IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH (COURT – II)

Item No. 201
(IB)-91(PB)/2022
IA-3971/2022

IN THE MATTER OF:
DBS Bank India Limited (DBIL) ... Financial Creditor

Versus

M/s Abhisar Impex Private Limited ... Corporate Debtor

AND IN THE MATTER OF I.A. No. 3971 OF 2022:
DBS Bank India Limited (DBIL)
Capitol Point, Baba Kharak Singh Marg,
Connaught Place, New Delhi-110001 **... Financial Creditor/Applicant**

Versus

M/s. Abhisar Impex Private Limited
Thapar House, 124 Janpath,
New Delhi- 110001 **... Corporate Debtor/Respondent**

Under Section: 7 of IBC, 2016

Order Delivered on: 25.01.2024

CORAM:
SH. ASHOK KUMAR BHARDWAJ, HON'BLE MEMBER (J)
SH. SUBRATA KUMAR DASH, HON'BLE MEMBER (T)

PRESENT:

For the Applicant /IRP	**:**	Adv. Dhruv Malik, Adv. Palak, Adv. Aditi Sinha, Adv. Rohit Chopra, Adv. Nitin Mohan Mathur, Adv. Nikhil Maan, Adv. Nikita Rana & Adv. Tanvi Jain
For the Respondent	**:**	Adv. Gaurav Mitra, Adv. Gunjesh Ranjan, Adv. Shaswat Anand, Adv. Ishan Roya Chowdhary

Hearing Through: VC and Physical (Hybrid) Mode

ORDER

IA-3971/2022: As can be gathered from the pleadings available on record, M/s Vayam Technologies Limited (Principal Borrower) had availed working capital credit facilities to the tune of Rs. 25 crores sanctioned on 01.08.2011

and renewed thereafter on 13.09.2012 and 22.11.2013 by the Financial Creditor under the Canara Bank Consortium comprising of Canara Bank (Lead Bank), the Applicant Bank (DBS Bank India Ltd.) and others member banks viz. Axis Bank Ltd., IDBI Bank Ltd., Standard Chartered Bank and Dena Bank.

2. Pursuant to the sanction of working capital facility, various documents were executed between the Applicant Bank and the Principal Borrower. The said facilities were secured inter alia by way of corporate guarantee dated 14.03.2012 extended by the Corporate Guarantor as well as creation of charge by way of equitable mortgage on pari-passu basis on commercial property located at D-319, Sector – 63, Noida.

3. The Corporate Debtor herein before us also executed a confirmatory Letter of Guarantee dated 17.05.2013 in favor of the Financial Creditor and executed the Guarantee Deed dated 11.10.2010. On 14.03.2012 the Applicant extended the additional Loan Facility, for which the Respondent stood as Guarantor.

4. Even the Letter/Memorandum of Entry (evidencing extension of equitable mortgage) dated 17.05.2013 was created by the Corporate Debtor and the charge pertaining to the equitable mortgage on the property was duly registered with the Registrar of Companies vide Certificate of Registration of Charge/Mortgage dated 22.05.2013.

5. As the principal borrower failed to honor its obligation and neglected to make the payment of the outstanding amounts, the Financial Creditor issued Loan Recall Notice dated 20.06.2015 to the Principal Borrower as well as to the Corporate Guarantor. As the Corporate Guarantor could not respond to Loan Recall Notice and also did not dispute its liability, the financial creditor approached the Debt Recovery Tribunal, New Delhi for recovering its outstanding dues by filling Original Application No. 466/2015.

6. Thereafter, the party entered into settlement and filed joint application. Nevertheless, the terms of the settlement could be breached and the Financial Creditor again issued default notice dated 23.10.2017 and

then filed Miscellaneous Application No. 135/2017 for issuance of Recovery Certificate. In terms of the Recovery Certificate, the Financial Creditor was awarded Rs. 23,29,19,212.46 along with interest of 18% per annum. As the amount was not paid, the Financial Creditor invoked the Corporate Guarantee vide Invocation notice dated 29.10.2021.

7. The details qua the amount defaulted to be paid and the date of default are mentioned in Part-IV of the Application which reads thus:

Part IV

PARTICULARS OF FINANCIAL DEBT

1.	TOTAL AMOUNT OF DEBT GRANTED DATE(S) OF DISBURSEMENT	The Corporate Debtor stood as guarantor to the debt of Rs. 25,00,00,000/- (Rupees Twenty-Five crores) sanctioned to Vayam Technologies Limited (**"principal borrower"**) vide offer letter dated 01.08.2011 and the Working Capital Credit Facility was renewed from time to time on 13.09.2012 and 22.11.2013. The principal borrower failed to make repayment of the outstanding amounts and therefore it was incumbent upon the Corporate Debtor to honour its agreed obligations in accordance with the Corporate Guarantee. However, the Corporate Debtor failed to make good the default(s) committed even despite service of Guarantee Invocation Notice (as described hereinbelow) upon it. The dates of disbursement of the amount by the Financial Creditor are as follows –

Date	Facility Number	Disbursement Amount		
01.08.2011	CDT/ADMIN/334/2011 (Working capital credit facility)		25,00,00,000	
13.09.2012	CDT/ADMIN/539/2012 (Supplemental working capital credit facility)	Fund Based Limit 7 Crore	Non-Fund Based Limit 15Crore	Total Limits 22Crore
22.11.2013	CDT/ADMIN/655/2013 (Renewal of working capital credit facilities)		22 Crores	

