BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, MUMBAI

C. P. NO. 292/I & BP/NCLT/MAH/2017

Coram: ***B.S.V. Prakash Kumar, Member (Judicial)***
V. Nallasenapathy, Member (Technical)

In the matter of u/s 7 of Insolvency and Bankruptcy Code, 2016 and Rule 4 of the I&B (Application to Adjudicating Authority), Rules 2016)

And

M/s. Edelweiss Asset Reconstruction Company Ltd. .... Applicant/ Financial Creditor

vs.

M/s. Bharati Defence and Infrastructure Ltd. .... Corporate Debtor

Applicants' Counsel:

Mr. Animesh Bisht, a/w. Mr. Dhananjay Kumar, Mr. Abhishek Mukherjee, Ms. Meena Sharma, Mr. Anush Mathur, Advocates.

Corporate Debtor's Counsel:

Mr. Mayur Khandeparkar, a/w. Mr. Aditya Pimple, Mr. Rakesh Kapoor, Khushuma Khan, Asfiya Ranjan, Advocates.

ORDER
(Heard on 25.04.2017)
(Pronounced on 06.06.2017)

Per B.S.V. Prakash Kumar, Member (Judicial)

It is a company petition filed u/s 7 of The Insolvency & Bankruptcy Code 2016 by a financial creditor, viz. Edelweiss Asset Reconstruction Co. Ltd. (herein after called as 'financial creditor') for initiating Corporate Insolvency Resolution Process against a corporate debtor viz. Bharat Defence and Infrastructure Ltd.(herein after called as corporate debtor), which has outstanding debt of about ₹9000crores, out of which, the loan IDBI Bank Ltd (IDBI) given as Working Capital Facility to the Corporate Debtor has been assigned to this Applicant. When this Corporate Debtor defaulted (Exhibit-"5-B") in making repayment of ₹591,95,73,112 as on

March 15, 2017, this financial creditor has taken out this application for initiating corporate insolvency resolution process against this Corporate Debtor Company. Notice has been duly served upon the corporate debtor and the corporate debtor availed full opportunity in making its side submissions.

2. The creditor submits that this debtor company is in shipping business, to meet its fund requirements, IDBI (assignor) granted loan to it as working capital facility (WCF) of ₹450crores under the working capital consortium agreement dated March 30, 2010 which has been modified from time to time. On account of default in repayment of the WCF by the corporate debtor, the dues outstanding under the WCF were restructured and certain additional facilities were granted to the corporate debtor by the Banks including IDBI under Corporate Debt Restructuring (CDR) scheme issued by Reserve Bank of India vide Master Restructure Agreement dated June 30, 2012 as amended from time to time. The details of the debts granted to the corporate debtor are as follows: -

1. Debts were granted to the debtor company as the working capital facility of ₹450crores under the working capital consortium agreement dated March 30, 2010 as amended by supplemental working capital consortium agreements dated September 30, 2010 and September 02, 2011. The original WCF is comprised of fund based limits (cash credits) and non-fund based limits (including bank guarantees under letters of credit). It was later reconstructed under CDR scheme by Master Restructuring Agreement (MRA) dated June 30, 2012 executed inter alia among the corporate debtor

and IDBI from time to time for a total facility amounting to ₹615.12crores which includes the following: -

1. Working capital facility (including cash credit facility, overdue due to interest, penal commission and crystallized non-fund based limits i.e. development of bank guarantees and letters of credit) of ₹319.81crores.

2. Working capital–additional cash credit facility (including interchangeability allowed from non-fund based to fund based) of ₹285crores.

3. Priority term loan facilities of₹6.24crores for vessel completion.

4. Priority term loan facility for capex programme of ₹4.07crores (it has been said that no amount under this facility was disbursed to the company).

3. Further, pursuant to the MRA, IDBI also advanced an amount of ₹5, 72,500 on March 10, 2016 towards funding of valuation expenses in relation to the aforementioned facilities. The aforementioned facilities under WCF and MRA are hereinafter called as facilities. When this Corporate Debtor failed to repay the dues, the facilities advanced by IDBI were assigned to this applicant i.e. Edelweiss Asset Reconstruction Company Ltd. acting in the capacity of trustee to EARC Trust SC-205 vide an Assignment Agreement dated March 30, 2016. Before entering into this assignment agreement, Edelweiss Asset Reconstruction Company executed a Declaration of Trust on 18 March 2016 stating that this applicant company pursuant to section 3 of Securitization and

Reconstruction of Financial Assets And Enforcement of Security Interest Act 2002 (SARFAESI Act)declared itself as trustee of the same by conforming that the trust fund shall be held and processed by the trustee in trust for the security receipt holders upon acceptance of the contributions from the security receipt holders in whose favour security receipts shall be issued by the trustee on the terms and conditions mentioned herein. It is normal practice that Asset Reconstruction Companies (ARC) pay 15% of the sale consideration in cash and the rest is given by way of security receipts (SR) payable soon after realisation, for undergoing this process, a Trust will be set up to meet this arrangement, likewise, here also, the applicant company has started a Trust called EARC Trust SC-205 by declaration of Trust. In this document, it has been declared that the applicant company (trustee) holds and stands possessed of initial trust fund together with all additions and accretions thereto in trust for the benefit of security benefit holders conferring power upon itself to act directly or through the Trust to recover the debt.

