THE NATIONAL COMPANY LAW TRIBUNAL
CHANDIGARH BENCH (Court-II), CHANDIGARH

CP (IB) No.180/Chd/Pb/2022

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

In the matter of:

UV ASSET RECONSTRUCTION COMPANY LIMITED
with its registered office at
704, Deepali Building 92,
Nehru Place, New Delhi-110019
CIN:U74900DL2007PLC167329
PAN:AAACU9193M

…Petitioner/Financial Creditor

Vs.

MAJESTIC HOTELS LIMITED
with its registered office at
Majestic Park Plaza, Bhai Bala Chowk,
Ferozepur Road, Ludhiana-141002
Punjab
CIN:U55101PB1989PLC037667

…Respondent/Corporate Debtor

Judgment delivered on: 03.07.2024

Coram: HON'BLE Dr. P.S.N. PRASAD, MEMBER (JUDICIAL)
HON'BLE MR. SATYA RANJAN PRASAD, MEMBER (TECHNICAL)

Present:

For the Petitioner-Financial Creditor : Mr. Prashant Kumar Kapila, Mr. Vipul Joshi, Advocates

For the Respondent-Corporate Debtor : Mr. Aalok Jagga, Mr. APS Madaan, Advocates

Per: Dr. PSN Prasad, Member (Judicial)
Mr. Satya Ranjan Prasad, Member (Technical)

JUDGMENT

1. The present petition has been filed by **UV ASSET RECONSTRUCTION COMPANY LIMITED** (hereinafter referred to as **'Petitioner/Financial Creditor'**) under Section 7 of the Insolvency and Bankruptcy Code, 2016, (hereinafter referred to as 'Code') read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 to initiate the Corporate Insolvency Resolution Process ('CIRP') against **MAJESTIC HOTELS LIMITED** (hereinafter referred to as **'Respondent/Corporate Debtor**') for default of Rs. 14,35,57,30,109/- as on 28.02.2022.

2. The brief facts of the case, as stated in the petition, are as follows:

   a. The Corporate Debtor had availed financial assistance aggregating to Rs. 6.75 crore from the Tourism Finance Corporation of India (hereinafter referred to as TFCI) and the Industrial Finance Corporation of India (hereinafter referred to as IFCI), pursuant to a Rupee Term Loan dated 06.11.1991 (Annexure -4 (Colly) at Page 54 of the Petition). TFCI and IFCI had further jointly granted three additional term loans through three separate loan agreements (Annexure – 5 (Colly) of the Petition).

   b. Due to the present Corporate Debtor's failure to service its debt obligations, its accounts with the IFCI and TFCI were classified as a Non-Performing Asset on 30.06.2012 and 30.09.2012, respectively.

   c. On or around August 2016, IFCI preferred an Original Application (hereinafter referred to as OA) under Section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as the RDDB Act, 1993) before the Chandigarh Bench of the Debt Recovery Tribunal-II

(hereinafter referred to as the DRT) for recovery of the amount due to it, that is, Rs. 2,30,34,52,549/- as on 15.04.2016 along with interest (Annexure – 8 at Page 285 of the Petition). Similarly, TFCI also filed an Original Application before the Delhi Bench of DRT-I for recovery of the debts due to it. (Annexure – 9 at Page 373 of the Petition).

d. During the pendency of the aforesaid OAs, the debt claimed thereunder by TFCI and IFCI in their respective OAs, along with all rights, titles, and interests in the financing documents and the underlying security interests created by way of hypothecation, mortgage, and pledge of shares in respect of payment of loans, stood assigned to the Financial Creditor ("UVARCL") herein pursuant to two separate Assignment Agreements, both dated 12.12.2017 (Annexure – 10 at Page 373 and Annexure – 11 at Page 407 of the Petition).

e. Post such assignment, the Corporate Debtor entered into a restructuring of the term loans vide letter dated 27.12.2017. Subsequently, a Memorandum of Understanding dated 29.12.2017 ("MoU") was also executed between the Financial Creditor and the Corporate Debtor outlining the terms and conditions of the restructuring of the term loans of the Corporate Debtor. Vide this MoU, the Corporate Debtor agreed and acknowledged that:

    i. The total debt owed by it to IFCI as on 07.12.2017 was Rs. 323.44/- Crore.

    ii. The total debt owed by it to TFCI was Rs. 242.17/- Crore as on 06.03.2017.

    iii. The Corporate Debtor will pay the settlement amount of Rs.16,25,00,000/- within 54 months, in 42 equal monthly instalments commencing from 31.01.2019.

iv. The Corporate Debtor will pay interest on the aforesaid amount of Rs. 16,25,00,000/- payable monthly @ 20% p.a. on reducing balance with effect from 12.12.2017.

v. The Corporate Debtor will pay an interest free additional amount of Rs. 2,84,37,500/-.

vi. Clause 6 of the MoU provided that *"In case any repayment as mentioned above is not paid by MHL on the respective due date, a cure period of 45 days from the due date shall be provided to clear the due amount for which additional interest @ 2% per month will be charged for the delayed period. In case, MHL still fails to repay the amount (inclusive of interest) within the cure period, then the same shall be considered as the event of default & the settlement shall come to an end and all the relief and concessions granted will automatically lapse and UVARCL will be entitled to recover the entire due amount as per the original financing documents / original application (recovery suit) filed before the DRT after adjusting the amount already received by UVARCL."*.

