NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Ins) No. 62 of 2024 & I.A. No. 195, 197 of 2024

(Arising out of the Order dated 28.11.2023 passed by the National Company Law Tribunal, Mumbai Bench (Court-III) in C.P(IB)-641 (MB)/C-III/2022)

IN THE MATTER OF:

Shankar Kashid
(Suspended Director of Shivani Flexipack Limited)
C-101, Gayatri Darshan, Thakur Complex,
Kandivali East, Mumbai - 400101 **…Appellant**

Versus

1. Intec Capital Limited
CIN: L74899DL1994PLC057410
708, Manjusha Building, 57,
Nehru Place, New Delhi – 110019
E-mail ID: ibc@inteccapital.com **…Respondent No. 1**

2. M/s. Shivani Flexipack Limited
(CIN U74950PN1998PLC013193)
Through Interim Resolution Professional
Having its registered office at
26, Piyu Shantiban Nemi Nath Nagar,
Sangli, Maharashtra-416416. **…Respondent No. 2**

3. Madan B Vaishnawa
Interim Resolution Professional (IBBI/IPA-001/IP-P-02011/2020-2021/13052)
Having his office at
Indian Mercantile Mansion
Extn. 4th Floor, Madame Cama Road,
Opp Regal Cinema, Colaba,
Mumbai- 400005. **…Respondent No. 3**

4. **M/s. Polygraph Printing Technologies Limited**

A company registered under Companies Act, 1956
having its office at 88, Mistry Industrial Complex,
M.I.D.C. Cross Road 'A'
Andheri (East), Mumbai 400093.

…Respondent No. 4

Present

For Appellants: Mr. Akshay Petkar, Mr. Pranav Shah, Mr. Viraj Pawar, Mr. Jaiveer Kant, Advocates.

For Respondents: Mr. P.B.A. Srinivasan, Mr. Manish Kumar, Ms. Aanchal Pundir, Mr. Prashant, Advocates for R-1. Mr. Madan B Vaishnawa, Mr. Manoj Mishra for RP.

J U D G E M E N T

(02.05.2025)

NARESH SALECHA, MEMBER (TECHNICAL)

1. The present appeal has been filed by the Appellant i.e. Shankar Kashid suspended director of M/s Shivani Flexipack Limited under Section 61 of the Insolvency and Bankruptcy Code, 2016 ('**Code**'), challenging the Impugned Order dated 28.11.2023 passed by the National Company Law Tribunal, Mumbai Bench (Court-III) ('**Adjudicating Authority**') in C.P. (IB)-641(MB)/C-III/2022.

2. Intec Capital Limited who is the Financial Creditor and a Non-Banking Financial Company (NBFC) is the Respondent No.1 herein.

M/s Shivani Flexipack Limited who is the Corporate Debtor through its Interim Resolution Professional is the Respondent No.2 herein.

Mr. Madan B Vaishnawa who is the Interim Resolution Professional is the Respondent No.3 herein.

M/s Polygraph Printing Technologies Limited who is the supplier of machinery to the Corporate Debtor is the Respondent No.4 herein.

3. The Appellant challenged the admission of the Corporate Debtor into the Corporate Insolvency Resolution Process ('**CIRP**') under the Code arising after Respondent No.1'sfiling of a Section 7 application (C.P. (IB) 641(MB)/C-III/2022) before the Adjudicating Authority which led to the Impugned Order dated 28.11.2023.

4. It has been brought out that the Corporate Debtor, M/s. Shivani Flexipack Limited (Respondent No.2), was engaged in manufacturing flexible packaging materials. It is also stated that the Respondent No.1 (NBFC), acted as the Financial Creditor by extending a loan facility to Corporate Debtor to finance machinery purchases from Respondent No.4 (a manufacturer of flexographic and rotogravure printing presses).

5. The Appellant submitted that the Respondent No.2 derived 60% of its 2011 turnover from printed pouches for Gutkha/Pan-Masala/Tobacco products, necessitating the procurement of three lamination machines from Respondent No.4 to fulfill sustained demand through invoice and Purchase Order.

6. The Appellant submitted that the Respondent No.2 through the Appellant, secured a loan facility of Rs.1,66,40,134 from Respondent No.1 to finance the lamination machines, formalized via Loan Agreement No. 011/496 dated 18.01.2012 which mandated 60 monthly installments of Rs.3,87,715 each at 7.96% p.a. interest (flat). To secure the loan, Respondent No.2 provided 60 post-dated cheques of Rs.3,87,715 each and deposited collateral of Rs.49,92,040 while Respondent No.1 disbursed Rs.45,00,110 directly to

Respondent No.2 and Rs.1,21,40,024 to the machinery vendor (Polygraph Printing Technologies Ltd.) i.e. Respondent No.4.

