IN THE NATIONAL COMPANY LAW TRIBUNAL,

MUMBAI BENCH, COURT – II

IA/678/2020, IA/742/2020

&

C.P.(IB)-4535(MB)/2019

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

In the matter of

Canara Bank

Having Registered Office at: 112, JC Road Bangalore.

Branch: 1st Floor, A Wing, Canara Bank Building C-14, 'G' Block, Bandra-Kurla Complex, Bandra (East), Mumbai, Maharashtra- 400051.

……Financial Creditor/Applicant

Vs

GTL Limited

Having Registered Office at: Global Vision Electronic Sadan No. II MIDC, TTC, Industrial Area, Mahape Navi Mumbai, Maharashtra -400710.

…….Corporate Debtor/Respondent

Order delivered on: 18.11.2022

Coram:

Hon'ble Member (Judicial) : Justice P.N. Deshmukh (Retd.)

Hon'ble Member (Technical) : Shri Shyam Babu Gautam

Appearances:

For the Financial Creditor : Counsel, *Mr. Rohit Gupta*

For the Corporate Debtor : Senior Counsel, *Mr. Atul Nanda*
Counsel, *Mr. Rohan Rajadhyaksha*

ORDER

Per- Justice P.N. Deshmukh (Retd.), Member Judicial

1. The present **Company Petition (IB)-4535(MB)/2019** is filed under Section 7 of Insolvency and Bankruptcy Code, 2016 (for brevity 'IBC, 2016') read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') on 06.12.2019, by Canara Bank (for brevity 'Financial Creditor') through its Authorised Person, *Mr. Amrit Ghosh*, who has been duly authorised vide Power of Attorney dated 01.06.1999 for initiating Corporate Insolvency Resolution Process (CIRP) against GTL Limited (for brevity 'Corporate Debtor') for default in repaying an amount of **₹534,76,33,736.81** (Indian Rupees Five Hundred Thirty Four Crores Seventy Six Lacs Thirty Three Thousand Seven Hundred Thirty Six and Eighty One Paise only), as on 29.09.2014.

Simultaneously, the Respondent filed IA/678/2020 and IA/742/2020 on 21.02.2020 and 26.02.2020 respectively, seeking to dismiss the CP(IB)/4535(MB)/2019 for lack of

authorisation in favour of the authorised signatory of the Petitioner and further, to defer the hearing in the above-mentioned petition, till SLP(Diary) No. 7345 of 2020 pending before the Hon'ble Supreme Court of India is decided.

2. On perusal of the IA/678/2020, IA/742/2020 and CP(IB)-4535(MB)/2019, it reveals that the Petitioner had filed Company Petition No. 3586 of 2018 (First Petition) before this Hon'ble Tribunal under Section 7 of IBC pursuant to a Notification dated February 12, 2018 issued by the Reserve Bank of India titled as Resolution of Stressed Assets-Revised Framework (Revised Framework). The Respondent opposed the First Petition on various grounds including that the Revised Framework was unconstitutional and accordingly filed a Writ Petition No. 1206 of 2018 before the Hon'ble Supreme Court of India, wherein, the respondent categorically admitted that the First Petition was filed pursuant to the Revised Framework. On 02.04.2019, the Hon'ble Supreme Court of India allowed the said Writ Petition and **declared the Revised Framework as *ultravires* and therefore *non-est*.** Further, it was **declared that all cases filed under Section 7 of IBC pursuant to the Revised Framework were *non-est*.** Despite this judgement, the Petitioner contended before this Tribunal that the First Petition was maintainable on the ground that it was not filed pursuant to the Revised Framework. Thus, the Respondent filed a Miscellaneous Application seeking dismissal of the First Petition on the basis of the judgement of

Hon'ble Supreme Court of India. Further, on 26.11.2019, this Tribunal allowed the said Miscellaneous Application and dismissed the First Petition as *non-est* and non-maintainable.

