,073 (Rupees one hundred four crores forty-four lakh

seventy-eight thousand seventy-three) as on 31.01.2022 for initiation of corporate insolvency resolution process against the respondent/corporate debtor.

the 22. regards contention of the As respondent/corporate debtor that termination payment payable to the Principal Borrower is not finally ascertained and that the liability of the respondent/ corporate debtor is a "restricted liability" and that the applicant has the alternative remedy of drawing the equities contributed by the Corporate Debtor, as such the present application is not maintainable. Ld. Senior Counsel submits that, none of these grounds have any bearing or relevance to the instant proceedings. Ld. Senior submits liability Counsel that the of the Respondent/corporate debtor to pay the amount as

demanded vide notice dated 05.02.2020, remains notwithstanding the above grounds.

In support of this submission Ld. Senior Counsel 23. contends that the credit facilities sanctioned by the applicant/financial creditor are strictly in terms of the finance/loan documents and the records stated *supra*, as liability of the respondent/corporate debtor such the arise when the "instalments" or the "entire would amount" becomes due and payable by the borrower, is defaulted by the Principal Borrower, and not upon the determination of "Termination Payment" by the NHAI. Ld. Senior Counsel states that under the Rupee Loan-II and Rupee Loan-III, the quarterly installments became due and payable during the currency of the Term Loan Agreements. Further, the entire facility also became due and payable upon the occurrence of various events of defaults i.e., Termination of the project in terms of Term Loan Agreements and also further when the financial creditor has recalled the loan. The loan account of the principal barrower after giving effect to the payment of some installments by the Principal Borrower, besides, after the compensation received from NHAI is appropriated, shows outstanding amount of INR 1,04,44,78,073/ - as on 31.01.2022 which, in terms of both the 'covenants', is a shortfall/default, and hence the Respondent/guarantor is liable to make good the same.

24. Therefore, Ld. Senior Counsel contends the liability of the respondent/corporate debtor is not contingent upon any event, much less upon pending arbitral proceedings and the same is *unconditional*, *irrevocable*, *and notwithstanding that of the principal borrower*. Further, the arbitral proceedings are not relevant to this instant Company

Petition, and NHAI has already determined the compensation and paid to the Rupee loan Lenders and the same has been appropriated.

- 25. Ld. Senior Counsel submits that, the respondent having admitted the *debt and also its default* and is seeking to "evade" its liability on untenable and baseless grounds, as such the defence of the respondent is liable to be rejected.
- 26. Ld. Senior Counsel also placed reliance on the following rulings.
- i). Innoventive Industries Limited v. ICICI Bank and Anr. (2018) 1 SCC 407 wherein, Hon'ble Supreme Court, has held as follows:

[&]quot;28.The moment the Adjudicatory 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."

[&]quot;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."

ii). M. Suresh Kumar Reddy v. Canara Bank and Ors. 2023 SCC Online SC 608 wherein it was held as follows:

"Thus, once NCLT is satisfied that the default has occurred, there is hardly a discretion left with NCLT to refuse admission of the application under Section 7.

Default is defined under subsection 12 of Section 3 of the IB Code which reads thus:

- "3. Definitions: In this Code, unless the context otherwise requires,
- (12) "default" means nonpayment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not [paid] by the debtor or the corporate debtor, as the case may be;" Thus, even the nonpayment of a part of debt when it becomes due and payable will amount to default."
- 27. Ms.Siva Praneetha, Ld. Counsel for the respondent/corporate debtor, while refuting the submissions of the learned counsel for the applicant would contend that, neither the respondent/corporate debtor nor the Principal Borrower are liable to pay any alleged sums to the Applicant/financial creditor herein, for the simple reason that no amounts have become *due*

or payable nor has any default been committed by the respondent/corporate debtor or the Principal Borrower as "liability" to pay amounts, if any to the applicant/lender is on NHAI and not of the respondent/corporate debtor and the Principal Borrower.

- 28. Ld. Counsel further submits that, the liability of the principal borrower is also an issue in the arbitral proceedings and that the said arbitral proceedings have a direct bearing on the subject matter of the present petition.
- 29. Ld. Counsel while not disputing the due execution of the deeds of Guarantee dated 25.01.2015, by the respondent/ corporate debtor referred clause 2.2 of the said guarantee deed and contended that the guarantee can be invoked only in terms of the said

clause, which mandates "default" and since, no default has been committed by the Principal Borrower and also owing to the fact that the issue of Termination Payment is currently pending in Deoli Kota Arbitration the present petition is not maintainable.

- 30. Ld. Counsel also contends that as per Section 3(1)(a) and 3(2) of the Usurious Loans Act, 1918, the rate of interest cannot be unfair and usurious and contended that the alleged financial debt has been disproportionately inflated by levying exorbitant and contractually as well as legally violative rates. Interest or penal interest for any default incurred on account of COVID-19 is unfair and violative of the said Act.
- 31. Ld. Counsel further contends that vide notice dated 26.05.2022 while invoking Arbitration, the

Principal Borrower has denied its liability to pay the amounts due to the applicant/financial creditor and called upon the applicant/ financial creditor to resolve the issues with the Principal Borrower through Arbitration. So much so, according to the Ld. Counsel until resolution of the dispute by the Arbitral Tribunal, due and payable by the the 'debt' said to be respondent/corporate debtor to the applicant does not even arise, and even otherwise, assuming but not admitting that a default is made out the applicant/financial creditor, this Tribunal is required to exercise its 'discretion' in admission of the main Application under Section 7 of the Code, in light of the Hon'ble Supreme Court ruling in Vidarbha Industries Power Ltd. v. Axis Bank Ltd., (2022) 8 SCC 352.

