IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH,COURT-II
KOLKATA

CP (IB) No. 1986/KB/2019

A petition under section 7 of the Insolvency and Bankruptcy Code, 2016.

In the matter of:
IL & FS Infrastructure Debt Fund

...Financial Creditor

Versus

McLeod Russel India Limited
[CIN: L51109WB1998PLC087076]

...Corporate Debtor

Order pronounced on: 10 February 2023

Coram:

Shri Rohit Kapoor : Member (Judicial)

Shri Balraj Joshi : Member (Technical)

Appearances (through hybrid mode):

For the Financial Creditor : Mr. Ratnanko Banerji, Senior Advocate
Mr. Rishad Medora, Advocate
Ms. Ramya Hariharam, Advocate
Ms. Asmita Rakhecha, Advocate

For the Corporate Debtor : Mr. Pranav Kohli, Senior Advocate
Mr. Jishnu Choudhury, Advocate
Mr. Rishav Banerjee, Advocate
Mr. Farhan Mirza, Advocate
Ms. Santosh Kumari, Advocate
Ms. Santosh Kumari, Advocate
Ms. Eshna Kumari, Advocate
Mr. Ritoban Sarkar, Advocate
Mr. Srinjoy Bhattacharya, Advocate

ORDER

Per Balraj Joshi, Member (Technical)

1. This Court convened through hybrid mode.

2. This is a Company Petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("Code") file by **IL & FS Infrastructure Debt Fund** ("Financial Creditor") seeking to initiate Corporate Insolvency Resolution Process ("CIRP") against **McLeod Russel India Limited** ("Corporate Debtor") for default in payment of Rs. 347,47,18,043/- as on 12 November 2019 (Principal amount is of Rs. 252,66,48,735/- and Pending Normal and Penal Interest is of Rs. 94,80,69,308/- along with further interest from 12 November 2019 till date of payment and/or realization). The date of default has been stated as 09 July 2019.
3. The Financial Creditor is a mutual fund scheme established in accordance with the Securities and Exchange Board of India (Mutual Fund) Regulations, 1996, having its office at the IL&FS Financial Centre, 1st Floor, Plot C-22 G Block, Bandra Kurla Complex, Bandra (East), Mumbai 400051 and is acting through its asset management company.
4. The Total Authorized Capital of Corporate Debtor is of Rs. 60,00,00,000/- of which Paid-up Capital Rs. 54,72,78,675/-.
5. It is submitted that Part – I of the Company petition contains the Particulars of Applicant, Part – II contains the Particulars of the Corporate Debtor, Part – III contains the particulars of the Proposed Interim Resolution professional, Part – IV contains the Particulars of Financial Debt and Part – V contains the Particulars of the Financial Debt (Documents, Records and Evidence of Default).

Submission of Mr. Ratnanko Banerji, learned Senior Counsel appearing for the Financial Creditor are summarized hereunder:

6. Mr. Banerji submitted that the Financial Creditor had subscribed to debentures of two group companies of the Corporate Debtor, being

Babcock Borsig Limited ("BBL") amounting to a sum of Rs.150Crore ("BBL Facility")[1] and Williamson Magor & Company Limited ("WMCL") amounting to a sum of Rs. 99.5 crore ("WMCL Facility")[2] (hereinafter collectively referred to as "Facilities").

7. The Corporate Debtor had executed a shortfall undertaking[3] in favour of the Financial Creditor ("Shortfall Undertaking"). Clause 3.2 (a) of the Shortfall Undertaking provides that on a breach by WMCL/BBL ("Borrowers") of its obligation to maintain the required amounts in the debt service reserve account ("DSRA") under the respective debenture trust deeds, the Corporate Debtor would have an irrevocable and unconditional obligation towards the Financial Creditor to meet any shortfall in the said DSRA. The Financial Creditor would communicate the amount of shortfall in the DSRA through a funding notice, and the Corporate Debtor would be under an obligation to provide the requisite sum to the Financial Creditor within 7 days of receiving such funding notice[4].

8. Further, Clause 6.2(j) of the Shortfall Undertaking provides that the shortfall provider, being the Corporate Debtor, would not be discharged of its liabilities at any time, till such time, the debenture holder, being the Financial Creditor, issues its discharge in writing.

9. Thus, by entering into the Shortfall Undertaking, the Corporate Debtor guaranteed to discharge the liability and obligations of the Borrowers in the event of a default, and such obligation was directly owed to the Financial Creditor. Section 126 of the Indian Contract Act, 1872 provides that, "A contract of guarantee is a contract to perform the promise, or discharge the liability, of a third person in case of his default". In the present case, the Corporate Debtor has, by executing the Shortfall

[1] Debenture Trust Deed at page 103, Volume I
[2] Debenture Trust Deed at page 311, Volume II
[3] page 402, Volume II
[4] funding notice dated July 1, 2019 at page 428, Volume II

Undertaking, promised to discharge the liability of the Borrowers in case of their default, thereby falling squarely within the definition of a "Contract of Guarantee" as provided under the statute. Thus, the Shortfall Undertaking is a guarantee, within the meaning of section 126 of the Indian Contract Act, 1872, executed in favour of the Financial Creditor. The Learned Senior Counsel placed reliance on ***Union Bank of India v. Era Infra Engineering Private Limited***[5] wherein it has been held that a shortfall undertaking constitutes a guarantee [Para 14 at Page 30, Paras 15 and 16 at Page 31, Para 17 at Page 32, Para 18 at Page 33, Para 19 at Page 34, Para 20 at Page 36].