vii. The last term of the MOU reads as follows:

"Notwithstanding anything contained hereinabove, it is agreed, understand and confirmed that in case MHL failed to comply with any of the conditions as stipulated above in full or part or committed default the settlement shall be deemed to have failed and both borrowers and guarantors jointly and severally shall be liable to pay the entire amount as per the agreements/documents executed recovery suits filed with the Hon'ble DRT."

f. Subsequently, the Financial Creditor and the Corporate Debtor executed three working capital term loans, namely, Working Capital Term Loan Agreement dated 15.01.2018 (“WCTL-1"), Working Capital Term Loan Agreement dated 08.08.2019 (“WCTL-2”) and Working Capital Term Loan Agreement dated 12.12.2019 (“WCTL-3”) under which further monies were disbursed by the Financial Creditor to the Corporate Debtor. As per the MoU and the terms and conditions of WCTL-1, 2, & 3, the Corporate Debtor was required to discharge the Financial Debt in the manner provided therein.

g. In the petition, the Financial Creditor has stated that while the principal and interest amounts were serviced as per the MoU and WCTL-1, 2, and 3 up till 31.12.2019, the Corporate Debtor defaulted in making payment of the principal amount due under the MoU and WCTL- 1, 2 & 3 for the month of January 2020. For the month of January 2020, the Corporate Debtor was to make a payment of Rs. 63,39,021 towards principal and Rs. 32,52,013 towards interest. The Corporate Debtor only paid Rs. 32,52,013 towards interest but did not pay Rs. 63,39,021 towards principal. For the month of February 2020, only an amount of Rs. 30,56,052 towards interest was paid, and no amount was paid towards the principal. For the month of March 2020, only an amount of Rs. 32,74,275 towards interest was paid, and no amount was paid towards the principal. From April 2020 onwards, no amounts at all have been paid by the Corporate Debtor to the Financial Creditor under the MoU and WCTL-1, 2, and 3.

h. It is further stated that constrained by the aforesaid default, which occurred in January 2020 and continued to subsist, the Financial Creditor terminated and revoked the restructuring arrangement vide notice dated 08.12.2020 (“Loan

Recall Notice"). Thereafter, the Financial Creditor issued demand notice dated 14.05.2021 and notice dated 11.06.2021 under Section 13(2) of the SARFAESI Act demanding payment of the due amount.

i. Accordingly, the present Petition came to be filed by the Financial Creditor default in respect of financial debt of Rs. 14,35,57,30,109 /- as on 28.02.2022 by the Corporate Debtor. Details of the default are set out in Part IV of the present application. The record of default with the NeSL/Information Utility has also been filed with the Petition.

3. The Corporate Debtor is stated to be incorporated on 01.02.1989 under the Companies Act, 1956. The company has its Registered Office at Punjab. Therefore, the jurisdiction lies with this Adjudicating Authority.

4. It is stated in the prescribed application for CIRP, Part-IV of Form No.1 that the total amount claimed to be in default is Rs. 14,35,57,30,109 /- (Indian Rupees Fourteen hundred and thirty five crores fifty seven lakhs thirty thousand one hundred and nine only) as on 28.02.2022.

5. The Respondent filed its reply via diary no. 00493/4 dated 21.03.2023. It is submitted that the Respondent Corporate Debtor which is running a Five Star Hotel in Ludhiana, has been most affected due to Covid-19 which started in the month of March 2020. It is the own admission of the petitioner that the interest and instalments have not been paid since April 2020.

Stand taken by the Corporate debtor

6. During the course of arguments, the Corporate Debtor presses for the dismissal of the petition.

7. The Corporate Debtor has alleged that the present Petition is barred under Section 10A of the Code as the default in question took place within the period of 25.03.2020

to 24.03.2021. While the Petition states the date of default to be January 2020, such date is incorrect because it ignores the cure period of 45 days, which is provided in all 4 agreements, i.e., MoU, WCTL-1, WCTL-2 and WCTL-3. As regards the January 2020 instalment, the Respondent submits that 'event of default' would befall on the Corporate Debtor in case of its failure to clear the dues within the cure period of 45 days which date would occur not on 31.01.2020, but 45 days thereafter, i.e., 16.03.2020.

8. The Corporate Debtor further states that monies towards the January 2020 instalment were cleared within 45 days i.e., by 16.03.2020, and thus, there was no default in January 2020. In so far as the defaults for the month of February, March and April 2020 are concerned, the same fell within the Section 10A period.

9. The Corporate Debtor further alleges that default could not have occurred on 31.01.2020, as an amount of Rs. 70,00,000/- was disbursed by the Financial Creditor to it on 19.03.2020. In view of such subsequent disbursal, the Corporate Debtor states that no default existed till 19.03.2020.

10. The Corporate Debtor also argues that OTS was terminated, and loan was recalled only on 08.12.2020, which falls within Section 10A period of the Code. Thus, default was not considered in January 2020.