7. The Appellant submitted that it was agreed between the Respondent No.2 and the Respondent No.1 that, since the Respondent No.2 had already paid an advance of Rs.45,00,110 towards the machinery to the Respondent No.4, Respondent No.1 would only disburse the remaining Rs.1,21,40,024 directly to Respondent No.4, as detailed in Clause 1.1 of the loan agreement. Further, by letter dated 18.11.2011, it was reiterated that the loan amount would not be disbursed in full at once, but rather in tranches, with the Respondent No.2 retaining the right to instruct the Respondent No.1 regarding the timing and amount of each disbursement to the Respondent No.4. Alternatively, if the Respondent No.1 wished to disburse the entire amount at once, Respondent No.2 requested that the full sum of ₹1,21,40,024 be paid to Respondent No.2 instead of Respondent No.4, as Respondent No.2 intended to make payments to the machinery supplier only as the manufacturing progressed and not prematurely.

8. The appellant submitted that in addition to the loan agreement, following security arrangements were provided as part of the transaction:

i. Collateral money amounting to Rs. 49,92,040/- was deposited as security.

ii. A personal guarantee was furnished by the Appellant to further secure the loan.

iii. A first and exclusive charge, by way of hypothecation, was created over three (3) Lamination Machines 1000MM (Lami Plus 2000 series)—for a total value of Rs. 1,66,40,134.

9. The Appellant submitted that the Respondent No. 1, in violation of the agreed terms and without any written or oral instructions, prematurely disbursed the entire pending loan amount of Rs. 1,21,40,024 to the Respondent No. 4 on 27.12.2012, despite the loan agreement mandating disbursement only upon fulfilment of specific conditions thereby breaching the loan agreement's terms. The Appellant submitted that this premature disbursement has caused material prejudice to the Appellant's rights under the agreement.

10. The Appellant submitted that following the ban on Gutkha/pan Masala products in July 2012, and in light of the fact that the originally ordered machineries had not been delivered, Respondent No. 2 requested changes in the technical specifications and issued a fresh Purchase Order based on new quotation No. PPTL/CONT/DOMT/12-13/049/07-2012 dated 10.07.2012 to the Respondent No. 4 for the supply of one Rotogravure Printing Press - 1000 mm - 8 Color (Orion 1000 series) (hereinafter "said revised machineries"). The Appellant submitted that under the initial purchase order for the supply of machinery, a total of Rs. 1,66,40,134 was disbursed to Respondent No. 4, comprising Rs. 1,21,40,024 disbursed by Respondent No. 1 and Rs. 45,00,110 paid directly by Respondent No. 2 as advance. Since no machinery was delivered under the first purchase order, the advanced amounts were required to be adjusted against the subsequent purchase order for Rs. 1,47,89,385. Given the lower value of the subsequent order, Respondent No. 4 was obligated to refund the excess amount of Rs. 18,50,749 which remains unjustly retained by them.

11. The Appellant submitted that despite Respondent No. 2 not receiving delivery of either the original or revised machineries, it continued honouring repayment cheques deposited as security with Respondent No. 1, resulting in payments totalling Rs. 21,74,517 between December 2011 and November 2012. However, due to Respondent No. 4's persistent failure to fulfil its commitments, Respondent No. 2 was compelled to cease honouring the post-dated cheques issued to Respondent No. 1 under the loan agreement. This refusal was directly necessitated by Respondent No. 4's breach of contractual obligations, which rendered further payments untenable.

12. The Appellant submitted that the Respondent No. 2 had issued 60 post-dated cheques to Respondent No. 1 as security and for repayment purposes; however, due to the non-delivery of machinery and suspected collusion between Respondent No. 1 and Respondent No. 4, Respondent No. 2 stopped payment on these cheques, leading Respondent No. 1 to file four separate complaints under Section 138 of the Negotiable Instruments Act, 1881, before the Metropolitan Magistrate, 33 Court, South East, Saket, New Delhi, around 2016-2017, which are currently pending at various stages.