Furthermore, the Petitioner filed another Petition under Section 7 of IBC, 2016, which is before us for our perusal wherein the Petitioner prays for initiation CIRP against the Corporate Debtor. The Financial Creditor has submitted that the Corporate Debtor has been availing financial facilities from the Financial creditor for around past eleven years. At the request of the Corporate Debtor, various financial facilities were sanctioned to the Corporate Debtor. The said facilities were secured by Mortgage and hypothecation of assets and the charge was duly filed with the concerned Registrar of Companies. Further, the Corporate Debtor has acknowledged that such financial facilities were availed and confirms the execution of Documents and liabilities from time to time. The Corporate Debtor by its Acknowledgement of Debt and security dated 31.03.2017 has confirmed the availing of facilities, execution of security documents and balance outstanding in respect of the facilities availed. In continuation of the said Acknowledgement of Debt and Security, the Corporate Debtor has admitted its liabilities in its Annual Report for the year 2017-2018. Owing to financial stress faced by the Corporate Debtor, the account of the Corporate Debtor was restructured under the Scheme of CDR during the period of 2011. On account of the Corporate Debtor's failure to comply with the CDR Package, the account of Corporate Debtor slipped into NPA on

29.09.2014. The Financial Creditor vide Recall Notice dated 10.07.2018 addressed to the Corporate Debtor recalled the entire advances and called upon the Corporate Debtor to make the outstanding payments, but the Corporate Debtor failed to do so. Hence, the Financial Creditor filed the present Company Petition.

3. In relation to this, the Respondent has filed an IA/678/2020 seeking dismissal of the said petition on the limited ground that the said petition is filed by one Amrit Ghose, who is purportedly authorised to file the same on behalf of the Petitioner vide a Power of Attorney dated 01.06.1999. The Respondent submits that the said power of attorney is a general power of attorney which does not authorize the said Amrit Ghose to file a petition under the IBC, 2016 or a petition against Respondent. The Respondent relied on the fact that the said power of attorney is dated 01.06.1999, which makes it *ex facie* evident that the said power of attorney could never have authorized anyone to file any proceedings under the IBC as the IBC itself came into force only in December 2016. Further in relation to his contention, the Respondent relied in the matter of **Palogix Infrastructure Private Limited Vs. ICICI Bank Limited**, wherein, Hon'ble NCLAT has held that-

> *"36. As per Section 7 of the 'I&B Code' an application for initiation of 'Corporate Insolvency Resolution Process' requires to be filed by 'Financial Creditor' itself. The form and manner in which an application under section 7 of the 'I&B Code' is to be filed by a 'Financial Creditor' is provided in 'Form-1' of the Adjudicating Authority Rules. Upon perusal of the Adjudicating Authority Rules and*

Form-1, it may be duly noted that the 'I&B Code' and the Adjudicating Authority Rules recognize that a 'Financial Creditor' being a juristic person can only act through an "Authorised Representative". Entry 5 8b 6 (Part I) of Form No. 1 mandates the 'Financial Creditor' to submit "name and address of the person authorised to submit application on its behalf. The authorization letter is to be enclosed. The signature block of the aforementioned Form 1 also provides for the authorised person's detail is to be inserted and also includes inter alia the position of the authorised person in relation to the 'Financial Creditor'. Thus, it is clear that only an "authorised person" as distinct from "Power of Attorney Holder" can make an application under section 7 and required to state his position in relation to "Financial Creditor".

37. The 'I&B Code' is a complete Code by itself. The provision of the Power of Attorney Act, 1882 cannot override the specific provision of a statute which requires that a particular act should be done by a person in the manner as prescribed thereunder.

38. Therefore, we hold that a 'Power of Attorney Holder' is not competent to file an application on behalf of a 'Financial Creditor' or 'Operational Creditor' or 'Corporate Applicant'."