11. The Corporate Debtor has placed reliance on the judgment of the Hon’ble National Company Law Appellate Tribunal (“NCLAT”) in JC Flowers Asset Reconstruction Private Limited v. Laxmi Oil and Vanaspati Private Limited [Comp. App. (AT) (Ins.) No. 1052 of 2022] dated 23.04.2024 (“JC Flowers”) to argue that the RBI Circular dated 27.03.2020 disallows any Petition to be filed for a default which occurs after 01.03.2020.

12. The Corporate Debtor further states that the judgement in JC Flowers is squarely applicable, as this was also a case where an asset reconstruction company was involved.

13. The Corporate Debtor also alleges that no specific date of default has been mentioned by the Financial Creditor in the Petition. The Petition only states that default occurred in January 2020, whereas the Corporate Debtor alleges, it was incumbent upon the Financial Creditor to mention the specific date of default, and not the month of default.

14. The Corporate Debtor has also raised an objection to its balance sheets being filed by the Financial Creditor at this stage. Relying on Order dated 17.04.2023 passed by this Hon'ble Bench, the Corporate Debtor states that the Financial Creditor had waived off its right to file a Rejoinder and cannot therefore be permitted to file fresh documents at this stage.

15. The Corporate Debtor further contends that Rs. 1,40,42,431 was paid by it after 16.03.2020 till 09.04.2020 and such payments would regularize the default for the month of January 2020 and there was no default "in praesenti". The Corporate Debtor also relies on the Hon'ble NCLAT's decision in JC Flowers with respect to this objection.

Analysis and findings

16. We have heard the arguments advanced by the learned counsels and have also perused the case records carefully.

17. Since the Corporate Debtor has sought to rely on Section 10A of the Code, which seeks to keep out "defaults" committed prior to 25.03.2020, the issue arising for consideration is the 'date' when the default occurred.

18. In the Petition, the Financial Creditor has stated that default occurred in January 2020 and continued to subsist thereafter for the reason that only Rs. 32,52,013 towards interest of the January 2020 instalment was paid and the amount of Rs. 63,39,021 towards principal was not paid.

19. In the Reply filed by the Corporate Debtor, this position that the Corporate Debtor did not pay Rs. 63,39,021 towards principal for the month of January by 31.01.2020 has not been disputed.

20. Furthermore, in the Written submissions dated 17.01.2024 filed on behalf of the Corporate Debtor, it is admitted that the amount of Rs. 63,39,021, which was to be paid by 31.01.2020 was not paid by this date but was allegedly paid subsequently in February 2020 (Rs. 30,56,052) and March (Rs. 32,74,275).

21. Therefore, the default under Section 3(12) of the Code can be said to have occurred on 01.02.2020. We note here that the financial creditor has stated the date of default to be January 2020. While the precise date of default in this case is not material, the date of default should be reckoned as 01.02.2020 when the Corporate Debtor failed to pay the January instalment by 31.01.2020.

22. The above also takes care of the objection raised by the Corporate Debtor that the Petition is defective as no specific date of default is stated therein and that January 2020 is only generally stated. This argument is neither here nor there. The Hon'ble NCLT, Delhi, in Geocon Infra Pvt. Ltd. v. Brij Gopal Construction Company Pvt. Ltd [IB – 514(ND)/2022] has held that non-mentioning of the date of default does not affect the merits of the Petition.

> *"5.ii. It is relevant to mention that in the present matter, the date of default has not been specifically mentioned neither in the Demand Notice nor in Part-IV of the application. On perusal of Invoice no. 003 dated 13.12.2021 issued by the*

Operational Creditor to the Corporate Debtor, it appears that the goods were delivered on 13.12.2021. The payment by the Corporate Debtor was to be made within 30 days i.e. by 12.01.2022, as per Invoice no. 003 which has not been made. Therefore, the default occurred and thus we assume the date of default in the present matter to be 12.01.2022. Hence, we observe that the non mentioning of the Date of Default does not affect the merits of the present case."

(emphasis supplied)

23. Further, as per the Hon'ble NCLAT, Chennai in Metal's & Metal Electric Pvt. Ltd. v. Goms Electricals Pvt. Ltd. [COMPANY APPEAL (AT)(CH)(INS) NO.243 OF 2021], has observed [paragraph 25] that "…To put it precisely, 'the date of default' is not to come into 'operative play' and the same ought not to be taken into account for anything but computing the period of limitation."

24. In the present case, the Financial Creditor has stated in Part-IV of the Application that default occurred in January 2020 and continued thereafter. Although, the default technically happened on 01.02.2020, we do not think that this by itself should entail the rejection of the Petition in view of the law laid down above and especially keeping in mind the fact that the Corporate Debtor in its balance sheets has also treated the default to be continuing since January 2020.

25. Next, the Corporate Debtor has placed reliance on Clause 6 of the MoU dated 29.12.2017 to contend that the same provided a cure period of 45 days from the due date in case repayment was not made by the respective due date. Thus, it is stated that there cannot be a default even in February 2020 because of non-payment of the January 2020 loan instalment and the occurrence of default is

postponed by 45 days, by which time the outstanding amounts for the month of January 2020 stood paid.