4. Since the Debtor Company could not fulfil its repayment obligations in relation to the restructured facilities under the MRA, it has been recorded that the lenders exited from CDR scheme owing to the debtor company's failure in repayment as per the MRA. Thereafter, on account of the debtor company failure to fulfil its obligations under CDR scheme, IDBI vide letter dated June 9, 2016 recorded the default by the corporate debtor classifying it as non-performing asset for non-servicing of the facilities provided by the Banks in the restructuring package. Besides this, IDBI had issued a recall notice dated August 5, 2015 to the company demanding payment of dues owed by the debtor company to IDBI. For there being clear evidence reflecting that the corporate debtor committed default in repaying debt aforesaid to IDBI, and having this applicant

(Asset Reconstruction Company) stepped into shoes of IDBI by virtue of assignment agreement dated March 30, 2016, this applicant has filed this case. In the annual report of the debtor company for the year ended March 31, 2016, it is reflected that the debtor company committed default in repayment of the loans assigned inter alia by IDBI to EARC. In addition to the aforesaid, EARC, vide letter dated August 25, 2016, had instructed SBICAP Trustee Company Ltd to invoke pledge of shares of the corporate debtor and its associates, pledged by the debtor company to IDBI and other Banks. When the debtor company failed to get the shares freed, SBICAP Trust, on the instructions of the Applicant, invoked the pledge. In the result, the applicant company received the proportionate value of the shares held in pledge by the financial creditor and the same has been deducted from the due outstanding. This applicant made claim for the balance outstanding after having deducted the value of those shares. The total amount in default including interest and overdue interest, as on March 15, 2017, has come to ₹599, 43, 43,163. As the corporate debtor defaulted in making repayment of the dues, the applicant has filed this company petition for initiation of corporate insolvency resolution process.

5. On this application being filed against the corporate debtor, the counsel for the Corporate Debtor raised objections stating that by virtue of the following issues, this petition shall be dismissed.

1. This CP is not maintainable having regard to the fact that no record or evidence of default has yet been produced as specified u/s 240 (2) (f) of the Code (power to make regulations by Insolvency and Bankruptcy Board of India-IBBI) despite sub clauses (a) & (c) of section 7 (3) of the Code insists upon to furnish record or evidence or information of default as specified by the Board.

2. This CP cannot be filed without record of the default recorded with the information utility as per section 7 (3) (a) r/w section 7 (5) (b) of the Code. Since Section 7 (5) clearly contemplates that the Adjudicating Authority is required to ascertain the existence of default from the record of Information Utility, for such record of default in respect to this claim is not in existence with information utility, this CP shall be dismissed.

3. The claim made by the applicant is not an adjudicated claim, therefore not a debt u/s 3 (11) of the Code.

4. This creditor applicant has not produced (i) record evidencing that the alleged amounts have been committed to the corporate debtor and also (ii) financial statement that debt has not been repaid, details of the amounts received upon invocation of 1,25,25,692 shares have been produced.

5. This petition is not maintainable having regard to the fact that there are company petitions pending against the debtor company before the Honourable High Court of Bombay, therefore insolvency proceedings cannot be simultaneously initiated.

6. The applicant herein will not fall within the definition of 'financial creditor', because the transactions enumerated in the company petition is in between the Debtor Company and IDBI, not with either Edelweiss Trust or EARC. Moreover, Edelweiss Asset Reconstruction Company Trust SE-205 is shown as financial

creditor, whereas this application is filed by Edelweiss Asset Reconstruction Company Limited.

7. This petition is not in the prescribed form, because no record of default is recorded with information utility, no identification number of financial creditor has been produced, computation has not been claimed as per Part IV of Form – 1, no details of record of default have been recorded with any credit information agency, the entries are not shown as stated under Banker's Book Evidence Act, 1981.

8. That IDBI Bank failed to provide additional facilities in full and in compliance with MRA; therefore, there has been no default on the part of the company qua any financial debt.

9. Stamp duty has not been paid over the Assignment Agreement dated March 30, 2016as per the provisions of Bombay Stamp Act 1958; therefore, this case should not be admitted for it is hit by Indian Stamp Act.

6. Before going into merits of the case, this Bench believes it is important to look into as to whether this company is solvent enough to discharge its debts. Why it is important is, the title of this Code itself says what this Code is – it comes into operation when company has become insolvent or become deemed insolvent. It has come into force with a stated objective to promote entrepreneurship, availability of credit, and balance the interests of all stakeholders, under the new code, if a company defaults, control would shift from the promoters to a committee of creditors, which will have 180 days to evaluate various proposals for

resuscitating the company, or else liquidate the assets. It is needless to say we are all in letter and spirit bound by the enactment given by legislative authority after making a long exercise over the evils haunting the society. If we go in depth into records of the corporate debtor, it is self-evident that the debtor company defaulted to make repayment of about nine thousand crore rupees to various financial institutions, in view of the same, the Banks already made all efforts to accommodate the company by restructuring the loans through CDR mechanism, then entered into Master Restructuring Agreement, but of no avail. The company failed on all fronts, today it is not the case of the debtor company that it could repay its debts, it is also not the case of the debtor company that the debt liability is false or the debt has not been assigned to this applicant, all it says is this petition is short of x, y, z reasons, therefore it has to be dismissed.

