IN THE NATIONAL COMPANY LAW TRIBUNAL MUMBAI BENCH-VI
CP (IB) No.1241/MB/2022 ALONG WITH IA No.165/2024

[Under Section 7 and Section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016]

IN THE MATTER OF:

ASSETS CARE & RECONSTRUCTION ENTERPRISE LIMITED

[CIN: U65993DL2002PLC115769]

2nd Floor, Mohandev Building

13, Tolstoy Marg

New Delhi-110001. **…Financial Creditor**

Vs.

HOTEL HORIZON PRIVATE LIMITED

[CIN: U55101MH1968PTC014157]

37, Juhu Beach

Mumbai-400049

Maharashtra. **...Corporate Debtor**

ALONG WITH

IA No.165/2024

HOTEL HORIZON PRIVATE LIMITED

…. Applicant

Vs.

ASSETS CARE & RECONSTRUCTION ENTERPRISE LIMITED

….Respondent

Pronounced: 19.11.2024

CORAM:

HON'BLE SHRI K. R. SAJI KUMAR, MEMBER (JUDICIAL)

HON'BLE SHRI SANJIV DUTT, MEMBER (TECHNICAL)

Appearances: Hybrid

Financial Creditor/Respondent: Sr. Adv. Gaurav Joshi a/w Adv. Nausher Kohli, Adv. Murtaza Kachwalla, Adv. Aashdin Chivalwala, Adv. Shreyas Lavekar i/b Argus Partners.

Corporate Debtor/Applicant : Adv. Shadab Jan a/w Adv. Shivam Bhagwati i/b Crawford Bayley & Co.

ORDER

[PER: SANJIV DUTT, MEMBER (TECHNICAL)]

1. BACKGROUND

1.1 This is an Application bearing C.P. (IB) No.1241/MB/2022 filed by Assets Care and Reconstruction Enterprises Limited, the Financial Creditor (acting in its capacity as trustee of ACRE-111-trust) on 29.10.2022 under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "the Code") read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as “the AAA Rules”) for initiating Corporate Insolvency Resolution Process (hereinafter referred to as "CIRP") in respect of Hotel Horizon Private Limited, the Corporate Debtor.

1.2 Housing Development Finance Corporation Limited (hereinafter referred to as “HDFCL”), the original lender, sanctioned various loan facilities amounting to a total sum of Rs.170,28,00,000/- (One Hundred Seventy Crores Twenty-Eight Lakhs Rupees) to the Corporate Debtor for renovation and extension of the existing hotel building from the year 2006 till 2015.

1.3 Pursuant to disbursement of loans, the Corporate Debtor started defaulting in its repayment obligations. In view of continued defaults, the account of the Corporate Debtor was classified as a Non-Performing Asset (NPA) on 30.10.2018. Despite repeated follow-up and issuance of Loan Recall Notice dated 15.11.2018 and demand notice under Section 13(2) of the Securitisation

and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "the SARFAESI Act") dated 10.01.2019, the Corporate Debtor neglected and failed to repay the outstanding debt owed to HDFCL.

1.4 Subsequently, HDFCL *vide* Assignment Agreement dated 29.06.2022 assigned the entire outstanding loans/ financial assets to the Financial Creditor. In Part-IV of the Application, the total amount of financial debt claimed to be in default is stated to be Rs.315,75,08,076/- (Three Hundred and Fifteen Crore Seventy-Five Lakh Eight Thousand Seventy-Six Rupees) as on 30.09.2022. In view of continuous default by the Corporate Debtor, the Financial Creditor preferred the present Application seeking initiation of CIRP in respect of the Corporate Debtor.

1.5 During the pendency of the Application and after filing the reply, the Corporate Debtor moved **IA No.165/2024** challenging the maintainability of the Application (main Application) as well as seeking appropriate relief from this Tribunal against alleged fraudulent/malicious and wrongful initiation of proceedings by the Financial Creditor under the Code. Hence, IA No.165/2024 was taken up for hearing along with the main Application and both are being disposed of by this common order.

2. AVERMENTS OF FINANCIAL CREDITOR

2.1 As stated above, HDFCL sanctioned a total sum of Rs.170,28,00,000/- to the Corporate Debtor under the following facilities:-

Facility	Loan Account No.	Amount (Rs.)
Term Loan I	5210188932	12,00,00,000/-
Term Loan II	5210191578	45,00,00,000/-
Term Loan III	5210207206	13,28,00,000/-
Lease Rental Discounting (LRD)	5210220681	100,00,00,000/-
Total		**170,28,00,000/-**

2.2 The aforementioned facilities were granted by HDFCL to the Corporate Debtor, *inter alia*, for the renovation/extension of the existing hotel building under various Finance Documents such as Sanction Letters, Loan Agreements, Supplemental Loan Agreements, Second Supplemental Loan Agreement, Third Supplemental Loan Agreement, Demand Promissory Notes, Facility Agreement, Master Facility Agreement, Inter-Creditor Agreement between Consortium Lenders. The loan facilities were secured, *inter alia*, by first charge over the project land, Business Hotel Building, Movable Assets, Receivables and personal guarantees of Shri Sagar Sharma and Shri Vishal Sharma, Directors of the Corporate Debtor.

2.3 Out of the total amount sanctioned, a total sum of Rs.169,84,42,994/- was disbursed by HDFCL to the Corporate Debtor between the period 2011-2018. Thereafter, the Corporate Debtor started defaulting in its repayment obligations. Therefore, *vide* letter dated 19.03.2018, HDFCL expressed its concern over the irregularities of the Corporate Debtor in making payments and called upon it to pay a sum of Rs.1,61,89,254/- towards outstanding interest as on 28.02.2018. However, the Corporate Debtor continued to default under the Finance Documents, and consequently, the account of the Corporate Debtor was

declared as NPA on 30.10.2018 by HDFCL as per the guidelines issued by the National Housing Bank (NHB).

2.4 Thereafter, on 15.11.2018, HDFCL issued a Loan Recall Notice to the Corporate Debtor calling upon it to repay the entire amount granted by HDFCL under Term Loans I, II, III, and LRD under the Finance Documents along with interest and other charges aggregating Rs.173,13,33,604/- due as on 31.10.2018 within 7 (seven) days from the receipt of the Notice. However, the Corporate Debtor failed to respond to the said Loan Recall Notice.