26. The Corporate Debtor has wrongly placed reliance on Clause 6 of the MOU. Clause 6 only provides that when the Corporate Debtor failed to repay the amount (inclusive of penal interest of 2%) within the cure period, then the same shall be considered as an "event of default" where the settlement shall come to an end and the full amount would become due and payable as per the original financing documents after adjusting the amount already received by the Financial Creditor.

27. This does not mean that no 'default' has taken place under the Code. The "event of default" under Clause 6 of MoU is for the purpose of recovering the full amount due under the term loans, which is different from "default" under the Code. Moreover, the cure period is triggered only once there is a 'default' in the repayment as per the MoU. Thus, the non-payment by 31.01.2020 itself triggered a default for the purposes of reckoning whether Section 10A applies or not. The Corporate Debtor is trying to confuse the concept of default under Section 10A of the Code, which is relatable to non-payment of even a part of the instalment of a loan, with "event of default" under the loan documents, when the entire amount of outstanding financial debt becomes due and payable. The explanation to Section 10A of the Code uses the expression "default" and therefore so long as it can be said that there is a non-payment of the due and payable financial debt prior to 25.03.2020, Section 10A of the Code will not come into operation. This view is in keeping with the spirit and intention of Section 10A of the Code that defaults which existed prior to onset of COVID-19 are not protected from initiation of CIRP under Section 10A of the Code.

28. Even if Clause 6 of the MoU has any application, even then the "event of default" has taken place prior to the onset of the period covered by Section 10A of the Code

because the outstanding amount of Rs. 63,39,021 towards the January 2020 instalment was not paid within 45 days, i.e., by 16.03.2020. In this regard, if the payments made by the Corporate Debtor as per Corporate Debtor's own reply at page 336 between 31.01.2020 and 16.03.2020 (when the 45-day cure period elapsed) are reckoned, the same aggregate to only Rs. 33,91,126 (as against 63,39,021 which was the outstanding principal amount under the January instalment). Further, there is no indication of the payment of the additional interest @ 2% by 16.03.2020.

29. This makes it clear that even the event of default under the MoU occurred by 16.03.2020, which is prior to the cut-off date of 25.03.2020 as provided under Section 10A of the Code.

30. Pertinently, the MoU does not require any notice of default to be addressed to the Corporate Debtor upon the occurrence of event of default. Instead, it states that on the occurrence of an event of default, the settlement shall "automatically" lapse.

31. Looking from any angle, the statutory default under Section 3(12) of the Code happened prior to 25.03.2020 and thus, the Petition is not hit by Section 10A of the Code.

32. JC Flowers is based on the RBI Circular dated 27.03.2020 (see para 52 of the judgment) which permitted certain entities to grant a moratorium of three months on payment of all instalments falling due between 01.03.2020 and 31.05.2020. The RBI Circular does not apply to ARCs. This position has not been disputed by the Corporate Debtor as well.

33. Corporate Debtor's submission, by drawing reference to the cause title of the said case, that this was also a case where an ARC was involved, is misleading. JC Flowers was a case where the credit facilities had been granted by YES Bank, the

petition under section 7 (which was dismissed vide the order dated 13.06.2022) was filed by YES Bank and even the appeal before NCLAT was filed by YES Bank. The account had been assigned to JC Flowers ARC only on 16.12.2022 i.e., after the dismissal of the petition and the substitution of ARC in place of YES Bank happened on 06.03.2023. (para 1 and 2 of the decision)

34. Further, this was a case where the Hon'ble NCLAT found that the date on which the instalment became due and payable was 01.03.2020 (paragraph 47). Since the instalment became payable only on 01.03.2020, which was the period covered by the RBI Circular, the Hon'ble NCLAT held that default occurred on 01.03.2020, and for this reason, the Petition was held to be not maintainable. The facts in the present case, however, are completely different and thus, JC Flowers has no application to the present facts.

35. The Corporate Debtor also relies on the issuance of a Loan Recall Notice issued by the Financial Creditor on 08.12.2020 to contend that date of default cannot be 31.01.2020 if the Loan Recall Notice was issued only on 08.12.2020. This argument lacks merit.

36. In this regard, it is pertinent to note that Loan Recall Notice itself states that the Corporate Debtor had defaulted in making payment from January 2020 onwards. This date of January 2020 was not disputed by the Corporate Debtor by way of any reply to the Loan Recall Notice. Thus, the date of the Loan Recall Notice is not material since the date of default mentioned in the said notice is January 2020. Once the default is established to have occurred prior to 25.03.2020, then the formal recall of the loan during the subsistence of the 10A period will not invite the application of Section 10A of the Code.

37. Corporate Debtor's further contention that it was only through the Loan Recall Notice that for the first time, it was notified that the settlement has come to end is concerned does not hold merit. It is plausible for a creditor to accord more time to pay to a debtor, even where default has occurred. The fact that such an opportunity was given (and despite that, no payments were made thereafter) does not mean that the previous default stands waived and/or that default takes place on the date of the recall notice.