"79. As observed above, the financial strength and nature of business of financial creditors and operational creditors being different, as also the tenor and terms of agreements/contracts with financial creditors and operational creditors, the provisions in the IBC relating to commencement of CIRP at the behest of an operational creditor, whose dues are undisputed, are rigid and inflexible. If dues are admitted as against the operational creditor, the corporate debtor must pay the same. If it does not, CIRP must be commenced. In the case of a financial debt, there is a little more flexibility. The adjudicating authority (NCLT) has been conferred the discretion to admit the application of the financial creditor. If facts and circumstances so warrant, the adjudicating authority can keep the admission in abeyance or even reject the application. Of course, in case of rejection of an application, the financial creditor is not denuded of the right to apply afresh for initiation of CIRP, if its dues continue to remain unpaid.

[...]

86. Even though Section 7(5)(a) IBC may confer discretionary power on the adjudicating authority, such discretionary power cannot be exercised arbitrarily or capriciously. If the facts and circumstances warrant exercise of discretion in a particular manner, discretion would have to be exercised in that manner.

87. Ordinarily, the adjudicating authority (NCLT) would have to exercise its discretion to admit an application under Section 7 IBC and initiate CIRP on satisfaction of the existence of a financial debt and default on the part of the corporate debtor in payment of the debt, unless there are good reasons not to admit the petition."

Thus, submitting Ld. Counsel prayed for dismissal of the Petition.

Our analysis & findings

Having heard the Ld. Senior Counsel, at the outset we wish to state that, it is trite law that, the guarantee becomes a 'debt' once the said guarantee is

invoked, wherein after the 'guarantor' becomes liable. In so far as the case on hand is concerned, the due *execution* of the deed of guarantee dated 24.01.2015 by the respondent/guarantor herein, in favor of the Security Trustee and the Lenders, which is *unconditional and irrevocable*, securing the due repayment of the credit facilities sanctioned in favor of the *principal borrower*, besides its *invocation* by the security trustee vide demand dated 05.02.2020, is not in dispute.

33. While it is the firm submission of the Ld. Senior Counsel for the applicant that, in view of breach of the terms as to repayment of the credit facilities *admittedly sanctioned* to and availed by the principal barrower, the applicant/financial creditor sent the 'notice of recall' of the said facilities vide its recall notice dated 08.01.2020 and as the terms of the said recall notice were not complied with by

the principal borrower, the applicant /financial creditor through the Security Trustee invoked the Corporate Guarantee given by the respondent/corporate guarantor herein, vide Demand Certificate dated 05.02.2020, however, as the respondent/corporate guarantor failed to honor the Demand Certificate dated 05.02.2020, the present application for initiation of corporate insolvency resolution against the respondent guarantor has been initiated, the Ld. Counsel for the respondent/guarantor would vehemently contend that, that the 'debt' that the principal borrower may have to pay to the applicant/creditor herein, will get crystallised only on passing of an Award by the Arbitral Tribunal which has already been constituted, as such there is neither any 'debt' which is 'due and payable' as on the date of invocation of the subject guarantee as

such the present petition is *per se*, not even maintainable.

34. Before we deal with the rival contentions, we wish to trace herein, the well settled legal position relating to the liability of the surety under a contract of guarantee. In terms of section 128 of the Indian contract Act, which is as below.

"128. Surety's liability.—

The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.

Illustration: A guarantees to B the payment of a bill of exchange by C, the acceptor. The bill is dishonoured by C. A is liable, not only for the amount of the bill, but also for any interest and charges which may have become due on it."

Hon'ble Supreme Court, in Bank of Bihar v. Damodar Prasad and Anr. – (1969) 1 SCR 620, held that;

[&]quot;3. The demand for payment of the liability of the principal debtor was the only condition for the enforcement of the bond. That condition was fulfilled. Neither the principal debtor nor the surety discharged the admitted liability of the principal debtor in spite of demands. Under Section 128 of the Indian Contract Act, save as provided in the contract, the liability of the surety is coextensive with that of the principal debtor. The surety became thus liable to

pay the entire amount. His liability was immediate. It was not deferred until the creditor exhausted his remedies against the principal debtor. 23 Company Appeal (AT) (Insolvency) Nos. 346 & 347 of 2018

