

IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD
DIVISION BENCH
COURT - 1

ITEM No. 304
TP/9(AHM)2022 in
CP 174 of 2012

Order under Section 7 of IBC, 2016

In The Matter Of:

Ashvinkumar Chandulal Shah
V/s
Desh Cam Technological
Resources Pvt Ltd

.....Applicant

.....Respondent

Order delivered on: 04/06/2024

Coram:

Mr. Shammi Khan, Hon'ble Member(J)
Mr. Sameer Kakar, Hon'ble Member(T)

PRESENT:

For the Applicant :
For the Respondent :

ORDER

The case is fixed for the pronouncement of the order. The order is pronounced in the open court, vide separate sheet.

-SD-

SAMEER KAKAR
MEMBER (TECHNICAL)

-SD-

SHAMMI KHAN
MEMBER (JUDICIAL)

**BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
COURT-I**

T.P. No. 09/7/NCLT/AHM/2022

IN

C.P. No. 174 of 2012

In the matter of :

[An application under Section 433 of the Companies Act, 1956 read with Rule 5 of the Companies [Transfer of pending proceedings] Second Amendment Rules, 2017 and read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with the Insolvency and Bankruptcy Code, 2016)

In the matter between:

Legal heirs of deceased Mr. Ashvinkumar Chandulal Shah

- 1. Sulochnaben wd/o Ashvinkumar Shah**
- 2. Minalben d/o Ashvinkumar Shah;**
- 3. Hetalben d/o Ashvinkumar Shah;**
- 4. Kinjalben d/o Ashvinkumar Shah;**
- 5. Jigneshbhai s/o Ashvinkumar Shah,**

Having registered office at:

Bhagwati Oil Mill, Village: Vejalpur,
Taluka: Godhra, Dist. Panchmahal. Gujarat.

....Applicants/Financial Creditor

VERSUS

**M/s. Desh Cam Technological Resources
Private Limited**

Having registered address at:
108, Shreeji Avenue, Jetalpur Road,
Alkapuri, Vadodara – 390 005,
Gujarat, India.

....Respondent/Corporate Debtor

Order Pronounced On: 04.06.2024

CORAM:

SH. SHAMMI KHAN, HON'BLE MEMBER (JUDICIAL)
SH. SAMEER KAKAR, HON'BLE MEMBER (TECHNICAL)

APPEARANCE:

For the Applicant : Mr. Jaimin Dave, Advocate a/w.
: Ms. Hirva Dave, Advocate
For the Respondent : Mr. Hashmukh Parikh, Sr. Advocate
: a/w. Mr. Nandish Shah, Advodcate

ORDER

1. Originally a Company Petition being C.P. No. 174 of 2012 was filed before the Hon'ble High Court of Gujarat by the then Applicant - Mr. Ashvinkumar Chandulal Shah (now deceased) against the Respondent - M/s. Desh Cam Technological Resources Private Limited under Section 433 & 434 of the Companies Act, 1956 seeking winding up of the the Corporate Debtor. Subsequently, vide order dated 26.11.2021 (which is annexed at **Annexure-P**) case was transferred from Hon'ble High Court to this Tribunal in view of change of jurisdiction in pursuance of establishment of National company law Tribunal. The case was re-numbered as T.P. No. 09/AHM/2022.

- 2.** Accordingly, this Application was filed on 22.07.2022 by the Applicants herein i.e. legal heirs of the Original Applicant and Deceased Late Ashvinkumar Chandulal Shah (hereinafter referred to as **“Financial Creditors”**) against the Respondent - M/s. Desh Cam Technological Resources Private Limited (hereinafter referred to as **“Corporate Debtor”**) under Section 433 of the Companies Act, 1956 read with rule 5 of the Companies (Transfer of pending proceedings) Second Amendment Rules, 2017 and read with the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as **“IBC, 2016”**) for initiation of Corporate Insolvency Resolution Process (**CIRP**) against the Respondent, to appoint Interim Resolution Professional (hereinafter referred to as **“IRP”**) and declare the moratorium for having defaulted payment of its outstanding dues **Rs.2,10,75,147/-**. The date of default is stated to be 24.05.2012 and 12.06.2012.
- 3.** On perusal of Part-I of the Form-1 reveals that this transfer application has been filed by the Applicants herein i.e. legal

heirs of the Original Applicant and Deceased Mr. Ashvinkumar Chandulal Shah:-

1. Sulochnaben Dd/o Ashvinkumar Shah,
2. Minalben d/o Ashvinkumar Shah;
3. Hetalben D/o Ashvinkumar Shah;
4. Kinjalben D/o Ashvinkumar Shah;
5. Jigneshbhai S/o Ashvinkumar Shah.

4. On perusal of Part-II of the Form-1 reveals that the Respondent is one M/s Desh Cam Technological Resources Private Limited having CIN No. U31909GJ2003PTC042084. The Company involved in the business of manufacturing of electrical equipments. The Respondent was incorporated on 28.02.2003 and having registered office at 108, Shreeji Avenue, Jetalpur Road, Alkapuri, Vadodara, Gujarat–Pin 390 005.
5. Part-III of the Form-1 reveals that the Applicants have proposed the name of the Interim Resolution Professional (**'IRP'**) **Mr. Parag Sheth**, having registration **No. IBBI/IPA-002/IP-N00142/2017-18/10381**. He has filed his written communication annexed with the Application as **Annexure-D** as per the requirement of Rule 9(l) of the Insolvency and

Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

- 6.** Part-IV of the Form-1 reveals that total dues as claimed by the Applicants is Rs.2,10,75,147/- consisting of Rs.72,79,985/- being the principle and amount of Rs.1,37,95,162/- as interest @ 18.00% per annum up-to 13.06.2012.
- 7.** The case of the Applicants is that, in the year 2004-05, one of the Directors of the Respondent herein had approached Mr. Ashvinkumar Chandulal Shah (hereinafter referred to as the deceased) and had sought financial assistance in establishing factory premises and had assured a handsome return in terms of share capital in the Respondent i.e., M/s. Desh Cam Technological Resources Private Limited. The deceased and the Director / Authorized Person of the Respondent had very strong relations and therefore, the deceased had agreed to disburse financial assistance as sought for by the Respondent.