10. Furthermore, the Corporate Debtor had also undertaken to indemnify the Financial Creditor under Clause 7 of the Shortfall Undertaking against any losses, expenses, claims and liabilities incurred or suffered by it in relation to the Shortfall Undertaking.

11. The learned Senior Counsel led us through section 5(8)(c) of the Code, the definition of 'financial debt' includes amounts raised through debentures. Pursuant to section 5(8)(i), any amount guaranteed in respect of any of the items referred to in sub-section 5(8)(a) to (h) would also constitute a financial debt under the Code. In the present case, the Corporate Debtor has given both a guarantee and an indemnity to secure the Facilities (which are in the form of debentures) by executing the Shortfall Undertaking. Therefore, the sums owed by the Corporate Debtor to the Financial Creditor under the Shortfall Undertaking constitutes a financial debt under the Code.

12. The Borrowers failed to comply with their obligations under the debenture trust deeds including its obligation relating to maintenance of DSRA. The Financial Creditor had issued two default notices dated May 6, 2019, and May 24, 2019 to the Borrowers. However, the Borrowers failed to remedy

[5] C.A. No. 997(PB)/2018 in C.P. (IB) No. 190(PB)/2017

the default. Consequently, the Facilities were recalled pursuant to the recall letters dated 10 June 2019. Thus, the entire amount payable under the Facilities became due and payable forthwith. Consequent to the recall of the Facilities, the Financial Creditor issued a funding notice in terms of Clause 3.2(a) of the Shortfall Undertaking requiring the Corporate Debtor to fund the shortfall in the DSRA, being the entire Facilities outstanding. The learned Senior Counsel submitted that the Corporate Debtor has neither paid the shortfall nor disputed the recall notice till date. In, ***Zee Enterprises Entertainment Limited v. IndusInd Bank***,[6] the Hon'ble Delhi High Court had in a similar fact situation held that upon recall of facility, the DSRA is required to be funded to the extent of the entire outstanding [Relevant Paras: Para 13.2 to Para 18 at Pages 12-18].

13. The Corporate Debtor had executed the Shortfall Undertaking so as to guarantee payment of the amounts due and payable by the Borrowers to the Financial Creditor which is evident from Clause 4.1 (ii) of the Shortfall Undertaking wherein the Corporate Debtor had agreed to provide post-dated cheques to the Financial Creditor, for all principal and interest amounts payable by the Borrowers to the Financial Creditor for the next one year. Pursuant to the said clause, the Corporate Debtor had issued post-dated cheques in favour of the Financial Creditor thereby substantiating that the intent of the Corporate Debtor was to assume liability in respect of the BBL Facility and the WMCL Facility towards the Financial Creditor, and guarantee payment of the sums owed by the Borrowers to the Financial Creditor as well as indemnify the Financial Creditor.

14. Learned Senior Counsel referred to section 139 of the Negotiable Instruments Act, 1881 which provides that, "it shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque, for the discharge, in whole or in part, of any debt or other liability". Thus, by

[6] I.A. No. 10556/2020 in CS (COMM) 500/2020

issuing the cheques in favour of the Financial Creditor, the Corporate Debtor has, by its own admission, acknowledged that a financial debt is owed by it to the Financial Creditor.

15. The Shortfall Undertaking has been specifically recognised as a "Definitive Document" under Clause 3.1 of the Shortfall Undertaking. The term "Definitive Document" has been defined under the debenture trust deed dated 28 April 2017 ("**BBL DTD**") and the debenture trust deed dated 08 October 2018 ("**WMCL DTD**") to include Security Documents and all other deeds, agreements, documents, undertakings, certificates, etc., executed pursuant to the BBL DTD and WMCL DTD. Further, the term "Security Documents" has been defined to include, "any other documents, undertakings, deeds, deeds of assignment, powers of attorney, etc., entered into or executed by the Borrowers, other security providers, or any other person for creating and perfecting the security and designated as a security document by the investor (*Financial Creditor herein)*". Thus, the Shortfall Undertaking is a Security Document and has been recognised as a Definitive Document under the Shortfall Undertaking, which includes Security Documents.

16. The Financial Creditor has recorded the debt with the information utility ("IU")[7] and the Corporate Debtor herein has been recorded as the debtor therein. In its reports dated February 8, 2020 (annexed hereto as Annexure A and Annexure B), the IU, being National E-Governance Services Limited, in response to the filing made by the Financial Creditor in Form C, had recorded the default of the Corporate Debtor in respect of the WMCL Facility and the BBL Facility and had assigned the colour code 'Yellow' to the debts. Further, the debt was deemed to be authenticated as the IU had issued three reminder emails to the Corporate Debtor and the

[7] page 437, Volume II of the Application

Corporate Debtor failed to issue any response to any of the emails sent to it.

17. The record of default with the IU in the present case should be treated as prima facie evidence of the existence of debt in respect of the Corporate Debtor.