2.	AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED (ATTACH THE WORKING FOR COMPUTATION OF AMOUNT AND DAYS OF DEFAULT IN TABULAR FORM)	While the Corporate Guarantee issued by the Corporate Debtor is for Rs. 25 Crores which is the debt in default, however the total amount of default by principal borrower is Rs. 49,55,93,696.48/- (Rupees Forty-Nine Crores Fifty-Five Lakhs Ninety-Three Thousand Six Hundred and Ninety Six and Paisa Forty Eight Only) as on 10.01.2022. Vide Recovery Certificate No. 347/2019 dated 24.07.2019, the Financial Creditor has been awarded Rs. 23,29,19,212.46/- (Rupees Twenty-Three Crore Twenty-Nine Lakhs Nineteen Thousand Two Hundred Twelve and Paisa Forty Six Only) along-with interest @18% p.a. with effect from O.A. i.e., 08.10.2015 till realisation. Copy of the Recovery Certificate No. 347/2019 issued in M.A. No. 135/2017 in O.A. No. 466/2015 by the Hon'ble DRT, New Delhi is annexed herewith as **ANNEXURE 5**. Computation of amount and days of default in tabular form is annexed herewith as **ANNEXURE 6**.

8. The petition came for hearing before this Tribunal on 29.03.2022 and was admitted. The Order read thus:

> ***"7.*** *The application for initiation of CIRP has been filed for total debt of Rs. 49,55,93,696.48/- (Rupees Forty-Nine Crores Fifty-Five Lakhs Ninety-Three Thousand Six Hundred and Ninety Six and Paisa Forty Eight Only) which include interest.*
>
> ***8.*** *The date of recovery certificate is 24.07.2019, so the application under Section 7 is within the period of limitation.*
>
> ***9.*** *The application is hereby* ***ADMITTED."***

9. The Corporate Debtor challenged the order before Hon'ble National Company Law Appellate Tribunal (NCLAT) by filing the Company Appeal (AT) (Insolvency) No. 464/2022. The salient plea espoused in the Appeal was that this Tribunal refused to grant any time to CD for filing reply on the first date of hearing and denied natural justice. Para 5, 12 and 13 of the Judgment passed by Hon'ble National Company Law Appellate Tribunal reads thus:

> *"5. Learned Senior Counsel for the Appellant submits that the Adjudicating Authority while refusing to grant any time for filing*

*reply on the first date of hearing has denied natural justice to the Appellant. Not even one opportunity was granted to the Appellant to file a reply. Learned Senior Counsel for the Appellant referring to Rule 37 of National Company Law Tribunal Rules, 2016 ("**Rules**") submits that the rule envisage that in event the Respondent does not appear on the date specified in the notice, Tribunal after according reasonable opportunity to the Respondent, shall forthwith proceed to ex-parte disposal of the Application. Whereas, when the Respondent appears on the first date of hearing, the Rules does not envisage that no reasonable opportunity should be given to the Respondent. A Corporate Debtor, who appears on the first date of hearing and seeks a reasonable opportunity to file a reply cannot be worse off than a Respondent who does not appear on first date of hearing. Further, the Rules does not provide for any consequence for non-filing of the reply on the first date of hearing, in the event notice is served. The provisions of Rules 37 are only procedural provisions, which are 'directory' and non-filing of reply on the first date does not result in forfeiting the right of the reply of the Appellant. The Rules 34 as well as Rule 51 of the NCLT Rules, 2016 empower the Tribunal to regulate its own procedure in accordance with the Rules of natural justice. Thus, even though Rules are silent on whether a Corporate Debtor can pray for time for filing the reply on the first date of hearing, the Court has to adopt a procedure with the consonance of principles of natural justice. The order passed by Adjudicating Authority on the first date of hearing, rejecting the request of the Appellant to grant some time to file reply, is in violation of the principles of natural justice and deserves to be set-aside. Order of Adjudicating Authority admitting the Application has serious consequences, hence, the Tribunal ought to have given opportunity to the Corporate Debtor to file a reply.*

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12. The procedure, which is to be adopted by the Tribunal has to be in consonance with the rules of natural justice and equity as required by the rules itself. Unless, it is held that due to non-filing of the reply before the date of hearing by the Corporate Debtor, the Adjudicating Authority is obliged to decide the application under Section 7, the Adjudicating Authority has ample jurisdiction to consider any request for reasonable time by a Corporate Debtor for filing a reply. The Tribunal is fully entitle to grant time for filing a reply asked for by the Corporate Debtor on the first date of hearing. Rejecting the request of the Corporate Debtor on the very first day for grant of time to file a reply, cannot be said to be in consonance with the principles of natural justice. There can be no dispute that in appropriate case, if the Adjudicating Authority is satisfied that

the Corporate Debtor is deliberately delaying the matter, the request for grant of any further time to file a reply can be refused. But present is not a case where it can be said that Corporate Debtor was delaying the disposal of the case, since 29.03.2022 was the first date of hearing as indicated in the notice served on the Corporate Debtor on 07.03.2022.