13. The Appellant submitted that Respondent No. 1 invoked the arbitration clause contained in clause 32 of the loan agreement and, on 04.012013, unilaterally appointed Mr. Bhupesh Narula as the sole arbitrator to adjudicate the disputes arising therefrom; pursuant to these proceedings, the arbitrator passed an award dated 21.02.2018, holding Respondent No. 2 and the guarantors jointly and

severally liable to pay a sum of Rs. 1,42,95,144 along with interest ("said Award").

14. The Appellant submitted that Respondent No. 2 has challenged the said arbitral award before the Hon'ble High Court of Delhi by filing O.M.P. (COMM) 232/2018 along with IA 7282/2018 under Section 34 of the Arbitration and Conciliation Act, 1996; pursuant to this challenge, the Hon'ble High Court has, by order dated 24th May 2018, stayed the enforcement of the award, subject to the condition that Respondent No. 2 deposits 50% of the awarded amount with the registry of the Court. The Appellant submitted that, at the relevant time, Respondent No. 2 was suffering severe financial losses and, consequently, was unable to comply with the direction of the Hon'ble High Court of Delhi to deposit 50% of the awarded amount as a precondition for stay of the arbitral award. Despite this financial constraint, Respondent No. 2 made a further effort to challenge the High Court's order by filing Special Leave Petition (C) No. 24085/2018 before the Hon'ble Supreme Court of India. The Supreme Court, however by its order dated 17.09.2018, dismissed the petition but granted Respondent No. 2 an additional four weeks to make the required deposit. However, even within the extended period, Respondent No. 2 was unable to deposit the amount due to the persistent lack of funds in the company. The Appellant submitted that the Hon'ble High Court of Delhi finally dismissed O.M.P. (COMM) 232/2018 and IA 7282/2018 on 1st April 2019,

15. The Appellant submitted that Respondent No. 1 has filed a petition under Section 7 of the Code being CP No. 641 of 2022, before the Adjudicating Authority against Respondent No. 2. This petition was filed by Respondent No. 1 in furtherance of the arbitration award dated 21st February 2018, which directed payment of Rs. 1,42,95,144 along with 12% simple interest, jointly and severally against the Appellant, Respondent No. 2 and Mr. Makrand Pandit.

16. The Appellant submitted that, on 28.11.2023, the Adjudicating Authority misconstruing the facts of the case, passed an unreasoned and irrational order against the Corporate Debtor vide the Impugned Order dated 28.11.2023, and admitted the application bearing C.P.(IB)-641(MB)/C-III/2022 filed by Respondent No. 1 under Section 7 of the Code. The Appellant submitted that the Adjudicating Authority erred in comprehending the complex transactional dynamics between the parties and the demonstrable collusion between Respondent No. 1 and Respondent No. 4, leading to an Impugned Order that admitted the purported financial debt without valid reasoning or clarification as to its nature, thereby contravening settled legal principles. The Appellant alleged that the Adjudicating Authority disregarded the critical fact that Respondent No. 1 breached the loan agreement and the terms of the letter dated 18th November 2011 by unilaterally disbursing the entire loan amount to Respondent No. 4 without authorization from Respondent No. 2, which vitiates the legitimacy of the claimed debt.

17. The Appellant submitted that the Adjudicating Authority also failed to consider the fact that the revised machinery was not delivered due to the non-deposit of margin money by Respondent No. 2, which was a material precondition under the agreement. The Appellant further submitted that Respondent No. 2 did not owe any amount to Respondent No. 4, as all dues were duly adjusted between the parties. Rather, as part of the settlement terms, a sum of Rs. 18,50,749 would have been receivable from Respondent No. 4, a fact which the Adjudicating Authority erroneously disregarded in its analysis of the dispute.

18. The Appellant submitted that the Adjudicating Authority erroneously relied on the findings of the Sole Arbitrator without scrutinizing the merits of the arbitral award or addressing critical procedural irregularities, including the Arbitrator's reliance on a Proforma Invoice/Quotation as purported proof of claim or asset creation, despite the Appellant's consistent assertion that the underlying transaction had been lawfully terminated and communicated to Respondent No. 1 prior to the arbitration proceedings. Further, the Appellant submits that Respondent No. 1 intentionally excluded Respondent No. 4 from all proceedings, despite disbursing the loan amount of Rs. 1,21,40,024/- directly to Respondent No. 4 in violation of the loan agreement.

19. The Appellant submitted that the Adjudicating Authority erred in passing the Impugned Order and admitting the Corporate Debtor into the CIRP under Section 7 of the Code despite the absence of any claim, debt due, or default in payment by the Corporate Debtor towards the Respondents, thereby failing to

satisfy the essential requirements for admission of a Section 7 application as mandated by law.