18. In this regard, the Hon'ble NCLAT has, in its judgement dated 18 May 2022 passed in ***Vipul Himatlal Shah v. Teco Industries***[8] held that, *"...regulation 21(3) of the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017 which provides that if the debtor does not respond even after three reminders, the information of default is deemed to be authenticated. Moreover, we note that the corporate debtor or its authorized representative did not take any action under Grievance Redressal Policy under regulation 12 of the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017 to set the record straight in case it found it to be incorrect. On the basis of these facts and analysis we are inclined to hold that the corporate debtor cannot deny the existence of a financial debt as defined in section 5(8) of the IBC as present in the record of the information utility*." (At para 13, page 5 of the judgement)

19. The Financial Creditor has placed the following documents on record:

    a. Copy of the Debenture Subscription Agreement dated March 30, 2017, executed by BBL and IDF; annexed to the petition and marked as **Annexure – A**.

    b. Copy of the Debenture Trust Deed dated April 28, 2017, executed by BBL and Vistra ITCL (India) Limited; annexed to the petition and marked as **Annexure – B**.

[8] Company Appeal (AT)(Insolvency) No. 470 of 2022

c. Copy of the Letter of Comfort dated March 29, 2017, executed by MRIL; annexed to the petition and marked as **Annexure – C**.

d. Copy of the Loan Agreement dated March 29, 2017, executed by IFIN and WMCL; annexed to the petition and marked as **Annexure – D**.

e. Copy of the Amendment Agreement to the Loan Agreement dated August 27, 2018, executed by IFIN and WMCL; annexed to the petition and marked as **Annexure – E**.

f. Copy of the Assignment Agreement dated September 10, 2018, executed by IFIN and IDF; annexed to the petition and marked as **Annexure – F.**

g. Copy of the Debenture Trust Deed dated October 8, 2018, executed by WMCL and Vistra ITCL (India) Limited; annexed to the petition and marked as **Annexure – G.**

h. Copy of the Letter of Comfort dated October 8, 2018, executed by MRIL; annexed to the petition and marked as **Annexure – H**.

i. Copy of the Shortfall Undertaking dated March 19, 2019, executed by IDF through AML and MRIL; annexed to the petition and marked as **Annexure – I**.

j. Copy of the Recall notice dated June 10, 2019, issued by Vistra ITCL (India) Ltd to BBL; annexed to the petition and marked as **Annexure – J**.

k. Copy of the Recall notice dated June 10, 2019, issued Vistra ITCL (India) Ltd to WMCL; annexed to the petition and marked as **Annexure – K.**

l. Copy of the Funding Notice dated July 1, 2019, issued by IDF through AML to MRIL; annexed to the petition and marked as **Annexure – L.**

m. Copy of the Annual Reports for MRIL, WMCL and BBL annexed to the petition and marked as **Annexure – M.**

n. Certificate issued by the Information Utility showing the record of debt; annexed to the petition and marked as **Annexure – O.**

20. The Financial Creditor has proposed the name of **Mr. Ritesh Prasad Adatiya,** registration number IBBI/IPA-001/IP-P01334/2018-2019/12013, as the Interim Resolution Professional of the Corporate Debtor. The proposed Interim Resolution Professional has given his written communication in Form 2 as required under rule 9(1) of the Insolvency and Bankruptcy [Application to Adjudicating Authority] Rules, 2016.

Submission of Mr. Pranav Kohli, learned Senior Counsel appearing for the Corporate Debtor are summarized hereinafter:

21. The learned Senior Counsel submitted that futuristic event would not be construed as a debt in terms of section 5(8) of the Code. The Applicant claims that the borrowers have defaulted in maintaining the DRA and have also not effected repayment. Further, it is pleaded that MRIL did not meet the shortfall in the DSRA despite being called upon by the applicant to do so by a funding notice dated 01 July 2019 in terms of clause 3.2(a) of the Interest Shortfall undertaking. Hence, it is alleged that the applicant has a cause of action against MRIL. Admittedly, the applicant has not referred to the letters of comfort as the basis of default or relied upon them for the purposes of deriving a cause of action against MRIL. The relevant paragraphs of the application are XI, XII, and XV. A collective reading of the pleadings in the application clarify in unequivocal terms that the applicant has also understood that the interest shortfall undertaking was

obtained only for the purposes of deposit of funds into the DRA and not for repayment of debt purportedly defaulted by the borrowers. Mr. Kohli has strenuously argued the following to drive home the fact that there has been no default.

22. The funding notice dated 1 July 2019 clearly record that the notice was for deposit of funds into the DSRA. On its failure to do so, the debenture holder i.e., the application was entitled to exercise any or all rights and remedies available to it under clause 39 (Events of default and consequences thereof) of the Debenture Trust Deed 1 and clause 36 (Events of default and consequences thereof) of the Debenture Trust Deed 2. The format of funding notice is also part of the Interest Shortfall Undertaking. A conjoint reading of the Funding Notice and the rights and remedies available to the applicant in the transaction documents inter alia establishes that the debenture holder can exercise right and remedies available to it under clause 39 (Events of default and consequences thereof) of the Debenture Trust Deed 1 and clause 36 (Events of default and consequences thereof) of the Debenture Trust Deed 2. As stated above, none of the rights or remedies are enforceable or available against MRIL. No right vests with the Debenture Holder against MRIL, much less any right which could create a relationship of financial creditor and corporate debtor between the applicant and MRIL. MRIL has neither promised nor undertaken to repay the debt to the applicant in any manner whatsoever.
23. Letter of Comfort is not a guarantee under section 126 of the Contract Act, 1872. This is specifically mentioned in clause (h) of the Letter of Comfort dated 25 March 2017.
24. Clause (e) of the Letter of Comfort, records that MRIL will take pragmatic steps, use best efforts and good offices to ensure BBL's maintenance of DSRA.
25. Further, MRIL under clause (f) agreed to ensure infusion of funds into the borrower to maintain DRA balance. None of the above obligations can be construed as a guarantee or an obligation of MRIL towards the applicant. In any event, these clauses cannot be enforced by the applicant.