Further in view of the above judicial precedent, the Respondent submits that it is unequivocally clear that any proceedings under the IBC to initiate the CIRP in respect of a corporate debtor can be filed only if the authorised signatory of the petitioner is empowered by a board resolution passed by such petitioner specifying the institution of such proceedings under the IBC and the above Petition has been instituted by *(i) a power of attorney holder; (ii) a person not specifically authorised on behalf of the Petitioner to file an Application under the IBC; (iii) by a person who is 'generally' authorised to act on behalf of the petitioner but not authorised to file an Application under the IBC against the*

Respondent. In view of the same, the Respondent prayed to dismiss the present petition.

4. Further, the Respondent has filed an IA/742/2020 to defer the hearing in the above-mentioned petition, till a decision is pending in the SLP(Diary) No. 7345 of 2020 before the Hon'ble Supreme Court of India. In addition to these two IAs, the Respondent has also filed a detailed reply stating that the Prudential Framework for Resolution of Stressed Assets vide a Notification dated June 7, 2019 was issued by the RBI which *inter-alia* provided as follows:

> "9. *All lenders must put in place Board-approved policies for resolution of stressed assets, including the timelines for resolution. Since default with any lender is a lagging indicator of financial stress faced by the borrower, it is expected that the lenders initiate the process of implementing a resolution plan (RP) even before a default. In any case, once a borrower is reported to be in default by any of the lenders mentioned at 3(a), 3(b) and 3(c), lenders shall undertake a prima facie review of the borrower account within thirty days from such default* ("**Review Period**"). During this Review Period of thirty days, lenders may decide on the resolution strategy, including the nature of the RP, the approach for implementation of the RP, etc. **The lenders may also choose to initiate legal proceedings for insolvency or recovery.**
>
> 10. **In cases where RP is to be implemented, all lenders shall enter into an inter-creditor agreement (ICA)**, *during the above-said Review Period, to provide for ground rules for finalisation and implementation of the RP in respect of borrowers with credit facilities from more than one lender.* **The ICA shall provide that any decision agreed by lenders**

representing 75 per cent by value of total outstanding credit facilities (fund based as well non-fund based) and 60 per cent of lenders by number shall be binding upon all the lenders. *Additionally, the ICA may, inter alia, provide for rights and duties of majority lenders, duties and protection of rights of dissenting lenders, treatment of lenders with priority in cash flows/differential security interest, etc. In particular, the RPs shall provide for payment not less than the liquidation value due to the dissenting lenders."*

The RBI also issued a Press Release in relation to the Prudential Framework which states that:

"The fundamental principles underlying the regulatory approach for resolution of stressed assets are as under:

i. Early recognition and reporting of default in respect of large borrowers by banks, FIs and NBFCs;

ii. **Complete discretion to lenders with regard to design and implementation of resolution plans**, *in supersession of earlier resolution schemes (S4A, SDR, 5/25 etc.), subject to the specified timeline and independent credit evaluation;*

iii. A system of disincentives in the form of additional provisioning for delay in implementation of resolution plan or initiation of insolvency proceedings;

iv. Withdrawal of asset classification dispensations on restructuring. Future upgrades to be contingent on a meaningful demonstration of satisfactory performance for a reasonable period;

v. For the purpose of restructuring, the definition of 'financial difficulty' to be aligned with the guidelines issued by the Basel Committee on Banking Supervision; and,

vi. **Signing of inter-creditor agreement (ICA) by all lenders to be mandatory, which will provide for a majority decision making criteria**."