8. The different amounts were disbursed on different dates, which are mentioned below in the tabular form:

| Sr.No. | Date | Amount (in Rs.) |
|---------------|-------------|------------------------|
| 1 | 15.04.2004 | 7,75,000.00 |
| 2 | 15.04.2004 | 1,04,195.00 |
| 3 | 15.04.2004 | 35,00,000.00 |
| 4 | 15.04.2004 | 22,94,000.00 |
| 5 | 16.04.2004 | 1,04,400.00 |
| 6 | 16.04.2004 | 2,00,000.00 |
| 7 | 21.04.2004 | 2,09,000.00 |
| 8 | 05.10.2004 | 12,50,000.00 |
| 9 | 06.10.2004 | 4,00,000.00 |
| 10 | 23.10.2004 | 3,30,000.00 |
| 11 | 31.12.2004 | 3,60,323.00 |
| 12 | 14.04.2005 | 1,26,000.00 |
| 13 | 29.04.2005 | 10,00,000.00 |

9. It is stated that the Respondent herein had duly acknowledged the receipt of the aforementioned amounts from time to time from the deceased and the same is annexed as **Annexure-E Colly** at page-55 to 66.
10. From the above mentioned amounts so disbursed by the deceased, an amount Rs.72,79,985/- admittedly remained outstanding and payable by the respondent, which is duly confirmed by the Respondent herein on 12.06.2012 by way of a balance confirmation letter. The copy of the balance

confirmation letter is annexed thereto as **Annexure-F** at page-67 - 68.

- 11.** It is also agreed between the parties that interest shall be charged at the rate of 18.00% on the amount lying with the Respondent herein. A copy of the consensus between the parties with respect to the interest to be levied is annexed as **Annexure-G** at page-69 - 70.
- 12.** In addition to that, the Respondent had also issued a certificate dated 24.05.2012 stating that the outstanding balance of the deceased as an Unsecured Depositor in the Respondent Company is of Rs.30,00,000/- inclusive cheque of Rs.10,00,000/- deposited in the State Bank of India and the remaining amount is out of the sum paid by the deceased to *Larsen & Toubro Limited* on behalf of the Respondent. The copy of the same annexed as **Annexure-H** at page-71 - 72.
- 13.** Being aggrieved by the said inaction on the part of the Respondent, on 13.06.2012, the Deceased was constrained to issue a statutory notice through an Advocate under Sections 433 and 434 of the Companies Act, 1956 seeking

repayment of the admitted outstanding principal amount of Rs.72,79,985/- along with an interest amount of Rs.1,37,95,192/- aggregating to Rs.2,10,75,147/-. The said notice was served upon the Respondent herein, and the copy of the same is annexed as **Annexure-I** at page-73 - 75.

14. In response to the said statutory notice dated 13.06.2012, vide a letter dated 05.07.2012. The copy of the same is annexed as **Annexure-J** at page-76 to 79. The Respondent had given an evasive reply, which is reproduced as under:

- a) It is stated by the respondent that, the notices are illegal.
- b) It is also stated that in notice para Nos. 1 to 9 are falsely stated and their client does not accept that points are true.
- c) Further, it is mentioned that the Respondent client has not received any financial assistance as stated in the Applicant notice. But considering the good social relations between you and our client, any liability arising from you in 2004-05 or Rs.45,00,000/- has been credited to you in the meantime.

- d) The Applicants have misrepresented and obtained the signatures of the respondent and his son on blank paper and after on that blank paper of 2004 and 2005, he wrote some text on it on top of that, after the year 2004 and 2005, he has written some text and shown such a huge amount in his notice and submitted a false demand.
- e) Apart from that, the applicants are also receiving the cheques of 2004-2005 from the respondent company for the year the account was closed. Any transaction which is not given on debit and any transaction which took place during the year 2004-2005 which was paid at that time and even those cheques were not returned by the Applicants and the account was closed without our public notice. The Applicants have not returned those cheques to the respondent even though they were issued on time.

15. Since, the Respondent did not repay the admitted outstanding amount to the deceased despite the issuance of the statutory notice dated 13.06.2012, the deceased was

constrained to file a Company Petition No. 174 of 2012 before the Hon'ble High Court of Gujarat under Sections 433,434 and 439 of the Companies Act, 1956 seeking winding up of the Respondent.

- 16.** In the said Company Petition No. 174 of 2012, the deceased had categorically stated that the principal amount of Rs. 72,79,985/- along with an interest amount of Rs. 1,37,95,162/- and aggregating to Rs.2,10,75,147/- was outstanding and payable as on 13.06.2012.
- 17.** Thereafter, the Hon'ble Gujarat High Court in Company Petition No. 174 of 2012 was duly served the notice upon the Respondent, and Respondent herein had appeared before the Hon'ble High Court of Gujarat and filed its reply. The Applicants filed Rejoinder to which the Respondent also filed Sur-Rejoinder. The Copies of the same are annexed as **Annexure-K Colly** at page-80 to 114.
- 18.** It is stated that, the Hon'ble High Court of Gujarat was pleased to admit the said Company Petition No. 174 of 2012 vide an order dated 06.07.2015. However, the Hon'ble High

Court of Gujarat deferred the advertisement with regard to admission of the petition by four weeks, so as to give a chance to the Respondent herein to settle the matter, and the said Company Petition was kept on 17.08.2015 for final hearing. A copy of the said order passed by the Hon'ble High Court of Gujarat is annexed as **Annexure-L** at page-115 to 124.

