Doha Bank Q.P.S.C vs Anish Nanavaty on 9 September, 2022

National Company Law Appellate Tribunal,
Principal Bench, New Delhi
Company Appeal (AT) (Ins)No. 414 of 2021

IN THE MATTER OF:

1. Doha Bank Q.P.S.C
Branch address at Sakhar Bhavan,
Ground Floor, Plot No. 230
Block No. III, Backay Reclamation,
Nariman Point, Mumbai 400021 ...Appellant No. 1
2. VTB Capital PLC
14, Cornhill, London EC3V 3ND
United Kingdom ....Appellant No.2
3. Industrial and Commercial Bank of China
801,8th Floor, A Wing,
One BKC, C-66
G Block Bandra Kurla Complex
Bandra Mumbai - 400051 ...Appellant No. 3
4. Emirates NBD Bank PJSC
1st Floor, 5 North Avenue
Maker Maxity, Bandra kurla Complex
Bandra (E), Mumbai 400051 ...Appellant No. 4

Versus

1. Anish Nanavaty
Resolution Professional of Corporate Debtor
Deloitte Touche Tohmatsu
India LLP, Indiabulls Finance Centre,
Tower 3, 27th Floor, Senapati Bapat Marg,
Elphinstone Road (West), Mumbai - 400013 ...Respondent No. 1
2. Assets Care & Reconstruction
Enterprise Limited
(acting in its capacity as Trustee of ACRE-41-
TRUST)
Having address at
2nd Floor, Mohan Dev Building,
13, Tolstoy Marg,
New Delhi - 110001 ...Respondent No. 2
3. Shubh Holdings Pte. Ltd. ....Respondent No.3

Having its registered address at
6 Battery Road, #21-01,
Singapore-049909
4. China Development Bank

A company organized and existing,
Under the laws of the
People's Republic of China,
Having its Principal place of business and
registered offices located at
18 Fuzingmennet Street,
Beijing 00031 ...Respondent No.4

5. Export Import Bank of China
A Company organized and existing
Under the laws of the
People's Republic of China,
Having its Principal place of business and
registered office located at 30 Fuzingmennei
Street, Xicheng District
Beijing 100140 ...Respondent No.5

Present:

For Appellants: Mr. Arun Kathpalia, Sr. Advocate with Mr. ShubhabrataChakraborti, Ms. Sharmistha Ghosh and Mr. Jinal Shah, Advocates.

For Respondents: Mr. Gaurav Joshi, Sr. Advocate with Mr. Rishabh Jaisani, Ms. Mohana Nijhawan, Ms. Sumidha Mathur, Mr. Mohana Nijhawah and Mr. Kriti Kalyani, Advocates for R-1.
Mr. Amit Sibal, Sr. Advocate with Mr. Saksham Dhingra and Mr. Kaustabh Prakash, Advocates for R-2.
Ms. SaloniThakker, Mr. Nilang Desai, Advocates for R-3.
Ms. NafisaKandeparket and Mr. AyushChadda, Advocates for R-2 & 3.
Mr. Pradeep Sancheti, Sr. Advocate for R-4.
Mr. Siddharth Ranade, Ms. Nishi Bhankharia, Mr. Kaazvin Kapadia and Ms. Saloni Gupta, Advocates for R- 4 & 5.
Mr. Ramji Srinivasan, Sr. Advocate with Ms. Rajshree Chaudhary and Mr. Jash Shah, Advocates for Intervenor for SBI.

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JUDGMENT

Dr. Ashok Kumar Mishra, Technical Member The present Appeal has been filed under Section 61 of the IBC, 2016 against the order dated 02.03.2021 passed by Adjudicating Authority (National Company Law Tribunal, Mumbai Bench, Court No. I) in M.A. No. 3055 of 2019 in CP (IB) No. 1385/(MB)/2017.

2. The Appellant No. 1/Doha Bank who claims to be the direct lender and a secured Financial Creditor of Reliance Infratel Ltd.(Corporate Debtor) is aggrieved with the order passed by the Adjudicating Authority holding the decision of the Resolution Professional of classifying the indirect lenders as the Financial Creditor of the Corporate Debtor as correct. Here, the Corporate Debtor is Reliance Infratel Ltd.

3. The Appellant has sought following Reliefs:

> To allow the present Appeal and set aside the Impugned Order dated 2nd March, 2021 passed by the Ld. Adjudicating Authority, Mumbai Bench, in I.A. No. 3055/MB/2019 in C.P. (IB) No. 1385/(MB)/2017, whereby the Ld. Adjudicating Authority dismissed all the prayers in the I.A. No. 3055/MB/2019, filed by the Appellant No.1 herein etc.