7. The issue zeroed in on is as to whether any shortage is there in the application as canvassed by the debtor company, if so, whether such shortage has been complied with by the applicant or not. On record, it is apparent that this company has become insolvent, and it is on face clear, thousands of crores of public money is stuck in the debtor company, the trials of the creditors to bail out the debtor company miserably failed, enough time had already been consumed in restructuring plans. This shipping business ship is now almost sunk, if further time is given, the danger lurking is, the creditors also get sunk along with the Debtor Company. If we see whose money all these thousands of crores is, it is evident mostly it is public money lying with the public sector banks. The purpose and object of the Code being to straighten the credit system in the country and augment the growth of the growing country, if at all this Bench, for any reason, makes mole out of the mountain to dismiss petition despite the petition is otherwise furnished with all material as mandated,

then we don't know whether we do injustice to the corporate debtor or not, but it is obvious the purpose and object of the Code would be knocked down and the cause of the country at large will get eclipsed. If the history of recession all over the world is seen, one of the causes for recession is bad loans, the problem today our country facing is bad loans in several crores. It is a known fact that there is a difference between criminal jurisprudence and civil jurisprudence in evaluating evidence – civil courts require plaintiff to prove his case by a preponderance of evidence, this means the person suing must prove that there is greater than 50% chance to win the case based on reasonable evidence, whereas in criminal case, the prosecutor must prove that the accused did the crime beyond reasonable doubt, by this, it is evident that there are two standards of proof in adjudicating cases, civil courts apply a lower standard of proof of "preponderance of evidence", while criminal courts apply higher standard of "beyond reasonable doubt". So in a case like this, which is civil in nature, lower standard is to be applied or at least go by the mandate given by the Code. Evidence is to be weighed to adjudicate the case. The logic behind variance of standard is simple, in criminal cases it deals with mens rea (guilty mind) and actus reus (guilty act) especially intended to commit crime with life/body of a person or his property, but in civil case, these two elements are not necessary elements. If we see now days, except a few companies, most of the businesses, small or big, all are run on the money of others, if business goes down, the most effected person is the person given loan, not the person manages the money of others, so we need not live in the past thinking that if insolvency proceedings are initiated, owners of the company get effected, indeed real owners are the creditors. The only difference that comes to the company is change of management, nothing more nothing less. Justice must be close to reality, the reality is creditors are left at bay until not even residue is left in

a company gone into liquidation, that result also comes only after four five years. Now situation is converse, once insolvency proceeding is initiated, committee of creditors come into onerous position to protect the sinking ship, it is inevitable to them to protect because their money is involved. It is also simultaneously to remember several checks and balances are arranged to safeguard the interest of the company, promoters, creditors and employees and workmen, now it is nobody's hegemony to leave somebody high and dry. If this Bench admits a case, it does not mean that creditor is left open to gobble up everything in the company, this is only a threshold step to initiate proceedings, after initiation of this proceeding, again the same creditor has to prove his claim before IRP; if anybody has any grievance at that stage, then also it is open to the aggrieved to come before NCLT. So one need not be under the impression that default has been crystallised and decreed and it can't be relooked into, ofcourse it has to be seen as to whether debt is in existence and default is there, what we say is simply by seeing slight variation in computation of interest, plus or minus here and there, if petition is dismissed, then it will be aberration of justice. There are various steps to correct slight variations. One more thing to be kept in mind is, financial debt is on different conspectus and operational debt is on different conspectus. It goes without saying that courts are meant for to effectuate the purpose and object of an enactment. This is an inbuilt enactment including procedure, mode of taking proof and substantial law, therefore this Bench need not look for outside help to adjudicate either to admit or dismiss these petitions. Natural justice is also inbuilt because an opportunity is allowed to a limited extent to the corporate debtor to establish that the applicant has no case as specified in the Code. May be it does not look conventional in adjudication of cases without reply, rejoinder or without chief examination and cross examination, but fact of the matter is almost all transactions in a company

at one or other level gets recorded, which company normally cannot disown such transaction, therefore there is hardly any possibility to sweep the facts under the carpet, and for proof facts, most of the times, courts need not fall back upon the conventional procedures, only thing to be known is which document and which register in the books of the company reveal which transaction. That is the reason; issues in corporate litigation are without any difficulty decided without applying the procedure of examination and cross examination, especially the issues on factual aspects. For this reason only, in corporate litigation fight will go on sidelines harping on shortfalls on procedure, stamp duty, maintainability, limitation and etc. There is a delay in passing this order because of vacation come in between; we believe it will not become an impediment for dispensation of justice for Honourable NCLAT already held in one case that proceedings will not get invalidated just because 14 days time line is crossed in admitting petitions.

8. Now let us analyse the issues raised one after another to find out as to whether any merit in any of the objections raised by the debtor company or not. Since the objections one to three are overlapping and falling under one subsection i.e., section 7 (3) of the Code, they have been dealt with together.

> *1. This CP is not maintainable having regard to the fact that no record or evidence of default has yet been produced as specified u/s 240 (2) (f) of the Code (power to make regulations by Insolvency and Bankruptcy Board of India-IBBI) despite sub clauses (a) & (c) of section 7 (3) of the Code insists upon to furnish record or evidence or information of default as specified by the Board.*
>
> *2. This CP cannot be filed without record of the default recorded with the information utility as per section 7 (3) (a) r/w section 7 (5) (b) of the Code.*

Since Section 7 (5) clearly contemplates that the Adjudicating Authority is required to ascertain the existence of default from the records of Information Utility, for such record of default in respect to this claim is not in existence with information utility, this CP shall be dismissed.