38. In this connection, reference may be made to Pratik Jiyani v. Piramal Capital & Housing Finance Ltd. & Anr [Company Appeal (AT) (Insolvency) No. 1198 of 2023], where the Hon'ble NCLAT held that default has to be reckoned under the Agreement and loan recall notice has no significance for the purposes of Section 10A of the IBC. It was held that:-

14…The submission of learned Counsel for the Appellant is that loan recall notice having been issued on 20.08.2020, the entire loan became due only consequent to loan recall notice, which loan recall notice having been issued on 20.08.2020, i.e., during 10A period, the application was clearly barred. Loan recall notice dated 28.08.2020 was addressed to Corporate Debtor as well as the Personal Guarantor. The contention advanced by the learned Counsel for the Financial Creditor to counter the above submission is on the basis of Clause 8.1 of the Loan Agreement. The Respondent's case is that on occurring of two consecutive defaults in the payment of interest, it will constitute an event of default and the whole of the loan shall become forthwith due and payable by the Borrower. The above Clause clearly contemplates that on occurring of event of default, the whole of the loan shall become forthwith due and payable, and even the principal amount of the loan shall become due when event of default occurs. There is no

dispute between the parties that there is admitted default in payment of interest for two consecutive months prior to 10A period, which is apparent from the Chart as extracted in paragraph 1.3 of the impugned order. Even if, no notice dated 28.08.2020 was issued by the Financial Creditor, the principal amount also became due on occurring of event of default as per Clause 8.1."

39. Also, in Milind Kashiram Jadhav v. State Bank of India & Anr. [Company Appeal (AT) (Insolvency) No. 1589 of 2023], the Hon'ble NCLAT, relying upon the decision of the Hon'ble Supreme Court in B.K. Educational Services Private Limited Vs. Parag Gupta and Associates [(2019) 11 SCC 633, rejected the argument of the corporate debtor therein and held that the date of default is not required to be aligned with the loan recall notice. Relevant excerpt reads as follows:

68. The doubts would be further cleared in the judgement of Hon'ble Apex Court as extracted below:

"Ordinarily, upon declaration of the loan account/debt as NPA that date can be reckoned as the date of default to enable the financial creditor to initiate action Under Section 7 of the Code. However, Section 7 comes into play when the corporate debtor commits "default". Section 7, consciously uses the expression "default" -- not the date of notifying the loan account of the corporate person as NPA. Further, the expression "default" has been defined in Section 3(12) to mean 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…

…

70. Appellant's arguments to treat the recall date as the date of default therefore cannot be sustained, in the abovementioned background."

(emphasis in original text)

> Subsequent payments of approximately Rs. 1.40 Crores did not have the effect of regularizing the loan accounts of the Corporate Debtor. Default continued to exist as on the date of the Petition

40. Next, the Corporate Debtor contends that Rs. 1,40,42,431 was paid by it after 16.03.2020 till 09.04.2020 and such payments would regularize the default for the month of January 2020 and there was no default “in praesenti”.

41. This position is contrary to Corporate Debtor’s own balance sheet for FY 2019-2020 and balance sheets for the subsequent financial years, which are available in the public domain. The balance sheet for FY 2019-2020 itself records that repayment of loan amount to the Financial Creditor is pending since January 2020. If the default of January 2020 had been regularized, then there was no question of recording such fact in the balance sheets year after year.

42. During the course of arguments, the Financial Creditor relied on and submitted financial statements of the Corporate Debtor for the period FY 2019-20 to 2022-23 before this Bench. The Corporate Debtor filed its reply dated 10.06.2024 bearing diary no. 00493/11 to the filing of the said balance sheets. In its reply, the Corporate Debtor has prayed that such documents cannot be taken on record and the present petition be dismissed with costs as the Financial Creditor did not avail the opportunity to file a rejoinder and place the same on record.

43. This Bench has considered the said reply of the Corporate Debtor and by order dated 10.06.2024 dismissed the same on the ground that the documents in question are Corporate Debtor’s own financial statements and are public documents. Therefore, the objection of the Corporate Debtor is not sustainable.

44. While deciding an application under Section 7 of the Code, there is no prohibition on filing documents even after the initial filing. Reference in this regard be had to the decision of the Hon'ble Supreme Court in Dena Bank (Now Bank of Baroda) v. C. Shivakumar Reddy and Another [(2021) 10 SCC 330] wherein it was held that:

> *"…..89. On a careful reading of the provisions of the IBC and in particular the provisions of Section 7(2) to (5) of the IBC read with the 2016 Adjudicating Authority Rules there is no bar to the filing of documents at any time until a final order either admitting or dismissing the application has been passed…."*

45. Even otherwise and as stated earlier, balance sheets are public documents, available to the public at large and the Hon'ble Bench can take notice of the same. The Hon'ble High Court of Bombay in Mannalal Jindal @ Agrawal v. State of Maharashtra [CRIMINAL APPLICATION NO. 611 OF 2010] held that:-

> *"…Whatever it may be, the annual report of the company is a public document so also annual report submitted by the company with the Registrar of the company is also a public document."*

46. The Corporate Debtor's contention is that the financial statements, even if taken on record, aid its own case, is not correct. It is clearly mentioned in the notes to the financial statement for FY 2019-2020, which were drawn on 31.03.2020 that:

> "During the financial year 2017-18, the company had availed a term loan from m/s UV Asset Reconstructions Pvt Ltd. amounting to Rs. 1625 lakhs which is deemed as assigned term loan @ 20% p.a. interest payable monthly and repayment of the principle amount in 42 equal monthly instalments of Rs. 3,869,048/- commencing from Jan '2020 to jun'2022 and also payable Rs. 284.37 lakhs in addition to interest free amount by the eighth instalment of

> Rs. 25 lakh and the last full and final instalment of Rs. 8,437,500, commencing from june'2019 to jun'2022. all terms & conditions of loans executed with IFCI & TFCI as well as the securities, personal guarantees, pledge of shares, shall remain the same, and eventually uvarcl has stepped into the shoes of the financial institutions that is IFCI & TFCI which were taken over by it during the financial year 2017-18. During the financial year 2020-21, total seventeen instalments of which fifteen amounting to Rs. 3,869,048 and two amounting to Rs. 25 lakhs each are due. the repayment of this loan is pending to the extent of Rs. 11060451/- since jan'2020 due to impact of covid-19 spread in the world since dec'2019. the overdue amount due to non-payment for the last quarter is Rs. 11,060,451/-."
>
> (emphasis supplied)

47. The aforesaid extract (also appearing in financial statements of subsequent years) makes it evident that Corporate Debtor itself acknowledges the repayment of the loan since "Jan'2020', thereby admitting to the default on its part from such date. As balance sheet for FY 2019-2020 is Corporate Debtor's own record, it is bound by the admissions made in its balance sheet and cannot be heard to controvert its contents.

48. The above argument of the Corporate Debtor also does not hold ground because once the default stands established as on 01.02.2020 and even contractually event of default stands made out by 16.03.2020, then the Corporate Debtor, which has itself admitted in its balance sheets for all subsequent years that it is in default of payment since January 2020, cannot be heard to say that subsequent payments made by it should be accounted for towards the unpaid instalment for the month of

January 2020 alone and not for the subsequent months, i.e. February, March and April 2020.

49. On an overall calculation, the total payments that the Corporate Debtor claims to have made from 01.01.2020 to 09.04.2020, viz. approx. 2 crores falls short of the total payment that it was required to make for January, February and March 2020, which was a sum of around Rs. 2.85 crores. No payments were thereafter made for the post 10A period, which is the position even today. Thus, by its own admission, the Corporate Debtor is in arrears of instalments under the loan documents since January 2020, with no payments admittedly having been made after 09.04.2020.

50. As such, it is not understood as to how the Corporate Debtor can claim that its account stood regularized or cured of default on the date of filing of the Petition, when the default in question was for the whole amount under the MoU and not simply the instalment for January 2020.

51. To suit his convenience, it appears that the Corporate Debtor is mixing up two separate issues. On one hand, the Corporate Debtor is pressing Section 10A of the Code and for that purpose has contended that only the default for the month of January 2020 is to be reckoned. On the other hand, for making its argument on partial payments, the Corporate Debtor attempts to confine the default to the instalment of January 2020. However, what the Corporate Debtor loses sight of the fact that under the MoU, it is not just the default for January 2020 but that of the entire amount of the loan that becomes due on account of the Corporate Debtor's failure to cure the default for January 2020 instalment.

52. At this stage, it is pertinent to note that in Milind Kashiram (supra), the Hon'ble NCLAT has observed that there is no requirement to compute the exact amount in debt so long as it meets the threshold. It held has follows:

"…Without going into the exact amount of the debt, it is an admitted fact that the debt was Rs.46.80 crores as on the date of declaration of NPA i.e. 27.09.2019. This amount is more than the threshold of Rs.1 crore and is enough for initiating proceedings. There is no requirement to calculate and fix the exact amount of repayment…"

53. The Hon'ble NCLAT in Milind Kashiram (supra) further goes on to say that mere existence of partial payments do not absolve the Corporate Debtor from default status . The relevant excerpt reads as follows:

> *"72. The Appellant/Corporate Debtor's attempt to refute this by highlighting certain payments made subsequent to the NPA classification is flawed on multiple fronts. Firstly, despite any payments made, the crucial fact remains that the loan accounts were never regularized; they continued to remain in the NPA category. Thus, the mere existence of partial payments does not absolve the Corporate Debtor from the default status. In the light of these incontrovertible facts, the argument put forth by the Appellant/Corporate Debtor holds no merit."*
>
> *(emphasis added)*

54. In Beetel Teletech Ltd. Vs. Arcelia IT Services Pvt. Ltd. [Company Appeal (AT) (Insolvency) No. 1459 of 2022], the Hon'ble NCLAT holds that under Section 60 of Indian Contract Act, 1872, upon payments made by a debtor, the creditor is well entitled to appropriate such payment as per its discretion. Relevant para reads as under:

> *19. A plain reading of Section 60 of the Indian Contract Act 1872, shows that if the debtor makes any payment without any appropriation, then the creditor can use his discretion to wipe out any of the remaining debt(s) which is/are*

due. The right of appropriation lies with the creditor if the debtor does not indicate in what manner the debt is to be discharged. In such circumstances, the creditor has a lot of scope for exercising his right in such a manner so as to put himself in the most advantageous position. It is also a well settled business practice that in a debt where the principal amount is outstanding and interest has also accrued on the debt, sums paid by the debtor is applied by the creditor first to the interest.