4. The facts of the case as revealed from pleadings of Appellants including submissions made by the Ld. Sr. Counsel for the Appellant are as follows:

> (a) It is the case of the Appellant that they have extended to the Corporate Debtor a foreign currency loan of US $ 250,000,000 pursuant to loan Company Appeal (AT) (Ins) No. 414 of 2021 agreement dated 19.03.2010, amended on 05.09.2016 and further amended on 04.12.2016. The outstanding amount as per Appeal Paper Book page -6, para 7 owed by the Corporate Debtor to the Appellants amounts to US $ 199,000,000 alongwith applicable interest. The amounts are due for long.
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> (b) The Corporate Debtor (CD) has gone under CIRP based on Company Petition bearing no. 1385 of 2017 filed under Section 9 of the Code. The Company has gone into CIRP vide an order of the Adjudicating Authority dated 15.05.2018 and IRP was appointed vide order dated 18.05.2018 by the Adjudicating Authority. Mr. Manish Dhirajlal Kaneria was appointed as IRP.
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> (c) The IRP made a public announcement on 07.05.2019 inviting claims from the Creditors of the Corporate Debtor and the Appellants submitted their claims alongwith the proof of claim.
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> (d) Thereafter, on 21.06.2019, Mr. Anish Nanavaty/Respondent No.1 was appointed as the Resolution Professional of the Corporate Debtor.
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> (e) The Appellant observed in the email dated 31.07.2019, circulating the agenda notes to the third meeting of the CoC of the Corporate Debtor that the revised list of financial creditors of the Corporate Debtor contains the names of Indirect Lenders who are the Creditors of Rcom and RTL. But in that email no basis for admitting the Indirect lenders as financial creditor was available so the Respondent no. 1 was asked to clarify this issue for explaining the basis for admitting the Indirect lenders as financial creditors of the corporate debtor.

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(f) What the RP is stated in the third meeting of the CoC in short that they are reviewing multiple documents including deed of hypothecation and other undertakings. Although there was no deed of guarantee but there is a deed of warranty for hypothecation etc.

(g) It was stated by the Ld. Sr. Counsel of the Appellant that the Respondent Nos. 2 to 5 are not the lenders of the Corporate Debtor nor has the Corporate Debtor extended any Corporate Guarantee in favour of Respondents; only 'Deed of Hypothecation' is there and considering the Respondents based on 'Deed of Hypothecation' (DOH) as Financial Creditor is a kind of ignorance of Section 5(8) of the Code.

(h) Thereafter, the Appellants challenged the same before the Adjudicating Authority and the Adjudicating Authority has not passed a reasoned order nor it is a speaking order.

(i) It was also stated by the Ld. Sr. Counsel of the Appellant that DOH records that it is the borrower and not the CD who shall repay the facilities availed by it as stipulated in the facility documents.

(j) Corporate Debtor has not agreed that it shall repay/discharge the liability of other borrowers upon their default and hence the question of construing the same as 'Contract of Guarantee' is untenable. DOH creates only Security Interest to the extent of hypothecated assets.

(k) DOH is a boiler plate clause at present in any standard draft of a DOH which was presented by the Ld. Counsel before this Appellate Tribunal. Company Appeal (AT) (Ins) No. 414 of 2021

(l) The DOH upon such enforcement if results into a shortfall in the value of Secured/charged assets over realisation of Assets vis a vis list of its realisation the Security trustee can call upon to pay on demand that particular borrower, who has committed the default in payment or occasioned the event of default to make good the said shortfall or the deficiency thereby shown.

(m) It was made clear by the Ld. Sr. Counsel of the Appellant that a 'Contract of Guarantee' is to perform the promise or discharge the liability of a third person in case of his default or the default by the concerned debtor.

(n) It was also stated by the Ld. Counsel that DOH is executed in favour of Security Trustee who is appointed and acts under the Master Security Trustee Agreement ('MSTA'), and the 'MSTA' nowhere requires a guarantee to be created in favour of Security Trustee.

5. What has been stated by the Ld. Sr. Counsel for Respondent No.1 including the details available in the pleadings are briefly stated as below:

> (a) Respondent No. 1 verified the claims of Respondent Nos. 2 to 5 based on 'DOH' with respect to various facilities availed.

(b) Clause 2, 3 & 5(iii) of the DOH read together contained a covenant to pay the shortfall or deficiency demanded by the security trustee on behalf of the lenders.

(c) There were common securities over the Charged Properties in the event of default, the security trustee had the right to take charge, possession, sell Company Appeal (AT) (Ins) No. 414 of 2021 and dispose off all or part of Hypothecated Properties including the charge property. Each of the Chargers including the CD, undertook to pay on demand by the Security Trustee any shortfall or deficiency.

(d) As a result of above Respondent No. 1 considered the 'DOH' as in the nature of guarantee/indemnity resulting such claim to fall within the definition of Section 5(8) of the Code.

(e) Respondent No. 1 has also stated that the Adjudicating Authority was correct in dismissing MA No. 3055 of 2019.

(f) The Adjudicating Authority has rightly appreciated the clauses of the DoH, in particular, the terms of Section 5(iii) of the DoH, whereby in the event of default, each of the chargors (which included the Corporate Debtor) had agreed to accept the security trustee's account of sales and realization, as sufficient amount of proof realized and relative expenses and to pay on demand by the Security Trustee, or the receiver, any shortfall or deficiency.

(g) It was also stated by the Ld. Sr. Counsel that Respondent Nos. 2 to 5 filed claims under the DoH are based on the beneficial interest under the DoH.

(h) Ld. Sr. Counsel has cited the Judgment of Bombay High Court construing an undertaking to pay as being guarantee. 'Intesa Sanpaola S.P.A. v. Videocon Industries Ltd.' (2013 SCC Online Bom 1910)- para 5 to 9, 23 & 59.