3. The claim made by the applicant is not an adjudicated claim, therefore not a debt u/s 3 (11) of the Code.

9. All these three objections raised are about non-compliance of the mandate given under section 7 (3) of the Code and Rules and Regulations thereto. Factual aspect of granting loan, default in repayment, restructuring of loan, failure to adhere to the restructuring package or even assignment of this loan to ARC and invocation of pledge of shares, have not been disputed. Since none of the factual aspects above mentioned being denied or disputed, now the aspect left to be answered is – as to whether 1-3 objections are on correct proposition of law or not, if so, whether such objections are supported by facts of this case or not.

10. For all three objections are hovering over sub section 3 of section 7, let us see what section 7 (3) asking the financial creditor to show for admission of this petition. The text of section 7 (3) is as follows:

Section 7: Initiation of corporate insolvency resolution process by financial creditor.

Sub Section 1: .....

Sub Section 2: .....

Sub Section (3):

The financial creditor shall, along with the application furnish—

(a) record of the default recorded with the information utility or such other record or evidence of default as may be specified;

(b) the name of the resolution professional proposed to act as an interim resolution professional; and

(c) any other information as may be specified by the Board.

11. In clause (a) of this subsection, three situations are given to establish default in repayment, one – the ***record available with information utility;*** two – ***such other record of default as specified;*** three – ***such other evidence of default as specified.*** All these three mandates are disjunctive, connected with clause **'OR'** not with clause 'AND', therefore each mandate is independent and complete. If the financial creditor is able to furnish material covering any of the three mandates, that application is construed to be complete in respect to furnishing material showing debt owed to be paid by debtor company, and such debtor committed default in making repayment.

12. To get completeness to this clause (a), the other word that is left out to be understood in the forgoing para is the word ***'as specified'.*** In section 239 of the Code, an authority is set out for making Rules to supplement the application of section of law while Adjudicating Authority exercise jurisdiction under section 7 of the Code. Likewise, section 240 is set out for IBBI making Regulations, in the said section, clause (f) of subsection (2) of section 240conferred power upon IBBI to notify a Regulation in respect to the procedure to be applied for taking ***"the other record or evidence of default under clause (a) and any other information under clause (c) of subsection (3) of section 7."*** Section 240 (2) (f) does not speak about availability of record of default with information utility. Basing on these two sections, central government framed Rules applicable to the Adjudicating Authority, simultaneously IBBI framed Regulations with the power under section 240 of the Code. As the procedure has been specified

in the above Rules and the Regulations, this Tribunal has to go by ***as specified*** under the Rules and Regulations to admit petition under either under section 7 or 9 or 10.

13. Moreover, by the time this case was filed, Information Utility Centres had not been established, to establish them, Rules have been notified only on 31st March 2017, registration of utility centres and bringing them to functioning will take its own time, therefore record of default getting recorded or not recorded with Information Utility Centre, could not have become an objection to admit this petition. Recording of debt and default of repayment with information utility centre is not made compulsory, it is only optional, perhaps for that reason only, other situations have been set out, one - is **record of default** as specified, two - is **evidence of default** as specified, and other information (in 'c' of section 7 (3)) as specified by IBBI in its Regulations. May be, the situation would have become different provided it had been said that unless default in repayment is recorded with Information Utility Centre, petition u/s 7 of the Code should not be filed. But, it is not the case here. Therefore, when choice is given by the statute to the financial creditor either for production of record of default or evidence of default, the financial creditor shall not be weighed down to produce record from Information Utility Centre in addition to production of record or evidence of default as specified.

14. Since it has been asked in section 7 (3) (a) either to produce ***record of default with information utility*** OR ***such other record OR evidence of default as may be specified,*** let us look into as to what is ***specified*** in Rule 4 of ***Insolvency and Bankruptcy (Application to adjudicating authority) Rules, 2016*** dealing with Application by financial creditor:

*"**Application by financial creditor:** — (1) A financial creditor, either by itself or jointly, shall make an application for initiating the corporate insolvency resolution process against a corporate debtor under section 7 of the Code in Form 1, **accompanied with documents and records required therein and as specified in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.***

(2) .....

(3) ....."

(For sub rule (1) alone having dealt with documents and records specified in the Form-1 and as specified in Regulations above mentioned, the other two sub rules have not been reproduced)

15. As this Rule (4) has not specified anything except saying to follow as specified in ***Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016,*** let us find out what is said in Regulation 8 set out for claims for financial creditors.

"8. Claims by financial creditors.

(1) A person claiming to be a financial creditor of the corporate debtor shall submit proof of claim to the interim resolution professional in electronic form in Form C of the Schedule:

***Provided** that such person may submit supplementary documents or clarifications in support of the claim before the constitution of the committee.*

*(2) The **existence of debt due to the financial creditor** may be proved on the basis of –*

*(a) the records available with an information utility, if any; **or***

(b) other relevant documents, including –

(i) a financial contract supported by financial statements as evidence of the debt;

(ii) a record evidencing that the amounts committed by the financial creditor to the corporate debtor under a facility has been drawn by the corporate debtor;

(iii) financial statements showing that the debt has not been repaid;

or

(iv) an order of a court or tribunal that has adjudicated upon the non-payment of a debt, if any."