13. Hon'ble Supreme Court had occasion to consider the Section 9(5) proviso, Section 7(5) proviso and Section 10(4) proviso of IBC in ***(2017) 16 SCC 143 - Surendra Trading Company vs. Juggilal Kamlapat Jute Mills Company Ltd. and Ors.*** *Section 9, sub-section (5) provides:*

> *"**9.** Application for initiation of corporate insolvency resolution process by operational creditor. –*
>
> ***(5)** The Adjudicating Authority shall, within fourteen days of the receipt of the application under subsection (2), by an order–*
>
> *(i) admit the application and communicate such decision to the operational creditor and the corporate debtor if, -*
>
> *(a) the application made under subsection (2) is complete;*
>
> *(b) there is no payment of the unpaid operational debt;*
>
> *(c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;*
>
> *(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and*
>
> *(e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any.*
>
> *(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if –*
>
> *(a) the application made under subsection (2) is incomplete;*
>
> *(b) there has been payment of the unpaid operational debt;*

(c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;

(d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or

(e) any disciplinary proceeding is pending against any proposed resolution professional:

Provided that Adjudicating Authority, shall before rejecting an application under subclause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the Adjudicating Authority."

The question before NCLT in a proceeding under Section 9 is as to whether fourteen days' time prescribed for the Adjudicating Authority to pass the order is 'directory' or 'mandatory'. The Appellate Tribunal has held the said provision as 'directory'. However, Appellate Tribunal held proviso to sub-section (5) of Section 7 or proviso to sub-section (5) of Section 9 and Section 10 (4) to remove the defect within seven days as mandatory, and on failure, application is fit to be rejected. The Hon'ble Supreme Court considered the proviso of Section 7 and 9 and did not approve the view of the Appellate Tribunal that time provided to remove the defects within seven days under proviso to sub-section (5) of Section 7 and under proviso to sub-section (5) of Section 9 are mandatory. Hon'ble Supreme Court held that the said provisions are 'directory' in nature. It further held that procedural provisions are generally 'directory'. The Hon'ble Supreme Court has quoted with approval an earlier judgment of the Supreme Court ***Kailash v. Nanhku (2005) 4 SCC 480****, which was a case where Hon'ble Supreme Court has considered the provision of Order 8 Rule 1 of CPC, which provided for time to file a written statement. Hon'ble Supreme Court had held the provision of Order 8 Rule 1 CPC as 'directory' and not mandatory and the Court can extend the time for filing of written statement beyond the time schedule. Paragraph 27 of the judgment in* ***Surendra Trading Co.*** *is as follows:*

*"**27.** The aforesaid process indicated by us can find support from the judgment of this Court in Kailash v. Nanhku [Kailash v. Nanhku, (2005) 4 SCC 480], wherein the Court held as under: (SCC pp. 500-01, para 46)*

"46. (iv) The purpose of providing the time schedule for filing the written statement under Order 8 Rule 1 CPC is to expedite and not to scuttle the

hearing. The provision spells out a disability on the defendant. It does not impose an embargo on the power of the court to extend the time. Though the language of the proviso to Rule 1 Order 8 CPC is couched in negative form, it does not specify any penal consequences flowing from the non-compliance. The provision being in the domain of the procedural law, it has to be held directory and not mandatory. The power of the court to extend time for filing the written statement beyond the time schedule provided by Order 8 Rule 1 CPC is not completely taken away.

(v) Though Order 8 Rule 1 CPC is a part of procedural law and hence directory, keeping in view the need for expeditious trial of civil causes which persuaded Parliament to enact the provision in its present form, it is held that ordinarily the time schedule contained in the provision is to be followed as a rule and departure therefrom would be by way of exception. A prayer for extension of time made by the defendant shall not be granted just as a matter of routine and merely for the asking, more so when the period of 90 days has expired. Extension of time may be allowed by way of an exception, for reasons to be assigned by the defendant and also be placed on record in writing, howsoever briefly, by the court on its being satisfied. Extension of time may be allowed if it is needed to be given for circumstances which are exceptional, occasioned by reasons beyond the control of the defendant and grave injustice would be occasioned if the time was not extended. Costs may be imposed and affidavit or documents in support of the grounds pleaded by the defendant for extension of time may be demanded, depending on the facts and circumstances of a given case."

10. As can be seen from aforementioned order passed by Hon'ble NCLAT, the appeal was allowed and the application filed under Section 7 (the present Application) was revived and it was directed to be listed for fresh consideration. Para 16 of the Judgment passed by Hon'ble NCLAT reads thus:

"16. In the result, we allow the Appeal, set-aside the impugned order dated 29.03.2022. As observed above, Appellant will file a

reply within two weeks from the date of this order and rejoinder to the same, if any, may be filed within two weeks thereafter. The Application under Section 7 is revived before the Adjudicating Authority and shall be listed before the Adjudicating Authority after four weeks for proceeding further in the matter in terms of law. No order as to costs."

11. The Respondent directed Corporate Guarantor/Corporate Debtor to file its reply on 03.08.2022. The reply runs into four volumes. The salient plea espoused in the reply are:

a) The Applicant/Financial Creditor has failed to mention in the petition that the Certificate of Registration of Mortgage under Section 132 of the Companies Act, 1956 is made between M/s. Abhisar Impex Pvt. Ltd. (Corporate Debtor) and the Canara Bank, thus, the locus to initiate CIRP lies with Canara Bank viz. the Lead Bank qua the CB;

b) In pursuance of the J.L.F. meeting dated 12.01.2016 in which member banks of the CB consortium participated and resolved that Canara Bank shall write to the H.O. of DBS Bank and its Country Office to take up its share per the JLF guidelines and challenge the petition of DBS Bank on invoking the security charged."

12. The Financial Creditor (Applicant) is acting against the dictate of the Consortium and the extant RBI guidelines, without any locus and authorization from the CB consortium to invoke or demand any payment or initiate any recovery mechanism.

13. The Canara Bank filed an Affidavit on behalf of other Consortium Banks and sought rejection of the O.A. 466/2015 filed by the Applicant herein.