- 4. Before payment the surety has no right to dictate terms to the creditor and ask him to pursue his remedies against the principal in the first instance. As Lord Eldon observed in Wright v. Simpson "But the surety is a guarantee; and it is his business to see whether the principal pays, and not that of the creditor". In the absence of some special equity the surety has no right to restrain an action against him by the creditor on the ground that the principal is solvent or that the creditor may have relief against the principal in some other proceedings.
- 5. Likewise where the creditor has obtained a decree against the surety and the principal, the surety has no right to restrain execution against him until the creditor has exhausted his remedies against the principal. In Lachhman Joharimal v. Bapu Khandu and Surety Tukaram Khandoji the Judge of the Court of Small Causes, Ahmednagar, solicited the opinion of the Bombay High Court on the subject of the liability of sureties. The creditors having obtained decrees in two suits in the Court of Small Causes against the principals and sureties presented applications for the 24 Company Appeal (AT) (Insolvency) Nos. 346 & 347 of 2018 imprisonment of the sureties before levying execution against the principals. The Judge stated that the practice of his court had been to restrain a judgment-creditor from recovering from a surety until he had exhausted his remedy against the principal but in his view the surety should be liable to imprisonment while the principal was at large. Couch, C.J., and Melvill, J. agreed with this opinion and observed-

"This court is of opinion that a creditor is not bound to exhaust his remedy against the principal debtor before suing the surety and that when a decree is obtained against a surety, it may be enforced in the same manner as a decree for any other debt." (Emphasis is ours)

Hon'ble Supreme Court in Kesoram Mills Case – [(1966)

59 ITR 767]', held that;

"Under the 'deed of guarantee' the liability of the company to pay debt arose when the borrower defaulted in making payments and the creditor sent a demand/notice invoking the guarantee" Thus, the demand for payment of the liability of the principal debtor is the only condition for the enforcement of the contract of guarantee. Having observed so, we usefully refer to clause 2.2 of the Corporate Guarantee dated 24.01.2015 which is reproduced below:

"2.2 In the event of any default on the part of the Borrower in payment/
repayment and in reimbursement of any of the Dues referred to 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
Financing Documents with respect to the RTL II Facility, the Guarantor
shall, upon demand by the Secured Parties, forthwith pay to the Secured
Parties or such other Person as the Secured Parties may determine,
without protest or demur:, all the amounts payable by the Borrower to the
Secured Parties in relation to the RTL II Facility under or in terms of the
Common Rupee Loan Agreement or such other Financing Documents
(hereinafter collectively referred to as the "Guarantee Obligations")'."

Thus, it is quite clear form the above *terms of the subject* guarantee deed also that, the Guarantor shall, upon demand by the secured parties, forthwith pay to the secured parties or such other person as the secured parties may determine, without protest or demur.

Admittedly, the applicant after having adjusted whatever part payments that were made by the principal barrower, besides, the 'termination compensation' received from NHAI, in respect of RTL-I, the demand issued got the respondent/guarantor through the security trustee demanding payment of the defaulted amount within three days and as the said demand was not honored by respondent/guarantor, initiated the the present proceedings.

Therefore, it is clear that, a surety's liability to pay the debt is not removed by reason of the creditor's omission to sure the principal debtor. The creditor is not bound to exhaust his remedy against the principal before suing the surety, and a suit may be maintained against the surely

though the principal has not been sued. In fact 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.

- 35. Having thus, traced the legal position on the liability of the surety, we now proceed to decide the 'stand' of the respondent/guarantor, that the subject debt is 'yet' to be 'quantified' as such *neither* any debt nor its *default* exists in law or fact.
- 36. In our considered view 'non-quantification' of a 'debt' does not mean its 'nonexistence' or it being 'contingent', as quantification of 'debt' is different from

a 'contingent' debt. The distinction between them is that, an 'existing' debt is one the payment whereof is 'deferred' and where both the 'debt and its payment' rest in the future, the same is contingent. In the former case there is a debt, in the latter case there is not.

37. Therefore, based on the legal position as crystallized in the rulings, supra, coupled with the *factual matrix* of this case, when the case on hand is 'tested' the only irresistible conclusion that we could arrive at is that, a *financial debt of a sum exceeding rupees one crore due* and payable by the respondent/guarantor to the applicant/financial creditor has come in 'existence', consequent upon the failure of the respondent to honor the validly issued 'demand'. We are also of the firm view that, the applicant/financial creditor is *not bound* to

exhaust its remedy against the principal debtor/borrower, before initiating the present action against the respondent/guarantor under section 7 of IB Code.

The point is answered accordingly.

- 38. Therefore, in the light of our findings on the Point above, we are fully satisfied that the applicant has established existence of 'financial debt' of a sum exceeding rupees one crore due and payable by the respondent to the petitioner herein, *besides* its default. We also found that the application is in order. Hence it is a fit case for admission of the present petition.
- 39. Hence, the Adjudicating Authority admits this Petition under Section 7 of Insolvency & Bankruptcy Code, 2016, declaring moratorium for the purposes referred to in Section 14 of the Code, with following directions:-

- (A) Corporate Debtor, GVK Transportation Private Limited is admitted in Corporate Insolvency Resolution Process under section 7 of the Insolvency & Bankruptcy Code, 2016,
- (B) The Bench hereby prohibits 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 any 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.

- (C) That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
- (D) 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.

- (E) That 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.
- (F) That order of **moratorium** shall have effect **from** the date of this order till completion of the Corporate Insolvency Resolution Process or until this Bench 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.
- (G) That public announcement of initiation of Corporate Insolvency Resolution Process shall be made immediately as prescribed under section 13 of Insolvency and Bankruptcy Code, 2016.