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(i) Ld. Sr. Counsel has also stated the Judgment of 'B.K. Education Service Pvt. Ltd. Vs. Parag Gupta' of Supreme Court ref. does not apply in the present case, as the supreme court in the said case was considering a time barred debt.

(j) The Code is a complete code with respect to insolvency laws [Refer para 13 of Innoventive Industries Ltd. v. ICICI Bank (2018) 1 SC 407]. The Code mandates all creditors of the CD, irrespective of the nature of its claim, to file claims before the RP in the CIRP. This is to ensure that the Resolution Applicant can take over the business of the CD on a clean slate [CoC of Essar Steels India vs. Satish Kumar Gupta (2019 SCC Online SC 1478)- Para 88]. Under Section 31 of the Code, an approved Resolution Plan is binding upon all the creditors/stakeholders of the CD. Considering that the Affected Lenders have a claim against the CD, they are bound to file claim in the CIRP. Further, since the claims of the Affected Lenders are based on the financial debt disbursed to

RCOM, and the undertaking of the CD to repay the said financial debt, the claims squarely fall within the definition of financial creditor as defined under Section 5(8), the RP has rightly thus admitted the claim and the same has been rightly appreciated by the Adjudicating Authority.

(k) Ld. Sr. Counsel further stated that the 'DoH' of indirect lenders had first charge on the following assets of the chargors:

> The present and future movable plant and machinery of the Chargors; Company Appeal (AT) (Ins) No. 414 of 2021 The capital work in progress;
>
> Insurance Contract
>
> (l) On the basis of the aforementioned DOHs of Indirect Lenders, the Indirect Lenders have been treated as financial creditors to the Corporate Debtor. It is pertinent to note, however, that the above facilities granted by, and the aforesaid securities held by the Lenders (both the Appellants and Indirect Lenders) is not in dispute in the present Appeal.
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> (m) Accordingly, he submitted that the well-reasoned findings of the Adjudicating Authority in the Impugned order, the Impugned order deserves to be upheld and the present Appeal ought to be dismissed.

6. Based on pleadings available on record & the Submissions made by the Ld. Sr. Counsel of Respondent No.2, Submissions are presented below:

> (a) It was stated by him that DoH is a guarantee and accordingly it should fall within the definition of Section 5 (8) of the Code and read with Section 126 of the Indian Contract Act, 1872.

(b) It was also stated by the Ld. Sr. Counsel that clause 2 & 5 of the DoH the obligation to pay lies with a CD and covers the shortfall/deficiency in recovery of the entire outstanding amount and not restricted to the deficiency in realisation where realisation is less than the cost of realisation.

(c) It was stated by the Ld. Sr. Counsel that beneficiaries of payment obligation can file proof of claim directly and do not need to file proof of claim via security trustee.

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(d) Respondent No. 2 (and, indeed, all Indirect Creditors) have benefit of all rights, benefits, undertakings and indemnities granted by, inter-alia, the Corporate Debtor, under the MSTA and the DoH, and not only the hypothecation over the secured assets.

(e) Appellants' have misled the Tribunal by wrongfully alleging that RP admitted that there is no contract of guarantee.

(f) Reliance upon specimen drafts of deeds of hypothecation by Appellants' are of no relevance to interpret the terms of DOH.

(g) It is a settled position that the rule of contra-proferentem is not applicable with respect to commercial contracts, for the reason that the clause in a commercial contract is bilateral and has been mutually agreed upon.

(h) Respondent No.2 is admittedly a Secured Creditor of the Corporate Debtor.

In the alternative and without prejudice to the rights and contentions of R-2 it is submitted that R-2's security interest cannot be extinguished during the CIRP without it being paid a proportionate or commensurate value of the security held by it under the DoH. If the Appellant's are successful in the present appeal then (subject to the right of the Respondents), the distributions provided under the approved Resolution Plan would be rendered non-compliant with Section 30 of the IBC as the Resolution Plan does not provide for any distributions to this class of Company Appeal (AT) (Ins) No. 414 of 2021 'secured creditors'. In order to avoid any prejudice, and to ensure that the Resolution Plan is compliant, so that the rights of the Secured Creditors are protected:

a. The office of the RP (R-1) would be required to be re-constituted for processing the Form C filed by R-2, as statutory forms as 'secured creditors';

b. The claim of R-2 which was already filed would need to be refiled (or in the alternate, processed by the RP as 'other secured creditors forms), and then be admitted as 'secured creditors' claims;

c. The R-2 would be entitled to distributions taking into account the order of priority and value of security interest of R-2 as secured creditor, as laid down under Section 53 of the IBC;

d. The distributions to financial creditors proposed under the approved Resolution Plan would be required to be amended to also provide for distributions to R-2 as a class of 'secured creditors' (taking into account the priority and value of security interest as laid down under Section 53 of the IBC).

Respondent No.2's rights have been protected and reserved throughout the present litigation on the following instances -(i) whilst voting in favour of the Resolution Plan (by specifically sending an email to the Resolution Professional stating that the approval is on the basis that they are classified as a secured financial creditor), (ii) challenging the Plan Approval Application Company Appeal (AT) (Ins) No. 414 of 2021 before this Tribunal on a limited ground, and (iii) filing a praecipe dated January 4,2021, before NCLT seeking clarification on the order approving the Resolution Plan. This Hon'ble Tribunal by its order dated January 19, 2021, clarified that depending on the outcome of the Appellant 1 Bank Application, if the order approving the Resolution Plan requires reconsideration, then NCLT would do the

same after hearing the parties.