16. This *Regulation* is made applicable in two situations, one - when financial creditor makes claim before *the interim resolution professional,* two – when the financial creditor makes claim before *Adjudicating Authority* at the time of admission of petition. For Rules governing the procedure observed that *Adjudicating Authority* dealing with petitions under section 7 shall follow the above Regulation 8, let us see what kinds of material to be furnished for admission of petition under section 7 of the Code.

17. Sub-Regulation (1) is not applicable to the claim before Adjudicating Authority; it is indeed a provision to be complied with when claim is made before insolvency professional, therefore it has not been dealt with. By reading Sub Regulation (2), it appears that three kinds of evidence have been set out, leaving it open to the financial creditor to submit any one out of the following three for admission of the petition:

one – *the records available with an information utility, if any,*

(Record available with information utility is sufficient to reckon record of default)

Or

two – (b) other relevant documents, including –

(i) a financial contract supported by financial statements as evidence of the debt;

(ii) a record evidencing that the amounts committed by the financial creditor to the corporate debtor under a facility has been drawn by the corporate debtor;

(iii) financial statements showing that the debt has not been repaid.

(as per this second mandate, if documents reflecting financial contract to show evidence of debt, evidence of debtor drawing such facility and financial statements disclosing failure of repayment are shown, then such proof is enough to this Bench to believe that the corporate debtor availed facility and committed default in making repayment)

Or

Three*- (iv) an order of a court or tribunal that has adjudicated upon the non-payment of a debt, if any.*

(Last option open to the financial creditor is, he can file court or Tribunal order upon non-payment of debt to independently prove the default to this Bench to believe debt has not been repaid)

18. So this Regulation specifies that the financial creditor can avail any of the three modes to prove to this Bench to believe that the corporate debtor defaulted in making repayment.

19. In view of above discussion, the corporate debtor proposition saying since record of default from information utility centre is not available, this petition shall be dismissed is invalid. It has no merit for two reasons, one – information utility centres were not established under law by the time this petition was filed, two – filing of record of default with the information utility centre is only optional, if it is available, it can be filed. For this reason alone, in Regulation 8 above mentioned, it has been said that ***if any*** record of default from information utility centre is available, it may be proved by that mode or else the creditor can file other records to prove default as stated above, therefore the objection on the ground of non-filing of record from utility centre will not make this petition invalid. So the objection raised by this corporate debtor is invalid.

20. In section (7) (3) (a), it has been said to produce such other record or such other evidence of default of repayment, means that financial creditor can produce evidence in the place of record as well, it is not that if record as mentioned is not available, then financial creditor is not entitled to lay evidence to the belief of the Adjudicating Authority to admit a petition. This Bench does not say that such other record to show default in repayment with regard to this case is not in existence, what all this Bench says is it is not that this Bench cannot look into other information to the belief of the Bench to ascertain existence of debt and existence of default in repayment.

21. Since the Code in section 7 (3) (a) speaks of evidence, this Bench could not restrain itself from saying what is meant by evidence under The Indian Evidence Act. In the Evidence Act, a few clauses have been interpreted to understand what could be the meaning of evidence; they are ***"fact", "facts in issue", "evidence", "proved".*** By seeing interpretation to the word "fact", it can be clear that anything perceivable to the senses or to conscious mental condition is a "fact". This fact will become "fact in issue" when a fact in existence, non-existence, nature or extent of any right, liability or disability is asserted or denied in any suit, then such issue has to be decided. By which it is understandable "a fact" will become "a fact in issue" only when it is denied, therefore as long as denial is absent, a fact asserted will not become "a fact in issue", of course whether such fact is believable or not is another point that is clarified in the ensuing clauses. Next clause is "Evidence', which is focal point for our discussion, in interpreting this clause, it has been said that all statements which court permits to be taken in an enquiry either orally or documentary is called evidence. Since this being the meaning of evidence, this Bench doubts that there is any impediment to prove a fact by taking evidence into consideration apart from presumptive facts. Here it does not matter whether any issue on fact is in existence or not in existence, in both the cases, evidence has to adduced in an enquiry, upon such adduce of evidence, a fact can be proved or disproved or not proved. Why this Bench discussed all these words is apart from clause "record of default", there has another clause ***"evidence of default"*** in Section 7 (3) (a), Section 240 (2) (f) of the Code and also in Regulation 8 of IBBI Regulations. Before going into what is said about **proof** in Regulation 8 IBBI Regulations, we must see as to how the meaning of the clause "proved" is arranged in The Evidence Act, the text is as follows.

"Proved" – A fact is said to be proved when, **after considering the matters before it**, the Court either ***believes it to exist,*** or ***considers its existence so probable that a prudent man ought,*** under the circumstances of the particular case, to act upon the supposition that it exists.

22. By looking at this definition, for fulfillment of proof, the tools required is/are a fact/facts, consideration of that fact/facts by a court or as the case may be, and finally upon such consideration of a fact, if the court believes it to exist, or considers its existence so probable that a prudent man ought to act upon the supposition that it exists, then such fact that inspired belief in the Court/judge is considered as proved. For this reason alone, Regulation 8 (2) starts saying that ***"Existence of debt due to the financial creditor may be proved on the basis of"***, by this, it is clear whatever the Code permits the party to place material to claim, that shall be satisfying to the belief of the court. Ultimately the belief of court is the requisite element to believe the existence of default.