(H) That this Bench hereby appoints **Mr. Harish Kant Kaushik**, having registration no.IBBI/ IPA-001/ IP-P01469/ 2018-2019/ 12340, as Interim Resolution Professional, whose contact details as mentioned in the application are:

Address: Flat No.1904, Sapphire, Regency Towers, Kavesar, Ghodbundar Road, Thane (West), Maharashtra, PIN: 400615.

as Interim Resolution Professional to carry on functions as mentioned under the Insolvency & Bankruptcy Code.

(I) Proposed IRP has filed Form-2 dated 14.12.2021 at page 848 of the application. His Authorisation for Assignment (AFA) is valid upto 29.11.2024. This information is also available in IBBI Website. Thus, there is compliance of Regulation 7A of IBBI (Insolvency Professionals) Regulations, 2016, as amended. Therefore,

the proposed IRP is fit to be appointed as IRP since the relevant provision is complied with.

40. Registry of this Tribunal is directed to send a copy of this order to the Registrar of Companies, Hyderabad for making appropriate remarks against the Corporate Debtor on website of Ministry of Corporate Affairs as being under CIRP.

Accordingly, this Petition is admitted.

SD/-CHARAN SINGH MEMBER (TECHNICAL)

SD/DR.VENKATA RAMAKRISHNA BADARINATH NANDULA
MEMBER (JUDICIAL)

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IN THE NATIONAL COMPANY LAW TRIBUNAL HYDERABAD BENCH-I, HYDERABAD

I.A. No.651 of 2022

in

CP (IB) No.69/7/HDB/2022

In the matter of CIRP of

M/s GVK Transportation Pvt Ltd

In the between:

GVK Deoli Kota Expressway Private Limited

A company incorporated under The Companies Act, 2013 having Registered office at: 156-159, Paigah House Sardar Patel Road Secunderabad, Telangana – 500003.

.. Applicant Principal borrower Proposed respondent no.2

AND

J.C. Flowers Asset Reconstruction Pvt Ltd

Registered office at: CG House, 12th Floor Dr. Annie Besant Road, Worli Mumbai – 400 030.

> .. Respondent Financial Creditor

APPLICATION UNDER RULE 11 OF NCLT RULES, 2016 FOR IMPLEADMENT OF THE

APPLICANT AS A PARTY TO THE APPLICATION UNDER SECTION 7 OF THE I&B CODE, 2016.

Coram:

DR. VENKATA RAMAKRISHNA BADARINATH NANDULA Hon'ble Member (Judicial)

SHRI CHARAN SINGH Hon'ble Member (Technical)

Counsels present:

For Applicant : Ms. Praneetha, Advocate.

For respondent : Mr.D.V. Seetharam Murthy, Senior Counsel with

Shri VVSN Raju, Advocate with Mr. Srikanth Rathi, Advocate.

Date of Order: 6th August 2024

Per: Bench

ORDER

This application is filed by the applicant/ proposed respondent no.2 with the following prayer:

- "(a) allow this application by impleading the applicant as a party to CP (IB) No.69 / 2022 pending before this Tribunal."
- 2. The parties to the present IA:

The applicant:

M/s GVK Deoli Kota Expressway Private Limited/principal borrower is the wholly owned subsidiary of GVK Transportation Pvt Ltd/ Corporate Debtor. The Corporate Debtor / GVK Transportation Private Limited has executed two Deeds of Corporate Guarantee in relation to the credit facilities availed by said GVK Deoli Kota Expressway Private Limited.

The respondent:

By virtue of order passed in IA (IBC) No.376 of 2023 dated 28.02.2023 and order dated 08.12.2023 in IA (IBC) No.1425 of 2023, Yes Bank Limited got substituted with the respondent herein/ J.C. flowers Asset Reconstruction Pvt Limited.

3. FACTS:

3.1 The applicant has narrated facts exhaustively. However, this application is filed for a limited purpose of impleadment of the applicant as respondent no.2 in CP

- (IB) No.69/7/HDB/2022, only gist of facts is taken as under:
- 3.2 NHAI has awarded the principal borrower the work of four laning of the highway in question vide Concessions Agreement dated 17.05.2010. In pursuance thereof various agreements were entered into, such as:
 - (i) Clause 4.2.16 of Common Loan Agreement dated 05.01.2011 (ANNEXURE A/2 of the Company Petition).
 - (ii) Sponsor Support Agreement dated 05.01.2011 (Annexure A/4 of the Company Petition).
 - (iii) Clause 36(ix) of Sanction Letter for RTL-II dated 04.09.2014 read with terms of First Amendment to Common Loan Agreement dated 24.01.2015.

- (iv) Clause e.1 (viii) Rupee Terms Loan-III

 Agreement dated 27.09.2016 and Clause 3.2 of the

 Sponsor's Support Agreement dated 27.09.2016.
- 3.3 The parties approached the obligations under these agreements as inter-connected and as being incapable of being separated from each other. The intent of the parties was to bind the signatories of GVK Group as well as the lenders to various agreements signed between the parties as part of one transaction and under the Agreements.
- 3.4 The applicant was constrained to terminate Concession Agreement effective from 25.06.2019. The matter was referred to arbitration wherein the applicant has raised various claims before the Hon'ble Arbitral Tribunal.