2.5 On 10.01.2019, HDFCL issued a Demand Notice under Section 13(2) of the SARFAESI Act to the Corporate Debtor for default under the LRD Facility, calling upon it to pay a sum of Rs.107,19,07,989/- within 60 (sixty) days, failing which it would be constrained to take action under Section 13(4) of the Act. However, the Corporate Debtor again failed to respond to the said Demand Notice.

2.6 Thereafter, HDFCL issued Guarantee Invocation Notice against Mr. Sagar Sharma and Mr. Vishal Sharma on 09.07.2019 invoking the personal guarantees provided by them in favor of HDFCL for repayment of the loan granted to the Corporate Debtor under the Finance Documents. However, no reply was received by HDFCL to the said Guarantee Invocation Notice.

2.7 The Corporate Debtor sent One-Time Settlement (OTS) proposal to HDFCL on 14.08.2019 enclosing a report of Chartered Accountant containing working of the “True Principal” amounts payable to HDFCL based on analysis and verification of the sanction letters, bank statements and ledger accounts in the books of the Corporate Debtor. Thus, the Corporate Debtor admitted its liability and receipt of

funds from HDFCL to the tune of Rs.81,72,00,000/- and proposed to pay the same along with interest thereon of Rs.26,14,00,000/-, thereby aggregating Rs.107,86,00,000/-.

2.8 In the meantime, *vide* Order dated 29.01.2019 passed by this Tribunal in Company Application No.1458 of 2017 filed by one, Phoenix ARC Private Limited against the Corporate Debtor, an order declaring moratorium against the Corporate Debtor in terms of Section 14 of the Code was passed. Accordingly, HDFCL filed its claim before the Resolution Professional which was admitted by the Resolution Professional of the Corporate Debtor. However, the said Order dated 29.01.2019 was set aside by the Hon'ble National Company Law Appellate Tribunal *vide* Order dated 07.02.2020. In other words, the Corporate Debtor was under CIRP from 29.01.2019 to 07.02.2020.

2.9 In or around 2021, HDFCL filed a Commercial Summary Suit No.79 of 2021 along with IA No.1626 of 2021 against the Corporate Debtor before the Hon'ble Bombay High Court. During the hearing on 10.03.2021, the Corporate Debtor and its Directors/Guarantors furnished undertaking to the Court that they would not in any manner deal with, dispose of, alienate and/or create any third party rights and /or interest, except in usual course of business, in any of their assets. On the same day, i.e., 10.03.2021, the Corporate Debtor made another OTS proposal to HDFCL.

2.10 On 22.06.2021, HDFCL issued Demand Notice under Section 13(2) of the SARFAESI Act to the Corporate Debtor for default under Term Loans II and III, calling upon the Corporate Debtor to pay a sum of Rs.81,31,09,917/- within 60

(sixty) days, failing which action would be taken under Section 13(4) of the Act. In response, *vide* its letters dated 31.08.2021 and 21.10.2021, the Corporate Debtor, for the first time, levelled frivolous allegations regarding non-disbursal of funds, fictitious journal entries and evergreening of loans. HDFCL responded to the Corporate Debtor *vide* its letter dated 03.11.2021 and refuted the aforesaid allegations.

2.11 Thereafter, *vide* Assignment Agreement dated 29.06.2022 entered into between HDFCL and the Financial Creditor, HDFCL assigned the entire outstanding loans/financial assets along with all its rights, title and interest under the Finance Documents, including underlying security interest, pledge, guarantee, etc., on an 'as is where is,' 'as is what is,' and 'without recourse' basis to the Financial Creditor. In its letter dated 04.07.2022, the Financial Creditor informed the Corporate Debtor that HDFCL had assigned the entire outstanding loans/financial assets to the Financial Creditor and that as on 31.05.2022, a total sum of Rs.303,45,77,700/- was due and payable by the Corporate Debtor to the Financial Creditor under the Finance Documents. However, no response was received from the Corporate Debtor.

2.12 As the Corporate Debtor had committed default and failed to pay the outstanding dues, the Application filed by the Financial Creditor under Section 7 of the Code for initiation of CIRP in respect of the Corporate Debtor deserves to be admitted, according to the Financial Creditor.

3. CONTENTIONS OF CORPORATE DEBTOR

3.1 The Corporate Debtor in its Affidavit-in-Reply dated 25.09.2023 opposes the admission of the Application on the following grounds:-

a) False claims related to dues, disbursals and time-barred claim amounts;

b) Fraud by the Financial Creditor;

c) Illegal evergreening of loan accounts and

d) Application is defective and incomplete.

More or less similar grounds have been raised by the Corporate Debtor in IA No.165 of 2024 challenging the maintainability of the present proceedings and seeking, *inter alia,* imposition of exemplary penalty on the Financial Creditor for filing the instant Application for fraudulent, malicious and wrongful initiation of CIRP of the Corporate Debtor.

3.2 As regards Term Loan-I, the Financial Creditor has claimed a disbursal of Rs.11,57,14,340/- in favour of the Corporate Debtor in terms of the Third Supplemental Agreement dated 29.12.2011. As per Part-IV of the Application, various amounts were disbursed on 30.12.2011 (Rs.6,15,75,316/-), 12.03.2012 (Rs.1,88,52,546/-), 31.03.2012 (Rs.1,00,36,243/-), 30.04.2012 (Rs.99,01,231/-), 31.05.2012 (Rs.1,03,49,004/-) and 28.09.2015 (Rs.50,00,000/-). However, such disbursements were not made by crossed/ “A/c Payee Only” cheques as mandated in clause 3.5 of the Loan Agreement dated 10.02.2016 pursuant to

which the Third Supplemental Agreement was executed between the parties. Therefore, the aforesaid disbursements are denied by the Corporate Debtor. It is alleged that the Financial Creditor has fabricated and drawn up the purported statement of accounts at Exhibits 55 and 56 [Pages 867 and 873] of the Application in order to mislead this Tribunal and to substantiate its false claim of disbursement. It is contended that the said document is a self-made one and hence, the Financial Creditor's claim under Term Loan-I as a financial debt ought to be rejected.