26. Clauses (c) and (d) of the Letter of Comfort (@ pg. 399 of the application) again record in the same language that MRIL would "take pragmatic steps, use best efforts and good offices to ensure infusion of funds into WMCL".
27. A Letter of Comfort has been held not to be a guarantee by the Hon'ble Bombay High Court in ***Yes Bank Limited V. Zee Entertainment Enterprises Limited MANU/MH/1009/2020***, (paras 59 and 64). Reliance was placed on the Division Bench judgment of the Hon'ble Karnataka High Court in ***United Breweries (Holding) Limited v. Karnataka State Industrial Investment and Development Corporation Limited, 2011 SCC Online Kar 4012*** (paragraphs 10, 11 and 12) and the definition of the term "Letter of Comfort" in P. Ramanatha Aiyar's Advanced Law Lexicon, which reads: " document that indicates one party's intention to try and ensure that another party complies with the terms of a financial transaction without guaranteeing performance in the event of default.". It is pertinent to note that the Hon'ble Bombay High Court has, in paragraph 64 of the judgment, considered the terms of the Letter of Comfort in the case before it, which are similar to the terms of the Letters of Comfort in the instant case.
28. Interest Shortfall Undertaking is for the purpose of maintaining the DRA balance. Clause 3.1 and 3.2 makes it clear that the undertaking is to maintain the balance until the 'Final Redemption Date'. Once the facility is recalled (vide notices, each dated 10 June 2019 to BBL & WMCL for recall of facility I and II), there is no requirement of maintaining a DRA.
29. Therefore, the undertaking becomes otiose and/or is not required. In the event of default, the same would trigger Clauses 36 and 39 of the Debenture Trust Deeds 1 & 2 and the applicant will be at liberty to proceed against the principal borrowers. [Reference to para 15 and 16 of ***Oriental Bank of Commerce v. Prakash Asphaltings & Tolls Highway (India) Limited (MANU/NC/1535/2021)***].
30. The learned Senior Counsel led us through Clauses 1, 2 and Clause 3.2.(a) and (b) of the Interest Shortfall Undertaking

"Clause 3.2. Obligation to fund by Shortfall Provider

Upon the occurrence of a breach of obligations by the issuer to maintain required amount for Debt Service Reserve Account under the Debenture Trust Deed or any definitive document, the Shortfall Provider hereby acknowledges, agrees and undertakes that it shall:

(a) Upon receiving the Funding Notice from the Debenture Holder have the irrevocable and unconditional obligation to provide funds to meet any shortfall in Debt Service Reserve Account ("Unpaid Account") no later than the Deposit Date, and

(b) the failure to deposit the Unpaid Amount by the Deposit Date by the Shortfall Provider, shall constitute a specific Event of Default. and the Debenture Holder shall have the irrevocable and unconditional right to declare an Event of Default and undertake all steps / actions as set out in Clause 39 of Debenture Trust Deed 1 and 36 of Debenture Trust Deed 2 (Events of Default and Remedies) of the Debenture Trust Deed."

Learned Senior Counsel submitted that the NCDs are fully secured in terms of the security documents and enforceable against the properties mortgaged, shares pledged, promissory notes executed etc. Though the interest shortfall undertaking is designated as definitive document, it does not create any guarantee, nor can it be enforced for the recovery of any defaulted amount payable by the borrowers. Furthermore, in terms of Clause 3.2., the obligation of the Corporate Debtor is restricted to provide funds to meet any shortfall in the DSRA. It cannot be construed as a guarantee to repay the debt.

31. It is important to take note of clause 3.2 (b), which provides the consequence, rights and obligations of the debenture trustee in the event of default i.e., enforcement of rights by way of invocation of security and / or additional security, personal guarantee etc. In other words, the

consequences of default of the undertaking are also exclusively enforceable against the borrowers and the properties mortgaged, shares pledges etc. (Clause 39.2 and Clause 36) and no right accrues in favour of the applicant against the Corporate Debtor nor does it create a relationship of Financial Creditor and the Corporate Debtor.

32. Mr. Kohli referred to Clause 4 and admittedly, the postdated cheques were also issued only for custody, and not for any other purpose, much less the repayment of the debt. The cheque amount that is allegedly claimed is only for shortfall in DSRA account. The same was not required to be honoured once the facility is recalled. Under clause 4.1(i) and (ji) of Interest Shortfall Undertaking, post-dated cheques were to be given by MRIL. The cheques provided were only for the purpose of custody.