- 4. The applicant has relied on the following clauses of the Concession Agreement:
 - Clause 37.3.2 of the Concession Agreement.

"Upon termination on account of an Authority Default, the Authority shall pay to the Concessionaire, by way of Termination Payment, an amount equal to:

- (a) Debt due; and
- (b) 150% of the adjusted equity."
- Clause 2.2 of the Corporate Guarantee dated 24.01.2015
- Clause 2.2 of the Corporate Guarantee dated 27.09.2016.

By virtue of the above clauses the applicant contends that since the issue of termination payment is sub-judice before Arbitral Tribunal, no debt can be said to be due and payable at present.

5. The applicant has delved deep on the issues:

- Force Majeure circumstances.
- RBI Circulars on the issue that an asset cannot be classified as NPA -- Annat Raj Ltd Vs. Yes Bank Ltd., 2020 SCC Online Del. 543.
- COVID-19 pandemic -- Cognisance for Extension of Limitation, Suo Motu Writ Petition (Civil) no.3 of 2020; Prakash Corporates v. Dee Vee Projects Ltd., 2022 SCC Online SC 180; Rural FairPrice Whole Wholesale Ltd & anr v. IDBI Trusteeship Services Ltd & others, 2020 SCC Online Bom Halliburton Offshore Services vs Vedanta 518: Ltd, 2020 SCC Online Del 2068; Mumbai Limited v. International Airport Airports Authority of India and Anr., 2020 SCC Online Del 2088; Hon'ble High court of Delhi judgment in MEP Infrastructure Developers Ltd. v. South

Delhi Municipal Corporation and Others, WP(C)

2241 of 2020 decided on 12.06.2020; Mumbai

International Airport Limited v. Airports

Authority of India and Anr., 2020 SCC Online Del

2088.

- Charging compound interest, interest on interest,
 penal interest -- Small Scale Industrial Manufactures
 Association (Regd.) v Union of India, (2021) 8 SCC
 511; Investment Trust of India Limited, Chennai v.
 P. Varahalamma, 2013 (6) ALT 212 (D.B.);
 - Geetu Lakpat v. Jaipal (2011) 181 DLT 4.
 - Bikram Chatterji & others v. Union of India, 2020 SCC Online SC 494.
- 6. On the basis of the above submissions the applicant has raised the following grounds:

- (A) The applicant requested Financial Creditor vide its letter dated 26.05.2022 to furnish correct amount due. However, it is not furnished.
- (B) No valid demand is raised by the Financial Creditor at the present stage and the application under sec.7 of IBC requires immediate intervention of the applicant.
- (C) If application u/s 7 of IBC is allowed, it would lead to premature adjudication of uncrystallized debt and would have unwanted adverse implications on the Corporate Debtor and the applicant.
- (D) In view of the above factual matrix and pending disputes between the applicant and the Financial Creditor, the applicant is necessary party to the application u/s 7 of IBC.

- Private Limited/ principal borrower herein has also filed an application u/s 8 of the Arbitration & Conciliation Act, 1996 before the Arbitral Tribunal, wherein notice dated 26.05.2022 has been issued by the applicant/ Principal Borrower. Copy of Statement of Claim filed before the Arbitral Tribunal is at Annexure-II (pages 1-192) of the Reply of the respondent.
- 7. The Financial Creditor has filed COUNTER dated 12.09.2022 offering para-wise comments to the Interlocutory Application as under:

In reply to paras 1 & 2: Contents are denied including the claim that the dispute is referred to Arbitration. It is submitted that the applicant is not a necessary party to the application; liability of the borrower and guarantor are

distinct and independent of each other. Hence the applicant has no locus standi.

In reply to paras 7 to 11: Contents are denied. It is not correct to say that intent of the parties was to refer each and every dispute to arbitration. Besides, Deoli Kota Arbitration has no relevant to the present proceedings. There is no dispute as to existence of debt and default.

In reply to para 12 to 16 (**premature demand in light of pending issue of Termination Payment**): Concession Agreement between the applicant and NHAI has no relevance to the present proceedings. Deed of Guarantee is a separate and distinct contract between the respondent and the Corporate Debtor. The Arbitral Tribunal proceeding has no relation with determination of debt.

The respondent submitted that the applicant has to establish as to why it should be allowed to intervene in the application u/s 7 of IBC. The applicant's plea that the demand is premature or that it is prosecuting arbitration has no merit.

In reply to paras 12 to 16 and 17 to 22 (Time for payment of debt stands extended in light of Majeure Circumstances): Contents are denied. The claim of the applicant that the time line to pay debt has not expired yet is incorrect. Borrower has to pay in terms of repayment schedule. Time is not extendable on any contingency. Provisions of Concession Agreement have no relevance to insolvency proceedings against guarantor.

In reply to paras 23 to 32: It is denied that notification of COVID-19 as force majeure has no bearing on finance covenants executed between the parties.

In reply to paras 33 to 43: Contents are denied as irrational, imprudent and devoid of merit. RBI has introduced measures such as imposing moratorium, etc. So also SEBI. However, it does not apply to applicant.

