IN THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH-IV

In the matter of

IDBI Bank Limited … Financial Creditor

V/s.

Zee Entertainment Enterprises Limited

… Corporate Debtor

CP (IB) No. 107/MB-IV/2023

AND

In the matter of

IA-581/2023

IN

CP (IB) No. 107/MB-IV/2023

Under Section 7 of the IBC, 2016

In the matter of

Zee Entertainment Enterprises Limited

… Applicant/Orig. Corporate Debtor

V/s.

IDBI Bank Limited

… Respondent/Orig. Financial Creditor

Order Pronounced on: **19.05.2023**

Coram:

Mr. Prabhat Kumar
Hon'ble Member (Technical)

Mr. Kishore Vemulapalli
Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Financial Creditor/Respondent: Mr. Ashish S. Kamat, Advocate.

For the Corporate Debtor/Applicant : Mr. Zal Andhyarjuna, Ld. Sr. Counsel a/w Mr. Karan Bhide, Ld. Counsel for the Corporate Debtor present.

O R D E R

Per: Prabhat Kumar, Member (Technical)

1. This is an application being CP (IB) No. 107/MB-IV/2023 filed by IDBI Bank Limited, the Financial Creditor/Applicant, filed on 14.07.2021 under Section 7 of the Insolvency & Bankruptcy Code, 2016 (I&B Code) for initiating Corporate Insolvency Resolution Process (CIRP) in the case of Zee Entertainment Enterprises Limited.

   1.1. The financial creditor has claimed a default of Rs. 149,60,69,763.39/- (Rupees One Hundred Forty-Nine Crore Sixty Lakh Sixty-Nine Thousand Seven Hundred Sixty-Three and Thirty-Nine Paisa Only) as on 08.12.2022. The date of default is not specifically stated in part IV. Instead, it is stated in the part IV that "*The Borrower defaulted in payment of its obligations under the Working Capital Facility on 30th September 2019 and the account of the Borrower was classified as a Non-performing Asset on 29th December 2019 in accordance with the existing guidelines of Reserve Bank of India. The Financial Creditor invoked the guarantee on 5th March 2021 and the Corporate Debtor is in continuous default in terms of the guarantee agreement dated 3rd August 2012.*"

2. The Corporate Debtor is a company incorporated under the Companies Act, 1956 which is engaged in the business of media and entertainment. It is involved in the business of broadcasting of general entertainment television channels.

2.1. The Financial Creditor has filed the captioned Company Petition against the Corporate Debtor pursuant to the Guarantee Agreement dated 3rd August, 2012 executed by the Corporate Debtor in favour of the Financial Creditor.

2.2. Pursuant to various sanction letters issued by the Financial Creditor in favour of one Siti Networks Ltd. ("Principal Borrower"), the Financial Creditor had originally sanctioned an aggregate amount of INR. 150 Crores by way of a working capital facility in favour of Principal Borrower, comprising a fund-based portion of INR 50 Crores and a non-fund-based potion of INR. 100 Crores. Subsequently, under the Enhancement Sanction Letter dated 11th February, 2016, the fund-based and non-fund-based limits of the working capital facility were enhanced to INR. 100 Crore and INR. 200 Crore, respectively.

2.3. The Facilities are secured, amongst others, by: (a) first charge over the entire moveable and immoveable properties and assets of the Borrower both present and future (Secured Assets); (b) guarantee of the Corporate Debtor. The security over the Secured Assets was created in favour of the Financial Creditor on various dates by way of deeds of hypothecation dated 30 January 2009, 14 December 2009, 23 March 2011, 17 July 2012 and memorandum of entry dated 27 March 2012, 11 March 2015 and 27 January 2017. The Borrower filed Form-CHG-1/Form-8 with the Registrar of Companies (ROC) in terms of the Companies Act, 2013 duly recording hypothecation over the moveable assets, mortgage over the immoveable assets of the Borrower for securing the financial assistances.