7. Pleadings available for Respondent No.3 and the submissions made by here are stated below:

(a) The impugned order is a well-reasoned Order, passed after considering the legal and factual submissions made by the parties at the time of arguments, and does not merit any interference.

(b) Under clause 2 and clause 5 of the DoH- the obligation to pay lies with the Corporate Debtor (RITL) and covers the shortfall/deficiency in recovery of the entire outstanding amounts.

(c) Beneficiaries of payment obligation can file proofs of claim directly and do not need to file proofs of claim via the Security Trustee.

(d) Respondent No.3 (and, indeed, all Indirect Creditors) have benefit of all rights, benefits, undertakings and indemnities granted by, inter-alia, the Corporate Debtor, under the MSTA and the DoH, and not only the hypothecation over the secured assets.

(e) Appellant's have misled the Tribunal by wrongfully alleging that RP admitted that there is no contract of guarantee.

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(f) Reliance upon specimen drafts of deeds of hypothecation by Appellant's are of no relevance to interpret the terms of DOH.

(g) Reliance by the Appellant's on the rule of contra-proferentem is misplaced.

(h) Respondent No.3 is admittedly a Secured Creditor of the Corporate Debtor.

In the alternative and without prejudice to the rights and contentions of R-3 it is submitted that R-3's security interest cannot be extinguished during the CIRP without it being paid a proportionate or commensurate value of the security held by it under the DoH. If the Appellant's are successful in the present appeal then (subject to the right of the Respondents), the distributions provided under the approved Resolution Plan would be rendered non-compliant with Section 30 of the IBC as the Resolution Plan does not provide for any distributions to a class of 'secured creditors'. In order to avoid any prejudice, and to ensure that the Resolution Plan is compliant and so that the rights of the Secured Creditors are protected:

a. The office of the RP (R-1) would be required to be re-constituted for processing the Form C filed by R-3, as statutory forms as 'secured creditors'; b. The claim of R-3 which was already filed would need to be refiled (or in the alternate, processed by the

RP as 'other secured creditors forms), and then be admitted as 'secured creditors' claims;

Company Appeal (AT) (Ins) No. 414 of 2021 c. The R-3 would be entitled to distributions taking into account the order of priority and value of security interest of R-3 as secured creditor, as laid down under Section 53 of the IBC;

d. The distributions to financial creditors proposed under the approved Resolution Plan would be required to be amended to also provide for distributions to R-3 as a class of 'secured creditors' (taking into account the priority and value of security interest as laid down under Section 53 of the IBC).

Respondent No.3's rights have been protected and reserved throughout the present litigation on the following instances -(i) whilst voting in favour of the Resolution Plan (by specifically sending an email to the Resolution Professional stating that the approval is on the basis that they are classified as a secured financial creditor), (ii) challenging the Plan Approval Application before this Tribunal on a limited ground, and (iii) filing a praecipe dated January 4, 2021, before NCLT seeking clarification on the order approving the Resolution Plan. This Hon'ble Tribunal by its order dated February 3, 2021, clarified that depending on the outcome of the Appellant 1 Bank Application, if the order approving the Resolution Plan requires reconsideration, then NCLT would do the same after hearing the parties.

8. Broad Pleadings and submissions made by the Ld. Counsel for Respondent No. 4 & 5 are enumerated here under:

Company Appeal (AT) (Ins) No. 414 of 2021 a. The CD, Reliance Communications Infrastructure Limited (RCIL), Reliance Communications Limited (RCom) and Reliance Telecom Limited (RTL) (collectively referred to as the RCom Entities) had jointly availed loan facilities from various lenders. In this regard, all RCom Entities pooled their assets to secure all loans availed by each of these entities. R-4 sanctioned five facilities to RCom and RTL, amounting to over USD 3605,200,000 which were secured inter alia by a first pari passu charge over common pooled assets of all four RCom Entities.

b. The DoH's have been executed jointly by each of the RCom Entities (in their capacity as chargors), including the CD to create charge over their property for securing repayment of the facilities advanced by R-4. Even if the loan was availed by any of the RCom Entities (in this case RCom and RTL), the other RCom Entities agreed to provide their assets as security and a further undertaking to repay any shortfall of debts owed by each of the RCom Entities. This understanding by the RCom Entities is clearly recorded by terms of the DoH. [Ref: Annexure O of the present Appeal, @ Page No. 483] c. It is submitted that the RCom Entities had pooled their resources in order to provide not only security for the facilities availed by any of the entities, but to ensure that each of the entities were individually liable to repay the debt of all the entities. Thus, as per the terms of the DoH, in the Company Appeal (AT) (Ins) No. 414 of 2021 event there is any default by any of the entities, all of