- 19.** In the meantime, the Respondent had filed a Civil Application (OJ) No. 636 of 2015 in Company Petition No. 174 of 2012 for review/ recalling of the admission order dated 06.07.2015 passed by the Hon'ble High Court of Gujarat.
- 20.** Thereafter, the deceased had filed his reply in the said Civil Application (OJ) No. 636 of 2015 in Company Petition No. 174 of 2012 and had vehemently opposed the said Civil Application on the ground of misuse of the process of law.
- 21.** However, the said Civil Application (OJ) No. 636 of 2015 in Company Petition No. 174 of 2012 was allowed vide an order dated 11.04.2016 and the admission order dated

06.07.2015 was recalled by the Hon'ble High Court of Gujarat and the Company Petition No. 174 of 2012 was kept for hearing at the admission stage again. The copy of the said order is annexed at **Annexure-M** at page-125 to 129.

- 22.** In view of the decision of the Hon'ble High Court of Gujarat with respect to the question of limitation in the present case, reliance is placed on the same. The order dated 06.07.2015, is reproduced as under:

"8. ... Another contention of learned Advocate Mr. Buch is that even assuming without admitting that the Applicant is claiming the amount from the respondent, even then the said claim is time barred debt because the transaction had taken place in the year 2004-2005 and notice was issued in the year 2012. With regard to the said submission, it is clear from the record that before issuance of the statutory notice, the respondent acknowledged its debt by issuing certificate dated 24.5.2012 and by accepting the confirmation of account statement. 9. Thus, in my view, from the facts and circumstances of the present case, the defence put forward by the respondent-company cannot be termed as bonafide and reasonable dispute with regard to the outstanding amount which is to be paid to the petitioner."

- 23.** Subsequently, the said order allowing the Civil Application (OJ) No. 636 of 2015 in Company Petition in Company Petition No. 174 of 2012 was challenged by the deceased by

way of an O.J. Appeal No. 16 of 2016, which came to be dismissed by the Hon'ble High Court of Gujarat vide an order dated 13.11.2017 and the Company Petition No. 174 of 2012 since then was kept at the admission stage for hearing and was getting adjourned from time to time. The copy of the said order dated 13.11.2017 is annexed at **Annexure-N** at page-130 to 137.

24. However, during the pendency of the Company Petition No. 174 of 2012, Mr. Ashvinkumar Chandulal Shah i.e, the Original Applicant in Company Petition No. 174 of 2012 died and therefore, his legal heirs came to be added as parties. The copy of the Death Certificate with Translations are annexed at **Annexure-O** at page-138 to 140.

25. During the pendency of the Company Petition No. 174 of 2012, with effect from 01.06.2016, this Adjudicating Authority was constituted in accordance with Section 408 of the Companies Act, 2013. In exercise of power conferred under Section 434(1) and (2) of the Companies Act, 2013, legislature framed the Companies (*Transfer of Pending Proceedings*) Rules, 2016. On 29.06.2017, these rules were

further amended vide the Companies (*Transfer of Pending Proceedings*) Second Amendment Rules, 2017.

- 26.** According to the said rules, all petitions relating to winding up of a company under clause (e) of Section 433 of the Companies Act, 1956 on the ground of inability to pay its debts pending before a High Court, and where the petition has not been served on the Respondent under Rule 26 of the Companies (Court) Rules, 1959 were required to be transferred to the Bench of the Tribunal established under Sub-Section (4) of Section 419 of the Companies Act, 2013 exercising territorial jurisdiction to be dealt with in accordance with Part II of the Code.
- 27.** Vide an order dated 26.11.2021, the Hon'ble High Court of Gujarat was pleased to transfer Company Petition No. 174 of 2012 to this Tribunal. A copy of the said order is annexed as **Annexure-P** at page-141 to 144.
- 28.** It is stated that, the present Application i.e. TP/9(AHM) 2022 was filed in this Tribunal on 22.07.2022. Vide an order dated 26.09.2022, this Adjudicating Authority issued notice

to the Respondent. Vide an order dated this Adjudicating Authority directed the Respondent to file reply along with the Board Resolution.

29. The Applicants have relied upon the following documents which are as under:-

| Sr. No. | Particulars of Documents | Annexure No. | Page no. |
|----------------|---|---------------------|-----------------|
| 1. | The copies of the acknowledgement receipts issued by the Respondent at the time of disbursement of financial assistance by the deceased dated 15.04.2004 to 31.12.2004. | E Colly | 55- 66 |
| 2. | A copy of the balance confirmation letter issued and confirmed by the Respondent on 12.06.2012 | F | 67-68 |
| 3. | A copy of the consensus between the parties with respect to the interest to be levied | G | 69-70 |
| 4. | A copy of the certificate dated 24.05.2012 issued by the Respondent | H | 71-72 |
| 5. | A copy of the Statutory Notice dated 13.06.2012 issued by the deceased Applicant. | I | 73-75 |
| 6. | A copy of the reply dated 05.07.2012 issued by the Respondent to the Statutory Notice | J | 76-79 |
| 7. | A copy of all the pleadings of the Company Petition No. 174 of 2012 before the Hon'ble High Court of Gujarat. | K Colly | 80-114 |
| 8. | A copy of the order dated 06.07.2015 passed by the Hon'ble High Court of Gujarat | L | 115-124 |
| 9. | A copy of the order dated 11.04.2016 passed by the Hon'ble High Court of Gujarat. | M | 125-129 |
| 10. | A copy of the order dated | N | 130-137 |

| | | | |
|-----|--|--|---------|
| | 13.11.2017 passed by the Hon'ble High Court of Gujarat | | |
| 11. | A copy of the Death Certificate of Mr. Ashvinkumar Chandulal Shah | O | 138-140 |
| 12. | A copy of the order dated 26.11.2021 passed by the Hon'ble High Court of Gujarat | P | 141-144 |
| 13. | A copy of the working computation of debt along with interest | Q | 145 |
| 14. | Police Complaint dated 13.03.2013 filed before the Kalol Police Station in Panchmahal by the deceased Applicant. | R1 of the Purshis dt.16.12.2023 | 3-5 |
| 15. | Statement of deceased Applicant reordered on 20.03.2013 before the Police Authorities in Police Complaint. | R2 of the Purshis dt.16.12.2023 | 6-12 |

30. A reply was filed by the Respondent on 10.01.2023, vide inward diary No. D-6414. The contentions in the reply are as under:-

I. It is submitted by the Respondent that the Applicants have preferred the present Application to pressurize the Respondent herein in giving away an amount which is not a debt admissible in the eyes of law and being allegedly supported by the dispute evidence. It is pertinent to note that the Applicants herein have placed reliance on the documents which are disputed and obtained fraudulently from the Respondent.