55. Therefore, the loan account did not stand regularized as on the date of filing of the petition by merely making certain partial payments, as the same could not have cured the entire default under the MoU. On the date of the presentation of the present petition under Section 7 of the Code, there was a live debt which was more than the threshold limit and as such, it cannot be held that the present petition is not maintainable.

56. It is further considered that not filing of account statement is not fatal to the present petition in as much as the same is not a mandatory requirement and the existence of debt can be reckoned from all documents on record, including the financial statement of Corporate Debtor as observed above.

57. The Corporate Debtor's assertion that since an amount of Rs. 70 Lacs was disbursed to it on 19.03.2020, no default could have occurred on 16.03.2020, is not germane. Once it is found that the date of default was 01.02.2020, merely because a subsequent disbursal was made to the Corporate Debtor does not alter the position that the Corporate Debtor was indeed in default as on 01.01.2020. Making a subsequent disbursal does not cure a pre-existing default of the Corporate Debtor under the Code.

58. Further, no clause in any of the financing documents has been shown which states that further amounts would not be disbursed after an event of default has occurred. Making further disbursement is a matter of its discretion of the Financial Creditor and one cannot find fault with the same. This can never be said to be a waiver or extinguishment of pre-existing default.

59. Another issue for consideration is whether the present application is filed within limitation. The date of default is stated to be January 2020. It can be seen from the records that the present petition is filed vide diary number 00493 dated 5.7.2022. Hence, the present petition is well within the period of limitation of three years.

60. In order to initiate CIRP under Section 7, the applicant is required to establish that there is existence of financial debt and its default by the corporate debtor.

61. In light of the given facts & circumstances, the present petition/application being complete, and the Financial Creditor having established the default on the part of the Corporate Debtor in payment of the financial Debt for an amount being above the minimum threshold limit and there being no disciplinary proceedings pending against the substituted resolution professional, the present petition/Application is liable to be admitted in terms of Section 7(5) of the Code.

62. In Part-III of Form No. 1, Mr. Manoj Sehgal was proposed as the Interim Resolution Professional (IRP). However, Authorization for Assignment (AFA) of the proposed IRP was valid up to 20.12.2023. Therefore, Mr. Navneet Gupta, Interim Resolution Professional (IRP), has been proposed by the petitioner. The valid 'Authorization for Assignment' in favour of the newly proposed IRP-Mr. Navneet Gupta along with NOC from the previously proposed IRP-Mr. Manoj Sehgal in compliance of the order dated 29.05.2024 has been filed vide diary No.00493/8 dated 03.06.2024.

63. The IRP's written consent shows that there is no disciplinary proceeding pending against the proposed Resolution Professional. In view of the above, we appoint Mr. Navneet Gupta, Registration No. IBBI/IPA-001/IP-P-00361/2017-2018/10619, Email: navguptaca@gmail.com, Mobile No. 9814333213, the Interim Resolution Professional with the following directions: -

i.) The term of appointment of Mr. Navneet Gupta shall be in accordance with the provisions of Section 16(5) of the Code;

ii.) In terms of Section 17 of the Code, from the date of this appointment, the powers of the Board of Directors shall stand suspended and the management of the affairs shall vest with the Interim Resolution Professional and the officers and the managers of the Corporate Debtor shall report to the Interim Resolution Professional, who shall be enjoined to exercise all the powers as are vested with Interim Resolution Professional and strictly perform all the duties as are enjoined on the Interim Resolution Professional under Section 18 and other relevant provisions of the Code, including taking control and custody of the assets over which the Corporate Debtor has ownership rights recorded in the balance sheet of the Corporate Debtor, etc. as provided in Section 18 (1) (f) of the Code. The Interim Resolution Professional is directed to prepare a complete list of the inventory of assets of the Corporate Debtor;

iii.) The Interim Resolution Professional shall strictly act in accordance with the Code, all the rules framed thereunder by the Board or the Central Government and in accordance with the Code of Conduct

governing his profession and as an Insolvency Professional with high standards of ethics and moral;

iv.) The Interim Resolution Professional shall cause a public announcement within three days as contemplated under Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 of the initiation of the Corporate Insolvency Resolution Process in terms of Section 13 (1) (b) of the Code read with Section 15 calling for the submission of claims against Corporate Debtor;

v.) It is hereby directed that the Corporate Debtor, its Directors, personnel and the persons associated with the management shall extend all cooperation to the Interim Resolution Professional in managing the affairs of the Corporate Debtor as a going concern and extend all cooperation in accessing books and records as well as assets of the Corporate Debtor;