the RCom entities are liable to make good the default and repay the outstanding amount. d. While the four RCom Entities jointly created a security interest in favour of R-4 under the DoH, the DoH also includes an unambiguous, equivocal and express covenant by the CD, as well as the other RCom Entities, to pay the amount of the secured facilities along with interest, liquidated damages and all other amounts including an undertaking to make good "any shortfall in realization" of proceeds of enforcement/disposal of the security to R-4. e. Clause 2 read with Clauses 3 and 5 (iii) of the DoH, makes it clear that each of the RCom Entities, including the CD, in its capacity as the charger, has covenanted to repay the facility availed by the obligor (i.e. RCom and RTL).Clause 2 of the DoH states that in view of the consideration paid by the secured lenders, each of the chargors covenants that each obligor shall repay the secured facilities. Further, Clause 3 of the DoH creates a first ranking pari passu charge for the benefit of the secured parties and Clause 5 (iii) specifically states that each of the chargors covenants to make good and shortfall in the realization of proceeds by paying on a demand to the security trustee/ receiver. Therefore, on a combined reading of the three clauses, it is amply clear that there is an express covenant to repay R-4 by the CD. f. When a charge is created on an immovable property either through express words or implied from the deed, the creator of the charge intends to make the property liable for repayment of debt due by him. [Ref: Annexure O Company Appeal (AT) (Ins) No. 414 of 2021 of the present Appeal, @ Page No. 484] Hence, it is amply clear that on a holistic reading of the DoH, there is an express covenant to repay by the CD. g. On a conjoint reading of Clauses 2,3 and 5 of the DoH, it is clear that the CD has in addition to hypothecating its properties, undertaken an obligation to repay R-4, the amounts due under the relevant facilities. The CD has covenanted to make good any shortfall in the realization of proceeds by paying on a demand made by the security trustee and/or the receiver, i.e. the beneficiary under the facility documents such as R-4. It is amply clear that this amounts to a personal obligation of the CD to repay the outstanding dues of R-4. Such an obligation which is expressly laid out in Clauses 2,3 and 5 of the DoH constitutes an express obligation to pay, which is akin to a guarantee.

h. The nomenclature used in a document is not decisive or conclusive and the nature of a transaction is to be determined on the basis of the substance of the document as a whole rather than the labels used therein. In this regard, it is submitted that the rule of interpretation of a document is that it should be read as a whole in its letter as well as in spirit. An individual sentence cannot be read in isolation while interpreting the document. The fact that the DoH does not use the term guarantee in its nomenclature shall not have any bearing on deciding the nature of the DoH. [Ref: Assam Small Scale Ind. Dev. Corp. v. M/s. J.D. Pharmaceuticals, @ Page 56 of the Case Compilation on behalf of R-4]. On a perusal of the overall scheme of the Company Appeal (AT) (Ins) No. 414 of 2021 DoH, it is evident that the only purpose of the DoH is not to merely create a charge, but it also includes an express obligation to repay the outstanding debt of R-4.

i. Under Clause 5 (iii) of the DoH, the CD has covenanted to make good any shortfall in the realization of proceeds of the creditors of RCom/RTL, by paying on a demand made by the creditor. Thus, the CD had undertaken a clear obligation to pay the shortfall in the realization of proceeds of the lenders. Hence, Clause 5 (iii) cannot be read down to apply only to shortfall of expenses incurred in the sale of assets.

j. The definition of 'financial debt' under Section 5(8) (i) of the Code specifically includes the amount of liability in respect of any guarantee or indemnity. As per the DoH, the CD has guaranteed to pay R-4 the deficiency or shortfall, if any, towards the debt due to it by RCom/RTL. Accordingly, the liability to repay the amounts due to R-4 by the CD as per the DoH, would squarely fall within the definition of financial debt under Section 5(8) (1) of the Code read with Clauses 2, 3 and 5 of the DoH. [Ref: Housing Development Finance Corporation Ltd. and Ors. v. Ariisto Developers Pvt. Ltd, Para 8-12, 16,20-23, 25 and 30-31 @ Page 10 of the Case Compilation on behalf of R-4].

k. The CIRP of the CD commenced in May 2019 and more than 3 years (almost 1600 days) have passed since then. It is submitted that R-4 was admitted as a financial creditor since July 2019 and has participated in each Company Appeal (AT) (Ins) No. 414 of 2021 meeting of the CoC of the CD since the third meeting held on 31 July 2019. Notably, R-4 is also part of the monitoring committee of the CD since 03 December 2020 till date.

l. Therefore, even if R-4 is held not to be a financial creditor, its security interest cannot be extinguished without it being paid a commensurate pay- out under the approved resolution plan. In such an event, the approved resolution plan will have to be modified to include a commensurate pay-out to R-4 as a secured creditor of the CD.

9. The Ld. Sr. Counsel for intervenor SBI largely mentioned the following:

> (a) The Ld. Sr. Counsel stated that the Reliance Projects & Property Management Services Ltd. ("RPPMSL") is the Resolution Applicant of the CD in CIRP and its Resolution Plan was approved by 100% of the CoC of the CD.
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> (b) It was also stated by the Ld. Sr. Counsel that the Intervenor & several other similarly placed financial creditors have not been made a party to the captioned Appeal having a direct bearing on the rights of intervenor led consortium.
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> (c) It has been almost four years and despite the plan being approved with a 100% majority of the Committee of Creditors, duly approved by the Adjudicating Authority and completion of conditions precedent set out under the approved resolution plan, the financial creditors have not yet received any resolution proceeds from the approved resolution plan.