23. On applying these legal propositions to the given facts, it is prolific that this corporate debtor not even once mentioned that it has not taken loan from IDBI Bank, MRA has not entered into, the Banks have not exited from CDR mechanism in 2013 itself, it has not mentioned shares have not been pledged with consortium Banks, it is not even the case of this Corporate Debtor that the debt claim in this case has not been assigned by IDBI to Edelweiss Asset Reconstruction Co. Ltd., therefore granting of WCFs by IDBI to the corporate debtor, default in repayment to IDBI, then entering into CDR package, there also failing to adhere to the Master Restructuring Agreement, then Banks exiting from CDR package, then assignment of debt to EARCL by IDBI, then even invocation of pledge of shares are facts not in issue, because the debtor has not denied any of those facts, therefore for there being record as proof (it is said as proof for two reasons, one – those facts have not been denied, two – record placed is

to the satisfaction of this Bench to believe those facts as true) showing grant of loan, then default, then assignment of the debt to EARCL, this Bench believes existence of debt, default, assignment of debt to EARCL and invocation of pledge of shares. Then the points left to be answered are the objections about no record in existence with information utility, no record or evidence of default, claim is not adjudicated by any court, debt is not in default for additional facilities have not been provided by IDBI, court cases pending in respect to this claim, the applicant cannot become a financial creditor, debt has not yet been crystallized, insufficient stamp duty on assignment deed. It has been already held that information utility center was not in existence as on the date of filing this petition, assuming information utility center was in existence as on the date of filing, then also non filing of record from utility center will not make this case invalid because it is only optional, not compulsory to produce the record from utility center. As to other objection in respect to non-filing of court order disclosing default, it is true no such record is in existence, therefore filing such order would not arise, that apart, this mandate is also one out of the three commands, therefore the creditor is at liberty to file proof under any one out of the three modes available, hence we don't find any merit in this objection also.

4th objection of the debtor company: *This creditor applicant has not produced (i) record evidencing that the alleged amounts have been committed to the corporate debtor and also (ii) financial statement that debt has not been repaid, details of the amounts received upon invocation of 1,25,25,692 shares have been produced.*

24. The objection raised by the Corporate Debtor is not correct because the Financial Creditor has placed financial contract dated 31.3.2010 as amended by supplemental Working Capital Consortium Agreement dated 30.9.2010 and 2.9.2011 to prove that this Corporate Debtor executed the Agreement to the then Financial Creditor, i.e. IDBI Bank Ltd. reflecting providing of working capital facility of ₹450crores and also other accounts disclosing that Corporate Debtor drawing the above amounts from the account lying with IDBI Bank Ltd and also the material disclosing the Corporate Debtor defaulted in making repayment to the IDBI Bank Ltd. and thereafter IDBI Bank issued a re-call notice dated 5.8.2015 to the company demanding payment of dues owed by the Debtor Company to IDBI. When IDBI Bank noticed Corporate Debtor failing to repay the loan despite notice has been issued by it, IDBI Bank assigned this debt to the present Financial Creditor on 30.3.2016 by executing an Assignment Agreement. It may be noted that SBICAP Trustee Company Limited (security trustee acting on behalf of the lenders of the debtor company) had, on instructions from the financial creditor, invoked some of the shares pledged as security with respect to the facilities advanced by several lenders to the company, of the entire sale consideration of ₹10,28,10,395 received from SBICAP on September 10,2016 and December 31,2016, ₹50,25,654 has been appropriated by Edelweiss Asset Reconstruction Company (Financial Creditor) towards this loan acquired from IDBI in proportion of the total outstanding amounts in relation to the facilities. This financial creditor has already filed a letter dated April 20, 2017 addressed by SBICAP Trustee to the financial creditor stating invocation of pledge and sale consideration received and the amount appropriated to the financial creditor, therefore it can't be the argument of the corporate debtor that invocation pledge of shares has not happened and money received by the financial creditor towards IDBI loan facility

has not been crystallised is not correct. The financial creditor filed dues position as on March 15, 2017 as Exhibit 5-B (page 52-D) disclosing subtraction of consideration received from the proceeds from pledge invocation. Moreover, if the amount is disputed that less has come on sale of shares, then it is understandable that the debtor is unfairly treated. Here this creditor in deed subtracted the proceeds from pledge invocation from the dues outstanding; hence forth we have not found any merit in the objection raised by the corporate debtor.

25. Since the Financial Creditor has filed the Agreements reflecting Financial Contract, the accounts disclosing disbursement of loan amount to the Corporate Debtor and also Financial Statements, even the Financial statement of the Debtor Company reflecting the failure of the company in making repayment to the Assignee itself, therefore, today this corporate Debtor cannot raise an objection that the Financial Creditor has not produced the document as specified under Regulation 8 of the Regulations of Insolvency and Bankruptcy Code of India (Corporate persons) Regulations thereby this Bench has also noticed that there is no merit in the objection raised by the Corporate Debtor.