2.4. Under the sanction letters, one of the terms for the grant of the aforesaid facility was that the Principal Borrower shall maintain a Debt Service Reserve Account ("**DSRA**") wherein credit balance equal to two quarters' interest on working capital facility ("**DSRA Amount**") was required to be maintained by the Principal Borrower at all times till the repayment of the aforesaid working capital facility. Under a separate Guarantee Agreement dated 3rd August, 2012, the Corporate Debtor has given a guarantee to maintain the credit balance equal to two quarters' interest on working capital facility to the extent of Rs. 50.00 crores in the DSRA in the event Principal Borrower fails to do so ["**DSRA Guarantee Agreement**"].

2.5. The entire credit facilities advanced by the Financial Creditor to Principal Borrower were recalled vide the Recall Letter dated 18th February, 2021 addressed by the Financial Creditor to Principal Borrower.

2.6. On 05 March 2021, the Financial Creditor invoked the guarantee provided by the Corporate debtor and called upon the Corporate debtor to pay Rs 61,97,33,612.80 together with further interest from 18 February 2021. The amount claimed represents an amount of INR. 51.29 Crores towards the principal amount of the fund-based portion of the working capital facility from the Corporate Debtor. The Corporate Debtor, on 15 March 2021, responded to the demand notice and only specified that they will respond with details. No denial of obligations under the guarantee.

3. The Corporate Debtor filed an affidavit in reply dated 28.04.2023 and brief written submission dated 12.05.2023 and has stated that

3.1. It is relevant to note that the claim of the Financial Creditor in the captioned Company Petition is restricted to the alleged outstanding amounts in respect

of the fund-based portion of INR. 50 Crores of the working capital facility only and does not relate to the non-fund-based portion thereof. In fact, till date, no demand is made by the Financial Creditor insofar as the non-fund-based portion of the facility is concerned.

3.2. The liability of the Corporate Debtor under the DSRA Guarantee is limited to the maintenance of the DSRA Amount in the DSRA only insofar as the original fund-based limit of INR. 50 Crores in respect of the said working capital facility is concerned. An over-all reading of the DSRA Guarantee Agreement and more particularly, Recitals 2 and 4 and Clause 4 thereof, read together with the sanction letters issued by the Financial Creditor to the Principal Borrower from time to time, exhibits that the Corporate Debtor only guaranteed the due maintenance of credit balance equal to two quarters' interest ("**DSRA Amount**") in respect of the fund-based limit of INR. 50 Crore of the working capital facility availed by Principal Borrower from the Financial Creditor till repayment of the said facility.

3.2.1. Clause 7 deals with tenor of guarantee and Clause 11 provides guarantee being continuous in nature. A perusal of the relevant sanction letters also exhibits that the said Guarantee Agreement was restricted to the maintenance of the DSRA Amount in the DSRA only limited to the original fund-based limit of INR. 50 Crores. The sanction letter explicitly stipulates that the Corporate Debtor's guarantee is restricted to maintenance of the DSRA Amount in the DSRA to the extent of the sanctioned limits of INR. 50 Crore, only, and under the sanction letter enhancing the fund-based limit to Rs. 100 crores, the guarantee of corporate debtor was to maintain DSRA for Existing Limits of Rs. 50 crores only; and one ARM Infra & Utilities Limited's guarantee was for the enhanced limits of Rs. 50 crores and the same is not restricted to the

DSRA Amount and extends to the aggregate outstanding in respect of the working capital facility. In the Renewal Sanction Letter dated 19th July, 2017, 19th December, 2018 also, it is again reiterated in the same manner once again, the Financial Creditor expressly agreed that the DSRA Amount shall be maintained in respect of the initially sanctioned limit of INR. 50 Crores, only.

3.2.2. This position is admitted by the Financial Creditor itself, as is evident from the Minutes of Meeting of lenders of Principal Borrower dated 15th April 2015, which records the statement of the representative of the Financial Creditor that the Financial Creditor's cash credit limits are secured by the Corporate Debtor's DSRA Guarantee Agreement to the extent of Rs.50 Crore only out of the Rs.100 Crore cash credit exposure. Admittedly, there is no demand/ claim made by the Financial Creditor for the non-fund-based facility.