In view of this Prudential Framework, the Respondent requested the CDR Lenders to convene an urgent meeting during the 'Review Period' of 30 days from the reference date i.e. June 7, 2019 and initiate actions as mandated under the Prudential Framework. Accordingly, a meeting of the CDR Lenders was held at which the Respondent presented a further revised settlement proposal ("**Revised OTS Proposal**"). The Petitioner stated that even though the Third Settlement Proposal had envisaged a payment of Rs. 1,638 crores to the CDR Lenders, the Revised OTS Proposal was for an amount of Rs. 894 crores for which the timelines and sources of funds were specified and informed to the CDR Lenders. The Respondent explained that the reduction in the settlement offer was on account of a reduction in the valuation of the OME Division of the Respondent and a revised expectation of nil recovery from the Aircel insolvency litigation. The Respondent further impressed upon the CDR Lenders that in case the corporate insolvency resolution process was initiated against the Respondent, there would not be any potential Resolution Applicant for the Respondent due to severe deterioration of the value of the Respondent's assets and the CDR Lenders would recover only Rs. 145 crores approximately in the insolvency of the Respondent. Thus, the Revised OTS Proposal offered by the Respondent indeed resulted in maximization of the Respondent's assets. As regards the Revised OTS Proposal, the CDR Lenders acknowledged and discussed as follows:

"Lenders will get a better value out of the same if they accept the OTS proposal otherwise by going to NCLT they will not fetch better value and once the Company admitted to NCLT the value of OME, share etc. will go down. Other assets of the Company will be sold at distress value."

5. After deliberations on the Revised OTS Proposal and the distribution proposed to the various categories of lenders, the CDR Lenders (except the Petitioner) opined that since the Respondent was in an EPC business, there were hardly any underlying assets that could be realized under any other mode of recovery and hence an OTS was a better option. While the Petitioner raised several ex-facie misconceived queries and refused to sign an Inter Creditor Agreement (ICA) as envisaged under the Prudential Framework, all the other CDR Lenders agreed to sign the ICA. Accordingly, at the said meeting on July 6, 2019, the CDR Lenders signed an ICA. The CDR lenders who signed the ICA represented 91.82% by value and 93.75% by number of the total CDR Lenders of the Respondent. Further, in these circumstances, the Petitioner is the only lender of the Respondent who is opposing the execution of Inter Creditor Agreement. In a meeting of the CDR Lenders dated November 22, 2019, M/s. BDO India LLP and Kanti Karamsey & Co., who were appointed to ascertain the enterprise value of the Respondent and one M/s. AXYK Capital Services Pvt. Ltd. who was appointed to ascertain the value receivable by the Respondent under arbitration proceedings against MSEDCL presented their reports. On the basis of the said reports, the CDR Lenders who attended the said meeting, in principle, approved the Revised OTS Proposal

and requested IDBI Bank Limited to appoint a Process Agent and Legal Counsel for implementation of the resolution plan and also suggested to form an Asset Sale Committee. Notably, the Petitioner did not agree to such a resolution plan for the Respondent.

Despite the fact that more than 91.82% (by value) of the CDR Lenders had executed an ICA, the Petitioner not only refused to abide by such majority decision but acted in malafide manner to the complete prejudice of the Respondent as well as all other lenders of the Respondent and filed the above Petition. Notably, the refusal of the Petitioner to sign the ICA is a breach of the Prudential Framework and taking recourse to the IBC by the Petitioner is contrary to the super majority decision of the lenders of the Respondent. Further, as stated above, the recourse to IBC by the Petitioner would not only frustrate the ICA executed by other lenders but also lead to erosion of value of the Respondent causing further losses to the lenders of the Respondent.

In these circumstances, the Respondent filed Writ Petition (Lodging) No. 223 of 2020 before the Bombay High Court *inter-alia* seeking a declaration that paragraph 9 and 10 of the Prudential Framework issued by the RBI were mandatory on all lenders of the Respondent and particularly the Petitioner. The Hon'ble Bombay High Court vide **Order dated February 3, 2020** dismissed the Writ Petition and held ***that the issue of maintainability of the above Petition ought to be raised before and decided by this Hon'ble Tribunal***. Further, the