3.3 Alternatively, it is argued that the Financial Creditor's claim under the Third Supplemental Agreement of Term Loan-I is barred by limitation, because the default in payment of interest had occurred as early as in 2011/2012. Similar plea is taken with regard to Term Loan-II, Term Loan-III and LRD facilities.

3.4 HDFCL has with a *mala fide* intention of siphoning the sanctioned loan amounts for its own benefit, enrichment and masking of stressed/NPA accounts, not provided the sanctioned loan amounts to the Corporate Debtor for actual project works and instead siphoned the same using illegal ways and means in total violation of NHB/statutory norms. The HDFCL has adopted an ingenious and systematic way of creating an impression that the said loan funds were actually availed/utilised by the Corporate Debtor. HDFCL carried out fraudulent transactions causing wrongful loss to the Corporate Debtor and unjust enrichment by HDFCL.

3.5 HDFCL has not disbursed the required sums under various facilities but systematically engaged in evergreening of loan accounts for its own benefit. This

was done by routing of sanctioned amounts/sanctioning of additional facilities for financing stressed loan/NPA accounts without actual disbursals to the designated bank accounts of the Corporate Debtor. The Corporate Debtor has provided sample bank account statements issued by HDFC Bank, demonstrating that the sums claimed to be disbursed by the Financial Creditor were never actually disbursed or received by the Corporate Debtor.

3.6 The Financial Creditor has filed the present Application on the basis of incomplete and false documents. It has annexed false and fabricated statement of accounts to the Application. Therefore, the claim of the Financial Creditor is not maintainable.

3.7 In **IA No.165/2024** filed by the Corporate Debtor on 12.01.2024, it has challenged the maintainability of the main Application on similar grounds and prayed for dismissal of the main Application. The determination of points in issue goes to the root of the matter and concerns the determination of jurisdictional facts such as debt in default and the date of default. The claim amount is not only incorrect, highly exaggerated and inflated but also barred by limitation. The amount claimed by the Financial Creditor as disbursed to the Corporate Debtor was not actually disbursed and the statement of accounts provided is fabricated. Instead, the Financial Creditor has either made fictitious entries in its accounts to perpetuate its loan accounts or avoided declaring them as NPA. As a part of larger scheme of illegal evergreening, the Financial Creditor has not only reflected fictitious disbursements but has also reflected payments being made towards EMI/PMI from time to time. Such ostensible payments are nothing but a

sleight of hand as neither monies were actually received by the Corporate Debtor in its Bank Account nor paid to the Financial Creditor.

3.8 For initiating CIRP, the Financial Creditor must provide undisputable proof of debt and default supported by authentic loan account statements and banking records which are absent in the present Application. The Financial Creditor's claimed receipts towards EMI/PMI are fictitious, thereby rendering the date of default pleaded by the Financial Creditor false. In the present case, the Financial Creditor has claimed a uniform and singular date of default for sums allegedly disbursed under four facilities being Term Loan-1, Term Loan-2, Term Loan-3 and LRD. Each of such facility has distinct terms of payment and obligations cast on parties. Therefore, it is inconceivable that a single date of default would apply uniformly across all such facilities. It is contented that the Financial Creditor's claims under the various facilities are time-barred, with specific reference to the LRD facility disbursed even before the Facility Agreement was executed. A pleaded date of default in the Application is absent, and hence, mere issuance of a loan recall notice neither establishes an event of default nor can it shift the actual date of default.

3.9 The Corporate Debtor has requested for reconciliation of accounts, for the reason of inauthentic calculation sheets provided by the Financial Creditor as they cannot be relied upon. The Financial Creditor has relied solely on these self-made calculation sheets to establish disbursements and maintain the Application. The Corporate Debtor's requests for reconciliation has not yielded any result. Despite the Corporate Debtor's willingness to settle all valid dues, the

Financial Creditor neither accepted nor rejected the Corporate Debtor's genuine settlement offer. The Financial Creditor is taking a chance and is aspiring to snatch an order from this Tribunal by misrepresenting facts end position of parties. Hence, appointment of an RBI or Government empanelled Chartered Accountant or Auditor to conduct a reconciliation of accounts and determination of accurate facts is necessary.

3.10 The Application lacks compliance with Section 7 of the Code and Rule 4 of the AAA Rules. The Financial Creditor has failed to provide all necessary documents and evidence to demonstrate the default by the Corporate Debtor, rendering the claim untenable. Therefore, the claim of the Financial Creditor is not maintainable and the present Application ought to be rejected.

3.11 In its written submissions, the Corporate Debtor has placed reliance on certain judicial decisions in support of its case. It is submitted that for the purpose of ascertaining limitation, the date of “default” and not the date of NPA has to be taken into account [***Laxmi Pat Surana Vs. Union Bank of India & Anr., (2021) 8 SCC 481***]. The Financial Creditor cannot seek benefit of any acknowledgment of liability without any pleading in the Application [***Babulal Vardharji Gurjar Vs. Veer Gurjar Aluminum Industries Private Limited & Anr. (2020) 15 SCC 1***]. It is also submitted that a rejected OTS proposal does not constitute an acknowledgment of liability [***Bimalkumar Manubhai Savalia Vs. Bank of India, 2020 SCC OnLine NCLAT 400***; ***Oberoi Construction Pvt. Ltd. Vs. Worli Shivshai CHS Ltd. 2008 SCC OnLine Bom 102 & Peacock Plywood Ltd. Vs. Oriental Insurance Co. Ltd. (2006) 12 SCC 673***]. Further, it is contended that

the Financial Creditor is not entitled to the benefit of limitation as allowed by the Hon'ble Supreme Court under *Suo Motu* Writ Petition [***Atul Nathalal Patel Vs. Manish Pardasani & Ors., CA (AT) (Ins) No. 1008 of 2023***]. Finally, it is submitted that the exemption sought by the Financial Creditor for the period even after cessation of moratorium till 07.03.2020 is contrary to law and a misinterpretation of Section 60(6) of the Code. The only period liable for exclusion would be that of moratorium i.e., from 29.01.2019 to 30.09.2019 when the CIRP order was stayed by the Hon'ble Supreme Court [***NDMC vs Minosha India Limited (2022) 8 SCC 384*** and ***Hotel Horizon Private Limited v. Palladian Hotel Private Limited,*** *Hon'ble Bombay High Court, Arbitration Petition No.485 of 2022***].**

4. <u>REJOINDER BY FINANCIAL CREDITOR</u>

4.1 The Financial Creditor filed a rejoinder dated 10.10.2023 and submitted that the Corporate Debtor's reply contains false and misleading grounds aimed at misguiding the Tribunal. The existence of a financial debt exceeding Rs.1,00,00,000/- (One Crore Rupees) and the default thereof are substantiated by certificates issued by Information Utility (IU) and various OTS proposals issued by the Corporate Debtor from time to time. These facts alone justify the admission of the Application without consideration of the baseless allegations and defences raised in the reply.