II. It is also submitted that the Applicants have suppressed the material facts that the Deceased and the father of Mr. Amit Deshmukh, one of the Directors of the Respondent, were old friends and use to support each other in their endeavours and the Respondent herein had never assured the Applicants of any returns of whatsoever manner. Moreover, if there was loan disbursed by the Applicants to the Respondent and the Applicants were entitled to any interest, the Applicants have failed to place on record any loan amount documents to substantiate their claim.

III. It is submitted Applicants have placed reliance on a piece of paper allegedly signed by the Respondent wherein the Respondent has agreed to pay 18.00% interest on the "Investment". It is further pertinent to note that the alleged acknowledgement so produced by the Applicants shows that the alleged amount taken by the Respondent was an investment but have grossly failed to provide any documentary evidence

apart from a piece of paper, which does not have legal binding and has been obtained fraudulently from the Respondent.

IV. It is submitted that alleged debt has arisen from the Transactions dated 15.04.2004 to 29.04.2005, However, the Applicants have not produced on record any licence issued by the concerned authority in favour of Applicants under Bombay Money Lending Act, 1946.

V. In view of the above, it is clear that there is no default on the part of the Respondent. The Applicants have not come before the Hon'ble Tribunal with clean hands. The Applicant have suppressed material information which if produced would clearly show the malafide of the Applicants. Alleged credit transactions are in violation of provisions of Companies Act, 1956 and Bombay Money Lending Act, 1946. The alleged debt is time barred.

31. Vide an order dated 24.01.2023, Learned Counsel for the Applicant seeks some time to file a rejoinder, and the same was filed on 05.01.2023, vide inward diary No. D-1980. The contentions of the rejoinder stated as under:-

- I. The Applicant stated in the rejoinder that the averments made therein are mere allegations and the Respondent has miserably failed to indicate as to what is suppressed by the Applicant and it is vehemently denied that the present Application has been preferred without disclosing material information.

- II. It is stated that the transaction under consideration duly includes the components of a loan, in so far as there is no denial whatsoever by the Respondent – Corporate Debtor that it had borrowed monies from the Applicant. Under the circumstances, the Respondent had absolutely no case to deny the fact that the Applicant had advanced disbursed the money to the Respondent solely as a loan and against payment of interest.

- III. It is further stated that the Respondent has received monies from time to time from the Applicant and the receipts appended at Page Nos. 55 to 66 **Annexure E-Colly** of the application.
- IV. Further, on 12.06.2012, a balance confirmation letter is issued (refer at Page Nos. 68 of the application [**Annexure F**], wherein the outstanding principal liability to the tune of Rs.72,79,985/- is duly confirmed by the Respondent against the Applicant as on 31.03.2012.
- V. Thus, having carried forward and acknowledged the debt in the accounts prepared year after year, now it is not open for the Respondent to contend that the amount disbursed by the Applicant is not a financial debt as well as the same is not due and payable.
- VI. The Applicant had made a written demand to repay the loan on 13.06.2012, by way of a statutory notice

sent to the Respondent. The said statutory notice dated 13.06.2012 is duly produced at **Annexure-I** of the application.

VII. The amount disbursed by the Applicant to the Respondent becomes due and repayable on and from 13.06.2012. The Respondent has absolutely no case to allege that the debt of the Applicant is barred by the law of limitation. The debt of the Applicant is not barred by the law of limitation.

VIII. Even otherwise, the **Hon'ble Supreme Court of India**, in the case of **Orator Marketing Pvt. Ltd. Vs. Samtex Desinz Pvt. Ltd.** reported in 2021 SCC OnLine SC 513, has held that disbursement of loan without having any assured rate of interest in return, will also be covered within the definition of a "financial debt" under Section 5(8) of the Insolvency and Bankruptcy Code, 2016.

IX. The Applicants submitted that the averments made qua violation of the provisions of Bombay Money-Lenders Act, 1946 are fallacious and misleading, in as much as the Bombay Money- Lenders Act, 1946 has been repealed. Moreover, by virtue of Section 238 of the Insolvency and Bankruptcy Code, 2016, the provisions of the Insolvency and Bankruptcy Code, 2016 are given an overriding effect over any other law that is inconsistent with the provisions of the Insolvency and Bankruptcy Code, 2016.

X. It is of great relevance to submit that considering the provisions of the Insolvency and Bankruptcy Code, 2016, it has been duly manifested hereinabove that the debt due to the Applicant is a "financial debt" within the meaning of Section 5(8)(a) of the Insolvency and Bankruptcy Code, 2016 and the Applicant herein is a "financial creditor" within the meaning of Section 5(7) of the Insolvency and Bankruptcy Code, 2016. Further, the debt has admittedly not been repaid by the Respondent. Hence,

there is even an admitted default within the meaning of Section 3(12) of the Insolvency and Bankruptcy Code, 2016. Thus, the present is a fit case to admit under the provisions of the Insolvency and Bankruptcy Code, 2016.