14. The Ld. DRT-II while passing the Order dated 13.04.2016 in I.A. No. 57/2016 in O.A. 466/2015 categorically observed that the Consortium Banks condemned the O.A. 466/2015 filed by the Financial Creditor.

15. The Recovery Certificate dated 02.02.2019 was questioned before the Ld. D.R.A.T., Delhi and the appeal is still pending, thus has not yet attained finality.

16. As can be seen from the order dated 18.07.2016 passed by the DRT-II, Delhi, a joint application was filed by the Applicant before us as well as Defendant Nos. 1 to 5 including the Respondent herein before us praying therein to dispose of the O.A. in terms of settlement terms details in para 5 of the application. The order passed by Ld. DRT-II reads thus:

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Supplementary item no.1

IA 706/16 IN OA 466/15	DBS BANK LTD.	VS	M/S VAYAM TECHNOLOGIES LTD. & ORS

Dated : 18.7.2016

Present – Sh. R.S. Randhawa & Sh. Amiteshwar Singh, counsel alongwith Sh. Ravi Roshan, AR of the applicant bank
Sh. Ashutosh Thakur and Sh. Anmol, counsel for the defendants alongwith
Sh. Shakti Kumar Chauhan, for defendant no.1 co.
Sh. Ashok Tiwari, defendant no.2
Ms. Amrita Tiwari, defendant no.3
Sh. Jitender Tiwari, defendant no.4
Ms. Shilpa Thakur, counsel for the defendant no.10/SCB

IA No.705/16 is a joint application filed by the applicant bank as well as defendants no.1 to 5 praying therein to dispose the OA in terms of settlement terms detailed in para 5 of this application.

DBS Bank is represented by Sh. Ravi Roshan its authorized representative, defendant no.1 represented by Shakti Kumar Chauhan as per Board Resolution, defendants no.2 to 4 are present in person and defendant no.5 is represented by defendant no.2 as per board resolution and they filed the terms of the settlement. The terms of settlement are read over to the parties and they agreed to the terms of settlement. The OA is disposed of in terms of the conditions detailed in para 5 of this joint application. The joint application shall form part of this order. Accordingly OA No.466/15 is disposed of in terms of joint application IA No.706/16.

File be consigned to record room.

"Delhi"

[redacted]u)
Presiding Officer,
DRT-II, Delhi

17. Subsequently, as the settlement could not materialize, the Applicant herein before us filed M.A. 135 of 2017 (in OA No. 466 of 2015) before Ld. DRT-II, Delhi. The application was disposed of in terms of order dated 15.07.2019 which reads thus:

> *"The applicant bank has filed this M.A. for issuance of recovery certificate for execution on the ground that during the pendency of the OA, there was settlement between the applicant bank and defendant no. 1 to 5 and they filed joint application i.e. IA no. 705 of 2016 with the following terms and conditions:-*
>
> > *"5. That the applicant bank and the defendants have agreed to a settlement in respect of the outstanding of the above*

amount of Rs.30,72,88,559.00 (Rupees Thirty Crore Seventy Two Lakhs Eighty Eight Thousand Five Hundred Fifty Nine Only) owed by the defendants to the applicant bank on the following mutually agreed terms;-

a) *Repayment Schedule-*
The Company, its Directors/Guarantors, Corporate guarantor and DBS Bank Ltd. has now agreed to the following repayment schedule whereby a sum of Rs. 30,72,88,559.00 (Rupees Thirty Crore Seventy Two Lakhs Eighty Eight Thousand Five Hundred Fifty Nine Only) shall be paid by the defendants over a period commencing from 30th September, 2016 till 31st December, 2022 in 21 quarterly instalments detailed below:-

Repayment Schedule		
FY	*Date*	*Total repayment*
FYE March 17	*30 Sep.16*	*3,000,000*
	31 Dec.16	*4,000,000*
	31 Mar,17	*17,650,401*
FYE March 18	*30 Jun.17*	*19,585,901*
	30 Sep.17	*19,311,656*
	31 Dec.17	*39,907,855*
	31 Mar.18	*9,098,300*
FYE March 19	*30 Jun.18*	*9,013,672*
	30 Sep.18	*8,926,313*
	31 Dec.18	*8,800, 736*
	31 Mar.19	*8,606,910*
FYE March 20	*30 Jun.19*	*9,900,752*
	30 Sep.19	*9,776,540*
	31 Dec.19	*9,619,568*
	31 Mar.20	*9,434,955*
FYE March 21	*30 Jun.20*	*10,202,310*
	30 Sep.20	*10,050,343*
	31 Dec.20	*9,872,442*
	31 Mar.21	*9,654,274*
FYE March 22	*30 Jun.21*	*10,882,370*
	30 Sep.21	*10,691,273*
	31 Dec.21	*10,481,978*
	31 Mar.22	*10,249,932*
FYE March 23	*30 Jun.22*	*13,249,687*
	30 Sep.22	*12,859,726*
	31 Dec.23	*12,580,665*
		307,288,559

b) *The payment of the installment amounts shall be made by the defendants to the applicant bank on or before the payment date through Bankers Cheque/RTGS. Time*

being the essence of the settlement, strict compliance of the terms shall be followed by the defendants. Non compliance of any terms/ non-payment of two consecutive installments shall be considered as an event of default. That in the event of default defendants shall be liable to make entire payment as per the prayer clause of the Original Application along with cost and interest up-to-date till the realization of the entire amount:

c) *The liability of the defendants (i.e. the borrower and the guarantors,) under the settlement shall be joint and several.*

d) *The upon payment of the entire amount by the defendants to the applicant bank as per the settlement, the applicant bank shall have no subsisting claim or cause of action in respect of the above OA against the defendants and the claim of the applicant bank against the defendants shall stand satisfied in full and final.*

e) *The upon entering into this settlement the defendants shall be left with no claims/counterclaim against the applicant bank or its officers, of whatsoever, nature hereafter, either civil or criminal, in any court or tribunal now or in future in respect of the present claim under the OA. Any such claim if filed by defendants or pending with any Court/Tribunal/DRT shall be deemed redundant/infructuous in view of the present settlement and shall be withdrawn forthwith."*