4.2 The Corporate Debtor disputes the quantum of the financial debt disbursed to or availed by it. However, it is submitted that at the admission stage, the Tribunal's focus should solely be on whether the financial debt exceeds Rs.1,00,00,000/-.

Disputes regarding the exact quantum of the financial debt are irrelevant at this stage and can be addressed later.

4.3 With respect to alleged non-disbursal of funds and lack of proof of disbursement, the Financial Creditor states that it has produced the statement of accounts maintained by the original lender HDFCL, which unambiguously shows the disbursal of funds and constitutes a sufficient proof by itself. Further, IU record of default dated 11.08.2023 has not been disputed by the Corporate Debtor. It is noticed from Form D that the status of authentication is stated as “deemed to be authenticated” by the IU on 12.09.2023. Therefore, the objection raised in the reply regarding non-disbursal of funds is merely an afterthought to mislead this Tribunal. Moreover, it is contended that through its OTS proposal dated 14.08.2019, the Corporate Debtor had admitted to have received true principal amount of Rs.81,72,00,000/- and proposed to pay the same along with interest of Rs.26,14,00,000/- thereon. Therefore, the plea regarding non-disbursal of funds and/or lack of proof of disbursal is contradictory to its own admission made in the OTS proposal.

4.4 The Financial Creditor asserts that the present Application is within the limitation period. The exclusion of the period from 15.03.2020 to 28.02.2022 as directed by the Hon'ble Supreme Court, due to the COVID-19 pandemic, applies to the Financial Creditor, thereby extending the limitation period. Moreover, the Corporate Debtor had issued the OTS proposals on 10.03.2021 and 27.06.2023 respectively which fall within the ambit of “acknowledgment of debt” as defined under Section 18 of the Limitation Act, 1963, and, therefore, the contention of the

Corporate Debtor that the claims made by the Financial Creditor are time-barred is baseless.

4.5 The Corporate Debtor's objections regarding fraud and evergreening of loan accounts are vague and unsubstantiated. Allegations of evergreening are irrelevant at the admission stage of the Application, where the focus should be only existence of a debt and subsequent default, both of which are undisputedly satisfied in this case.

4.6 The contention that the Application is defective and incomplete is vexatious and without merit. It is submitted that the Application is filed in accordance with the provisions of the Code and the AAA Rules. The Financial Creditor denies that it had ceded charge against the Corporate Debtor's property due to repayment under the First and Second Supplemental Agreement. It is submitted that the charge was assigned to a new consortium of lenders due to the restructuring of the Corporate Debtor's loan account and that HDFCL was a member of the new consortium. There was no ceding of the charge in any manner whatsoever and HDFCL continue to hold a *pari-passu* charge over the secured assets of the Corporate Debtor along with other members of the consortium.

4.7 Lastly, the Financial Creditor denies that the Statement of Accounts is fabricated and drawn up to mislead the Tribunal. It maintains that the statement is accurate and supports its claim of disbursement.

4.8 In its written submissions, the Financial Creditor has placed reliance on certain judicial precedents. It is submitted that while admitting application under Section 7 of the Code, the Adjudicating Authority only needs to examine the existence of

debt and default and not quantum of debt **[*Suresh Kumar Reddy Vs. Canara Bank and Ors. 2022 SCC Online NCLAT 3483; Rajesh Kedia Vs. Phoenix ARC Private Limited 2022 SCC Online NCLAT 147 and Shrem Residency Pvt. Ltd. Vs. Shraman Estates Pvt. Ltd., 2023 SCC Online NCLAT 70*].** The Code does not envisage a pre-admission enquiry with respect to proof of default [***Allahabad Bank Vs. Link House Industries Ltd. CA (AT) (Ins) No. 1304 of 2019***]. Attention is drawn to the judgment of Hon'ble Supreme Court in ***Shree Chamundi Mopeds Ltd Vs. Church of South India Trust Association CSI Cinod Secretariat, Madras, (1992) 3 SCC 1***, where it has been held that stay of order does not lead to restoration of the position as it stood on the date of passing of the order. Therefore, the Financial Creditor submits that it cannot be said that moratorium ceased to be in effect by virtue of the stay order. Further, it is submitted that OTS offer made within the period of limitation is to be construed as acknowledgment of debt under Section 18 of the Limitation Act and mere use of the words "without prejudice" has no significance in an undertaking acknowledging the debt [***Dena Bank Vs. C. Shivkumar Reddy, (2021) 10 SCC 330; Ishrat Ali Vs. Cosmos Co-operative Bank Ltd., (2022) SCC OnLine NCLAT 3469 and ITC Ltd Vs. Blue Coast Hotels & Ors., (2018) 15 SCC 99***]. Non-compliance with RBI guidelines may attract penal action from the RBI, however, such non-compliance does not render the loan transactions void, as was held by the Hon'ble High Court of Bombay in the cases of ***World Crest Advisors LLP Vs. Catalyst Trusteeship Limited and Ors***., [Interim Application (L) NO. 29574 of 2021 in Commercial Suit No. 189 of 2022] and ***IL&FS Financial***

Servics Ltd. Vs. SKIL Infrastructure Pvt. Ltd., [Summons For Judgment No. 30 of 2019, in Commercial Summary Suit No.779 of 2019]. Finally, relying on the judgments of the Hon'ble Supreme Court in ***Rajendra Narottamdas Sheth Vs. Chandra Pakash Jain and Anr., (2022) 5 SCC 600 and of Hon'ble NCLAT in Manmohan Singh Jain Vs. State Bank of Indian and Anr., (2021) SCC OnLine NCLAT 5983,*** it is submitted that non-furnishing of information at the time of filing of application under Section 7 of Code does not entail dismissal of the Application and that omission to mention the date of default in Part-IV of the application is not fatal to the Application.