20. Concluding his arguments, the Appellant requested this Appellate Tribunal to set aside the Impugned Order and allow his appeal.

21. Per contra, the Respondent No.1, the main contesting Respondent denied all averments made by the Appellants as misleading and baseless.

22. The Respondent No. 1 submitted that the Corporate Debtor (Respondent No. 2) approached the Respondent No.1 to avail a loan facilities for the purchase of machineries. In response, Respondent No. 1 duly sanctioned the loan facility vide sanction letter dated 18th November 2011, amounting to Rs. 1,66,40,134. Pursuant to this sanction, a formal loan agreement dated 18th January 2012 was executed between Respondent No. 1 and the Corporate Debtor i.e Respondent No.2, thereby establishing a legally binding debtor-creditor relationship in accordance with the terms mutually agreed upon by the parties.

23. The Respondent No. 1 submitted that as per the terms and conditions of the loan agreement executed between the parties, the loan amount was repayable in 60 monthly installments of Rs. 3,87,715/-, with the agreed rate of interest being 7.96% per annum. Pursuant to the instructions received from the Corporate Debtor vide communication dated 18.01.2012, the Respondent No. 1 disbursed an amount of Rs. 45,11,110/- to the account of the Corporate Debtor and an amount of Rs. 1,21,40,024/- to the account of Respondent No. 4, in accordance with the directions provided by the Corporate Debtor.

24. The Respondent No. 1 submitted that the Corporate Debtor defaulted in payment of the installments that were due and payable under the Loan Agreement. Consequently, Respondent No. 1 was constrained to invoke arbitration in accordance with clause 32 of the said agreement. Pursuant to the arbitration proceedings, an Arbitral Award was passed in favor of Respondent No. 1 by the Sole Arbitrator on 21.02.2018. The said award attained finality after the challenge under Section 34 of the Arbitration and Conciliation Act, 1996 was dismissed by the Hon'ble High Court of Delhi vide order dated 01.04.2019 in O.M.P. (COMM) 232/2018. The Respondent No. 1 submitted that the Corporate Debtor/Respondent No. 2 challenged the order dated 24.05.2018 of the Hon'ble High Court of Delhi by filing SLP (C) No. 24085 of 2018 before the Hon'ble Supreme Court of India. The Hon'ble Supreme Court dismissed the application filed by Respondent No. 2 (through its Suspended Board) and directed the said Respondent to deposit 50% of the arbitral award amount within four weeks vide its order dated 17.09.2018. However, Respondent No. 2 (through its Suspended Board/Appellant) failed to comply with the Hon'ble Supreme Court's directive.

25. The Respondent No. 1 submitted that there have been cross complaints by the Appellant and the Respondent No.1 on criminal matters for their transactions, which are still pending and but do not vitiate the rights of the Respondent No.1 to file the application under section 7 of the Code.

26. The Respondent No.1 submitted that the Adjudicating Authority, vide its impugned order dated 28.11.2023, admitted the petition filed under Section 7 of

the Code thereby appointing Respondent No. 3 as the Interim Resolution Professional for the Corporate Debtor.

27. The Respondent No. 1 submitted that the Corporate Debtor entered into an agreement with Respondent No. 4 for the supply of machinery, and subsequently, the Corporate Debtor availed a loan from Respondent No. 1 for the purpose of purchasing said machinery. As per the terms outlined in the loan agreement, the loan amount was to be disbursed according to the specific instructions provided by the Corporate Debtor.

28. The Respondent No. 1 submitted that both the sole Arbitrator and the Adjudicating Authority have correctly observed that any contractual dispute between the Corporate Debtor and Respondent No. 4 has no bearing whatsoever on the debt that is due and payable by the Corporate Debtor to Respondent No. 1. Despite these clear and unambiguous findings by the judicial authorities, the Appellant is attempting to mislead this Appellate Tribunal by incorrectly asserting that there exists a contractual dispute between the Corporate Debtor and Respondent No. 1, and further erroneously claiming that such alleged dispute constitutes a bar to the admission of the Application filed under Section 7 of the Code.