The Tribunal vide order dated 18.07.2016 dispose of the OA no. 466/2015 in terms of the joint application in the presence of both the parties with the following endorsement: -

> *"The terms of the settlement are read over to the parties and they agreed to the terms of the settlement. The OA is disposed of in terms of the conditions detailed in para 5 of this joint application. The joint application shall form part of this order."*

The applicant bank further submits that as the defendant nos. 1 to 5 failed to pay the amount due as per the terms and conditions of the joint application, by virtue of terms and conditions of joint application, the applicant bank is entitled for issuance of the recovery certificate as the joint application provides that "Non compliance of any terms/non-payment of two consecutive installments shall be considered as an event of default. That in the event of default defendants shall be liable to make entire payment

as per the prayer clause of the Original Application along with cost and interest up-to-date till the realization of the entire amount."

The defendants resisted the application contending inter alia that the consortium of the DBS bank Ltd., Canara Bank, Axis Bank, IDBI, SCB and Dena Bank lend the amount to the defendants on 31.05.2017 before Joint Lender's Forum/consortium entered into a strategic debt restructuring (SDR) and debt of the defendant no.1 was restructured. On 22.12.2017, the consortium through its lead bank, Canara Bank entered into the Management Framework Agreement and in pursuance of SDR the shares were received in favour of consortium at the price, which was very low in comparison to the market value of the shares of the company and even the articles of association of D-1 was amended and consortium became the majority shareholder of the D-1 with 51% and voting right, as well and the consortium revoked the strategic debt restructuring by relying upon a RBI circular issue don 12.02.2018.

It is further submitted that the D-1 filed a Writ Petition (Civil) no. 7221/2018 before the Hon'ble High Court of Delhi against the Union of India and aforesaid writ petition has been transferred to the Hon'ble Supreme Court of India vide its order dated 11.09.2018 and the debt of D-1, being restructured and implemented by other members of the consortium and they revoked the strategic debt restructuring. Hence, the present application cannot be adjudicated upon without notice to the consortium members and there are no merits in the present application and application is liable to be dismissed.

Heard both sides.

Now the point for consideration is whether the applicant bank is entitled for issuance of RC in pursuance of the terms and conditions of the consent order passed in OA no. 466 of 2015 in IA no. 705/2016, as prayed for?

Admittedly, the order of this Tribunal is between the applicant bank and D-1 to D-5 and consortium of the bank has nothing to do as to the order passed by this Tribunal dated 18.07.2016. It is a consent order under Order 23 of CPC. So far, the order is not challenged by defendant no. 1 to 5 and get the same set aside. In the absence of getting the order challenged in higher forum, the order is a compromise order and binding on defendant no. 1 to 5.

The ld counsel for the bank vehemently contended that they are not party before the Hon'ble Apex Court and the compromise decree was not challenged by the defendant no.1 to 5 anywhere.

That ld counsel for the defendant no. 1 to 5 also did not dispute about entering into the compromise order dated 18.07.2016 in OA no. 466 of 2015. They did not dispute that one of the terms in the compromise order provides as follows:-

> *"Non compliance of nay terms/non-payment of two consecutive installments shall be considered as an event of default. That in the event of default defendants shall be liable to make entire payment as per the prayer clause of the Original Application along with cost and interest up-to-date till the realization of the entire amount."*

As per the OA prayer clause, the claim of the applicant bank is Rs.23,29,19,212.46 i.e. Rs.7,13,90,368.26 in respect of Purchase Invoice Discounting facility and Rs.16,15,28,844.20 In respect of Letter of Credit facility total Rs.23,29,19,212.46.

In view of the same, (the applicant bank is entitled for a decree against defendant no. 1 to 5 for a sum of Rs.23,29,19,212.46 with interest @18% p.a. from the date of the OA till realization) as prayed for. Recovery Certificate be issued accordingly recoverable pari passu with members of consortium of the Canara Bank, out of the properties i.e. (i) E-7/10, IInd Floor, Vasant Vihar, New Delhi (ii) Ground floor Plot no. 6, Street No. E/4, Vasant Vihar, New Delhi (iii) SCS Plot no. 81 situated at Sector-14 Gurgaon, Haryana (iv) D-319, Sector-63, Noida and if the same is not sufficient, the same shall be recovered from the sale of movable and immovable properties of defendant no. 1 to 5 jointly and severally.

File be consigned to records."