XI. Without prejudice to the above and even otherwise, the provisions of Section 10 of the Bombay Money-Lenders Act, 1946 are not applicable to the present case since those provisions are made applicable only to a suit to which the said Act applies and the term "suit to which this Act applies" is defined under Section 2(17) of the Bombay Money-Lenders Act, 1946 as follows: -

"(17) "suit to which this Act applies" means any suit or proceeding-

(a) for the recovery of a loan made after the date on which this Act comes into force;

(b) for the enforcement of any security taken or any agreement, made after the date on which this Act comes into force in respect of any loan made either before or after the said date; or

(c) for the redemption of any security given after the date on which this Act comes into force in respect of any loan made either before or after the said date;"

XII. That the instant proceedings do not fall within the meaning and definition provided under Section 2(17) of the Bombay Money-Lenders Act, 1946 and therefore, contentions of the Respondent fall flat.

XIII. Under the circumstances, the Applicant is not required to hold any license issued by the concerned authority under the provisions of the Bombay Money- Lenders Act, 1946, as alleged by the Respondent, for maintaining the instant proceedings. Further, it is thoroughly denied that the alleged transactions are an attempt to recover the amount thereunder, therefore would be in violation of the provisions of the Bombay Money -Lenders Act, 1946 and it is also denied that the present proceedings are required to be dismissed under Section 10 of the Bombay Money-Lenders Act, 1946. It is by now well-established that the proceedings under the Insolvency and Bankruptcy Code, 2016 are not for recovery of the debt, rather the proceedings are for resolution of the debt. Thus, it is not open for the

Respondent to impose the provisions of another law which are otherwise not applicable to the instant case.

XIV. Further, in view of the judgment of the **Hon'ble Apex Court** in the case of **Innoentive Industries Ltd. Vs. ICICI Bank Ltd.** reported in [2017] 140 CLA 39(SC), it is urged before this Hon'ble Adjudicating Authority to allow the instant application filed by the Applicant to initiate Corporate Insolvency Resolution Process against the Respondent.

XV. Further, the allegations of the Respondent with regards to the documents being disputed and having been obtained fraudulently, it is submitted that no competent authority has adjudicated upon such documents holding them to be forged, fabricated or fraudulent as alleged by the Respondent. It is submitted that in the case of **Radha Exports (India) (P) Ltd. Vs. K.P. Jayaram** reported in [2021] 163 SCL 210 (SC), the **Hon'ble Supreme Court of India** has clearly held that

"40. There are, as observed above cogent records including letters signed by the Respondent Nos. 1 and 2 which evince that on 6th October, 2007, Respondent No. 2 resigned from the Board of the Appellant Company and at that time the Respondent No. 2 requested the Appellant Company to treat the share application money of Rs.90,00,000/- as share application money of Mr. M. Krishnan and to issue shares for aforesaid value to Mr. M. Krisllrian. The amount was to be treated as a personal loan from the Respondent No.2 to Mr. M. Krishnan. A personal Loan to a Promoter or a Director of a company cannot trigger the Corporate Resolution Process under the IBC. Disputes as to whether the signatures of the Respondents are forged or whether records have been fabricated can be adjudicated upon evidence including forensic evidence in a regular suit and not in proceedings under section 7 of the IBC".

XVI. Therefore, a debt is disputed or not is immaterial, when the debt claimed to be outstanding is a financial debt. Reliance is placed on the judgement of the Hon'ble Supreme Court of India in the case of **Innoventive Industries Ltd . Vs. ICICI Bank Ltd.** reported in [2017] 140 CLA 39 (SC), wherein it has been held thus:-

"30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records

of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred . It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise."

XVII. Further, even in the case of **Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited** reported in AIR 2017 SC 4532, the Hon'ble Supreme Court of India has held that the Adjudicating Authority is required to see and establish "existence of dispute" for rejecting an application preferred by an operational creditor and not a Financial Creditor. Accordingly, it is denied that the debt so claimed by the present Applicants is a disputed debt and hence, the ratio laid down by the Hon'ble Apex Court is applicable in the present case.

32. On 04.10.2023, during the course of the hearing, it was apprised by both the sides that Police Complaint was lodged in this matter with the Kalol Police Station in Panchmahal

District and some statement was recorded over there. Therefore, the Bench directed both the Counsels to assist this Tribunal from the record of the Hon'ble High Court of Gujarat, which forms part of these documents on the next date of hearing and also directed to file a short synopsis.

33. In compliance with the order dated 04.10.2023 and 21.11.2023, the applicant filed a purshish on 18.12.2023 vide diary No.D5222 along-with the Copy of Police Complaint dated 13.03.2013 made before the Kalol Police Station, District – Panchmahal as well as copy of the Statement dated 20.03.2013 given by the deceased Applicant before Police with translation which were taken on record. It is also recorded that, Learned Counsels for both the sides filed their synopsis in the matter on 18.12.2023 vide diary No.D5221.

34. On 23.01.2024, during the course of the hearing, Counsel for the Respondent relied upon the issue of limitation. Therefore, this Adjudicating Authority directed the Respondent to place on record the balance sheets of the Respondent Company of the last three financial year to

ascertain the status of the present applicant in the annual accounts of the corporate debtor.

35. In compliance with the order dated 23.01.2024, the Respondent has filed an affidavit dated 26.02.2024 vide diary No.D1830 on 29.02.2024 to place on record the Independent Auditor's Report along-with Audited Financial Statements for the Financial Years ended on 31.03.2012, 31.03.2021, 31.03.2022 and 31.03.2023 of the Respondent Company to ascertain the status of the present applicant in the annual accounts of the Respondent. In this regard, Counsel for the applicant was also given a liberty to file counter affidavit.

36. On 10.04.2024, the Applicant has filed a counter affidavit vide diary No.D3106 in response to the affidavit of the Respondent dated 26.02.2024 to counter the Independent Auditor's Report along-with Audited Financial Statements for the Financial Years ended on 31.03.2012, 31.03.2021, 31.03.2022 and 31.03.2023 of the Respondent Company.