5. <u>SURREJOINDER BY CORPORATE DEBTOR</u>

5.1 The Corporate Debtor, in its surrejoinder dated 04.01.2024, has produced copy of Statement of Account No.01142560001013 maintained with the HDFC Bank, Andheri West Branch, Mumbai and submitted that no monies were received by the Corporate Debtor in said account on certain dates as is being claimed by the Financial Creditor. This shows that the claim of the Financial Creditor is not only exaggerated but it has been a party to practice of circular routing of funds and evergreening in violation of RBI guidelines.

5.2 As regards the Financial Creditor's reliance on the three letters dated 14.08.2019, 10.03.2021 and 27.06.2023 ("OTS Letters"), the Corporate Debtor contends that these letters were issued on a 'without prejudice' basis during ongoing negotiations and confidential discussions between the parties. The Corporate Debtor maintains that it has not waived privilege attached to these OTS Letters nor intended these to be used as evidence. Therefore, the Financial

Creditor's act of relying on such 'without prejudice' correspondence is impermissible and goes against legal norms. Further, the OTS Letters do not meet the criteria for acknowledgment of liability under Section 18 of the Limitation Act, as they were never acted upon by the parties and were part of confidential correspondence aimed at facilitating a compromise.

5.3 The Corporate Debtor disputes the reliance placed by the Financial Creditor on the Record of Default allegedly indicating intimation and reminders by the IU to the Corporate Debtor and its promoters. It denies receiving any such email or communication from the IU, either to itself or to its promoters. The Corporate Debtor argues that records with IUs are not conclusive proof of debt or default by a corporate debtor. Additionally, the Corporate Debtor points out that it disputed the debt and default as early as 27.02.2023.

5.4 Lastly, the Corporate Debtor contends that in the absence of statements of accounts certified in accordance with the Bankers' Books Evidence Act, 1891, the defaults alleged on its part cannot be ascertained. Therefore, the self-made statements of accounts provided by the Financial Creditor cannot be relied upon.

6. ANALYSIS AND FINDINGS

6.1 Upon perusal of all the pleadings and documents and after hearing the Ld. Counsel for both the Financial Creditor and the Corporate Debtor on the main Application as well as IA No.165/2024, it is noted that the Corporate Debtor has in its reply and in the IA raised similar objections opposing the admission of the present Application. It is now proposed to deal with each of the objections raised by the Corporate Debtor as under:-

6.2 With regard to the dispute concerning Disbursement of Loans to the extent claimed in the Application, it is noticed from the record that HDFCL sanctioned a total loan amount of Rs.170,28,00,000/- to the Corporate Debtor, comprising Term Loan-I of Rs.12,00,00,000/- *vide* Sanction Letter dated 22.12.2011; Term Loan-II of Rs.45,00,00,000/- *vide* Sanction Letter dated 05.05.2012; Term Loan-III of Rs.13,28,00,000/- *vide* Sanction Letter dated 19.03.2014 and Lease Rental Discounting Facility (LRD) of Rs.100,00,00,000/- *vide* Sanction Letter dated 28.09.2015. The Financial Creditor asserts that out of the total sanctioned amount, Rs.169,84,42,994/- was disbursed to the Corporate Debtor from time to time and the same is supported by statements of accounts maintained by HDFCL. However, the Corporate Debtor disputes these statements and contends that a far lesser amount was disbursed by HDFCL. In this connection, the contention raised by the Corporate Debtor that the statements of accounts are not compliant with the Bankers' Books Evidence Act, 1891 is not sustainable, since HDFCL as an NBFC fell outside the purview of the said Act.

6.3 It is well-settled that at the admission stage, all that the Adjudicating Authority is required to see is whether the financial debt exceeds the pecuniary threshold of Rs.1,00,00,000/- (One Crore Rupees) under Section 4 of the Code and whether default has occurred in repayment thereof. Disputes regarding the exact quantum of the financial debt are irrelevant at this stage. It is immaterial that the debt is disputed so long as the debt is due and payable. It is observed from the record that the Corporate Debtor, in its OTS proposal dated 14.08.2019, furnished a certificate by a Chartered Accountant showing that only an amount

of Rs.81.72 Crore was disbursed by HDFCL as the "true principal" as against Rs.169.84 Crore claimed by the Financial Creditor. On careful perusal of the aforesaid certificate, we find that the total principal amount received by the Corporate Debtor has not been worked out correctly. For instance, the amount repaid by HDFCL to other lenders of the Corporate Debtor in discharge of debt obligations of the latter cannot be excluded or disregarded while working out the actual disbursals. The disbursements made by HDFCL to the Corporate Debtor would obviously include disbursements made on behalf of the latter towards repayment of loans availed by it from other lenders. Similarly, fees and expenses charged by lenders were payable under the loan documents and would accordingly be adjusted and recovered from the disbursals made to the Corporate Debtor. In view of this, the working of true principal amount disbursed (as provided by the Corporate Debtor) cannot be treated as correct or reliable and the same is accordingly rejected. Besides, as stated above, such working of "true principal" amount disputing the amount of financial debt claimed by the Financial Creditor in Part-IV of the Application is not relevant at the stage of consideration of the Application for admission under Section 7 of the Code. On the facts of the present case, we thus find that the Corporate Debtor has admitted having received total disbursement of loans to the tune of Rs.81.72 crore, which is more than one crore rupees, thereby acknowledging the financial debt and its disbursement.