3.3. Section 128 of the Contract Act, 1872 (dealing with the co-extensive liability of a guarantor) is expressly made subject to a contract to the contrary. As aforesaid, the said Guarantee Agreement is limited only to the maintenance of the DSRA Amount in the DSRA (as set out in Clause 4 stated above) and is not co-extensive with the liability of the principal borrower to repay the entire outstanding amounts in respect of the working capital facility. It is therefore submitted that the said Guarantee Agreement shall operate as a contract to the contrary for the purposes of Section 128 of the Contract Act, 1872. It is thus submitted that the Corporate Debtor could only have been called upon to maintain the DSRA Amount in the DSRA and therefore the said invocation/ demand vide the Financial Creditor's letter dated 5th March, 2021 is bad in law and is illegal and invalid.

3.3.1. It is settled law that a contract of guarantee must be strictly construed, and that the liability of a guarantor depends on the terms of the contract of guarantee [see, ***(i) State of Maharashtra vs. M.N. Kaul & Ors., MANU/SC/0370/1967, para 5 – 7; (ii) Syndicate Bank vs. Channaveerappa Beleri & Ors., (2006) 11 SCC 506, para 9; (iii) Gundla Venkamma vs. Rao Sahib Kotla Sanyasayya, AIR 1938 Mad 422, para 7;*** *and* ***(iv) Chandukutty Nambiar vs. Raman Nair & Ors., MANU/KE/0061/1959, para 7 – 9***].

3.3.2. In almost identical facts to the facts of the present case, in the case of (i) ***Aditya Narayan Chouresia vs. Bank of India & Ors., MANU/BH/0045/2000, para 10 – 11; and (ii) G. Purnachander vs. Syndicate Bank, MANU/AP/3822/2013, para 17-22***, the Court, while construing a continuing guarantee for a cash-credit facility for the purpose of securing a floating balance which may from time to time be due from the principal borrower, held that the liability of the guarantor cannot extend beyond the terms of the guarantee and that the guarantors are not liable for the whole debt, but the part of the debt, agreed between the parties in terms of the deed of guarantee. The ratio in the aforesaid decisions is squarely applicable to the facts of the present case.

3.4. Subsequently, on 6th August, 2021, the Financial Creditor filed an Original Application before the Hon'ble Debts Recovery Tribunal, Mumbai inter-alia against the Corporate Debtor wherein the Financial Creditor admitted that the invocation of the said Guarantee Agreement against the Corporate Debtor was for the aggregate amount of INR. 61.97 Crores.

3.5. The above conduct of the Financial Creditor shows beyond doubt that the Financial Creditor capped its demand against the Corporate Debtor only towards the originally sanctioned fund-based limit of INR. 50 Crore and that

the Financial Creditor itself claimed the balance fund-based portion of INR. 50 Crores from ARM Infra and Utilities Ltd. The Financial Creditor has once again, in Part IV of the Company Petition recording 'Date of Default' clearly admitted that it is by the letter dated 05th March 2021 that they invoked the DSRA Guarantee Agreement. As such, as per the Financial Creditor's own understanding, the said Guarantee Agreement is limited to the originally sanctioned fund-based limit of INR. 50 Crore only and does not extend to the over-all fund-based limit of INR. 100 Crores in respect of the working capital facility.

3.6. The all the sanction letters expressly provide that the obligation of Principal Borrower to maintain the DSRA Amount in the DSRA is for the specific purpose of "*interest servicing*". Further, the Corporate Debtor's obligation under the said Guarantee Agreement is limited to guaranteeing the due maintenance of the DSRA Amount in the DSRA and as such relates to Principal Borrower's obligation of "*interest servicing*".

3.7. There can be no dispute to the proposition that once the entire facility is recalled by the lender, the obligation to service the interest ceases to apply and the borrower is obligated to repay the amount due. Given that the Financial Creditor has consciously chosen to recall the entire facility by its letter dated 18th February, 2021 addressed to Principal Borrower, the obligation of Principal Borrower to service the facility no longer survives. Consequently, the obligation of the Corporate Debtor to guarantee the obligation of Principal Borrower also does not survive. The remedy of the Financial Creditor is only against Principal Borrower to recover the full amount due.