vi.) The Suspended Board of Directors is directed to give complete access to the Books of Accounts of the corporate debtor maintained under section 128 of the Companies Act. In case the books are maintained in the electronic mode, the Suspended Board of Directors are to share with the Resolution Professional all the information regarding Maintaining the Backup and regarding Service Provider kept under Rule 3(5) and Rule 3(6) of the Companies Accounts Rules, 2014 respectively as effective from 11.08.2022, especially the name of the service provider, the internet protocol of the Service Provider and its

location, and also address of the location of the Books of Accounts maintained in the cloud. In case accounting software for maintaining the books of accounts is used by the corporate debtor, then IRP/RP is to check that the audit trail in the same is not disabled as required under the notification dated 24.03.2021 of the Ministry of Corporate Affairs. A reference is made to the provisions of Section 128(5) of the Companies Act 2013, whereby every company should maintain its books of accounts for not less than 8 financial years immediately preceding a financial year. Minutes and statutory records are the principal documents of the company that should be maintained and preserved since inception.

> *"As per Rule 7 (f) of Companies (Registered Valuers and Valuation) Rules, 2017, Registered Valuer shall maintain records of each assignment undertaken by him for at least three years from the completion of such assignment;"*
>
> As per the Standard of Auditor (SA-230)
>
> *"The retention period for audit engagements is ordinarily no shorter than seven years from the date of auditor's report, or, if later, the date of the group auditor's report."*

In view of the above mandatory provisions, the suspended directors of the board will ensure that the books of accounts for the eight previous financial years preceding the date of this order be made available to the IRP/RP within 15 days of the initiation of the CIRP order. The statutory auditor is also directed to share the records maintained by him in the course of the audit of the accounts of the corporate debtor for the period of three years prior to the date of initiation of this CIRP order within the same period of 15 days. The statutory auditor is directed to share with

the Resolution Professional the audit documentation and the audit trails, which they are mandated to retain pursuant to SA-230 (Audit Documentation) prescribed by the Auditing and Assurance Standards Board ICAI. The IRP/Resolution Professional is directed to take possession of the Books of Account in physical form or the computer systems storing the electronic records at the earliest.

vii.) In case of any non-cooperation by the Suspended Board of Directors or the statutory auditors, he may take the help of the police authorities to enforce this order. The concerned police authorities are directed to extend help to the IRP/RP in implementing this order for retrieval of relevant information from the systems of the corporate debtor, the IRP/RP may take the assistance of Digital Forensic Experts empanelled with this Bench for this purpose. The Suspended Board of Directors is also directed to hand over all user IDs and passwords relating to the corporate debtor, particularly for government portals, for various compliances. The Interim Resolution Professional is also directed to make a specific mention of non-compliance, if any, in this regard in his status report filed before this Adjudicating Authority immediately after a month of the initiation of the CIRP.

viii.) The Resolution Professional is directed to approach the Government Departments, Banks, Corporate Bodies and other entities with request for information/documents available with those authorities/institutions/others pertaining to the corporate debtor which would be relevant in the CIR proceedings. The Government

Departments, Banks, Corporate Bodies and other entities are directeFd to render the necessary information and cooperation to the Resolution Professional to enable him to conduct the CIR Proceedings as per law.

ix.) The Interim Resolution Professional shall after collation of all the claims received against the Corporate Debtor and the determination of the operational position of the Corporate Debtor constitute a Committee of Creditors and shall file a report, certifying constitution of the Committee to this Tribunal on or before the expiry of thirty days from the date of his appointment, and shall convene first meeting of the Committee within seven days of filing the report of constitution of the Committee; and

x.) The Interim Resolution Professional is directed to send a regular progress report to this Tribunal every fortnight.

64. In the given facts and circumstances, the present petition being complete and having established the default in payment of the Financial Debt for the default amount being above the threshold limit, the petition is admitted in terms of Section 7(5) of the IBC and accordingly, also direct moratorium in terms of sub-section (1) of Section 14 of the code to take effect as below:

a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree, or order in any court of law, tribunal, arbitration panel, or other authority;

b) transferring, encumbering, alienating, or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Operational Assets and Enforcement of Security Interest Act, 2002; and

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

e) It is further directed that the supply of essential goods or services to the corporate debtor as may be specified, shall not be terminated or suspended or interrupted during the moratorium period. The provisions of Section 14(3) shall, however, not apply to such transactions as may be notified by the Central Government in consultation with any operational sector regulator and to a surety in a contract of guarantee to a corporate debtor.

f) The 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 the corporate debtor under Section 33 as the case may be.

65. We direct the Financial Creditor to deposit a sum of ₹2,00,000/- (Rupees Two Lakhs Only) with the Interim Resolution Professional to meet out the expense to perform the functions assigned to him in accordance with Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The amount, however, is subject to adjustment by the

Committee of Creditors as accounted for by the Interim Resolution Professional on the conclusion of CIRP.

66. A copy of the order shall be communicated to both parties. The learned counsel for the petitioner shall deliver a copy of this order to the Interim Resolution Professional forthwith. The Registry is also directed to send a copy of this order to the Interim Resolution Professional at his email address forthwith.

67. The petition is admitted accordingly.

Sd/- Sd/-

(Satya Ranjan Prasad) **(Dr. PSN Prasad)**
Member (Technical) **Member (Judicial)**

July 03, 2024
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