8. The respondent states and submits that in application under sec.7 of IBC, no one can claim right to hearing except the Corporate Debtor as held by Hon'ble NCLAT, New Delhi in order dated 14.01.2019 in DEB Kumar Majmudar & others v. State Bank of India, CA (AT) (Insolvency) No.44 of 2019, wherein it was held:

"We agree with the observations made by the Adjudicating Authority at the stage of application filed under Section 7 that no person has right to claim for hearing except the 'Corporate Debtor'. No other 'Financial Creditor' or 'Operational Creditor' or any other creditor is required to be heard except the 'Financial

Creditor' who has filed an application under Section 9 of the I&B Code. The Adjudicating Authority is required to notice whether there is a 'debt' and 'default' committed by the 'corporate debtor' if the application under Section 7 is filed."

A similar view is taken by the Hon'ble NCLAT, New Delhi in Axis Bank Ltd v. Lotus Three Developments Ltd & others, CA (AT) (Insolvency) No.246 of 2018.

- 9. The applicant has filed REJOINDER dated 10.10.2022 submitting that:
- 9.1 Arbitral proceedings pending between the parties is material and relevant for proper adjudication of the Company Petition u/s 7 of the IBC.
- 9.2 Impleadment of the applicant is necessary to determine whether any 'financial debt' exists an there is 'default' which are necessary ingredients u/s 7 of IBC.

 The Financial Creditor relied on –

 Pioneer Urban Land & Infrastructure Ltd v. Union of India, 2019 SCC Online SC 1005, wherein it was held:

"The definition of "financial debt" in Section 5(8) then goes on to state that a "debt" must be "disbursed" against the consideration for time value of money. "Disbursement" is defined in Black's Law Dictionary (10th ed.) to mean:

"The act of paying out money, commonly from a fund or in settlement of a debt or account payable. The money so paid; an amount of money given for a particular purpose."

• Swiss Ribbons P Ltd & another v. Union of India & others, (2019) 4 SCC 17, wherein it was held:

"In this context, it is important to differentiate between —claim, —debt and —default. Each of these terms is separately defined as follows:

3. Definitions.—In this Code, unless the context otherwise requires,—

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;

—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 paid by the debtor or the corporate debtor, as the case may be;"

9.3 The Financial Creditor has relied on several other decisions which were relied on in the main Company

Petition and IAs connected thereto. The same have been considered.

10. The Financial Creditor has submitted para-wise response to the Counter filed by Financial Creditor as under:

As regards the contention of the Financial Creditor made in paras 2-3 that the applicant herein has no locus standi, the applicant refutes such contention.

In response to paras 5 and 6 of the Counter the applicant has denied the same and submitted that 'financing documents' is defined in Schedule VII of the Common Rupee Loan Agreement dated 05.01.2011. It covers and includes all agreement executed between GVK group and lenders. Hence it is evident that the parties intended that the agreements between the parties are part of one

common transaction and that other commercial terms like 'force majeure' and 'arbitration clause' etc were also incorporated into each agreement and the intent was clear under the agreements, viz. intent to arbitrate for any disputes under the agreements and/ or transaction and therefore, the arbitral proceedings which are currently pending do have a connection and a nexus to the present issue at hand and are relevant to determine whether in any event CIRP proceedings can / or should be initiated against R/2, viz. GVK Transportation Pvt Ltd.

11. The applicant further submitted that the parties also approached obligations under these agreements as being inter-connected and as being incapable of being separated from each other. In this respect, sanction letter dated 02.08.2010 specifically states that the same is an integral part of the Loan Agreement entered into by GVK Group

and the lenders. Again guarantees deeds dated 24.01.2015 and 27.09.2016 were executed to secure transaction between GVK group and the lenders. This clearly indicates that the intent of parties was that all agreements formed part of one single transaction between GVK group and lenders. Thus, the intent of the parties was to clearly bind the signatories of GVK group as well as the lenders to various agreements signed between the parties as part of one transaction and under the agreements that also refer to the umbrella agreements and transaction. Henc the applicant has locus stand to prefer the present application. Financial Creditor has filed WRITTEN 12. The SUBMISSIONS dated 24.07.2023, wherein it reiterated what has been submitted during the course of oral

arguments.

13. In light of the contest as above, the point that emerges for our consideration is:

POINT:

Whether the principal barrower is a *necessary and proper party* for the just and complete adjudication of an application filed under section 7 of the I&B Code, 2016 by the creditor against the guarantor?

14. We have heard Ms. Praneetha, learned advocate for the applicant; and Mr.D.V. Seetharam Murthy, Senior Counsel appearing with Mr. VVSN Raju and Mr.Srikanth Rathi, learned advocates for the respondent.

POINT:

Whether the principal barrower is a *necessary and proper* party for the just and complete adjudication of an application filed under section 7 of the I&B Code, 2016 by the creditor against the guarantor?