Respondent filed Special Leave Petition No. 5667 of 2020 (SLP) before the Hon'ble Supreme Court of India impugning the Order passed by the Hon'ble Bombay High Court in Writ Petition (Lodging) No. 223 of 2020, wherein, Hon'ble Supreme Court decided that ***paragraphs 9 and 10 of the RBI's directions on 'Prudential Framework for Resolution of Stressed Assets' dated June 7, 2019 cannot be read as mandatory and binding on secured lenders, and upheld the Hon'ble Bombay High Court Judgement***. Thus, the Corporate Debtor is raising various contentions before this Tribunal in the light of Hon'ble Supreme Court's judgement in case of **Vidarbha Industries Power Ltd. Vs. Axis Bank [2022 SCC Online 841].**

6. The Corporate Debtor further submits that the present Petition ought to be dismissed on the following grounds:

a. The well-established objects of the IBC are (i) maximization of value; and (ii) resolution of the Corporate Debtor. In the peculiar facts of the present case, even the vast majority of lenders have recognized that maximization of value and resolution is possible only outside IBC.

b. Initiation of insolvency proceeding in a scenario where majority of the secured creditors have (i) already elected to enforce their security interest through SARFAESI proceedings; and (ii) actually sold various investments and assets, would not permit resolution of the Corporate Debtor and hence would be futile and not serve the objects of IBC.

c. In light of the Hon'ble Supreme Court's judgment in ***Vidarbha Industries Power Ltd. v. Axis Bank [2022 SCC***

Online SC 841] this Hon'ble Tribunal is bound to exercise its discretion to consider these relevant factors while admitting or rejecting a petition.

d. Malicious intent in filing the present Petition by the Petitioner knowing very well that no resolution is possible for the Corporate Debtor and is only intending to use the CIRP as a recovery tool.

e. Lenders also considering transfer of Corporate Debtor's account to NARCL, which offer will be adversely impacted if CIRP is initiated against the Corporate Debtor.

Further, the Corporate Debtor proposed several OTS proposals, whose value kept diminishing due to passage of time and continued issues in the telecom sector *(including the shutting down of Aircel, Tata Teleservices and R Com - all direct or indirect customers of the Corporate Debtor).* In 2019, the lenders accepted *(in-principle)* a revised OTS proposal of INR 694 crores. However, this OTS proposal was also not implemented due to certain onerous conditions imposed by the lenders. Then the Lenders, who were the part of a consortium and parties to a Master Restructuring Agreement, decided to enforce the security and sell the assets, investments, etc. Accordingly, IDBI on behalf of Consortium Lenders (which includes Petitioner) issued SARFAESI Notices under Sec.13(2) and Sec. 13(4). Further, the Corporate Debtor has submitted that the sale of assets under SARFAESI was, in many ways, similar to the OTS proposal involving monetizing of all assets, investments, etc. Moreover, the lenders have realized the following:

a. *During January 1, 2022 to January 17, 2022, Lenders have sold 1,85,99,435 number of shares pledged by the promoters and recovered value aggregating to INR 38.42 crores.*
b. *Lenders have appropriated total INR 119.90 crores, which was initially deposited by the Corporate Debtor towards the OTS proposal.*
c. *Lenders realized INR 501.68 crores by selling equity of GTL Infrastructure Limited.*
d. *Lenders have sold immovable properties, which resulted in monetization of INR 120.55 crores.*

Accordingly, the lenders have already realized close to INR 780.55 crores, which is already in excess of the earlier approved OTS amount of INR 694 crores. In fact, the minutes of the Joint Lenders meetings (in which the Petitioner itself participated) shows that the vast majority of lenders recognized that resolution under IBC would not result value maximization, especially taking into consideration the nature of business of the Corporate Debtor but the Petitioner did not object to the action taken by the vast majority of lenders to exercise their security and sell the assets of the Corporate Debtor.