37. It is inter-alia contended by the Applicants in counter affidavit that as per Audited Financial Statement for the Financial Year ended on 31.03.2012 of the Respondent Company filed by the Respondent through affidavit dated 26.02.2024 itself indicates that there were outstanding Long-Term Borrowings from other parties to the tune of Rs.1,35,85,219/-. The said outstanding amount of Long-term borrowings from other parties will include the outstanding principal sum of Rs.72,79,985/-.

38. Further, even in the financials produced by the Respondent for the years ended on 31.03.2021 and 31.03.2022, the Respondent has also duly acknowledged that there were outstanding Unsecured Long-term borrowings from other parties to the tune of Rs.1,09,34,755/-. Thus, from the foregoing fact, it can be discerned that the outstanding principal sum of Rs.72,79,985/- owed to the Applicant herein was acknowledged by the Respondent till the Financial Year ended on 31.03.2022.

39. We have heard Ld. Counsel for the Applicants as well as Ld. Counsel for the Respondent and perused the material available on record as well as their written submissions.

(a) On perusal of the records, it is found that the Respondent has acknowledged to have received different amounts in tranches on different dates w.e.f. 15.04.2004 to 31.12.2004 as per annexed **Annexure-E Colly** with the petition at page-55 to 66 from Mr. Ashvinkumar Chandulal Shah (hereinafter referred to as the deceased).

(b) The Respondent had issued a certificate dated **24.05.2012** stating therein that the **outstanding balance** of the deceased as an **“Unsecured Depositor”** in the Respondent Company is of **Rs.30,00,000/-** inclusive cheque of Rs.10,00,000/- deposited in the State Bank of India and the remaining amount is out of the sum paid by the deceased to *Larsen & Toubro Limited* on behalf of the Respondent. The copy of the same annexed with the petition as **Annexure-H** at page-71 – 72.

- (c) It is also found that on 12.06.2012 the Respondent and deceased Ashvinkumar Chandulal Shah agreed that interest shall be charged at the rate of **18.00%** on the amount of investment. A copy of the consensus between the parties with respect to the interest to be levied is annexed with the petition as **Annexure-G** at page-69 – 70.
- (d) However, on 12.06.2012, the Respondent confirmed an amount Rs.72,79,985/- remained outstanding and payable by way of Balance Confirmation Letter issued by the Respondent on 12.06.2012 which is annexed with the petition as **Annexure-F** at page-67 – 68.
- (e) Further, on 20.03.2013 deceased Ashvinkumar C. Shah made a statement before the police authorities of receiving Rs.40,00,000/- from the Respondent. However, at the same time deceased Ashvinkumar C. Shah also categorically made a statement that out of the total money given to the Respondent in the Year 2004- 2005 Rs.55,88,000/- was deposited in shares

Account and Rs.16,91,985/- in current Account. Thus, a principal amount in total Rs.72,79,985/- still due from the Respondent by giving breakup the amount given to the Respondent from time to time in the Year 2004-2005 which matches with details of acknowledgments given by the respondent from time to time annexed with the Petition as **Annexure E-Colly, F, H.**

- (f)** As per Audited Financial Statement for the Financial Year ended on 31.03.2012 of the Respondent Company filed by the Respondent through affidavit dated 26.02.2024 vide diary No.D1830 on 29.02.2024 itself indicates that there were outstanding Long-Term Borrowings from other parties to the tune of Rs.1,35,85,219/-. Further, in the Audited Financial Statement for the years ended on 31.03.2021 and 31.03.2022 produced by the Respondent also indicates that there were outstanding Long-Term Borrowings from other parties to the tune of Rs.1,09,34,755/-.

(g) However, neither the Respondent has given any breakup of outstanding Long-Term Borrowings nor the names of other parties either in the aforementioned Audited Financial Statements or in the affidavit dated 26.02.2024. Moreover, the Respondent has failed to prove that it has repaid the said outstanding amount of Rs.72,79,985/- either in reply to demand Notice, or reply, Sur-Rejoinder before Hon'ble High Court or before this Tribunal in reply and in additional affidavits. Hence, the said outstanding amount of Long-term borrowings from other parties can be very well assumed include the outstanding principal sum of Rs.72,79,985/-.

(h) Even otherwise, after deduction of aforementioned an amount of Rs.40,00,000/- (received from the Respondent) from total principal amount Rs.72,79,985/-, an amount of Rs.32,79,985/- was still due at relevant point of time from the Respondent Company.

(i) Whether, the present transactions are covered within the ambit of “**financial debt**” and the Applicants herein are a “**Financial Creditor**” and is there any “**default**” within the meaning as defined under the IBC?

(i) Under the scheme of the IBC, the Insolvency Resolution Process begins, when a default takes place, in the sense that a debt becomes due and is not paid. Some of the relevant provisions of the IBC are set out herein below for convenience: -

Section 3(11) of IBC defines “**debt**”: It means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;

Section 3(12) of IBC defines “**default**” means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be;

Section 5(7) of IBC defines “**financial creditor**”: It means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;

Section 5(8) of IBC defines “**Financial Debt**”: It means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes-

(a) money borrowed against the payment of interest;

.....

Section 7 of IBC defines “**Initiation of corporate insolvency process by financial creditor**”:

Section 7(1) of IBC defines: A financial creditor either by itself or jointly with [other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government] may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred

(ii) In the present case the Respondent has acknowledged to have received different amounts in tranches on different dates w.e.f. 15.04.2004 to 31.12.2004 as per annexed **Annexure-E Colly**. The money was taken for purchase of Larsen & Turbo's property at Kalol. Further, on 12.06.2012 the Respondent and deceased Ashvinkumar Chandulal Shah agreed that interest shall be charged at the rate of **18.00%** on the amount of investment as per annexed **Annexure-G**.