The applicant herein, who is admittedly the principal borrower of the credit facilities extended by the assignor of the respondent herein, *namely*, Yes Bank Limited,

which debt along with underlying securities had been assigned by the said native lender in favour of the respondent herein, filed his application praying to implead it as *second respondent* in the above company petition, contending, inter alia, that, on the premise that the applicant herein had committed default in repayment of credit facilities extended to it by the lenders, the due payment of which is guaranteed by GVK Transportation Pvt Ltd., by executing a corporate guarantee in favour of the respondent/lenders (not made a party to this IA), the respondent/creditor has filed the above CP (IB) No.69/7/ HDB/2022 under section 7 of the I&B Code 2016, against the corporate guarantor alone, viz. GVK Transportation Pvt Ltd, for initiation of corporate insolvency resolution process against the said guarantor and the same is pending.

- The factual matrix, relevant and necessary for the due consideration of this application is, that for the amounts borrowed by the applicant herein, from YES Bank Limited, which in turn has assigned the said debt in favor of the respondent herein, one M/s. GVK Transportation Limited, offered two deeds of corporate guarantees dated 24.01.2015 & 27.09.2016. Attributing 'default' in repayment of the said 'debt' by the applicant/principal borrower, the respondent has invoked the corporate guarantee by serving the demand' notice on the guarantor, and thereafter filed the above CP (IB) No.69/7/ HDB/2022 under section 7 of the I & B Code, 2016 against the corporate guarantor.
- 16. According to the applicant, National Highway Authority of India (NHAI) has awarded the applicant/principal borrower the work of four-laning of the highway

vide Concession Agreement dated 17.05.2010, and pursuant thereof, various agreements were entered into, such as:

- (i) Clause 4.2.16 of Common Loan Agreement dated 05.01.2011 (ANNEXURE A/2 of the Company Petition).
- (ii) Sponsor Support Agreement dated 05.01.2011 (Annexure A/4 of the Company Petition).
- (iii) Clause 36 (ix) of Sanction Letter for RTL-II dated 04.09.2014 read with terms of First Amendment to Common Loan Agreement dated 24.01.2015.
- (iv) Clause e.1 (viii) Rupee Terms Loan-III Agreement dated 27.09.2016 and Clause 3.2 of the Sponsor's Support Agreement dated 27.09.2016.
- 17. Learned counsel for the applicant further states that the parties' approach to the obligations under these agreements are *inter-connected* and incapable of being separated from each other. The applicant contends that the intent of the parties was to bind the signatories of GVK Group as well as the lenders to various agreements signed between the parties as part of one transaction and under the Agreements.

Learned counsel for the applicant further submits that the Concession Agreement dated 17.05.201 has been wrongfully terminated by NHAI and the "termination payment" payable is *sub judice*, before the Arbitral Tribunal. Therefore, according to the applicant, pending adjudication and passing pf an Award by the Arbitral Tribunal, no 'debt' much less a 'financial debt' of any sum 'due and payable' by the applicant to the respondent/creditor has come into existence, as such the very application against the corporate guarantor is not maintainable.

18. Nextly, learned counsel for the applicant contended that, despite request made by the applicant to the financial creditor vide letter dated 26.05.2022 to furnish the correct amount due, the same was not furnished. According to the learned counsel no valid demand was raised by the

financial creditor and the present application requires immediate intervention by the applicant and if the present application which is under section 7 of the IBC is allowed, it would lead to premature adjudication of uncrystallized debt and would have adverse implication on the corporate debtor and the applicant.

- 19. Learned counsel submits that the applicant/respondent also filed an application under section 8 of the Arbitration & Conciliation Act, 1996 before the Arbitral Tribunal and notice has also been issued by the Arbitral Tribunal to the principal borrower. Therefore, according to the applicant, for the aforesaid reasons, the applicant is a necessary party to the application.
- 20. Learned Senior Counsel for the respondent/ financial creditor while denying the contentions including the submission that the dispute has been referred to

arbitration, contends that the applicant herein is neither a necessary nor a proper party to the present proceedings, as such the application is liable to be dismissed. The learned Senior Counsel further submits that it was never the intention of the parties that for each and every dispute between them they would approach the Arbitral Tribunal, viz. Deoli-Kota Arbitration. According to the learned counsel Deoli-Kota Arbitration has no relevance to the According to learned Senior present proceedings. Counsel there is no dispute as to existence of "debt" and its "default" insofar as the respondent/ corporate debtor, namely, GVK Transportation Pvt Ltd is concerned. Learned Senior Counsel submits that the Concession Agreement, which is admittedly entered into between the applicant and NHAI has no relevance to the present proceeding, as the present proceeding is for the

enforcement of the corporate guarantee, admittedly executed by the corporate guarantor.

21. Having heard the learned counsels, at the outset it is to be stated that it is settled law that creditor has right to proceed against guarantor independently, without first initiating action against the principal borrower in terms of section 128 of the Indian contract Act, which is as below.

"The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract".

Illustration. A guarantees to B the payment of a bill of exchange by C, the acceptor. The bill is dishonoured by C. A is liable, not only for the amount of the bill, but also for any interest and charges which may have become due on it.