33. In any event, since the instant application is not based on post dated cheques, no further submission is required. Furthermore, Clause 4.1(iii) provides for a corporate guarantee to be executed in the future. Admittedly, no corporate guarantee was ever executed by MRIL. In the absence of any Corporate Guarantee for the specified purpose of repayment, the undertaking mentioned supra cannot by itself be construed as a guarantee. The obligation to provide corporate guarantee was a contingent event, which was to be executed on a future date. In the absence of a guarantee, MRIL cannot be said to be a guarantor.

34. A collective reading of clause 3.2(a) read with 6.2(g) clearly delineates MIL's obligation to be to the extent of servicing the DRA and not to repay any purported debt owed to the applicant by the borrower.

35. The Hon'ble NCLT, Mumbai Bench has dealt with the issue of guarantee and breach of undertaking vide its order dated 07 October 2022 passed in ***Axis Bank Ltd. v. Mr. Nageshwar Rao, IA No. 717/MB/C/I/2022 in CP. (IV) No. 1231/MB/C-I/ 2021***. The ratio as laid down in the aforementioned judgement is squarely applicable in the present case. In the said judgment,

Learned NCLT, Mumbai Bench has held that the obligor's undertaking cannot be construed as a financial debt under Section 5(8) of the Code. The Learned Bench in para 27 of the Judgement has recorded that the obligor merely undertook to infuse funds into RHFL to redeem the commercial papers issued by RHFL. The undertaking cannot be construed as a guarantee in terms of section 126 of Indian Contract Act, 1872. The Hon'ble Tribunal also dealt with indemnity clause of the obligor undertaking holding that the indemnity clause only relates to the breach of the Agreement itself. It is not an indemnity issued in respect of commercial papers issues by RHFL.

36. In certain cases, a Letter of Comfort may constitute a guarantee on a construction of the terms contained therein. In the instant case, the Letters of Comfort or Interest Shortfall Undertaking cannot, under any circumstances, be said to be guarantee.

37. The DSA lists out the security and additional security documents, which do not include letter of comfort or interest shortfall undertaking. The intention of the parties was not that the letters of comfort or the interest shortfall undertaking should impose an obligation in the nature of guarantee on MRIL. The Assignment Agreement would also not show that MRIL is a surety.

38. In a contract of guarantee, there is a promise to perform or discharge liability of a third person in the event of his default, which is absent in the present case. In ***Phoenix ARC v. Ketulbhai Ramubhai Patel (2021) 2 SCC 799***, the Hon'ble Supreme Court has dealt with the undertaking and the circumstances in which an undertaking can be construed as a guarantee in terms of Section 126 of the Indian Contract Act. In the language of the relevant documents in the present case, such promise to perform or discharge liability is absent.

39. The learned Senior Counsel further relied on ***Innoventive industries Ltd. vs ICICI Bank. (2018) 1 SCC 407***.

40. Learned Senior Counsel the language employed in the Letters of Comfort would show that only an "effort" will be made by the Corporate Debtor. There is no promise made by MRIL in terms of section 126 of the Contract Act, 1872.

41. MRIL is not the borrower. There are no obligations under the Letters of Comfort or Interest Shortfall Undertaking which would require payment to the applicant by MRIL. In order to constitute a contract of guarantee there must be a third contract, by which the principle debtor expressly calls upon the surety to act as such (Reference has been placed on AIR 1940 Bom 315, 1940 ILR Bombay Series 552). This is absent in the instant case. Interest Shortfall Undertaking is an agreement to provide a guarantee in future and such guarantee was not provided by MRIL and nor was it demanded by the applicant. This would be evidenced from clause 4.1. (iii) of the Interest Shortfall Undertaking.

42. The applicant relies on section 7(5) of the Code to argue that the only ingredients for allowing admission under section 7 are (a) existence of debt and (b) occurrence of default. In this regard, they rely, inter alia, on the alleged information utility certificate.

43. The information utility document is not a verified claim. Thus, the Applicant's reliance on this document is inconclusive as a proof of debt. The record of Information Utility is itself subject to verification and cannot be sufficient to establish a relationship of Financial Creditor and Corporate Debtor. The Information Utility Regulations, in particular Regulations 20 and 21, make it clear that on receipt of information of default, an information utility shall expeditiously undertake the process of authentication and verification of information. There is a stringent requirement of such regulations. This process was not complied with which

does not make the information utility certificate a conclusive document. [Reference is placed on para 85, 86 and 87 of ***Swiss Ribbons Private Limited v. Union of India (2019) 4 SCC 171]***. Therefore, the records with IUs are not conclusive proof and they are only a prima face evidence of default, which is rebuttable by the corporate debtor. In terms of Section 7 (3) and (4) of the IBC, the Adjudicating Authority shall ascertain the existence of the default from the records of Information Utility and other evidence furnished by the Financial Creditor. The Debenture Agreements, Letter of Comforts and Interest Shortfall Undertaking is the relevant evidence furnished by the applicant under section 7(3) of the Code which is required to be considered for the purposes of ascertaining the existence of a debt or default thereof.