3.8. As such, it is submitted that the said Guarantee Agreement cannot be invoked for the entire outstanding amount and in fact stands discharged pursuant to

the letter dated 18th February, 2021 addressed by the Financial Creditor to Principal Borrower recalling the entire facility amount.

3.9. Pertinent to note that the Financial Creditor has not once quantified or called upon the Corporate Debtor to replenish any such shortfall in the DSRA Amount i.e 2 quarters of interest, prior to recall of the entire facility. Thus, the invocation notice dated 5th March 2021 calling upon the Corporate Debtor to pay the full amount of fund-based dues of Principal Borrower is bad in law and hence unenforceable.

3.10. Further, at no point did the Corporate Debtor acknowledge or accept the entire dues as its liability. In fact, the sanction letters (as amended from time to time) as well as the other documents mentioned hereinabove make it clear that the Corporate Debtor had only guaranteed maintenance of DSRA Amount in respect of the facility. Thus, the Financial Creditor's stand that the Corporate Debtor had acknowledged the entire dues is incorrect.

3.11. The Financial Creditor has claimed the principal amount of Rs.51,29,43,895.80/- from the Corporate Debtor and remaining principal amount from other Corporate Guarantor i.e. Arm Infra and Utilities Limited. Besides this the Financial Creditor has claimed total interest of Rs.10,67,89,718/- from the Corporate Debtor as well as the other Corporate Guarantor, without realizing the fact that the Corporate Debtor's liability under Guarantee is limited to interest component on the working capital loan of Rs.50 Crores and not on the whole outstanding. Despite the same, the Financial Creditor has claimed the entire over-all fund-based limit of INR 100 Crores from the Corporate Debtor in the present petition, thus, making misleading and exorbitant claim.

3.12. The Corporate Debtor is a listed, debt-free, solvent and profit-making company and has good financial health; having net-worth of Rs.10,000/- Crores employing 3500 persons. It is a matter of public record that the Corporate Debtor is in the process of effecting a scheme of merger of the Corporate Debtor with and into 'Culver Max Entertainment Pvt. The post scheme net-worth of the amalgamated entity is slated to be in excess of INR. 40,000 Crores. The shareholders of the Corporate Debtor will hold 45.15% shareholding in the amalgamated entity while its founders will hold 3.99% and Culver Max Entertainment Pvt. will hold 50.86% of the shareholding. Moreover, under Clause 2.1 (d) and 2.1 (h) of the proposed Scheme, all debts and liabilities (including contingent liabilities) of the Corporate Debtor as also all pending legal and other proceedings shall stand transferred to the amalgamated entity.

3.13. It is settled law that the date of NPA (of the principal borrower) cannot amount to a date of default in respect of the guarantor and that the Financial Creditor is bound to substantiate the date of default qua the guarantor. It is submitted that Section 7 of the Code comes into play when the Corporate Debtor commits a "default" [see, ***(i) Laxmi Pat Surana vs. Union Bank of India & Anr., (2021) 8 SCC 481, para 42-43; and (ii) Pooja Ramesh Singh vs. SBI & Anr., Order dated 28th April, 2023 in CA No. 329 of 2023, para 6 – 24***]

3.14. It is settled law that in an 'on-demand' guarantee (such as the present case) that demand/ invocation is a necessary prerequisite and a condition precedent to the guaranteed amount to become payable under the guarantee and that the liability of the guarantor, in an 'on-demand' guarantee, arises only after a demand is made on the guarantor. Correspondingly it is also settled that a default occurs only when such a demand is not honoured by the guarantor. [see ***(i) Syndicate Bank vs. Channaveerappa Beleri & Ors., (2006) 11 SCC 506,***

para 11 – 13; (ii) Edelweiss Asset Reconstruction Company Ltd. vs. Orissa Manganese and Minerals Ltd. & Ors., 2019 SCC OnLine NCLAT 764, para 26; (iii) YES Bank Ltd. vs. Deserve Exim Pvt. Ltd., National Company Law Tribunal, Mumbai Bench, Order dated 10th February, 2023 in IA No. 609 of 2022 in CP No. 1191 of 2021, para 9 and 10; and (iv) State Bank of India vs. Shaliwahan Farms Pvt. Ltd., National Company Law Tribunal, Mumbai Bench, Order dated 3rd March, 2023 in in CP No. 1280 of 2022, para 4].