Hon'ble Supreme Court, in Bank of Bihar v. Damodar Prasad and Anr. – (1969) 1 SCR 620, held that;

[&]quot;3. The demand for payment of the liability of the principal debtor was the only condition for the enforcement of the bond. That condition was fulfilled. Neither the principal debtor nor the surety discharged the admitted liability of the principal debtor in spite of demands. Under Section 128 of the Indian Contract Act, save as provided in the contract, the liability of the surety is coextensive with that of the principal debtor. The surety became thus liable to pay the entire amount. His liability was immediate. It was not deferred until the creditor exhausted his remedies against the principal debtor. 23 Company Appeal (AT) (Insolvency) Nos. 346 & 347 of 2018

- 4. Before payment the surety has no right to dictate terms to the creditor and ask him to pursue his remedies against the principal in the first instance. As Lord Eldon observed in Wright v. Simpson "But the surety is a guarantee; and it is his business to see whether the principal pays, and not that of the creditor". In the absence of some special equity the surety has no right to restrain an action against him by the creditor on the ground that the principal is solvent or that the creditor may have relief against the principal in some other proceedings.
- 5. Likewise where the creditor has obtained a decree against the surety and the principal, the surety has no right to restrain execution against him until the creditor has exhausted his remedies against the principal. In Lachhman Joharimal v. Bapu Khandu and Surety Tukaram Khandoji the Judge of the Court of Small Causes, Ahmednagar, solicited the opinion of the Bombay High Court on the subject of the liability of sureties. The creditors having obtained decrees in two suits in the Court of Small Causes against the principals and sureties presented applications for the 24 Company Appeal (AT) (Insolvency) Nos. 346 & 347 of 2018 imprisonment of the sureties before levying execution against the principals. The Judge stated that the practice of his court had been to restrain a judgment-creditor from recovering from a surety until he had exhausted his remedy against the principal but in his view the surety should be liable to imprisonment while the principal was at large. Couch, C.J., and Melvill, J. agreed with this opinion and observed-

"This court is of opinion that a creditor is not bound to exhaust his remedy against the principal debtor before suing the surety and that when a decree is obtained against a surety, it may be enforced in the same manner as a decree for any other debt." (Emphasis is ours)

Hon'ble Supreme Court in Kesoram Mills Case – [(1966) 59 ITR 767]', held that;

"Under the 'deed of guarantee' the liability of the company to pay debt arose when the borrower defaulted in making payments and the creditor sent a demand/notice invoking the guarantee"

22. Thus, is clear as crystal that the demand for payment of the liability of the principal debtor is the only condition for the enforcement of the contract of guarantee.

Having observed so, we usefully refer to clause 2.2 of the Corporate Guarantee dated 24.01.2015 which is reproduced below:

"2.2 In the event of any default on the part of the Borrower in payment/ repayment and in reimbursement of any of the Dues referred to 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 Financing Documents with respect to the RTL II Facility, the Guarantor shall, upon demand by the Secured Parties, forthwith pay to the Secured Parties or such other Person as the Secured Parties may determine, without protest or demur:, all the amounts payable by the Borrower to the Secured Parties in relation to the RTL II Facility under or in terms of the Common Rupee Loan Agreement or such other Financing Documents (hereinafter collectively referred to as the "Guarantee Obligations')'."

Thus, it is quite clear form the above terms of the subject guarantee deed also that, the Guarantor shall, upon demand by the secured parties, forthwith pay to the secured parties or such other person as the secured parties may determine, without protest or demur.

- 23. Admittedly, the respondent herein, after having adjusted whatever part payments that were made by the applicant/ principal barrower, besides, the 'termination compensation' received from NHAI, in respect of RTL-I, got the demand issued to the guarantor through the security trustee demanding payment of the defaulted amount within three days and as the said demand was not honored by the guarantor, initiated the present proceedings.
- 24. Having thus, traced the legal position on the liability of the surety, we now proceed to decide the 'stand' of the applicant that the subject debt is 'yet' to be 'quantified' as such *neither* any debt nor its *default* exists in law or fact, as such the applicant should be heard.
- 25. In our considered view even assuming that the subject debt is yet to be quantified, mere 'non-

quantification' of a 'debt' does not mean its 'nonexistence' or it being 'contingent', as quantification of 'debt' is different from a 'contingent' debt. The distinction between them is that, an 'existing' debt is one the payment whereof is 'deferred' and where both the 'debt and its payment' rest in the future, the same is contingent. In the former case there is a debt, in the latter case there is not.

26. It is trite aw that, a 'necessary party' is one whose presence is indispensable or against whom relief is sought and without whom no effective order can be passed, and a 'proper party' being one whose presence is necessary for complete and final decision on question involved in proceedings. Therefore, having tested the present application on the touchstone of above well accepted legal principle, coupled with the *factual matrix* of this case, we

have no hesitation to say that, the presence or the absence of the applicant/ borrower in an application filed for enforcement of the guarantee admittedly executed and duly invoked, is neither necessary nor proper. The present application therefore is devoid of any merit or substance besides frivolous. Hence the same is liable to be dismissed with costs. Accordingly, the same is dismissed with costs of Rs.25,000/- (Rupees twenty-five thousand only) payable by the applicant to the Prime Minister's Relief fund within seven days from today. The applicant shall file compliance.

27. Accordingly, I.A. No.651 of 2022 in CP (IB) No.69/7/HDB/2022 is dismissed, with costs.

SD/CHARAN SINGH
MEMBER (TECHNICAL)

SD/DR.VENKATA RAMAKRISHNA BADARINATH NANDULA
MEMBER (JUDICIAL)

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