18. As can be seen from the aforementioned order, the Ld. DRT clearly ruled that the Applicant Bank i.e. the Applicant herein before us is entitled for a decree against the Defendant Nos. 1 to 5 for a sum of Rs. 23,29,19,212.46/-. Relevant excerpt of the order reads thus:

> *"As per the OA prayer clause, the claim of the applicant bank is Rs.23,29,19,212.46 i.e. Rs.7,13,90,368.26 in respect of Purchase Invoice Discounting facility and Rs.16,15,28,844.20 In respect of Letter of Credit facility total Rs.23,29,19,212.46.*

In view of the same, (the applicant bank is entitled for a decree against defendant no. 1 to 5 for a sum of Rs.23,29,19,212.46 with interest @18% p.a. from the date of the OA till realization) as prayed for. Recovery Certificate be issued accordingly recoverable paripassu with members of consortium of the Canara Bank, out of the properties i.e. (i) E-7/10, IInd Floor, Vasant Vihar, New Delhi (ii) Ground floor Plot no. 6, Street No. E/4, Vasant Vihar, New Delhi (iii) SCS Plot no. 81 situated at Sector-14 Gurgaon, Haryana (iv) D-319, Sector-63, Noida and if the same is not sufficient, the same shall be recovered from the sale of movable and immovable properties of defendant no. 1 to 5 jointly and severally.

File be consigned to records."

19. In the wake, the aforementioned order passed by Ld. DRT-II, the Recovery Certificate dated 24.07.2019 was issued. The certificate reads thus:

(RECOVERY CERTIFICATE FOR ₹ 23,30,69,212.46 (RUPEES TWENTY THREE CRORE THIRTY LACS SIXTY NINE THOUSAND TWO HUNDRED TWELVE AND PAISE FORTY SIX ONLY)

This M.A. No. 135/2017 in O.A.No.466/2015 has come up before me on this day 15.07.2019 for final disposal and for issuance of Recovery Certificate. Disposing this Original Application, it is ordered that:

1. The Original Application is allowed with cost.

2. The applicant bank is entitled to recover a sum of Rs.23,29,19,212.46 (Rupees Twenty Three Crore Twenty Nine lacs Nineteen Thousand Two Hundred Twelve and Paise Forty Six Only alongwith interest @ 18% per annum with effect from O.A. i.e. 08.10.2015 till realization failing which the same shall be recovered by out of property in question i.e. ***(i) E-7/10, 2nd floor, Vasnt Vihar, New Delhi (ii) Ground Floor Plot No.6 Street No. E/4, Vasant Vihar, New Delhi (iii) SCS plot No.81, Situted at Sector-14, Gurgaon, Haryana, (iv) D-319, Sector-63, Noida and if the same is not sufficient, the same shall be recovered from the*** from the sale of movable and immovable assets of defendant no.1 to 5 jointly and severally.

3. The applicant bank is directed to file the revised statement of account before the Recovery Officer, DRT-II, Delhi.

Details of the Cost: Court fee on Application: ₹ 1,50,000/-

It is certified that the above mentioned sum of ***RECOVERY CERTIFICATE FOR ₹ 23,30,69,212.46 (RUPEES TWENTY THREE CRORE THIRTY LACS SIXTY NINE THOUSAND TWO HUNDRED TWELVE AND PAISE FORTY SIX ONLY)*** along with future interest is due to the Bank hereinafter referred to as **Certificate Holder** from the defendants, hereinafter referred to as the.

Certified Debtor 1	M/s. Vayam Technologies Limited,
Certified Debtor 2	Mr. Ashok Tiwari (Managing Director),
Certified Debtor 3	Ms. Amrita Tiwari,(Director),

Certified Debtor 4	Mr. Jitender Tiwari (Director),
Certified Debtor 5	M/s. Abhisar Impex Pvt. Ltd.

The Recovery Officer shall realize the amount as per this certificate in the manner and mode prescribed Under Section 25 and 28 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 from the above named Certificate Debtors.

Given under my hand and seal of this Tribunal on this the 24nd day of, 2019

Pr ...g Officer
DRT-II, DELHI

Note: The defendants shall appear before the Recovery Officer-I,16.09.2019
Recovery Certificate prepared by:

20. As can be seen from the aforementioned certificate, the CD herein before us was Respondent No. 05 in the aforementioned proceedings before DRT.

21. The salient plea espoused on behalf of the CD is that the Order passed by Ld. DRT-II was challenged by filing Appeal No. 415/2019. The Ld. Counsel for the Applicant could draw our attention to the Order dated 08.12.2022 passed by Ld. DRAT-II dismissing the Appeal. The order reads thus:

DEBTS RECOVERY APPELLATE TRIBUNAL, DELHI

Appeal No. 415/2019
In
M.A. No. 135/2017
Arising out of O.A No. 466/2015 (DRT-II, Delhi)