3.15. Order dated 22nd February, 2023 passed by the NCLT in IndusInd Bank Ltd. vs. Zee Entertainment Enterprises Ltd. is entirely distinguishable since the same was an order u/s. Section 10A of the Code and did not deal with the arguments of the Corporate Debtor on merits. The facts prevailing in this case with regard to Section 10A of the Code are totally different and do not apply to the present case; The clauses of the DSRA guarantee in this case are materially different from the present case, including without limitation, Clause 4 thereof (dealing with the extent of liability), which provided that the guarantee shall extend to the aggregate outstanding amounts due from the principal borrower in respect of the term loan facility, whereas in the present case, the guarantee is restricted to the maintain balance of DSRA amount in relation to interest on working capital facility only. As such, any reliance placed thereon in entirely misconceived.

3.16. Further, the judgment dated 21st December, 2020 passed by the Hon'ble Delhi High Court in Zee Entertainment Enterprises Ltd. vs. IndusInd Bank Ltd. & Anr. proceeded on the wording of Clause 4 of the DSRA guarantee in that case, which is materially different from Clause 4 of the present Guarantee Agreement, insofar as Clause 4 of the guarantee in that case provided that the guarantee shall extend to the aggregate outstanding amounts due from the principal borrower in respect of the term loan facility. Owing to the above,

the order and judgment of the Hon'ble Delhi High Court is entirely distinguishable on facts and cannot apply to the facts of the present case.

4. The Corporate Debtor filed Interlocutory Application No.581 of 2023 seeking an outright dismissal of the captioned Company Petition at the threshold under Section 10A of the Code. It is the case of Corporate Debtor that the Financial Creditor addressed a letter on 18th February 2021, to principal borrower recalling *inter alia* the credit facilities granted by the Financial Creditor to principal borrower including the Working Capital Facilities and accordingly demanded an aggregate sum of Rs.135,70,32,574.77 along with further interest thereon calculated from 16th February 2021 to be paid within a period of 15 days from the date of the said letter. Pertinent to note that the letter was issued only to principal borrower and not to the Corporate Debtor. Merely a copy of the said letter was marked to the Corporate Debtor. Also pertinent to note that although the said letter mentions the DSRA Guarantee Agreement, no claim as regards the DSRA Guarantee Agreement was made in the said letter nor was there any mention of any purported defaults in the maintenance of the DSRA. Shortly thereafter, the Financial Creditor addressed a letter dated 5th March, 2021 to the Corporate Debtor purportedly invoking the DSRA Guarantee Agreement and calling upon the Corporate Debtor to make payment of a sum of Rs.61,97,33,612.8 being the purported outstanding amount under the Working Capital Facilities together with further interest thereon calculated from 18th February, 2021. Pertinent to note that prior to the recall of the loan or the invocation of the DSRA Guarantee Agreement on 5th March 2021, the Corporate Debtor was never notified by the Financial Creditor of any default committed by the Principal Borrower of any purported shortfalls in the DSRA. Clauses 7, 9, 10, 11 and 27 make it clear that the DSRA Guarantee is an on-demand guarantee.