(iii) Now it is not open for the Respondent to contend that the amount disbursed by the Applicant is not a financial debt as well as the same is not due and payable. Further, the plea of violation of the provisions of Bombay Money- Lenders Act, 1946 are

also not sustainable as by virtue of Section 238 of the Insolvency and Bankruptcy Code, 2016, the provisions of the Insolvency and Bankruptcy Code, 2016 are given an overriding effect over any other law that is inconsistent with the provisions of the Insolvency and Bankruptcy Code, 2016.

(iv) Even otherwise, **Hon'ble Supreme Court of India**, in the case of **Orator Marketing Pvt. Ltd. Vs. Samtex Desinz Pvt. Ltd.** reported in 2021 SCC OnLine SC 513, has held that disbursement of loan without having any assured rate of interest in return, will also be covered within the definition of a "financial debt" under Section 5(8) of the Insolvency and Bankruptcy Code, 2016.

(v) The money was borrowed and disbursed against the consideration for the time value of money. Hence, the present transactions are covered within the ambit of "**financial debt**" as defined U/s 5(8)(a) of the Insolvency and Bankruptcy Code, 2016 and the Applicants herein are a "**Financial Creditor**" within

the meaning of Section 5(7) of the Insolvency and Bankruptcy Code, 2016. Further, the “debt” as explained in forgoing paras has not been repaid by the Respondent. Hence, there is even a “**default**” within the meaning of Section 3(12) of the Insolvency and Bankruptcy Code, 2016.

- (j) Further, the plea of the Respondent with regards to the documents being disputed and having been obtained fraudulently is also not sustainable as no competent authority has adjudicated upon such documents holding them to be forged, fabricated or fraudulent as alleged by the Respondent. **Hon'ble Supreme Court of India** in the case of **Radha Exports (India) (P) Ltd. Vs. K.P. Jayaram** reported in [2021] 163 SCL 210 (SC), has clearly held that:-

"40. There are, as observed above cogent records including letters signed by the Respondent Nos. 1 and 2 which evince that on 6th October, 2007, Respondent No. 2 resigned from the Board of the Appellant Company and at that time the Respondent No. 2 requested the Appellant Company to treat the share application money of Rs.90,00,000/- as share application money of Mr. M. Krishnan and to issue shares for aforesaid value to Mr. M. Krisllrian. The amount was to be

treated as a personal loan from the Respondent No.2 to Mr. M. Krishnan. A personal Loan to a Promoter or a Director of a company cannot trigger the Corporate Resolution Process under the IBC. Disputes as to whether the signatures of the Respondents are forged or whether records have been fabricated can be adjudicated upon evidence including forensic evidence in a regular suit and not in proceedings under section 7 of the IBC”.

(k) Therefore, a debt is disputed or not is immaterial, when the debt claimed to be outstanding is a financial debt. Reliance is placed on the judgement of the **Hon'ble Supreme Court of India** in the case of ***Innoventive Industries Ltd. Vs. ICICI Bank Ltd. & Anr.*** (2018) 1 SC 407, clearly held that:-

“The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the application to rectify the defect within 7 days receipt of a notice from the adjudicating authority.

30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred . It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that

it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise ."

(1) Whether, the present petition is filed with in limitation from the date of default under the IBC?

(i) The Respondent has acknowledged to have received different amounts in tranches on different dates w.e.f. 15.04.2004 to 31.12.2004 as per annexed **Annexure-E Colly**. Further, on 12.06.2012, the Respondent confirmed an amount Rs.72,79,985/- remained outstanding and payable by way of Balance Confirmation Letter issued by the Respondent on 12.06.2012 which is annexed with the petition as **Annexure-F**.

(ii) Moreover, as per Audited Financial Statement for the Financial Year ended on 31.03.2012 of the Respondent Company filed by the Respondent through affidavit dated 26.02.2024 vide diary No.D1830 on 29.02.2024 itself indicates that there

were outstanding Long-Term Borrowings from other parties to the tune of Rs.1,35,85,219/-. The said outstanding amount of Long-term borrowings from other parties can be very well assumed include the outstanding principal sum of Rs.72,79,985/-.

(iii) The judgment of Hon'ble Supreme Court in the ***Dena Bank which clearly held that: (Now Bank of Baroda) Vs Shivkumar Reddy and Anr.*** (2021) SCC Online SC 543, which clearly held that:-

113. As per Section 18 of Limitation Act, an acknowledgement of present subsisting liability, made in writing in respect of any right claimed by the opposite party and signed by the party against whom the right is claimed, has the effect of commencing a fresh period of limitation from the date on which the acknowledgement is signed. Such acknowledgement need not be accompanied by a promise to pay expressly or even by implication. However, the acknowledgement must be made before the relevant period of limitation has expired.

118. It is well settled that entries in books of accounts and/or balance sheets of a Corporate Debtor would amount to an acknowledgment under Section 18 of the Limitation Act. In Asset Reconstruction Company (India) Limited v. Bishal Jaiswall (supra) authored by Nariman, J. this Court quoted with approval the judgments, inter alia, of Bengal

Silk Mills Co. v. Ismail Golam Hossain Ariff, [“Bengal Silk Mills”] and in Re Pandem Tea Co. Ltd. , the judgment of the Delhi High Court in South Asia Industries (P) Ltd. v. General Krishna Shamsher Jung Bahadur Rana and the judgment of Karnataka High Court in Hegde Golay Ltd. v. State Bank of India and held that an acknowledgement of liability that is made in a balance sheet can amount to an acknowledgement of debt.”

(iv) On 13.06.2012, the Deceased Ashvinkumar C. Shah issued a Statutory Notice under Sections 433 and 434 of the Companies Act, 1956 seeking repayment of the outstanding principal amount of Rs. 72,79,985/- along with an interest amount of Rs. 1,37,95,192/- aggregating to Rs. 2,10,75,147/-. The said notice was duly served upon the Respondent. The copy of the Statutory Notice is annexed with the Petition as **Annexure-I**.