7. The Ld. Senior Counsel for the Corporate Debtor argued that the initiation of insolvency proceeding in a scenario where majority of the secured creditors have already elected to enforce their security interest through SARFAESI proceedings would be futile and would not serve the objects of IBC. Election of SARFAESI by vast majority of lenders ought not to be undone or jeopardized. Moreover, all the lenders of the Corporate Debtor

(except Petitioner) representing over 90% in value have elected to proceed with SARFAESI route. Once this route has been elected by significant majority, it cannot simply be ignored. The Corporate Debtor further relied on the Press Release dated June 7, 2019 by RBI, which while laying down the fundamental principles underlying the regulatory approach for resolution of stressed assets has set out as under:

> *"(vi) Signing of inter creditor agreement (ICA) by all the lenders to be mandatory, which will provide for a majority decision making Criteria"*

Further it is argued that dissent by a vast majority of the financial creditors, to initiation of Insolvency Proceeding is a good ground to exercise discretion against the initiation of Corporate Insolvency Resolution Process (CIRP) of Corporate Debtor given that the IBC itself accords primacy to the decision of Committee of Creditors (CoC) and commercial wisdom of the majority of the financial creditors as seen from the provisions of Section 12A, Section 28 and Section 30(4) of IBC. It is pertinent to note that SARFAESI proceedings by the majority of lenders is well underway, where the lenders have already realized a substantial portion of the assets in an expeditious manner. In such a scenario, the timelines and value for the balance assets will be severely impacted if the Corporate Debtor is admitted to CIRP. The Ld. Senior Counsel relied on ***Innoventive Industries v. ICICI Bank (2018)1 SCC 407*** (para16)

The Committee believes that there is only one correct forum for evaluating such possibilities, and making a decision: a creditors committee, where all financial creditors have votes in proportion to the magnitude of debt that they hold.

K. Sashidhar v. Indian Overseas Bank - (2019) 12 SCC 150

"52.... Besides, the commercial wisdom of CoC has been given paramount status without any judicial intervention, for ensuring completion of the stated processes within the timelines prescribed by the I&B Code.

64.... To take any other view would enable even the minority dissenting financial creditors to question the logic or justness of the commercial opinion expressed by the majority of the financial creditors albeit by requisite per cent of voting share to approve the resolution plan; and in the process authorize the adjudicating authority to reject the approved resolution plan upon accepting such a challenge."

8. The Corporate Debtor has filed a separate written submission and relied on **Vidarbha Industries Power Limited Vs. Axis Bank Limited**, wherein, Hon'ble Supreme Court has held that:

70. As argued by Mr. Gupta, had it been the legislative intent that Section 7(5)(a) of the IBC should be a mandatory provision, Legislature would have used the word 'shall' and not the word 'may'. There is no ambiguity in Section 7(5) (a) of the IBC. Purposive interpretation can only be resorted to when the plain words of a statute are ambiguous or if construed literally, the provision would nullify the object of the statute or otherwise lead to an absurd result. In this case, there is no cogent reason to depart from the rule of literal construction.

"76. Significantly, Legislature has in its wisdom used the word 'may' in Section 7(5) (a) of the IBC in respect of an application for CIRP initiated by a financial creditor against a Corporate Debtor but has used the expression 'shall' in the otherwise almost identical provision of Section 9(5) of the IBC relating to the initiation of CIRP by an Operational Creditor.

77. The fact that Legislature used 'may' in Section 7(5) (a) of the IBC but a different word, that is, 'shall' in the otherwise almost identical provision of Section 9(5)(a) shows that 'may' and 'shall' in the two provisions are intended to convey a different meaning. It is apparent that Legislature intended Section 9(5)(a) of the IBC to be mandatory and Section 7 (5)(a) of the IBC to be discretionary…."

"78. On the other hand, in the case of an application by a Financial Creditor who might even initiate proceedings in a representative capacity on behalf of all financial creditors, the Adjudicating Authority might examine the expedience of initiation of CIRP, taking into account all relevant facts and circumstances, including the overall financial health and viability of the Corporate Debtor. The Adjudicating Authority may in its discretion not admit the application of a Financial Creditor.