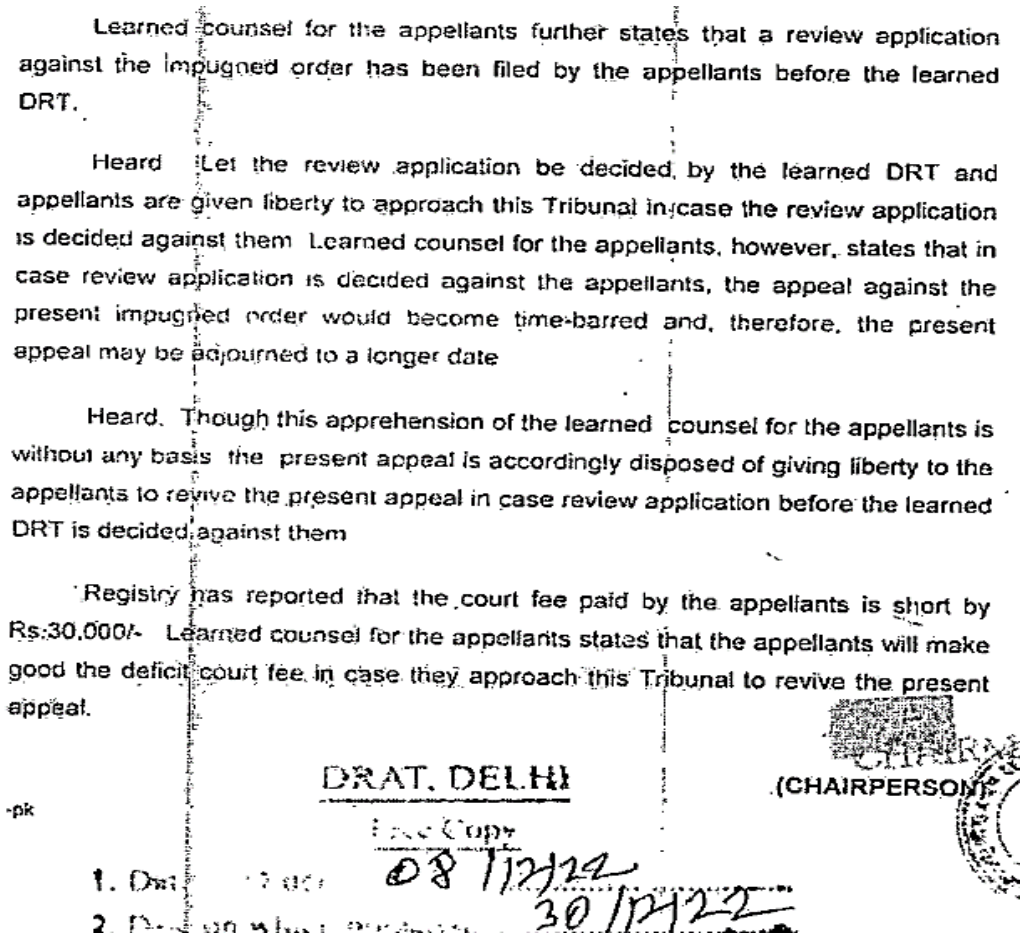
Vayam Technologies Ltd & Anr
Vs
DBS Bank & Ors

08.12.2022 **Hon'ble Mr. Justice Brijesh Sethi**

Present Mr. Anand Aggarwal, Ld. counsel for appellants
Ms. Sharmistha Ghosh, Ld. counsel for respondent no.1 bank
Ms Prerna Sabharwal, Ld counsel for respondent no.5

This matter has been taken up by me through Video Conferencing.

Learned counsel for appellants states that DBS Bank has approached the NCLT and an IRP has been appointed and the moratorium has started. Learned counsel for the respondent no 1, however, states that the appellants have approached the NCLAT against the said order of NCLT and the said order stands stayed



Learned counsel for the appellants further states that a review application against the impugned order has been filed by the appellants before the learned DRT.

Heard Let the review application be decided by the learned DRT and appellants are given liberty to approach this Tribunal in case the review application is decided against them Learned counsel for the appellants, however, states that in case review application is decided against the appellants, the appeal against the present impugned order would become time-barred and, therefore, the present appeal may be adjourned to a longer date

Heard. Though this apprehension of the learned counsel for the appellants is without any basis the present appeal is accordingly disposed of giving liberty to the appellants to revive the present appeal in case review application before the learned DRT is decided against them

Registry has reported that the court fee paid by the appellants is short by Rs:30,000/- Learned counsel for the appellants states that the appellants will make good the deficit court fee in case they approach this Tribunal to revive the present appeal.

DRAT, DELHI

(CHAIRPERSON)

-pk

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22. As can be seen from Section 7(4) of IBC, 2016, the Adjudicating Authority shall within 14 days of the receipt of the application under sub-section (2), ascertain the existence of a default from the records of an Information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3).

23. As has been provided in Section 7(5) of the Code, where the Adjudicating Authority is satisfied that - a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution plan, it may, by order, admit such application. We can see from IBBI (Insolvency Resolution for Corporate Persons) Regulations, 2016 that a person claiming to be a Financial Creditor may prove the existence of debt on the basis of:- (a) the record available with an information utility, if any; or (b) other relevant documents including an order of a Court or Tribunal that has adjudicating

upon the non-payment of a debt. Regulation 8 of the aforementioned Regulations reads thus:

> *"**8. Claims by financial creditors.—**(1) A person claiming to be a financial creditor, other than a financial creditor belonging to a class of creditors, shall submit claim with proof to the interim resolution professional in electronic form in Form C of the Schedule-I:*
>
> *Provided that such person may submit supplementary documents or clarifications in support of the claim before the constitution of the committee.*
>
> *(2) The existence of debt due to the financial creditor may be proved on the basis of—*
>
> *(a) the records available with an information utility, if any; or*
>
> *(b) other relevant documents, including—*
>
> *(i) a financial contract supported by financial statements as evidence of the debt;*
>
> *(ii) record evidencing that the amounts committed by the financial creditor to the corporate debtor under a facility has been drawn by the corporate debtor;*
>
> *(iii) financial statements showing that the debt has not been repaid; or*
>
> *(iv) an order of a court or tribunal that has adjudicated upon the non-payment of a debt, if any."*

24. In the present case, the Ld. Counsel for the Applicant could draw our attention to the order passed by the Ld. DRT-II, the appeal against which has been disposed of. He could also draw our attention to the Recovery Certificate prepared and issued on the basis of the said order. In the wake, we have no doubt that there is a debt defaulted to be paid by the Corporate Debtor.