5th objection of the debtor company: *This petition is not maintainable having regard to the fact that there are company petitions pending against the debtor company before the honourable High Court of Bombay, therefore winding up proceedings cannot be simultaneously initiated.*

26. On perusal of the Insolvency and Bankruptcy Code, especially in Section 7, it is apparent that it has not spoken about pending proceedings will become impediment to initiate proceedings under section 7 of the

Code unlike in proceedings under section 9 of the Code. Moreover, the suit pending before High Court is for an injunction against invocation of pledge of shares, wherein Hon'ble High Court, Bombay categorically denied granting any injunction on the footing that the Corporate Debtor itself agreed for invocation of pledge of shares in the Master Restructuring Agreement as well as the minutes passed on 28th July 2016, and when an appeal was filed over the order passed by the Hon'ble High Court of Bombay, the Division Bench of Hon'ble High Court simply affirmed the order passed by the Hon'ble High Court of Bombay. By reading the judgements passed by the Learned Single Judge and the Division Bench of the Hon'ble High Court of Bombay, two things are evident, (i) that this Company defaulted in making repayment of more than ₹7000crores as on the date of passing those orders, (ii) the invocation of shares was very much in the knowledge of the Debtor company, therefore, the Corporate Debtor today cannot say that since proceedings are pending before some other court this Petition shall be dismissed. Notwithstanding above reasoning, since this Code has overriding effect on every other law in existence till today, the corporate debtor cannot take out an argument since proceedings pending before Honourable High Court, this petition liable to be dismissed. The Corporate Debtor Counsel, in support of this arguments, cited a case in between ***Annapurna Infrastructure Pvt. Ltd. v/s. Soril Infra Resources Ltd.*** *CP No. (IB) -22 (PB)/2017*, to say that this case is hit by Section 10 of CPC, but the case supra being decided on the provisions applicable to Section 9 of the Code, the ratio decided in that case is not applicable to the case under Section 7 of the Code.

27. It is not out of context to mention that under Section 63 of the Code, it has been categorically mentioned that no civil court or authority shall have jurisdiction to entertain any suits or proceedings in respect of any

matter in which NCLT or NCLAT has jurisdiction under this Rule likewise in Section 238, it has been mentioned that the provisions of IB Code shall have effect, notwithstanding anything inconsistent therewith contained with any other law for time being in force or any instrument having effect by virtue of any such law. In view of bar of jurisdiction under Section 63 and overriding effect on all other laws under Section 238, pendency of proceedings in respect to this claim before any other court will not become a bar to entertain this petition, therefore, the objection raised by the Corporate Debtor has no merit.

6th objection of the debtor company: *The applicant herein will not fall within the definition of 'financial creditor', because the transaction enumerated in the company petition is in between the Debtor Company and IDBI, not with either Edelweiss Trust or EARC, apart from this, Edelweiss Asset Reconstruction Company Trust SE-205 is shown as financial creditor, whereas this petition is filed by Edelweiss Asset Reconstruction Company Limited.*

28. If you see the definition of 'Financial Creditor', it is clear that "any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to" here the debt since has been assigned to this applicant through an Assignment Agreement dated 30.3.2016, the assignee will automatically become Financial Creditor as stated in the definition to Financial Creditor. In view of the definition above mentioned, this applicant is a valid Financial Creditor to file this Company Petition; therefore, this Bench has not found any merit in the objection raised by the Corporate Debtor. Since in the Trust Deed itself it has been mentioned that this applicant, as a trustee, can deal in all respects with respect to the trust and its assets, for this reason, we are of the view

that this applicant is competent to file this petition as an applicant; therefore, this objection raised by the corporate debtor is invalid.

7th objection of the debtor company: *This petition is not in the prescribed form, because no record of default is recorded with information utility, no identification number of financial creditor has been produced, computation has not been claimed as per Part IV of Form – 1, no details of record of default have been recorded with any credit information agency, the entries are not shown as stated under Banker's Book Evidence Act, 1981.*

29. As to record of default with information utility, this point has already been answered saying that nonexistence of record of default from information utility will not make this Petition invalid if the Financial Creditor furnishes the record of default as specified under any other two modes specified in the Regulation 8 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. Since the Financial Creditor has furnished the record of default by showing Financial Contract, Financial Statements of the Debtor Company and the accounts of IDBI and the Assignment Agreement assigning the debt to this applicant, this Bench believes that the applicant furnished the material as specified under law. As to non production of identification number of the Financial Creditor, since it is a Trust that is making the claim, there cannot be any possibility to have an identification number like CIN that companies will have. As to computation of the claim defaulted, the applicant has annexed Schedules to the form, since those annexure have been mentioned in the form, those annexure have to be construed as part of the form disclosing computation of the default claim. It is true that credit information agency report had initially not been filed but whereas subsequently the applicant filed CIBIL

report disclosing that this Debtor Company has not repaid loan to IDBI at any point of time therefore, the Debtor Company cannot say that the record lying with Credit Information Agency has not been filed. Since the present applicant is not an NBFC, there is no obligation to be recorded with Credit Information Agency therefore, it is not even an obligation upon this Applicant to place any such record maintained by Credit Information Agency. Inspite of it, this applicant has furnished that information as well. The applicant has filed all the copies of the ledgers maintained by IDBI Bank until this debt has been assigned to the applicant herein, therefore, this debtor company could not have stated that entries shown in the ledgers of IDBI Bank are not in accordance with Bankers Books Evidence Act, 1891.In view of the reasons given above, this Bench has not found any merit in the objection raised by the Corporate Debtor.