6.4 As regards its vehement insistence on seeking reconciliation of accounts of the Financial Creditor, the Corporate Debtor has failed to invite our attention to any

specific statutory provisions of the Code or binding judicial precedents requiring the Adjudicating Authority to direct reconciliation of accounts between the parties or appointment of Chartered Accountant or Auditor to do so in order to determine the correct amount of debt in default at the pre-admission stage. We are of the considered view that there is no legal requirement in the adjudication of Section 7 application to calculate and fix the exact amount of debt in default of repayment. It is only to be seen whether the amount in default is more than the threshold value prescribed in Section 4(1) of the Code. It is well-settled that in the case of a Corporate Debtor who commits a default of a financial debt, the Adjudicating Authority needs only to see the records of the IU or other evidence produced by the Financial Creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is due and payable. [***Innoventive Industries Ltd. Vs. ICICI Bank Ltd. (2017) SCC OnLine SC 1025***]. The Adjudicating Authority is not required to direct a forensic audit and engage in a long-drawn pre-admission exercise which will have the effect of defeating the very object of the Code. Nor does the Code envisage a pre-admission enquiry in regard to proof of default by directing forensic audit of the accounts of the financial creditor, corporate debtor or any financial institution. In view of above position, the plea taken up by the Corporate Debtor on this count is found to be legally untenable and devoid of substance and is accordingly dismissed.

6.5 The next objection raised by the Corporate Debtor is with regard to the occurrence of default and the absence of a pleaded date of default in Part-IV of the Application. In this context, the Financial Creditor has relied on the judgment

in ***Manmohan Singh Jain*** (supra) wherein the Hon'ble NCLAT held that omission to mention the date of default in Part-IV of Form-1 is not fatal to the application which cannot be rejected on this sole ground by adopting a hyper-technical approach so long as the financial creditor has stated the date of default in the pleadings and in the other documents enclosed with the application. The satisfaction in regard to occurrence of default has to be drawn by the Adjudicating Authority either from the records of the IU or other evidence provided by the Financial Creditor. It is noticed from the record that the Financial Creditor has annexed the Record of Financial Information of the Corporate Debtor maintained by the IU to the Application and also produced the Record of Default filed with the IU on 11.08.2023 showing the date of default as 30.10.2018. Further, it is observed that the record of default of the debt in question, though disputed by the Corporate Debtor, was "deemed to be authenticated" by the IU on 12.09.2023. It is well-recognised that the "deemed to be authenticated" default report in respect of the corporate debtor is sufficient evidence of loan and default**.** However, the Application specifies 31.10.2018 as the date when the Corporate Debtor's loan accounts were classified as NPA. It is well-accepted that the 'date of default' cannot be strictly construed as the date of NPA. On perusal of the record, it is observed that the Financial Creditor has not furnished any documentary evidence to substantiate the claim that the loan accounts of the Corporate Debtor were declared as NPA on 31.10.2018. Therefore, it appears likely that 31.10.2018 was mentioned as the date of NPA through oversight

whereas it ought to have been specified as the date of default in Part-IV of the Application.

6.6 On careful perusal of the statement of loan accounts, it is observed that the Corporate Debtor failed to pay the EMIs due on 28.02.2018. The non-payment of EMIs constituted the first event of default under the terms of the loan agreements. Following this initial default, HDFCL sent a notice dated 19.03.2018 calling upon the Corporate Debtor to make payment of the overdue amount of Rs.1,61,89,254/- as on 28.02.2018. It is noticed that the Corporate Debtor made some partial and irregular payments in the months of May, June and September, 2018. No further payments were made after September, 2018. The next default took place in October, 2018 when the EMI due on 30.10.2018 was not paid. This led HDFCL to issue a recall notice on 15.11.2018, demanding the entire loan amount to be repaid within 7 days due to continued default by the Corporate Debtor. In these circumstances, we find that 30.10.2018 represents the correct date of default which is further supported by the IU certificate dated 12.09.2023. The law is settled that it is neither mandatory nor necessary for the Financial Creditor to rush to the Tribunal immediately on the initial default. There is no bar under Section 7 of the Code that prevents the Financial Creditor from approaching the Adjudicating Authority after the occurrence of subsequent defaults. Further, there is no rule of universal application that in case of a corporate debtor availing multiple loan facilities, there will always be a different date of default for each such facility. In the present case, we find that a single date of default, viz., 30.10.2018 is established as the date of default, because

the Corporate Debtor failed to repay the instalments/EMIs which fell due across all four loans on the said date. In view of this position, the Corporate Debtor's contention that the Financial Creditor has claimed 30.10.2018 as a "false date of default" is found to be devoid of merit and is accordingly dismissed.

6.7 It is pertinent to note that on the one hand, the Corporate Debtor disputed the validity of debt before the IU as on 27.02.2023 and on the other hand, it had already acknowledged by way of OTS offer dated 14.08.2019 that a sum of Rs.81,72,00,000/- was disbursed to it and was due to the Financial Creditor and that the Corporate Debtor was willing to settle the dues of the HDFCL for a sum of Rs.107.86 Crore. The subsequent OTS offers made by the Corporate Debtor *vide* letters dated 10.03.2021 and 27.06.2023 were for an amount up to Rs.85 Crore and Rs.105 Crore respectively. In any case, unlike an operational debt, a dispute with regard to the exact quantum of financial debt is of no consequence so long as the debt in question is in excess of the pecuniary threshold prescribed in Section 4 of the Code.

6.8 As regards the plea of limitation, the case of the Corporate Debtor is that considering 30.10.2018 as the date of default, the Application should have been filed on or before 29.10.2021 whereas it was actually filed on 29.10.2022 and hence, the same is time-barred. In this connection, it is noticed from the record that the Corporate Debtor was admitted into CIRP on 29.01.2019 in CP No.1458/2017 filed by Phoenix ARC Pvt. Ltd. and a moratorium was declared against it in terms of Section 14 of the Code. Thereafter, HDFCL submitted its claim before the Resolution Professional, which was admitted. The admission of

the Corporate Debtor into CIRP was later upheld by the Hon'ble NCLAT on 05.09.2019. In further appeal, the Hon'ble Supreme Court *vide* its judgment dated 30.09.2019, set aside the order of Hon'ble NCLAT and directed fresh determination of the matter. It was also directed that the order of admission shall remain stayed until further orders from the Hon'ble NCLAT. Thereafter, the Hon'ble NCLAT *vide* its order dated 07.02.2020 disposed of the matter and set aside the order of admission. Therefore, the Financial Creditor contends that the period from 29.01.2019 to 07.02.2020 should be excluded in computing the limitation in accordance with Section 60(6) of the Code. However, the Corporate Debtor argues that since the admission order was stayed by the Hon'ble Supreme Court, only the period from 29.01.2019 to 30.09.2019 can be excluded in computing limitation and, consequently, the present Application will be barred by limitation.