44. The learned Senior Counsel submitted that Post Dated Cheques cannot be taken to be unqualified admission of debt because the presumptions drawn under section 118 and section 139 of the Negotiable Instruments Act, 1881, are rebuttable presumptions. The presumption under Section 118 of the Negotiable Instrument Act is restricted to the proceedings under the said Act alone. The said presumption though rebuttable cannot be applied in the proceedings under Code for presuming the existence of any debt or liability. In any case, the financial creditors have already initiated proceedings under the Negotiable Instruments Act, 1881. The cheques provided to the applicant were only to be kept in custody and were not as security as indicated page 78 of the supplementary affidavit. (Reference para 11 & 12 of ***N.C Goel & Mayal Goel v. Piyush Infrastructure India Pvt. Limited C.P (IB). 453/ALD/2019***).

45. Without prejudice to the aforesaid, the overall financial health and viability of MRIL may be taken into account and discretion exercised in refusing to admit the instant application under Section 7 of Code against MRIL, as held in ***Vidharbha Industries v. Axis Bank Ltd (2022 SCC OnLine SC 841] at para 77; Innoventive Industries v. ICICI Bank Ltd ((2018) 1 SCC***

407] at para 27, 28, 29. In the present case, all lenders of the MRIL have executed an Inter Creditor Agreement dated 3 December 2020 agreeing to restructure all exposure of MRIL. MRIL employs approximately 70,000 persons, and is the largest tea grower and manufacturer in the world. Therefore, the overall balance of convenience is in favour of MRIL and discretion may be exercised in favour of the MRIL and against applicant.

46. Further and in any event, Vistra ITCL (India) Limited, the security trustee has also taken measures under the SARFAESI Act against the secured assets of the borrowers and security providers, which are of a value in excess of the amount claimed herein. Once sold, those assets shall fetch more power than the debt alleged herein. It is pertinent to mention that Valuation report shows the value of the secured assets to be over Rs. 600 crores.

47. The learned Senior Counsel further submitted that the judgment cited by the applicant is inapplicable. In ***Union Bank of India v. Era Infra Engineering Private Limited [2018 SCC OnLine NCLT 9130],*** promoters had given an undertaking to the applicant / Union Bank of India to fund and arrange for shortfall of payment [para (v)(a),pg. 12]. It is in view of such direct undertaking to the applicant that it was held in para 6(a) and para 18, that the undertaking, agreement, arrangement constituted a guarantee. In the present case, there is no undertaking given by MRIL to pay any sum of money to the applicant and therefore, there is no contract of guarantee. This judgment is inapplicable to the present case.

48. The learned Senior Counsel submitted that supplementary affidavit cannot be considered under regulation 55 of NCLT Rules, no leave has been obtained. Therefore, the statements made in the supplementary affidavit cannot be looked into. In any event, the case of the applicant cannot be amplified or expanded by supplementary affidavit. Reliance has been placed on ***Bharat Bhari Udyog Nigam Ltd v. Jesso and Co. Ltd [(2003) 4 CompLJ 333 (Cal).***

Rejoinder to the reply of the Corporate Debtor

49. The learned Senior Counsel appearing for the Corporate Debtor had, stated that, since the Shortfall Undertaking has not been termed as a 'guarantee', the same cannot be interpreted to create a principal and guarantor relationship between the Financial Creditor and the Corporate Debtor. However, as stated hereinabove, the Corporate Debtor, had assumed the liability in relation to the Facilities and had further undertaken that it would not be discharged till such time the Financial Creditor issues its discharge in writing, thereby creating a binding obligation. Further Clause 1.2(c) of the Shortfall Undertaking provides that for the purposes of the Shortfall Undertaking, headings and the use of bold typeface shall be ignored in its construction. Thus, the usage of the term 'Undertaking' instead of "Guarantee" cannot be construed to release the Corporate Debtor of the obligations assumed by it under the Shortfall Undertaking. The Corporate Debtor's purported defences in respect of the instant application are sham and mala fide.

50. It may be relevant to note that under Clause 4.1.(iii) of the Shortfall Undertaking, the Corporate Debtor had undertaken to enter into a 'Right to Sell Agreement' once limits were available for providing a corporate guarantee. The clause does not provide/imply or can be deemed to imply that limits were not available at the time of providing the Shortfall Undertaking. The said clause can utmost be intended to cover future guarantee and cannot be construed to relate to the present Shortfall Undertaking which, as demonstrated above, already constitutes a guarantee. Thus, the Corporate Debtor has tried to mislead, if possible, this Hon'ble Tribunal by submitting that the Corporate Debtor had undertaken to provide a corporate guarantee to the Financial Creditor. However, in reality, the Shortfall Undertaking itself was the guarantee provided by the Corporate Debtor, and it had additionally agreed to enter into a Right to Sell Agreement subsequently.

51. The Corporate Debtor had argued that supplementary affidavit cannot be admitted. In this regard it may further be noted that, the Hon'ble Supreme Court has, in ***Kotak Mahindra Bank Limited v. Kew Precision Parts Private Limited***[9], held that "Additional affidavits filed subsequent to the filing of the application, by way of additional affidavits or applications would have to be construed as pleadings, as also the documents enclosed with or relied upon in the application made in the statutory format." Relying on the judgement passed by the Supreme Court in ***Dena Bank (Now Bank of Baroda) v. C. Shivakumar Reddy and Another***[10], the Hon'ble Supreme Court further held that, "documents can be filed at any time until the application for CIRP is finally dismissed". The Hon'ble Supreme Court held that, "*On a careful reading of the provisions of the IBC and in particular the provisions of Section 7(2) to (5) of the IBC read with the 2016 Adjudicating Authority Rules there is no bar to the filing of documents at any time until a final order either admitting or dismissing the application has been passed*."