5. The Financial Creditor filed a reply dated 28.02.2023 to the IA-581/2023 stating that the Corporate Debtor has a coextensive liability and once the principal borrower defaults the creditor can be qua the amount from the guarantor. In this case the borrower defaulted in September, 2019 and this fact was in knowledge of the Corporate Debtor through emails sent by the Financial Creditor to the principal borrower with copy marked to the Corporate Guarantor also. Further clause 25 of the Agreement provides that "*This Guarantee shall be irrevocable and the obligations of the Guarantors hereunder shall not be conditional on the receipt of any prior notice by the Guarantors or by the Borrower and the demand or notice by the Lender to the Borrower shall be sufficient notice to or demand on the Guarantors".* Accordingly, the Corporate Guarantor cannot claim that the demand notice dated 5th March, 2021 is to be treated as the demand on the Applicant/Corporate Debtor. It is further submitted that the intention of the legislature cannot be to have 2 defaults for the same debt for the purpose of section 10A of the Code. Once it is established that the default under the Working Capital Facility, which the guarantee secures, occurred before the Covid period, the corporate guarantor cannot take defense of Section 10A of the Code. This is also upheld by the Hon'ble National Company Law Tribunal. Further, clause 7 of the guarantee agreement also minds the guarantor to replenish the DSRA immediately at the request of lender. It is also stated that the liability of the guarantor is continuing one and the guarantor can said to be in default till today. Also, the liability of the guarantors extends to the entire amount under Working Capital Facility and not limited only to the DSRA amount.

6. The Corporate Debtor has filed a affidavit in rejoinder dated 23.03.2023 that the primary allegation of the Financial Creditor that the liability of a guarantor is simultaneous with that of the borrower, and that there cannot be a different/ separate debt for the borrower, is *ex-facie* flawed owing to the very reason that it is settled law that the liability of a guarantor is to be gathered from the terms of the

guarantee. If the guarantee provides for a limited and restricted liability on the guarantor, surely the guarantor cannot then be held liable for the entire debt in case of default by the borrower. The DSRA Guarantee Agreement clearly identifies and limits the guarantee to maintaining the amounts in the DSRA in the event of the borrower failing to do so. The question therefore of the Corporate Debtor being held liable for the entire outstanding amounts of the credit facilities availed by the Principal Borrower does not and cannot arise. Further, it is undisputed that the purported acceleration of the credit facilities took place only on 18th February 2021 upon recall thereof by the Financial Creditor against Principal Borrower. Pertinently, the said date falls within the 10A Period. It is also undisputed that the Financial Creditor invoked the DSRA Guarantee Agreement and demanded the alleged outstanding amounts from the Corporate Debtor on 5th March 2021, thereby placing the Company Petition squarely within the clutches of Section 10A of the Code. It is clear from the express language of the said Notice that it was the first demand made on the Corporate Debtor. There is no mention of any prior demand made on the Corporate Debtor or any failure of the Corporate Debtor to comply with the same. In the absence of a demand or intimation, it is unfathomable that a default on the part of the Corporate Debtor can be said to have occurred. In fact, the terms of the DSRA Guarantee Agreement make it clear that the Corporate Debtor shall make payment only upon being called upon to do so by the Financial Creditor in writing. The Financial Creditor's reliance on Clause 25 of the DSRA Guarantee Agreement to allege that no notice is required to be issued to the Corporate Debtor is utterly misplaced and misconceived. The said clause is merely a general residuary clause meant to give effect to the guarantee from the date of execution without any further notice. The only effect and consequence of this clause is that the obligation of the Corporate Debtor as a guarantor for the DSRA amounts is live during the subsistence of the Facility and not subject to any further notice. To interpret this clause in the manner in which the Financial Creditor seeks to do, would do grave

injustice and render redundant several other clauses of the DSRA Guarantee Agreement which categorically require a demand/ request or notice on the Corporate Debtor, particularly Clauses 7, 9, 10 and 11. Without prejudice to the above and in any event, the Financial Creditor having issued its Notice of 5th March, 2021 invoking the DSRA Guarantee Agreement and calling upon the Corporate Debtor to make payment thereunder, surely cannot backtrack its actions by now alleging that the Corporate Debtor was always liable since the year 2019. It is estopped from doing so now.

7. Heard both the Counsel and perused the material available on record.

7.1. From the perusal of documents, the following facts emerge:

7.1.1. The Corporate Debtor executed a guarantee agreement to secure the maintenance of two quarters interest on Working Capital Facility to the extent of Rs.50 Crores agreed to be provided by Financial Creditor to the principal borrower.

7.1.2. The principal borrower failed to maintain the DSRA balance and consequently pay the interest accruing on said Working Capital Facility since September 2019.

7.1.3. The Corporate Debtor had knowledge of such failures in the form of emails communication between the Financial Creditor and principal borrower, the copy of which was marked to the Corporate Debtor also.