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(d) The Corporate Debtor owed a sum of Rs. 41,055 crores to the Financial Creditors. The RPPMSL resolution plan provides for a payment of Rs. 4,520 Crore to all the stakeholders including the Financial Creditors. Evidently, the Financial Creditors are taking a haircut of around 88%. Thus, despite having such enormous outstanding against the Corporate Debtor and waiting for resolution of debt for over four years, the Financial Creditors have been unable to recover any dues from the Corporate Debtor.

(e) However, on the contrary if the present Application is dismissed by this Hon'ble Tribunal, there will be severe prejudice which will be caused to the stakeholders of the Corporate Debtor, including the Intervenor and the Consortium.

10. While dismissing the Application, the Adjudicating Authority has observed the following:

> "Para 8. (xiii) Further Chapter IV of IBBI (Insolvency Resolution Process for Corporate Persons), Regulations 2016- Regulations 7 to 14 deals with the claims by Operational Creditors, Financial Creditors, Workmen, Employees etc. Regulations clearly provides that a person claiming to be a creditor (either financial or operational, etc.) shall submit proof of claim to the IRP. Para 8. (xiv) Neither the Section of law nor the Regulations says that the claim of a debt can be made only when there is a default. The debt and default would be a sine qua non for the admission of a Section 7 or Section 9 or Section 10 Company Appeal (AT) (Ins) No. 414 of 2021 petition. But for filing claim before IRP, mere debt is sufficient and it would not be necessary that the debt has been defaulted. In view of this, the submission of the Counsel for the Applicant that the claimant must establish not only the existence of the financial debt but also that the same is due and unpaid which means that the debt should have been defaulted, is untenable. In this scenario, the Applicant's reliance on the judgment of B.K. Educational case (supra) is misplaced since the facts of that case are distinguishable from the facts of the present case.
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> Para 8. (xv) Section 2(11) of the Code provides that debt means a liability or obligation in respect of a claim which is due from any person and includes financial debt and operational debt. Here, in this case, the Corporate Debtor by the DoH guaranteed the Respondents to pay the deficiency or shortfall, if any, towards the debt after realization of the hypothecated assets. Admittedly, hypothecated assets were not sold in this case and hence the whole debt is due to the Respondents and the Respondents as Financial Creditors as already indicated by us are entitled to file a claim before the IRP. The IRP has rightly admitted the claim of Respondents as Financial Creditor. The contention of the Applicant that the said debt shall be in default is not applicable as far as filing of the claim is concerned, however, in view of the fact that CIRP has been initiated against the Corporate Debtor, Corporate Debtor as a guarantor is liable to pay the debts and the Respondents are right in filing a claim as a Financial Creditor.
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> Company Appeal (AT) (Ins) No. 414 of 2021 Para 8. (xvi) If the proposition of the Applicant that no claim can be made before the IRP/RP, until the debt is defaulted is accepted, then except the petitioning creditor whose petition has been admitted for the reason that there is debt and default, the other debtors whose debts are not defaulted by the Corporate Debtor cannot file claim and that would lead to an unenviable proposition that only the defaulted debts of the creditors can be claimed and the rest will end up in a remediless situation. The said proposition fo the Applicant is entirely foreign to the Code. In this regard, the reliance of the Applicant

on the decision of the Hon'ble Supreme Court in the case of Swiss Ribbon (supra), Para 63 to 65 is totally misplaced since the paras referred deals with the differentiation in the triggering of the CIRP by Financial Creditors under Section 7 and Operational Creditors under Section 8 & 9 of the Code and not with the filing of claim with the RP. Para 65 of the Hon'ble Supreme Court's case in Swiss Ribbon supra is extracted below:

"65. ...Whereas a claim gives rise to a debt only when it becomes due, a default occurs only when a debt becomes due and payable and is not paid by the debtor. It is for this reason that a Financial Creditor has to prove default as opposed to an operational creditor who merely claims a right to payment of a liability or obligation in respect of a debt which may be due. When this aspect is borne in mind, the differentiation in the triggering of the insolvency resolution process by Financial Creditors under Section 7 and by operational creditors under Sections 8 and 9 of the Code becomes clear."

The submission of the Applicant that the ratio decided in Export Import Bank of India (supra) is contrary to Swiss Ribbons' case does not hold water. Company Appeal (AT) (Ins) No. 414 of 2021 Para 8. (xvii) In respect of the contention of the Applicant that the individual lenders are not entitled to file claims with the RP on the guise that the Respondents do not have a legal title to the security under DoH but only have a beneficial interest, the legal rights having been vested with the Trustee, we are of the view that the judgment of Hon'ble Gujarat High Court in the case of Essar Steel v. Gramercy Emerging Market Fund supra relied on by the Respondents is a complete answer to this question and we hold that the R2 to R5 as lenders/creditors are entitled to file Form C as required under Regulation 8 of CIRP Regulations. Filing a claim in CIRP cannot be construed as enforcement of security interest. Before the enforcement of security interest by the Security Trustee, CIRP intervened and the Creditors are entitled to file Form C before the IRP. It is to be noted that in Form C also the claimant has to give the name of the Financial Creditor, amount of claim, how and when the debt incurred, etc. A Security Trustee cannot become a Financial Creditor to file a claim before the IRP and we feel that on going through the contents of Form C even in cases when a Security Trustee is appointed there is no bar for a Financial Creditor to file a claim. The contention of the Applicant that the beneficiary can enforce his right only when the Trustee has failed to discharge his duties or otherwise cannot be accepted for the reason that there is no question of enforcement of right by the Trustee since CIRP has intervened. Para 9. The Counsel for the Applicant referring to the last sentence of clause 5