52. Further, it may be relevant to note that, this Adjudicating Authority had, *vide* its order dated 18 March 2021, granted the Corporate Debtor the opportunity to file a reply to the supplementary affidavit. However, the Corporate Debtor has deliberately chosen to not exercise the said right and has refrained from filing any reply to the said supplementary affidavit.

Analysis and Findings

53. Heard the learned Senior Counsel appearing for the Financial Creditor and the learned Senior Counsel appearing for the Corporate Debtor and perused the record.

54. The issuer companies namely BBL and WMCL have entered into a debenture trustee deed with the debenture trustee namely IL & FS

[9] CIVIL APPEAL NO. 2176 OF 2020
[10] (2021) 10 SCC 330

Financial Services Limited. The role of the debenture trustee is to service the interest accruing on these NCDs and over all management of the fund. The proceeds from the NCDs are eventually to be deployed by the companies for their business operations. The debenture trustee is also suppose to pay the redemption amount upon maturity of the NCDs in terms of the issuance conditions of the NCDs.

55. Eventually the debenture trustee has to arrange for finances for meeting these commitments on behalf of the issuing companies for which certain collateral securities also would be necessary to be presented by the debenture trustee for prosecuting such finances.

56. In the absence of any tangible securities, it is customary in the business world to depend on the some sort of guarantee to be given by a competent client or business associate. In the instance case a shortfall makeup agreement was signed by the debenture trustee with other company called MRIL, who by virtue of its financial standing has entered into the said deed with the debenture trustee which provides for adopting up of the DSRA account of the debenture trustee in case of shortfalls, if any, required for redeeming of the NCDs or for paying the interest. The Corporate Debtor has undertaken to ensure infusion of necessary funds into the Company, to enable it to meet its financial and contractual obligations including but not limited to maintenance of the financial ratios, and the security cover and DSRA requirements. The Debenture trustee deed defines an outlines number of documents for assigning meaning to the terms of the debenture trust deed.

57. It defines the terms called definitive document and explains the documents which would be instrumental in operation of the debenture trust deed. It also contains definitions for the security documents and the addition security documents. In addition to the shortfall undertaking agreement the Corporate Debtor has also given a letter of comfort to the debenture trustee which confined to making good the losses only as an assurance and not in

the tangible terms. Furthermore, the letter of credit is not mentioned in any of the headings brought out above like security documents and addition security documents and therefore, can be construed to be not material for the purpose of considering this to be considered in the spirit of a guarantee instrument. Consequently, Ld. Senior Counsel for the Corporate Debtor submitted that since no liability in the shape of a guarantee is incumbent upon his client, therefore, in terms of Section 5(8) no financial debt can said to be existing against his client. Here it would be pertinent to reproduce the provisions of section 5(8) of the Code:

(8) "financial debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes—

(a) money borrowed against the payment of interest;

(b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;

(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

(e) receivables sold or discounted other than any receivables sold on non-recourse basis;

(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation is respect of a guarantee, indemnity, bond, documentary letter of credit of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;

58. As can be seen from the above, the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses A to H of this Clause shall constitute financial debt.

59. So, the issue before this Adjudicating Authority is whether the following documents can be construed to be constituting a guarantee or not

    i. Letter of comfort

    ii. Indemnity bond

    iii. Shortfall undertaking

60. Before delving on the aspects of Letter of comfort and Indemnity bond, it is pertinent to mention here that the Corporate Debtor had also in terms of the shortfall undertaking issued postdated cheques to the Financial Creditor, the copies of which have been placed by way of a supplementary affidavit by the Financial Creditor. Thus, apart from other documents the Financial Creditor has placed the cheques issued by the Corporate Debtor. The Supplementary Affidavit was filed on 17 March 2021 by the Financial Creditor placing on record the twenty-four PDCs dated 01.05.2019, 01.06.2019, 01,07,2019, 01.08.2019, 31.08.2019, 01.10.2019, 01.11.2019, 30.11.2019, 01.01.2020, 01.02.2020, 29.02.2020, 01.04.2020 amounting to Rs. 33,77,47,811/- (Rupees Thirty-Three Crore Seventy Seven Lakh Forty Seven Thousand Eight Hundred and Eleven only).

61. However, considering that the issue of postdated cheques could be of material significance for the matter, we allowed that affidavit to be taken on record a copy of which was also furnished to the Corporate Debtor already by the Financial Creditor.

62. An exception was taken by the Ld. Senior Counsel appearing on the other side that no leave had been taken to file the supplementary affidavit. While

considering this plea, we refer to an order dated 18 March 2021 passed by this Adjudicating Authority, the Corporate Debtor was granted liberty to file reply to the supplementary affidavit within two weeks. Extract of the order is reproduced herein:

"Supplementary affidavit has been filed in the matter on 16/03/2021. Respondent shall be at liberty to file reply to the supplementary affidavit, keeping alive their objection to taking it on record. Reply, if any, to be filed within two weeks by serving copy on the Ld. Counsel for the Financial Creditor."