7.1.4. The Financial Creditor invoked the guarantee on 05.03.2021 asking the Corporate Debtor to pay forthwith the amount of Rs.619733612.80/-.

7.1.5. The details of default of Rs.149,60,69,763.39/-, claimed in the present application, are as follows:

Facility	Account Number	Date of Default	Days of Default	Outstanding as on NPA date	Total Principal Dues as on 8 December 2022	Total Interest Dues as on 8 December 2022	Total Dues as on 8 December 2022
Working Capital	126655100000356	29 December 2019	1076 days	Rs. 102,95,26,742.50	Rs. 100,09,99,203.50	Rs. 495070559.89	Rs. 149,60,69,763.39

7.1.6. No specific date of default is stated in part IV of the petition. Instead, it is stated that the Financial Creditor invoked the guarantee on 5th March 2021 and the Corporate Debtor is in continuous default in terms of the guarantee agreement dated 03.08.2012.

7.1.7. The guarantee agreement makes the Corporate Debtor obliged till the repayment of complete facility and is irrevocable.

7.2. This Bench has no doubt that obligation of the Corporate Debtor was limited to maintenance of two quarters interest on Working Capital Facility restricted up to 50 Crores; The Corporate Debtor is not obligated to pay amount of principal outstanding in said Working Capital Facility, the clause of this guarantee agreement making the guarantee valid till the complete payment under the facility cannot enlarge the scope and make the Corporate Guarantor responsible for the outstanding on account of principal Working Capital Facility; The Financial Creditor has made a claim of incorrect amount of Rs.149.60 Crores in the petition, while the demand notice was issued only for a sum of Rs.61.97 Crores; The interest of Rs.10,67,89,718/- has accrued on the total outstanding of Working Capital Facility of Rs.101.29 Crores, and the

Corporate Debtor can, at best, be called upon to pay outstanding interest relatable to first 50 Crores of principal Working Capital Facility.

7.3. This Bench feels that the principal question for determination in the present case is (a) whether the obligation to pay the DSRA shortfall arises only upon issuance of the notice or mere knowledge of default at end of principal borrower a sufficient to hold the corporate debtor in default; (b) Whether obligation to maintain DSRA exists even after recall of working capital facility.

7.4. This Bench finds that the Financial Creditor has in its demand notice dated 05.03.2021 stated the following:-

> *"3. The Borrower has failed and neglected to maintain the DSRA Account, as mentioned in the Corporate Guarantee executed by you on August 3, 2012…"*
>
> *"4. The Borrower has failed and neglect to pay the dues of IDBI Bank as per its above letter…"*
>
> *"6. In the premises, we hereby call upon you and demand from you to pay forthwith to IDBI Bank …sums aggregating Rs. 61,97,33,612.80/- …"*

7.5. It follows from the language of said demand notice that it was the first notice demanding payment from the Corporate Debtor under the guarantee. Though, it is undisputed facts that the Corporate Debtor had the knowledge of default at the end of the principal borrower, this Bench feels that such knowledge implies existence of an obligation on the part of Corporate Debtor and such obligation is a debt under Section 3 (11) of the Code. This Bench further notes that Section 3(12) defines default to "*means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not (paid) by the debtor or the Corporate Debtor, as the case may be".*

In other words, the debt and default are two distinct propositions. Mere existence of debt, which undoubtedly came into being at each incidence of failure to maintain DSRA balance, cannot be equated with existence of default. In the present case, it is undisputed facts that the first demand notice was addressed to the Corporate Debtor on 05.03.2021 to pay an amount of Rs.*61,97,33,612.80/-* upon receipt of the notice, accordingly, the default qua Corporate Debtor took place on the date when the demand notice dated 05.03.2021 was served upon it. The Financial Creditor has not claimed that the service of the demand notice was complete on after 24.03.2021. Accordingly, this Bench is of the considered view that the Corporate Debtor committed the default in relation to its obligation to maintain two quarter interest in the principal borrower DSRA account during the period specified in Section 10A of the Code. As per the provisions of Section 10A of the Code, no application for initiation of corporate insolvency resolution process can be filed in respect of a default that has occurred on or after 25th March, 2020 till 24th September, 2020. By a notification dated 24th September 2020 the applicability of Section 10A was extended for a further period of three months till 25th December, 2020. Thereafter, by a notification dated 22nd December, 2022 the applicability of section 10A was further extended by a period of three months till 25th March, 2021. Thus, Section 10A bars absolutely and forever, the filing of any application under Sections 7, 9 and 10 of the Code, for defaults committed on or after 25th March, 2020 upto 25th March, 2021.