(v) Thereafter, originally, C.P. No.174 of 2012 dated 20.07.2012 was filed by the deceased Ashvinkumar C. Shah before the Hon'ble high Court which was listed before the Registrar on 04.09.2012 for admission. However, vide an order dated

26.11.2021, the Hon'ble High Court of Gujarat was pleased to transfer Company Petition No. 174 of 2012 to this Tribunal which is annexed with the petition as **Annexure-P**. Therefore, we find that the present Petition was filed before the Hon'ble High Court well within the limitation period.

- 40.** In view of above, the present Petition is complete in terms of under Section 433 of the Companies Act, 1956 read with Rule 5 of the Companies [Transfer of pending proceedings] Second Amendment Rules, 2017 and read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with the Insolvency and Bankruptcy Code, 2016. The Applicant is entitled to claim its dues, establishing the default in payment of the financial debt beyond doubt. The outstanding financial debt was of more than **rupees one lakh** at relevant point of time which meets the threshold limit as per section 4 of the IBC, 2016 (unamended) and is well within the limitation for filing the present application.

41. Hence, the Petition filed under Section 433 of the Companies Act, 1956 read with Rule 5 of the Companies [Transfer of pending proceedings] Second Amendment Rules, 2017 and read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with the Insolvency and Bankruptcy Code, 2016 for initiation of corporate insolvency resolution process against the Respondent/Corporate Debtor deserves to be admitted.

42. Accordingly, in light of the above facts and circumstances, it is, **hereby ordered** as under: -

(i) The Respondent/Corporate Debtor **M/s Desh Cam Technological Resources Private Limited** is **admitted** in Corporate Insolvency Resolution Process (**CIRP**) under section 7 of the Code.

(ii) As a consequence thereof, moratorium under Section 14 of Insolvency and Bankruptcy Code, 2016 is declared for prohibiting all of the following in terms of Section 14(1) of the Code.

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;*
- 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.*
- e. The provisions of sub-Section (1) shall however, not apply to such transactions, agreements as may be notified by the Central Government in consultation with any financial sector regulator and to a surety in a contract of guarantee to a Corporate Debtor.*

(iii) The order of moratorium under section 14 of the Code shall come to effect from the date of this order till the completion of the Corporate Insolvency Resolution Process or until this Adjudicating

Authority approves the Resolution Plan under sub-section (1) of section 31 or passes an order for liquidation of the corporate debtor under Section 33 of the IBC 2016, as the case may be.

- (iv) However, in terms of Section 14(2) to 14(3) of the Code, the supply of essential goods or services to the corporate debtor as may be specified, if continuing, shall not be terminated or suspended, or interrupted during the moratorium period. The corporate debtor to provide effective assistance to the IRP as and when he takes charge of the assets and management of the corporate debtor.
- (v) As proposed by the Financial Creditor, we appoint **Mr. Parag Sheth**, having registration **No. IBBI/IPA-002/IP-N00142/2017-18/10381(AFA valid upto 10.12.2024)** under section 13 (1)(c) of the Code to act as Interim Resolution Professional (**IRP**). He shall conduct the Corporate Insolvency Process as per the Insolvency and Bankruptcy Code, 2016 r.w. Regulations made thereunder.
- (vi) The IRP so appointed shall make a public announcement of the initiation of Corporate Insolvency Resolution Process and call for

submissions of claims under section 15, as required by Section 13(1)(b) of the Code.

(vii) The IRP shall perform all his functions as contemplated, *inter-alia*, by sections 17, 18, 20 and 21 of the Code. It is further made clear that all personnel connected with the corporate debtor, its promoters, or any other person associated with the management of the corporate debtor are under legal obligation as per section 19 of the Code to extend every assistance and cooperation to the IRP. Where any personnel of the corporate debtor, its promoters, or any other person required to assist or co-operate with IRP, do not assist or cooperate, the IRP is at liberty to make appropriate application to this Adjudicating Authority with a prayer for passing an appropriate order.

(viii) The IRP is expected to take full charge of the corporate debtor's assets, and documents without any delay whatsoever. He is also free to take police assistance in this regard, and this Court hereby directs the Police Authorities to render all assistance as may be required by the IRP in this regard.

- (ix) The IRP shall be under a duty to protect and preserve the value of the property of the ‘corporate debtor company’ and manage the operations of the corporate debtor company as a going concern as a part of obligation imposed by section 20 of the Code.
- (x) The IRP or the RP, as the case may be shall submit to this Adjudicating Authority periodical report with regard to the progress of the CIRP in respect of the Corporate Debtor.
- (xi) We direct the financial creditor to pay IRP a sum of **Rs.2,00,000/- (Rupees Two Lakh Only)** in advance within a period of 7 days from the date of this order to meet the cost of CIRP arising out of issuing public notice and inviting claims etc. till the CoC decides about his fees/expenses.
- (xii) The Registry is directed to communicate this order to the financial creditor, corporate debtor, and to the Interim Resolution Professional, the concerned Registrar of Companies and the Insolvency and Bankruptcy Board of India after completion of necessary formalities, within seven working days and upload the same on the website immediately after pronouncement of the order. The Registrar of Companies shall update its website by updating the

Master Data of the Corporate Debtor in MCA portal specific mention regarding admission of this Application and shall forward the compliance report to the Registrar, NCLT.

(xiii) The commencement of the Corporate Insolvency Resolution Process shall be effective from the date of this order.

43. Accordingly, this Petition **T.P. No.09/7/NCLT/AHM/2022** in **C.P. No.174 of 2012** is allowed and disposed of. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities

-SD-
SAMEER KAKAR
MEMBER (TECHNICAL)

-SD-
SHAMMI KHAN
MEMBER (JUDICIAL)

VP/ST