6.9 The question of limitation is essentially a mixed question of fact and law. The trigger for initiation of CIRP by a Financial Creditor is default on the part of the Corporate Debtor and the right to apply under the Code accrues on the date when default occurs. The default referred to in the Code is that of actual non-payment by the Corporate Debtor when a debt or part thereof has become due and payable. The period of limitation for an application seeking initiation of CIRP under Section 7 of the Code is governed by Article 137 of the Limitation Act, 1963, and is, therefore, three years from the date when the right to apply or sue accrues.

6.10 Having considered the aforesaid facts in light of binding judicial precedents, we are of the firm view that the stay of the order by Hon'ble Supreme Court does not restore the position as it stood on the date of passing of the order and, therefore, it cannot be said that the moratorium ceased to be in effect by virtue of the stay order. We are fortified in this view by the judgment of Hon'ble Apex Court in ***Shree Chamundi Mopeds Ltd.*** (supra) cited by the Financial Creditor, where the distinction between staying of an order and quashing of an order was clarified. Therefore, we find merit in the contention of the Financial Creditor that the period from 29.01.2019 to 07.02.2020 should be excluded while calculating the limitation. Thus, the period from 30.10.2018 to 29.01.2019 is approximately 3 months and after excluding the aforesaid period, the remaining limitation period of 2 years and 9 months will count from 08.02.2020 which will end on 07.11.2022. Accordingly, the present Application filed on 29.10.2022 is found to be well within limitation.

6.11 It is also pertinent to note that the Corporate Debtor made several OTS proposals including the one submitted on 10.03.2021, before the expiration of the normal three-year limitation period on 29.10.2021. It is settled law that the OTS proposals fall within the ambit of "acknowledgement of debt" as defined under Section 18 of the Limitation Act, 1963, as held by the Hon'ble Apex Court in ***Dena Bank*** (supra). Therefore, a fresh period of limitation would start from 10.03.2021, which would last until 09.03.2024. As the present Application was filed on 29.10.2022, it can by no means be claimed that such Application is barred by limitation. We do not find merit in the Corporate Debtor's contention that merely

because the said OTS proposals were made "without prejudice", these do not fall under the ambit of acknowledgment of debt within the meaning of Section 18 of the Limitation Act, 1963 for extending the limitation period. It is settled law that Section 18 of the Limitation Act cannot be construed with pedantic rigidity in relation to proceedings under the Code and that there is no valid reason why an OTS offer of a live claim made within the period of limitation should not be construed as an acknowledgement of liability to attract Section 18 of the Limitation Act. The words “without prejudice” are irrelevant for the purpose of Section 18. The standard phrase “without prejudice” does not imply any denial of the debt involved and OTS proposals given on a "without prejudice" basis do not extinguish any liability, as held by Hon’ble Supreme Court in ***Ishrat Ali*** (supra).

6.12 As regards Corporate Debtor’s reliance on the judgment of Hon’ble Supreme Court in ***Peacock Plywood Pvt. Ltd***. (supra), it is observed that the said judgement was rendered in the context of interpretation of a policy of Marine Insurance entered into between the parties under the Marine Insurance Act, 1963, and hence, the same is not relevant for purposes of the Code. Moreover, the Hon’ble NCLAT in ***Abhishek Gupta Vs. Asset Reconstruction Company (India) Pvt. Ltd***. [Company Appeal (AT) (Insolvency) No.1094 of 2021] has already distinguished the ratio laid down in ***Peacock Plywood Pvt. Ltd.*** (supra) observing that if any letter clearly acknowledges a crystallised debt and shows a willingness to pay, it is valid, even if it is labelled as "without prejudice." In the present case, the mention of “without prejudice” in the OTS letters does not imply

a denial or rebuttal of the debt. Therefore, the above judgment does not come to the aid of the Corporate Debtor. Similarly, reliance of the Corporate Debtor on the judgment in ***Babulal Vardharji Gurjar*** (supra) will be of no avail, because in that case, the relevant facts for enlargement or extension of limitation under Section 18 were not pleaded at all, whereas in the present case, OTS proposals are not only mentioned in the pleadings but also annexed to the Application. We hold that merely because LRD facility was disbursed before execution of the Master Facility Agreement on 06.01.2016, it will not make the debt time-barred, because the limitation starts not from the date of disbursement or the date of loan agreement but from the date of default. Thus, the plea of limitation taken up by the Corporate Debtor is found to be legally untenable and is accordingly dismissed.

6.13 The Corporate Debtor alleges that the Financial Creditor engaged in the illegal practice of evergreening loans, reflecting fictitious disbursements and payments. Evergreening of loans refers to the practice where banks extend new loans or provide additional credit to Borrowers struggling to repay existing debt so as to prevent loans from being classified as NPA, thereby hiding the financial health of both the Borrowers and the bank. In view of this, it is hard to believe that any alleged evergreening of loans was carried out without the knowledge and consent of the Corporate Debtor. In present case, it is noticed that the allegation of evergreening of loans was made by the Corporate Debtor for the first time in its reply dated 21.10.2021 to the Demand Notice dated 22.06.2021 issued by HDFCL under Section 13(2) of the SARFAESI Act. In response, HDFCL *vide* its

letter dated 03.11.2021 not only denied the allegation but also made it clear that from the inception, disbursement of the loan amounts had been made either into the accounts of the Corporate Debtor or to its other lenders or for servicing of the loan amounts only at the request/written communication of the Corporate Debtor. There is nothing on record to show that any complaint was made to the NHB while alleged evergreening of loans was being resorted to by HDFCL. Assuming that HDFCL indulged in evergreening of loans, the Corporate Debtor being the beneficiary of such alleged evergreening cannot escape consequential action under the NHB directives/guidelines. Be that as it may, the question of evergreening of loans actually falls within the domain of the NHB, and, therefore, we are not required to go into the merits of this contention.