(iii) of DoH submitted that it relates to Security Trustees Account of expenses Company Appeal (AT) (Ins) No. 414 of 2021 for sale of the hypothecated properties and if there is any shortfall/deficit in the expenses which the Security Trustee could not repay from the sale proceeds that shortfall/deficiency has to be collected from the chargors and it does not relate to the deficiency/shortfall that will take place after adjusting the sale proceeds to the debt recoverable. The Ld. Counsel submitted that in view of this, there is no guarantee as provided under Section 126 of the Contract Act. Without prejudice to the above submission, it is further submitted that there is no occasion for the Security Trustee to realize the hypothecated properties in view of the fact that

moratorium has triggered on admission of the CIRP petition against the Corporate Debtor as provided under Section 14(1)(c) of the Code. It is further submitted that the security interest as defined under Section 3(31) of the Code does not have any effect as long as the moratorium continues. In this case, since moratorium has already kicked in there is no question of realization of the security interest by the Security Trustee. It is further submitted that in case the resolution plan then pending for approval of the Bench is rejected, the Respondents as Creditors can either relinquish their security interest and stand in the que as creditors or can prefer to stay outside the insolvency proceedings and realize the hypothecated security.

Para 10. As far as the above argument is concerned, we are unable to accept the contention that the said sentence of Clause 5 (iii) of DoH is only relating to the expense of sales and realizations. The proper meaning according to us is Company Appeal (AT) (Ins) No. 414 of 2021 that on default, the Security Trustee is entitled to sell and realize the hypothecated assets and on such sale and realization of hypothecated assets the Security Trustee will account for each and every realization, deduct the expenses of sale and the balance amount available in his hands will be appropriated to the loan due and after such appropriation, still if any balance is pending towards the loan, then the chargors undertakes/guarantees to pay the deficit amount of the loan. This is what our understanding is. In view of this, we hold that the submission made by the Ld. Counsel for the Applicant is devoid of any merit and the same is rejected.

Para 11. The Ld. Counsel for the Applicant submitted that the nomenclature given to the document i.e., Deed of Hypothecation cannot and will not create a guarantee. It is submitted that since the document itself is Deed of Hypothecation, there is no question of giving guarantee by the Corporate Debtor. In this regard, we agree with the contention of the Respondents that the nomenclature given to a document or a clause can never be determinative of the legal nature of the obligations undertaken thereunder. Para 12. The Applicant also relied on the judgement of Hon'ble Supreme Court in Anuj Jain vs. Axis Bank (supra) to buttress the point that the Corporate Debtors liability under DoH do not constitute a financial debt. However, the said case relates to a simple mortgage wherein only security interest was created in the property of the Corporate Debtor therein and there is no Company Appeal (AT) (Ins) No. 414 of 2021 execution of the guarantee by the Corporate Debtor. Here in this case, the facts are completely different and the ratio in that case is not applicable for the case in hand.

Para 13. In view of the above discussion, we are of the view that the action of R1 in admitting the claims of R2 to R5 as Financial Creditors of the Corporate Debtor is perfectly in order and no interference is called for. Accordingly, the Application is dismissed."

11. We have carefully gone through the Pleadings of the parties, submissions made by the Ld. Sr. Counsels/Counsels for the parties and the law laid down on the subject and are having the following observations:

(i) The Appellant No.1/Doha Bank is a Secured financial Creditor of Corporate Debtor. This fact is not in dispute and none of the Respondents have denied this.

(ii) The Corporate Debtor here is Reliance Infratel Ltd. (RITL/RTL). The Corporate Debtor has gone into CIRP vide order of Adjudicating Authority dated 15.05.2018 and Mr. Manish Dhirajlal Kaneria was appointed as IRP. Thereafter on 21.06.2019 Mr. Anish Nanavaty/Respondent No.1 was appointed as Resolution Professional of the Corporate Debtor. This fact is also not under dispute.

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(iii) What has come under appeal is that the Adjudicating Authority has considered the R- 2 to R- 5 as Financial Creditors of the Corporate Debtor. The basis of consideration is the 'Deed of Hypothecation'only for considering the R- 2 to R-5 as Financial Creditors of the Corporate Debtor. The Appellant No. 1 has critically sought that R-2 to R-5 should be derecognized/deleted as 'Financial Creditors' of the Corporate Debtor.

(iv) It is an admitted position that the Corporate Debtor hypothecated its asset in favor of R-2 to R-5 under the Deed of Hypothecation to secure the loans disbursed by them to the Reliance Communication Entities. It is also an admitted position that R-2 to R-5 have not disbursed money to Corporate Debtor.