63. Thus, it is incorrect to say that the leave was not granted. However, the Corporate Debtor choose not to file any affidavit in rebuttal to the Supplementary Affidavit. Thus, the averments contained in the Supplementary and documents placed on record remained unrebutted, undenied and undisputed in any manner. Further, in this regard law is also well settled with respect to the proceedings under the Code.[11]

64. The submission regarding issuance of PDCs through the said supplementary affidavit has acquired significance because be in a way it tends to give a tangible shape to a security cover which otherwise exists in the maze of documents called by various names. Since the amount involved is more than the extant threshold limit at this stage it is immaterial to go into the exact magnitude of the claim as long as it remains more than the threshold of Rupees One Crore and the default is established. Still for the records it may be mentioned here that the total amount of the PDCs given by the Corporate Debtor comes to Rs. 33,77,47,811/- (Rupees Thirty-Three Crore Seventy Seven Lakh Forty Seven Thousand Eight Hundred and Eleven only).

65. Section 7 of the Code envisages that the Adjudicating Authority has to 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. On the basis of the PDCs issued by the Corporate Debtor herein to the Financial

[11] Kotak Mahindra Bank Limited v. Kew Precision Parts Private Limited and Dena Bank (Now Bank of Baroda) v. C. Shivakumar Reddy and Another

Creditor herein, the debt is established and the fact that the borrower failed to respond to the notices sent by the Financial Creditor who had issued two default notices dated May 6, 2019, and May 24, 2019 to the borrowers, the Facilities were recalled pursuant to the recall letters dated 10 June 2019. Therefore, this Adjudicating Authority is satisfied that a default has occurred and therefore this petition deserves to be admitted.

66. For the purposes of admission of the petition on the basis of the debt and default indicated above, we place reliance on the judgement of The Hon'ble Supreme Court in Innoventive Industries Limited vs. ICICI Bank and Anr.- (2018) 1 SCC 407 where it has been stated in Paragraphs 28 and 29 of the judgment of the Hon'ble Supreme Court as follows:

> *"**28.** When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the Explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor — it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in Part III, particulars of the financial debt in Part IV and documents, records and evidence of default in Part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of*

evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.

29. *The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing—i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code."*

67. In regard to the issued outlined above viz. Letter of comfort, Indemnity bond and the shortfall undertaking, suffice it to say that whether or not these can be construed as guarantees would depend on the intention of the parties, which in the instant case, without drawing technical inferences, clearly

reflect the intentions of the parties that they are meant to be acting as securities protecting the interest of the financial creditor.

68. As regards default the Financial Creditor has lead us to page no. 428 of the Company Petition wherein the Corporate Debtor has been called upon to deposit the amount in DSRA in terms of the shortfall undertaking agreement which is not controverted by the Corporate Debtor as well on the basis of the evidence in the shape of PDCs and hence we hold that a financial debt exists and which has been defaulted by the Corporate Debtor and accordingly it is hereby ordered as follows:-

    a. The application bearing ***CP (IB) No. 1986/KB/2019*** filed IL & FS Infrastructure Debt Fund, the Financial Creditor, under section 7 of the Code read with rule 4(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against ***McLeod Russel India Limited***, the Corporate Debtor, is ***admitted***.

    b. There shall be a moratorium under section 14 of the IBC.

    c. The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.

    d. Public announcement of the CIRP shall be made immediately as specified under section 13 of the Code read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

    e. **Mr. Ritesh Prasad Adatiya,** registration number **IBBI/IPA-001/IP-P01334/2018-2019/12013**, is hereby appointed as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the Code subject to submission of a valid Authorisation of Assignment in terms of regulation 7A of the

Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016. The fee payable to IRP or the RP, as the case may be, shall be compliant with such Regulations, Circulars and Directions as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out his functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the Code.

f. During the CIRP period, the management of the Corporate Debtor shall vest in the IRP or the RP, as the case may be, in terms of section 17 of the IBC. 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 within one week from the date of receipt of this Order, in default of which coercive steps will follow. There shall be no future opportunities in this regard.

g. The Interim Resolution Professional is expected to take full charge of the Corporate Debtor, its assets and its documents without any delay whatsoever. He is also free to take police assistance in this regard, and this Court hereby directs the concerned Police Authorities to render all assistance as may be required by the Interim Resolution Professional in this regard.

h. The IRP/RP shall submit to this Adjudicating Authority periodical report with regard to the progress of the CIRP in respect of the Corporate Debtor.

i. The Financial Creditor shall deposit a sum of ***Rs 3,00,000/- (Rupees Three Lakh only)*** with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors (CoC).

j. In terms of section 7(5)(a) of the Code, Court Officer of this Court is hereby directed to communicate this Order to the Financial Creditor, the Corporate Debtor and the IRP by Speed Post, email and

WhatsApp immediately, and in any case, not later than two days from the date of this Order.

k. Additionally, the Financial Creditor shall serve a copy of this Order on the IRP and on the Registrar of Companies, West Bengal, by all available means for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court within seven days from the date of receipt of a copy of this order.

69. **CP (IB) No. 1986/KB/2019** to come up on **31st March 2023** for filing the periodical report.

70. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Balraj Joshi **Rohit Kapoor**

Member (Technical) **Member (Judicial)**

This order is pronounced on 10th day of February 2023.

GGRB_LRA