6.14 As per settled law, the twin requirements of a valid Section 7 application are existence of financial debt above the prescribed threshold and occurrence of default both of which are undisputedly satisfied in the present case. In view of above, we find that allegations of evergreening of loan accounts by fictitious journal entries, fraud etc., are irrelevant and immaterial at this stage for the purpose of admission of the Application. Likewise, with regard to the allegations of “siphoning of sanctioned loan amounts for its own benefit” and “fraudulent transactions causing wrongful loss to the Corporate Debtor and unjust enrichment to HDFCL”, we find that no criminal complaint or civil suit has been filed by the Corporate Debtor against HDFCL. Disputes as to whether records have been fabricated can be adjudicated upon evidence including forensic evidence in a regular suit and not in proceedings under Section 7 of the Code.

Reliance placed by the Corporate Debtor on the judgment of Hon'ble NCLAT in ***Ocean Deity Investment Holdings Ltd. Vs. Suraksha Asset Reconstruction Ltd.*** [CA (AT)(Ins) No.795 of 2021] will be of no help, because in that case, there were adequate materials on record by way of investigation reports of CBI and ED showing evidence of circular movement of funds and collusive as well as fraudulent transactions by the financial creditor and certain other parties, whereas no such incriminating evidence against HDFCL/Financial Creditor has been brought on record by the Corporate Debtor.

6.15 In the result, we do not find any valid reason for allowing IA No.165/2024 which was filed with a view to challenging the maintainability of the present Application. We find that the grounds raised in the IA are bereft of substance and it was nothing but another dilatory tactics resorted to by the Corporate Debtor. Hence, the said **IA No.165/2024** filed by the Corporate Debtor is accordingly **dismissed.**

6.16 It is well-established that for the purpose of admission of Section 7 Application, what is paramount is the occurrence of default. As held by the Hon'ble Apex Court in ***Innoventive Industries*** (supra), the moment the Adjudicating Authority is satisfied that a default has occurred, the application must be admitted. It is immaterial that the debt is disputed so long as the debt is due and payable unless interdicted by some law. We find that the Financial Creditor in the present case has placed on record necessary evidence to demonstrate the existence of the debt exceeding the minimum threshold of Rs.1 Crore prescribed under Section 4 of the Code due and payable by the Corporate Debtor as well as the default in repayment thereof by the Corporate Debtor. The Corporate Debtor has failed to

show that the debt in question is interdicted by any other law. The Application has been filed in the prescribed form and is complete. The Financial Creditor has also filed a fresh Affidavit of the Interim Resolution Professional (IRP) in compliance with Section 7(3)(b) of the Code. The Applicant has proposed the name of Mr. Rohit Ramesh Mehra, a registered Insolvency Professional as the Interim Resolution Professional (IRP) to carry out the functions as mentioned under the Code and has provided his valid AFA in Form B and also given his declaration in Form 2 dated 17.10.2022, *inter alia,* stating that no disciplinary proceedings is pending against him. Therefore, we find that all pre-requisites of Section 7(5)(a) of the Code are fulfilled and, accordingly, we are satisfied that the instant Application is fit for admission under Section 7 of the Code.

ORDER

In view of the aforesaid findings, this Application bearing C.P.(IB) No.1241/MB/2022 filed under Section 7 of the Code by Assets Care & Reconstruction Enterprise limited, the Financial Creditor, for initiating CIRP in respect of Hotel Horizon Private Limited, the Corporate Debtor is **admitted**.

We further declare moratorium under Section 14 of the Code with consequential directions as mentioned below:-

1 We prohibit-

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

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

c) any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the SARFAESI Act, 2002;

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

2 That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period.

3 That the order of moratorium shall have effect from the date of this order till the completion of the CIRP or until this Tribunal approves the resolution plan under Section 31(1) of the Code or passes an order for the liquidation of the Corporate Debtor under Section 33 thereof, as the case may be.

4 That the public announcement of the CIRP shall be made in immediately as specified under Section 13 of the Code read with Regulation 6 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and other Rules and Regulations made thereunder.

5 That this Bench hereby appoints **Mr. Rohit Ramesh Mehra, a registered Insolvency Professional** having **Registration Number IBBI/IPA-001/IP-P00799/2017-2018/11374** and e-mail address, **rohitmehra@hotmail.com**

having valid Authorisation for Assignment up to 31.12.2025 as the IRP to carry out the functions under the Code.

6 That the fee payable to IRP/RP shall be in accordance with such Regulations/Circulars/ Directions as may be issued by the IBBI.

7 That during the CIRP Period, the management of the Corporate Debtor shall vest in the IRP or, as the case may be, the RP in terms of Section 17 or Section 25, as the case may be, of the Code. The officers and managers of the Corporate Debtor are directed to provide effective assistance to the IRP as and when he takes charge of the assets and management of the Corporate Debtor. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP/RP within a period of one week from the date of receipt of this Order and shall not commit any offence punishable under Chapter VII of Part II of the Code. Coercive steps will follow against them under the provisions of the Code read with Rule 11 of the NCLT Rules for any violation of law.

8 That the IRP/IP shall submit to this Tribunal periodical reports with regard to the progress of the CIRP in respect of the Corporate Debtor.

9 In exercise of the powers under Rule 11 of the NCLT Rules, 2016, the Financial Creditor is directed to deposit a sum of Rs.5,00,000/- (Five Lakh Rupees) with the IRP to meet the initial CIRP cost arising out of issuing

public notice and inviting claims, etc. The amount so deposited shall be interim finance and paid back to the Financial Creditor on priority upon the funds becoming available with IRP/RP from the Committee of Creditors (CoC). The expenses incurred by IRP out of this fund are subject to approval by the CoC.

10 A copy of this Order be sent to the Registrar of Companies, Maharashtra, Mumbai for updating the Master Data of the Corporate Debtor.

11 A copy of the Order shall also be forwarded to the IBBI for record and dissemination on their website.

12 The Registry is directed to immediately communicate this Order to the Financial Creditor, the Corporate Debtor and the IRP by way of Speed Post, e-mail and WhatsApp.

13 **Compliance report of the order by Designated Registrar is to be submitted today.**

Sd/-
SANJIV DUTT
MEMBER (TECHNICAL)

Sd/-
K. R. SAJI KUMAR
MEMBER (JUDICIAL)

//LRA-Deepa//