"80. …In the case of a financial debt, there is a little more flexibility. The Adjudicating Authority (NCLT) has been conferred the discretion to admit the application of the Financial Creditor. If facts and circumstances so warrant, the Adjudicating Authority can keep the admission in abeyance or even reject the application. Of course, in case of rejection of an application, the Financial Creditor is not denuded of the right to apply afresh for initiation of CIRP, if its dues continue to remain unpaid."

"82. The title "Insolvency and Bankruptcy Code" makes it amply clear that the statute deals with and/or tackles insolvency and bankruptcy. It is certainly not the object of the IBC to penalize solvent companies, temporarily defaulting in repayment of its financial debts, by initiation of CIRP. Section 7(5) (a) of the IBC, therefore, confers discretionary power on the Adjudicating Authority (NCLT) to admit an application of a Financial Creditor under Section 7 of the IBC for initiation of CIRP."

"89. The Adjudicating Authority (NCLT) has to consider the grounds made out by the Corporate Debtor against admission, on its own merits. For example when admission is opposed on the ground of existence of an award or a decree in favour of the Corporate Debtor, and the Awarded/decretal amount exceeds the amount of the debt, the Adjudicating Authority would have to exercise its discretion under Section 7(5)(a) of the IBC to keep the admission of the application of the Financial Creditor in abeyance, unless there is good reason not to do so. The Adjudicating Authority may, for example, admit the application of the Financial Creditor, notwithstanding any award or decree, if the Award/ Decretal amount is incapable of realisation. The example is only illustrative."

> *"91. We are clearly of the view that the Adjudicating Authority (NCLT) as also the Appellate Tribunal (NCLAT) fell in error in holding that once it was found that a debt existed and a Corporate Debtor was in default in payment of the debt there would be no option to the Adjudicating Authority (NCLT) but to admit the petition under Section 7 of the IBC."*

In view of the judgment in ***Vidharbha Industries (supra)***, the Corporate Debtor has submitted that that the present Petition ought to be dismissed.

9. In response to this, the Petitioner/Financial Creditor has filed rejoinder on September 29, 2022 and raised few preliminary contentions. *Firstly*, that the Corporate Debtor has raised inconsistent pleas before this Tribunal and in reply to SARFAESI process. On the one hand, the Corporate Debtor prays to not initiate CIRP on the ground that SARFAESI action is already initiated and on the other hand they oppose the SARFAESI notice by replying that lenders cannot sell the immovable property in contempt of Hon'ble Bombay High Court's Order dated June 9, 2022 passed in Notice of Motion No.145 of 2017 in Commercial Suit No.49 of 2017 filed by SBI (Mauritius) Ltd. against Corporate Debtor. The Petitioner placed reliance on letter dated March 11, 2022.

Secondly, the contentions of Corporate Debtor to not to initiate IBC is contrary to the object of IBC, as the present proceeding is not for recovery but for revival of Corporate Debtor. It is the SARFAESI proceeding which is for recovery and not IBC.

Thirdly, none of the lenders have raised any objection against the present Petition. If any lender had problem with Petitioner's actions then they would have objected before this Tribunal. Further referred to the Minutes dated July 20, 2022.

Fourthly, when the OTS is not accepted by Petitioner, it is being termed as malicious intent by Corporate Debtor.

10. In relation to the above contentions raised by the Petitioner, the Corporate Debtor has responded on the same and submitted that the Corporate Debtor has not opposed the SARFAESI action, as the OTS proposal of the Corporate Debtor involved monetizing of all assets, investments etc. Thus, the sale of assets under SARFAESI was in a sense similar to the OTS proposal involving monetizing of all assets, investments, etc. So far as the reference of the Bombay High Court Order is concerned, which was passed amidst the sale of assets undertaken by lenders under SARFAESI, the Corporate Debtor only brought the injunction granted against Corporate Debtor to the notice of the lenders. As regards the letter dated March 11, 2022, the same cannot amount to the Corporate Debtor opposing SARFAESI action. The Corporate Debtor has only stated in the said letter that if assets are sold by the lenders then nothing would remain under IBC. Despite this, the lenders elected to sell the assets under SARFAESI - which is exactly what is being submitted before this Hon'ble Court. Further it was submitted that maximum recovery for the lenders in the present case can be achieved outside IBC i.e. by monetization of assets. In fact, this is