(v) Clause 5(iii) of the Deed of Hypothecation states as follows:

"In the event that an Event of Default has occurred under a Facility Document, the Security Trustee or its nominees shall, on receiving instructions from the Secured Lenders, in accordance with Section 4 of the Security Trustee Agreement and after providing 7 (seven) Business Days notice to any of the Chargors and without assigning any reasons and at the risk and expense of the Chargors and if necessary as attorney for and in the name of the Chargors, be entitled to take charge and or possession of seize, recover, receive and remove them and/or sell by public auction or by private contract, dispatch,or consign for realization or otherwise dispose of or deal with all or any part of the Company Appeal (AT) (Ins) No. 414 of 2021 Hypothecated Property (including by way or through the exercise of its powers and rights specified in Section 6 thereof) and to enforce, realise, settle, compromise and deal with any rights or claims relating thereto, without being bound to exercise any of these powers or be liable for any losses in the exercise or non-exercise thereof and without prejudice to the Security Trustee's rights and remedies of suit or otherwise. Notwithstanding any pending suit or other proceeding, each of the Chargors undertakes to give possession to the Security Trustee or its nominees or the Receiver within 7 (seven) Business Days of a notice of demand from the Security trustee and or the Receiver, the Charged Property and to transfer and to deliver to Security Trustee and/or the Receiver all related bills, contracts and securities. Each of the Chargors further agrees to accept the Security Trustee's account of sales and realization as sufficient proof of amounts realised and relative expenses and to pay on demand by the Security Trustee and/or the Receiver any shortfall or deficiency thereby shown. Provided however, the Security Trustee or the Receiver shall not be in any way liable

> or responsible for any loss, damage or depreciation that the Hypothecated Property may suffer or sustain on any account whatsoever whilst the same are in possession of the Security Trustee or the Receiver or by reason of exercise or non-exercise of rights and remedies available to the Security Trustee or the Receiver as aforesaid and that all such loss, damage or depreciation is caused by any negligence or willful default of the Security Company Appeal (AT) (Ins) No. 414 of 2021 Trustee or the Receiver, as may be finally determined by a court of competent jurisdiction".

This is the primary basis on which the Adjudicating Authority has considered the claims of R-2 to 5 as 'Financial Creditors'.

(vi) Section 5(8) of the Code is exhaustive and mere 'Deed of Hypothecation' does not fall within its ambit. RP has considered DOH as a 'Deed of Guarantee' which is a misconception of the obligations.

(vii) CD has not extended Corporate Guarantee in favour of R-2 to R-5.

(viii) The Security Interest created under the DOH shall be continuing security and shall remain enforce until all the obligations have been discharged by the borrowers under the respective facility documents. Hence, it can be construed that the clauses of DOH cannot be construed to be a 'Covenant of Guarantee' or 'Contract of Guarantee'. (Clause 9 of DoH- page 492).

(ix) Hypothecation Deed is a legal document and it establishes contractual relations between the parties where the lender agrees to grant a loan to the borrower in return for movable assets provided as security. Hypothecation of a moveable assets does not involve giving up ownership rights like title or possession. The Hypothecation Deed ensures that the parties are aware of their rights and liabilities and have a document which can be enforced in a court of law. It also grants the lender a right to cease the asset when the borrower fails to meet the terms of the Hypothecation Deed.

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(x) Clause 3 of the Hypothecation Deed as appearing at page 9 of convenience compilation submitted vide Diary no. 30494 dated 18.10.2021 is depicted below:

> (xi) The 'Deed of Hypothecation' also provides certain standard features which includes definitions, issuance rights and remedies of each party incase of any default, security details marked for hypothecation, sales realization, issuance proceeds, etc.
>
> (xii) While a 'Deed of Guarantee' is a binding legal document under which one party agrees to guarantee that certain obligations of another party will be met.

Company Appeal (AT) (Ins) No. 414 of 2021 If the other party fails to meet its obligations the guarantor is then require to step in and meet them. A Deed of Guarantee covers the risk of borrower.

(xiii) The 'Deed of Hypothecation' is merely creation of security interest and a mere security of interest created by hypothecation or mortgage does not constitute a financial debt. From our commercial understanding 'Deed of Hypothecation' is not a 'Deed of Guarantee'. The 'Deed of Hypothecation' discharges the liabilities of other borrowers upon their default and is limited to the realization value of those hypothecated assets and hence it cannot be construed as a contract of guarantee.

(xiv) 'Deed of Hypothecation' is a regular boilerplate clause in any standard draft of a 'Deed of Hypothecation'. The instrument which covers hypothecation or guarantee is specifically specified in the initial part or object of the agreement or preamble and not somewhere some wordings are mentioned in the agreement. If any, there is a guarantee there will be express or unequivocal promise to discharge the liability of the Principal Borrower incase of any default and will not contain a clause somewhere in the agreement that deficiency will be recouped. The only party to the 'Deed of Hypothecation' are the chargors and the security trustee and the only purpose of the document is appearing in broadly is to create a charge and the chargor is not and cannot be treated as a guarantor within the meaning of the Contract Act vide Section 126. Company Appeal (AT) (Ins) No. 414 of 2021

(xv) All these suggests that 'Deed of Hypothecation' cannot be a basis to declare the parties as financial creditors as these Respondents are not even party to the DOH i.e. 'Deed of Hypothecation'.

12. In view of the above stated position of law and fact we are not in a position to sustain the order of the Adjudicating Authority and we are constrained to set aside the impugned order of the Adjudicating Authority and remanding back to the Adjudicating Authority for taking all consequential actions resulting from de-recognizing R-2 to R-5 as 'Financial Creditors'. No order as to costs.

[Justice Rakesh Kumar] Member (Judicial) [Dr. Ashok Kumar Mishra] Member (Technical) New Delhi 09.09.2022 sr Company Appeal (AT) (Ins) No. 414 of 2021