29. The Respondent No.1 submitted that, in light of the judgement of the Hon'ble Supreme Court in ***Dena Bank v. C. Shivkumar Reddy*** (Civil Appeal No. 1650 of 2020), ***Kotak Mahindra Bank Limited v. A. Balakrishnan*** [(2022) 9 SCC 186], and ***E.S. Krishnamurthy v. M/s Bharath Hi Tech Builders Pvt.***

Ltd. (Civil Appeal No. 3325 of 2020), it is now well settled that insolvency proceedings under Section 7 of the Code, can be validly initiated on the basis of an arbitral award, provided the award has attained finality and the dues of the financial creditor remain unpaid by the award debtor. The Supreme Court has clarified that when an arbitral award crystallizes a liability that qualifies as a "financial debt" under Section 5(8) of the Code, the amount payable under such an award itself constitutes a financial debt, and any default in payment by the debtor gives the award holder the right to initiate a corporate insolvency resolution process under Section 7 of the Code.

30. The Respondent No. 1 submitted that, in the present case, following the Corporate Debtor's default in repayment of outstanding dues under the loan agreement dated 18.01.2012, the arbitration clause was duly invoked and a Sole Arbitrator was appointed to adjudicate the claim. Upon consideration of the sanction letter, statement of accounts, loan agreement, and other relevant documents, the Sole Arbitrator passed an arbitral award dated 21.02.2018 in favor of Respondent No. 1, directing the Corporate Debtor to pay Rs. 1,42,95,144 along with interest at 12%. The claim thus stood crystallized by the award, which attained finality after the challenge under Section 34 of the Arbitration and Conciliation Act, 1996 was dismissed and no further appeal was preferred within the prescribed period. Despite the award attaining finality, the Corporate Debtor failed to discharge its liability and remained in financial distress, compelling Respondent No. 1 to initiate the Corporate Insolvency Resolution Process by

filing an application under Section 7 of the Code as the unpaid award amount constitutes a crystallized debt and default under the Code.

31. The Respondent No. 1 submitted that, as held by the Hon'ble Supreme Court in *Innoventive Industries Limited vs. ICICI Bank and Anr.* [(2018) 1 SCC 407] and *M Suresh Kumar Reddy vs. Canara Bank and Ors.*, as well as by this Appellate Tribunal in a series of judgments, the sole criterion for admission of an application under Section 7 of the Code, 2016, is the existence of a default in respect of a financial debt. The Adjudicating Authority is required only to ascertain whether a financial debt exists and whether a default has occurred; if so, the application must be admitted unless it is incomplete, or there is a pending disciplinary proceeding against the proposed resolution professional. Thus, an application under Section 7 can only be rejected on the limited grounds that: (i) no default has occurred, (ii) the application is incomplete under Section 7(2), or (iii) there is a disciplinary proceeding pending against the proposed resolution professional.

32. The Respondent No. 1 submitted that the Appellant's contention regarding non-disbursement of the loan amount in accordance with the Loan Agreement is factually incorrect and legally untenable. The Appellant has relied on a purported letter dated 18.11.2011, which is demonstrably false and fabricated, to falsely allege that the Corporate Debtor instructed disbursement to Respondent No. 4 in tranches. However, the factual record unequivocally demonstrates that, vide communication dated 18.01.2012, Respondent No. 2 explicitly instructed

disbursement of a portion of the loan amount to Respondent No. 4 and the balance to the Corporate Debtor. This position was duly considered and adjudicated by the sole Arbitrator, who categorically rejected Respondent No. 2's defense as false, fabricated, and an afterthought, thereby affirming the validity of the disbursement process. The Arbitral Award, which has attained finality, conclusively establishes the Answering Respondent's compliance with the Loan Agreement and the Corporate Debtor's liability for the defaulted financial debt under Section 5(8) of the Code.

33. The Respondent No. 1 submitted that without prejudice to its other contentions, that the Appellant is impermissibly re-agitating issues already conclusively adjudicated by the sole Arbitrator. The Financial Creditor and Corporate Debtor voluntarily submitted their disputes to arbitration, resulting in a binding award in favor of the Financial Creditor, which attained finality upon dismissal of the challenge under Section 34 of the Arbitration and Conciliation Act, 1996. The Respondent No.1 submitted that cannot now seek to reopen these settled matters, and this Appellate Tribunal, consistent with the principles of *res judicata* and the statutory framework of the Arbitration Act, ought not to re-examine or sit in appeal over the Arbitral Award. Permitting such a course would undermine the finality of arbitration and contravene the legislative intent of the Arbitration and Conciliation Act, 1996.