7.6. This Bench notes that the Hon'ble Supreme Court in the *Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors (2019) ibclaw.in 03 SC* held that *It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors.* In this case, it is undisputed fact that the Corporate Debtor can be

said to be in default to the extent of interest outstanding remaining unpaid on the working capital facility to the extent of Rs.50 Crores availed by the primary borrower. The Financial Creditor claims that a sum of Rs. 10,67,89,718/- has accrued on the total outstanding of Working Capital Facility of Rs.101.29 Crores. In other words, the outstanding interest of Rs.10,67,89,718/- pertain to total outstanding of Rs. Rs.101.29 Crores, out of which the Corporate Debtor guaranteed for maintenance of interest for two quarter on credit facility restricted to Rs.50 Crores as DSRA amount. It follows there from that the liability of the Corporate Debtor is not for the whole amount of interest i.e. Rs.10,67,89,718/- due from the primary borrower, but the Corporate Debtor is obligated under the guarantee for such interest amount in the ratio of Rs.50 Crores to the total working capital principal outstanding, which shall come to approximately Rs.5 Crores. It is not disputed that the Financial Creditor had issued a notice invoking guarantee requiring the Corporate Debtor to pay a sum of Rs.61,97,33,612.80/- and filed the present petition claiming an amount of Rs.1,49,60,69,763.39/- as in default. This bench finds that debt the financial Creditor is not clear what is recoverable from the Corporate Debtor and the claim of exorbitant amount, which are unsustainable even in terms of guarantee agreement, leads to an inference that the present application is in realm of recovery than an attempt to seek the resolution of the Corporate Debtor. It is trite Law that, the proceedings under the Code are meant for resolution of defaulting corporate debtor and not for determination of what is due from the corporate debtor. Further, in the case of *M Suresh Kumar Reddy Vs. Canara Bank & Ors. (2023) ibclaw.in 67 SC*, the Hon'ble Supreme Court distinguished the decision in case of *Vidharbha Industries Power Limited vs Axis Bank Limited reported in 2022 SccOnline SC 841* wherein it was held that the Hon'ble NCLT ought to exercise its discretion to not admit the present Company Petition, and rejected the appeal noting that "*Even assuming that*

NCLT has the power to reject the application under Section 7 if there were good reasons to do so, in the facts of the case, the conduct of the appellant is such that no such good reason existed on the basis of which NCLT could have denied admission of the application under Section 7". Upon consideration of decisions in the case of Swiss Ribbons (Supra), Vidarbha Industries (Supra), and M Suresh Kumar Reddy (Supra), this Bench feels even if debt and default exists, a distinction is to be drawn whether the application filed by the financial creditor is in realm of recovery or it seeks the resolution of the corporate debtor, as held in the case of Swiss Ribbons (Supra) and other decisions, and this proposition still holds the ground even in the light of decision in the case of M Suresh Kumar Reddy (Supra).

7.7. Having said so, this bench refrains from deciding on the issue whether obligation to maintain DSRA exists even after recall of working capital facility.

7.8. In view of the forgoing discussion, this Bench is of the considered view that the present application is barred by Section 10A of the Code. This application is also not maintainable on the ground that it is not in accordance with the intent and purport of the Code.

7.9. In view of the above discussion, IA-581/2023 is allowed. The present petition CP(IB)-107/MB/2023 deserves to be dismissed.

Sd/-

PRABHAT KUMAR
MEMBER (TECHNICAL)
19.05.2023

Sd/-

KISHORE VEMULAPALLI
MEMBER (JUDICIAL)