8th objection of the debtor company: *That IDBI Bank failed to provide additional facilities in full and in compliance with MRA; therefore, there has been no default on part of the company qua any financial debt.*

30. The Corporate Debtor has raised this objection saying since additional facilities as mentioned in the MRA have not been provided by IDBI Bank, this Petition shall be dismissed, but we have not observed any merit in that objection because it has already been decided that this Corporate Debtor failed to adhere to the MRA and the banks already exited from the CDR package. Therefore, this applicant now cannot make any claim under MRA for additional facilities; accordingly, this Bench has noticed no merit on this objection.

9th objection of the debtor company: *Stamp duty has not been paid over the Assignment Agreement dated March 30, 2016 as per the provisions of Bombay Stamp Act 1958; therefore, this case should not be admitted for it is hit by Indian Stamp Act or Bombay Stamp Act 1958.*

31. As to non-payment of stamp duty over assignment agreement, the applicant has categorically mentioned that the applicant has paid requisite stamp duty to Government of Maharashtra on 30-3-2016; therefore, this debtor company should not have taken this plea, which is not valid in the eye of law.

32. For the sake of information, it is hereby informed that Enforcement of Security in Trust and Recovery of Debts Law and Miscellaneous Provisions (Amendment) Act, 2016 has come into force on September 1,2016 with an amendment to four laws: (i) Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI), (ii) Recovery of Debts due to Banks and Financial Institutions Act, 1993 (RDDBFI), (iii) Indian Stamp Act, 1899 and (iv) Depositories Act, 1996. It also confers more powers to the Reserve Bank of India (RBI) to regulate asset reconstruction companies (ARCs).After having approved Insolvency and Bankruptcy Code, 2016, earlier this year, the Central Government had been putting stress on the bringing up an infrastructure to deal with escalating bad debt at banks. This Bill finally received the assent of the President on August 12, 2016. The Ministry of Finance had issued a notification (S.O. 2831 (E)) dated September 01, 2016, through which the Act came into force on September 01, 2016, therefore, this Bench has either way not found any merit in the allegation that stamp duty has not been paid over the assignment Agreement. It is not the case

stamp duty has not been paid, if at all it is payment of inadequate stamp duty, obligation is upon the corporate debtor to specify how much duty has been paid, how much in fact is to be paid has to come from the debtor, and specific section of law governing the situation, dehors all these details, can a party engage the court to get into an enquiry on a sweeping allegation of the party? We sincerely believe it is a tactic to burden this Tribunal to decide issues without any factual foundation.

33. The Corporate Debtor Counsel relied upon a ratio in these cases, ***(a) Ashok Kumar Sharma & Anr. vs. Chander Shekher & Anr.*** *1993 Supp (2) SCC 611 (Para 19);* ***(b) Nazir Ahmed vs. The King Emperor (page 381-382); (c) Ramchandra Keshav Adke & Ors. vs. Govind Joti Chavare & Ors*** *(1973) 1 SCC 559 (Para 19-25);* ***(d) Shiv Kumar Chadha V/s. Municipal Corporation of Delhi, MANU/SC/0522 1993 (Para 34); (1993) 3 SCC 161 (Para 36),*** to say that issues are to be decided as mandated by law, which this Bench has done to the core, therefore, we don't believe that there is any requirement to deal with the above citations independently.

34. Since this Bench already held that the applicant produced all records evidencing debt and default therein, this Bench has not done anything contrary to the ratio decided in cases ***Smart Timing Steel Ltd. vs. National Steel & Agro Industries Ltd. (CP No. 6/I&BP/NCLT/MAH/2017); Urban Infrastructure Trustee Ltd. V/s. Neelkanth Township and Construction Pvt. Ltd. (CP No. 21/I&BP/NCLT/MB/MAH/2017) (Para 11).***

35. For it has already held that what evidence is sufficient, what is not sufficient as outlined in the statute and Regulations and Rules, this Bench cannot read something into the statute and Regulations, therefore, the ratio in ***Chandradhar Goswami vs. Gauhati Bank Ltd.*** *(1967)1 SCR 898 (Para 6)* is not applicable to the present facts.

36. As to stamp duty, it has already been elaborately dealt with, hence nothing is repugnant to the ratio decided in ***SMS Tea Estates Pvt. Ltd. V/s. Chandmari Tea Company Pvt. Ltd. (2011)14 SCC 66,*** moreover it is the case decided in arbitration proceeding.

37. On perusal of the documents placed and the reasons given above, this Bench being satisfied that the debtor company defaulted in repaying its debt to the financial creditor, this Bench hereby admits this application prohibiting all of the following of item-I, namely: -

I (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 Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002(SARFAESI Act);

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

(II) That supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.

(III) That the provisions of sub-section (1) Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(IV) That the order of moratorium shall have effect from 06.06.2017 till completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, as the case may be.

(V) That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.

(VI) That this Bench hereby appoints, Mr. **Dhinlal Shah**, 9, Urmikunj Society, Nr. St. Xavier's College Corner, Navrangpura, Ahmadabad-380009, Gujarat, India, Registration Number: IBBI/IPA-01/2016-

17/015, as Interim Resolution Professional to carry the functions as mentioned under Insolvency & Bankruptcy Code.

38. Accordingly, **this CP 292/I & BP/NCLT/MAH/2017 is admitted.**

39. The Registry is hereby directed to communicate this order to the Financial Creditor and the Corporate Debtor within seven days from the date order is made available.

Sd/-
V. NALLASENAPATHY
Member (Technical)

Sd/-
B. S.V. PRAKASH KUMAR
Member (Judicial)