25. At this stage, Mr. Gaurav Mitra, Ld. Counsel appearing for the Corporate Debtor, submitted that:-

(i) the obligation to pay in terms of the settlement would not amount to default;

(ii) the decree holder cannot be treated as Financial Creditor, in terms of the provisions of Section 5(8) of IBC, 2016 though, he can stake claim before RP on the basis of the decree;

(iii) it was the consortium only which had sanctioned loan and before DRT, the members of the consortium were parties and the Applicant herein before us cannot alone claim the benefit of the order passed by DRT-II and Recovery Certificate.

26. As far as the plea regarding the settlement being no obligation to pay the debt and the default to honor the same being not covered by the definition of default is concerned, in the present case, it is not so that the claim of the Applicant is arising out of settlement only. Indubitably, the Applicant was member of consortium which sanctioned loan to the Principal Borrower for which the Corporate Debtor stood as Personal Guarantor. Additionally, there was an order passed by the DRT-II declaring the Corporate Debtor liable to pay the defaulted amount to the Applicant.

27. The Ld. Counsel for the CD also raised the plea that the loan was sanctioned by the consortium and the Applicant alone could not have moved the present application. It is stare decisis that, when the loan is sanctioned by the Consortium, and one of the member of the consortium qua the loans the default in repayment of which is committed invoke the procedure under Section 7 of IBC, 2016, these are the other members of the Consortium, who can question the claim of one of the consortium and not the Corporate Debtor/Corporate Guarantor. At this stage, it would not be out of context to refer to the judgment of Hon'ble Supreme Court in ***Dena Bank vs. C. Shivakumar Reddy and Anr.***, (Civil Appeal No. 1650 of 2020). In the said judgment, Hon'ble Supreme Court ruled that the recovery certificate is cause of action to Appellant to institute the petition under Section 7 of IBC, 2016. Para 128, 138, 139 and 143 of the Judgment reads thus:

> *"128. In the instant case, Rs 111 lakhs had been paid towards outstanding interest on 28th March, 2014 and the offer of One Time Settlement was within three years thereafter. In any case, NCLAT overlooked the fact that a Certificate of Recovery has been issued in favour of the Appellant Bank on 25th May 2017. The Corporate Debtor did not pay dues in terms of the Certificate of Recovery. The Certificate of Recovery in itself gives a fresh cause of action to the Appellant Bank to institute a petition under Section 7 IBC. The petition under Section 7 IBC was well within three years from 28th March 2014.*

138. A final judgment and order/decree is binding on the judgment debtor. Once a claim fructifies into a final judgment and order/decree, upon adjudication, and a certificate of Recovery is also issued authorizing the creditor to realize its decretal dues, a fresh right accrues to the creditor to recover the amount of the final judgment and/or order/decree and/or the amount specified in the Recovery Certificate.

139. The Appellant Bank was thus entitled to initiate proceedings under Section 7 IBC within three years from the date of issuance of the Recovery Certificate. The Petition of the Appellant Bank, would not be barred by limitation at least till 24th May 2020.

143. Moreover, a judgment and/or decree for money in favour of the Financial Creditor, passed by the DRT, or any other Tribunal or Court, or the issuance of a Certificate of Recovery in favour of the Financial Creditor, would give rise to a fresh cause of action for the Financial Creditor, to initiate proceedings under Section 7 IBC for initiation of the Corporate Insolvency Resolution Process, within three years from the date of the judgment and/or decree or within three years from the date of issuance of the Certificate of Recovery, if the dues of the Corporate Debtor to the Financial Debtor, under the judgment and/or decree and/or in terms of the Certificate of Recovery, or any part thereof remained unpaid."

28. In view of the aforementioned, particularly the view taken by the judgment of Hon'ble Supreme Court in Dena Bank (ibid), **we are left with no other but to admit present petition, ordered accordingly the CIRP is directed to be commenced.**

29. In the wake, moratorium as provided under Section 14 of IBC, 2016 is declared qua the CD and as a necessary consequence thereof the following prohibitions are imposed, which must be followed by all and sundry:

(a) The institution of suits or continuation of pending suits or proceedings against the Respondent 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 Respondent 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 Respondent in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

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

30. As proposed by the Petitioner, CA Ritu Rastogi, having e-mail id: Ipesspl.riturastogi@gmail.com and Registration No. IBBI/IPA-001/IP-P00204/2017-18/10393, is appointed as IRP, subject to the condition that no disciplinary proceeding is pending against him and disclosures as required under IBBI Regulations, 2016 are made by him within a period of one week from this Order. It is further ordered that:

CA Ritu Rastogi, (Registration No. IBBI/IPA-001/IP-P00204/2017-18/10393) shall take charge of the CIRP of the Corporate Debtor with immediate effect and would take steps as mandated under the IBC specifically under Section 15, 17, 18, 20 and 21 of IBC, 2016 read with extend provisions of IBBI (Insolvency Resolution of Corporate Persons) Regulations, 2016.

31. The Petitioner is directed to deposit Rs. 2,00,000/- only with the IRP to meet the immediate expenses. The amount, however, will be subject to adjustment by the Committee of Creditors as accounted for by Interim Resolution Professional and shall be paid back to the Financial Creditor.

32. A copy of this Order shall immediately be communicated by the Registry/Court Officer of this Tribunal to the Petitioner /Financial Creditor, the Respondent/Corporate Debtor and the IRP mentioned above.

33. In addition, a copy of this Order shall also be forwarded by the Registry/Court Officer of this Tribunal to the IBBI for their records.

Sd/-
(SUBRATA KUMAR DASH)
MEMBER (T)

Sd/-
(ASHOK KUMAR BHARDWAJ)
MEMBER (J)