34. The Respondent No. 1 submitted that the allegation that the Corporate Debtor instructed the Respondent No.1 not to disburse the loan amount in full and

instead to disburse it in tranches is entirely false and baseless. The purported letter dated 18.11.2011 relied upon by the Appellant is fabricated, and the Appellant could not give any proof thereof. The Respondent No.1 submitted that this contention was specifically rejected by the sole Arbitrator, who found no evidence to establish that the letter dated 18.11.2011 was ever communicated to the Answering Respondent. On the contrary, it is on record that by communication dated 18.01.2012, the Corporate Debtor expressly instructed the Respondent No.1 to disburse an amount of Rs. 1,21,40,024 to the account of Respondent No. 4, M/s Polygraph Printing Technologies, and the balance loan amount of Rs. 45,00,110 to the account of the Corporate Debtor. Therefore, the plea of the Appellant alleging breach of the loan agreement in the disbursement process is wholly without merit and stands disproved by the documentary evidence and the findings of the Arbitrator.

35. The Respondent No. 1 submitted that the report submitted to the Metropolitan Magistrate, Borivali relied upon by the Appellant clearly establishes that the Corporate Debtor initially placed an order with Respondent No. 4 for three "Lamination Machines" and availed the loan from the Respondent No.1 for this purpose. Subsequently, due to a government-imposed ban on Guthka/Pan Masala, the Corporate Debtor cancelled the original order and entered into a new contract with Respondent No. 4 on 23.08.2013 for a different machine, namely, the "Rotogravure Printing Press 1000 mm08 Color Machine." The Respondent No.1 stated that this change in circumstances was never communicated to the

Respondent No.1. Despite this, the Corporate Debtor did not discharge its debt to the RespondentNo.1 and failed to provide a No Objection Certificate for refund of Rs. 1,21,40,385/- to the Respondent No.1, which prevented completion of the transaction under the second agreement. The Respondent No.1 denied that the amounts advanced by the Respondent No.1 under the first purchase order were to be adjusted against the amounts payable under the second purchase order; such a plea is false, fabricated, and inconsistent with the stand taken by the Corporate Debtor before the Adjudicating Authority. In its reply to the Section 7 petition, the Corporate Debtor itself admitted that, following the government ban, it requested Respondent No. 4 to adjust the loan amount already disbursed by the Respondent No.1, but Respondent No. 4 did not do so and instead raised a fresh purchase order. The Respondent No.1 stated that therefore the Appellant's present plea is thus contrary to its own earlier submissions and is devoid of merit.

36. The Respondent No. 1 submitted that as per the loan agreement dated 18.01.2012, a total sum of Rs. 2,32,62,907 was due and payable by the Corporate Debtor in 60 monthly installments, with the last installment falling due on 01.01.2017. In furtherance of the said agreement, the Corporate Debtor handed over 59 post-dated cheques and paid the first installment via RTGS at the time of execution. However, the Corporate Debtor subsequently defaulted in payment of installments, and the cheques issued began to be dishonoured, compelling the Respondent No.1 to issue a loan recall-cum-arbitration notice on 28.11.2012, demanding payment of the outstanding amount of Rs. 1,78,32,055. The

Appellant's allegation that the Respondent No.1 directed Respondent No. 4, by email dated 27.01.2013, not to deliver the machinery thereby causing losses to the Corporate Debtor and resulting in non-repayment of the loan is false and fabricated. The Respondent No.1 stated that the Corporate Debtor began incurring losses of approximately Rs. 25 lakhs per month from October 2012 due to the government-imposed ban on guthka/pan masala in July 2012, which led to the dishonouring of cheques issued to the Respondent No.1. Under the loan agreement, the Respondent No.1 held a first and exclusive charge over the machinery, and accordingly, instructed Respondent No. 4 not to deliver the machinery only after the Corporate Debtor defaulted on its repayment obligations. Such action was fully in accordance with the terms of the loan agreement and standard lending practices, which allow the lender to protect its security interest in the event of default.

37. Concluding his pleadings, the Respondent No.1 requested this Appellate Tribunal to dismiss the appeal with cost.

38. The Respondent No. 4 submitted that it, M/s Polygraph Printing Technologies Ltd., is a leading manufacturer based in Mumbai, India, specializing in the production of Flexographic Printing Machines, Rotogravure Printing Machines, and Lamination Machines.

39. The Respondent No. 4 submitted that in the instant matter, Respondent No. 2 (M/s Shivani Flexipack Ltd.) placed its first purchase order for three lamination machines dated 27.06.2011 for an amount of Rs. 1,66,40,134. In furtherance of

the loan agreement between Respondent No. 1 (M/s Intec Capital Ltd.) and Respondent No. 2, Respondent No. 4 received a payment of Rs. 1,21,40,024/- on 31.01.2012 through Respondent No. 1, as per the disbursement instructions provided by Respondent No. 2.