what is clear to almost all lenders except the Petitioner and therefore, 94% by value of the lenders have acted accordingly. It was further submitted that on a bare reading of the minutes dated July 20, 2022, it is apparent that IDBI Bank merely enquired about status of the proceedings before the Hon'ble NCLT. This cannot amount to support of lenders to the present IBC proceedings. The Corporate Debtor in relation to fourth contention has submitted that the Petitioner may be entitled to reject an OTS offer by the Corporate Debtor but the Petitioner's grossly arbitrary conduct *(as already set out above, which is not restricted to rejecting the OTS offers)* and arbitrarily diverging from the vast majority of lenders i.e. decision of the Consortium and taking steps only for its individual recovery, is clearly a malicious abuse of process.

11. After hearing both the parties and on perusal of the IA/678/2020, IA/742/2020 and CP(IB)4535(MB)/2019 including other material on record, we first deal with the IA/742/2020 that was filed by the Corporate Debtor to defer the hearing in the above-mentioned petition, till a decision is pending in the SLP(Diary) No. 7345 of 2020 by the Hon'ble Supreme Court of India. We observe that the same has already been decided by the Hon'ble Supreme Court *that paragraphs 9 and 10 of the RBI's directions on 'Prudential Framework for Resolution of Stressed Assets' dated June 7, 2019 cannot be read as mandatory and binding on secured lenders, and upheld the Hon'ble Bombay High*

Court Judgement. In view of the same, **IA/742/2020** has been ***dismissed as infructuous***.

As per the Press Release dated June 7, 2019 by RBI (*while laying down the fundamental principles underlying the regulatory approach for resolution of stressed assets),* ***"(vi) Signing of inter creditor agreement (ICA) by all the lenders to be mandatory, which will provide for a majority decision making Criteria"*** clarifies that any proposed action by the Lenders is to be deemed as collective action. So, as per this clause, signing of ICA (which determines the majority decision making criteria) by all lenders seems to be mandatory, as more than 90% of Lenders have signed it. The Petitioner has breached this clause as the Petitioner has refused to sign the same. Moreover, all the lenders of the Corporate Debtor (except Petitioner) representing over 90% in value have elected to proceed with SARFAESI route.

Coming back to IBC, which itself accords primacy to the decision of Committee of Creditors (CoC) and commercial wisdom of majority of the financial creditors as per the provisions of Section 12A, Section 28 and Section 30(4) of IBC, as per Section 12A of the IBC, with the approval of voting share of 90% of the CoC, even where the petition is admitted, it can be withdrawn. In the present case, where the lenders by majority of more than 90% have already taken a decision of realization in terms of SARFAESI Act. In case the present petition is admitted, the other lenders have more than 90% of majority to withdraw the petition, as the Petitioner has a mere 4.47% share by value in secured interest.

Therefore, initiation of insolvency proceedings, contrary to the decision of the majority of the secured creditors would be counter-productive, especially if most of the assets are secured, as such assets would neither be available for resolution nor for liquidation. So, in view of Judgement of the Hon'ble Supreme Court in ***Vidarbha Industries Power Limited Vs. Axis Bank Limited***, we are of the opinion that the present petition should be dismissed. Hence, the **CP(IB)/4535/2019** is ***dismissed***.

Since the Petition is dismissed, therefore this bench refrain to express any opinion on merit as to whether the Petitioner is properly authorized to file petition or not. In view of the same ***IA/678/2020*** is ***dismissed as infructuous***.

Sd/-

SHYAM BABU GAUTAM

(MEMBER TECHNICAL)

Sd/-

JUSTICE P.N. DESHMUKH

(MEMBER JUDICIAL)