40. The Respondent No. 4 submitted that, following the imposition of the gutka ban, Respondent No. 2 modified its original purchase order and issued a revised order dated 23.08.2012 for one Rotogravure machine for an amount of Rs. 1,47,89,385. The Respondent No. 4 submitted that the Appellant failed to complete payments for the delivery of the Rotogravure machine. The Respondent No.4 denied the allegation of the Appellant that the machine was not delivered despite timely payments is factually incorrect and unsupported by the record.

41. The Respondent No.4 submitted that the Appellant's claim regarding an alleged advance payment of Rs.45,00,110 to Respondent No. 4/Manufacturer is wholly unsubstantiated. No such payment was ever made to Respondent No. 4, and the Appellant has failed to produce any documentary evidence or proof of such payment on record. Furthermore, it is clearly stipulated in the purchase order dated 23.08.2012 that the machinery would be delivered only upon payment of 50% of the total amount as advance, with the remaining 50% payable prior to delivery. The terms of the purchase order thus indicate that delivery was conditional upon advance payment, which, as stated, was never received by Respondent No. 4.

42. The Respondent No. 4 submitted that the Appellant has, in paragraph (xii) under point 7 of the appeal, expressly admitted that it was communicated in March 2013 that the machine was ready for delivery. This admission clearly establishes that the manufacturing process had reached completion and that Respondent No. 4 was prepared to deliver the machinery at that stage. However, the Corporate Debtor could not make necessary payments.

43. The Respondent No. 4 submitted that the Adjudicating Authority in its impugned order dated 28.11.2023 has explicitly observed that the disputes raised by the Appellant against Respondent No. 4 fall outside the scope of these proceedings and must be adjudicated through appropriate legal remedies elsewhere. The Respondent No. 4 asserts that the impugned order correctly identifies the jurisdictional limitations of the Adjudicating Authority in addressing the Appellant's claims, which pertain to contractual or civil disputes unrelated to the insolvency proceedings under the Code. The referred paraph reproduced herein bellow:

> *"21. The dispute, between the Corporate Debtor and the Manufacturer to whom the loan amount was disbursed on the instructions of the Corporate Debtor, cannot be a ground to scuttle the proceedings under section 7 of the Code as long as debt and default is proved. If the Respondent has not received the machines for which payment was made to the Machine Manufacturer, then the remedy against the Manufacturer lies elsewhere and not before the Adjudicating Authority under the Insolvency and Bankruptcy Code, 2016.*

Under the Code, the Adjudicating Authority has to merely examine whether there is 'debt' and 'default'."

44. The Respondent No.4 reiterated that the machines remain in its possession in a dismantled state and asserts that their dispatch could have been made upon receipt of the outstanding amount of Rs.45,08,111 from the Corporate Debtor. The Respondent No.4 stated that non-delivery of machinery is attributed solely to the non-payment of dues, which has hindered the reassembly and logistical arrangements necessary for delivery.

45. Concluding his pleadings, the Respondent No.4 also requested this Appellate Tribunal to dismiss the present appeal with cost.

Findings

46. We note that in the present case, the Corporate Debtor has defaulted in repayment of the loan and the application under section 7 of the Code was filed by the Respondent No.1 duly accompanied by a record of default as recorded with the information utility, in compliance with the mandatory requirements under Section 7 of the Code. The Corporate Debtor has not disputed the sanction and disbursal of the loan, execution of the loan agreement, related transactional documents, or the registration of charge with the Registrar of Companies. We also take into consideration that the arbitral award dated 21.02.2018 which crystallized the outstanding amount payable by the Corporate Debtor of Rs.1,42,95,144 along with interest @12% which constitutes a financial debt under Section 5(8) of the

Code, and the non-payment of this award amount amounts to a default. The Adjudicating Authority has correctly applied the provisions of Section 7 of the Code as well as the settled legal position laid down in ***Innoventive Industries Limited vs ICICI Bank and Anr. (2018) 1 SCC 407*** to admit the Corporate Debtor into the CIRP.

47. Suffice to note that the Corporate Debtor approached the Financial Creditor for loan facility for purchase of packing machineries for which loan of Rs. 1,66,40,134 was sanctioned vide sanction letter dated 18.11.2021. This was repayable in 60 monthly instalments along with interest.

48. We note that the Appellant has raised several issues regarding the conduct of Respondent No.1/ Financial Creditor as well as supplier of the machine i.e., Respondent No. 4 herein and several complaints and counter complaints have been lodged by the respective parties which are which are still pending. We further note that contractual issues have also been raised. However, none of these are directly concerned with the debt and default which is a subject matter for the present appeal.

49. Thus, the issue before us in the appeal is limited that whether there has been debt of more than Rs. 1 Crore to meet the threshold as stipulated under Section 7 of the Code and whether there has been default by the Corporate Debtor. We will also look into whether the Arbitral Tribunal Award dated 21.02.2018 could tantamount to financial debt in terms of Code.

50. From the facts noted from the pleading, of all parties noted by us in all discussions earlier ,we observe that the money indeed was disbursed by the Financial Creditor to the Corporate Debtor as well as to supplier of the machinery i.e., Respondent No. 4 based on the instruction of the Corporate Debtor. It is also fact that the total money disbursed was more than Rs. 1 Crore. We observe that the Corporate Debtor vide letter dated 18.01.2012 advised the Financial Creditor to disbursed an amount of Rs. 45,11,110/- to the account of the Corporate Debtor and Rs. 1,12,40,024/- in favour of Respondent No. 4. The necessary documentations have been annexed in the appeal. Thus, the money was paid as a loan by the Respondent No.1/Financial Creditor to the Corporate Debtor /Respondent No. 2 and therefore it is clearly established that the said amount meet the threshold criteria as stipulated under Section 7 of the Code.

51. Now, we have to see whether there has been default or not. In this connection, we note that the Respondent No.1/Financial Creditor issued a loan recall-cum-arbitration notice dated 28.11.2012 calling upon the Corporate Debtor to pay outstanding amount of Rs. 1,78,32,055/-. It has also been brought out that the Financial Creditor has invoked arbitration notice in terms of the Clause 32 of the Loan Agreement dated 18.01.2012 executed between the Corporate Debtor and the Financial Creditor. The Arbitration Award was passed by the sole Arbitrator in favour of the Respondent No.1/Financial Creditor by the sole arbitrator on 21.02.2018 and it has attained finality vide order dated 01.04.2019 passed by the Hon'ble Delhi High Court in O.M.P. (COMM) No. 232/2018. It is

significant to note that the issue has travelled up to Hon'ble Supreme Court of India as the Corporate Debtor had filed SLP No. (C) No. 24085/2018 against the order of the Hon'ble Delhi High Court dated 24.05.2018, however, the Hon'ble Supreme Court of India vide order dated 17.09.2018 dismissed the application filed by the Corporate Debtor by granting the liberty of four weeks to deposit the 50% award amount which was not complied by the Corporate Debtor.

52. We have noted that in fact the Appellant on his own changed the specifications of the machinery and has given the order to the Respondent No.4 for different machinery without consent of the Respondent No.1/Financial Creditor. It has also been brought out that the Corporate Debtor refused to take delivery of the machines from Respondent No.1 on some pretext since the ban on the guthka came into force in Maharashtra and did not make payment to Respondent No.4. We observe that the issues regarding ban of gutka in Maharashtra or not supply of machinery or not acceptance of the machinery by the Corporate Debtor from Respondent No. 4, do not really impact the transaction between the Financial Creditor and the Corporate Debtor. It need to be appreciated that the proper and legally enforceable loan agreement was executed between the Financial Creditor and the Corporate Debtor. It is reiterated that the money was transferred by the Financial Creditor in the accounts of the Corporate Debtor and in the accounts of the machine supplier i.e. Respondent No. 4 at the instructions of the Corporate Debtor. Hence, the arguments of the Appellant that

there has been connivance between the Respondent No. 1 and Respondent No. 4 and therefore, alleged financial debt cannot be legally enforced, is not tenable.

53. It is also important to note that even the sole arbitrator appointed in terms of Clause 32 of the Loan Agreement dated 18.01.2012 has also held clear debt and default thereafter, gave the Arbitral Award dated 21.02.2018 tenable.

54. We have made careful perusal of the Impugned Order and we are of the considered opinion that the Adjudicating Authority has gone through details of the case fully including the Arbitral Award and the judgement of the Hon'ble Delhi High Court as well as the Hon'ble Supreme Court of India. The Impugned Order also clearly establish the facts regarding debt and default which are basic ingredients to admit application under Section 7 of the Code.

55. We do not find any error in the Impugned Order. The Appeal devoid of any merit stand rejected. No cost. I.A., if any, are closed.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

[Mr. Indevar Pandey]
Member (Technical)

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