

National Company Law Appellate Tribunal

Principal Bench, New Delhi

COMPANY APPEAL (AT) (INSOLVENCY) No. 795 of 2021

&

I.A. No. 1332 of 2022

(Arising out of Order dated 20th September, 2021 passed by National Company Law Tribunal, Mumbai Bench, Court III, in C.P. No.- 1621/IBC/MB/2019).

IN THE MATTER OF:

**Ocean Deity Investment Holdings Limited,
PCC**

Ebene House, Hotel Avenue, 33,
Cybercity, Ebene, 7221, Mauritius

...Appellant

Versus

1. Suraksha Asset Reconstruction Limited

20th Floor, "A" Wing, Naman Midtown,
Elphinstone Road, Senapati Bapat Marg,
Mumbai – 400013.

...Respondent No. 1

2. Mack Star Marketing Private Limited

1102, 11th Floor, Tower B, Peninsula Business
Park, Lower Parel, Mumbai – 400013.

...Respondent No. 2

For Appellant:

**Mr. Krishnendu Datta, Sr. Advocate with
Mr. Vividh Tandon, Mr. Prakshal Jain,
Ms. Angelika Awasthi, Mr. Dhruv Dewan and
Mr. Nitesh Jain, Advocates.**

For Respondent No. 1:

**Mr. Abhinav Vasisht, Sr. Advocate with
Mr. Chitranshul A. Sinha, Mr. Jaskaran S.
Bhatia and Ms. Priya, Advocates for R-1.**

WITH

COMPANY APPEAL (AT) (INSOLVENCY) No. 806 of 2021

&

I.A. No. 2221 of 2021

(Arising out of Order dated 20th September, 2021 passed by National Company Law Tribunal, Mumbai Bench, Court III, in C.P. No.- 1621/IBC/MB/2019).

IN THE MATTER OF:

Sumit Ranjan Saha

C-452, Chittranjan Park,
New Delhi – 110019.

...Appellant

Versus

1. Suraksha Asset Reconstruction Limited

20th Floor, “A” Wing, Naman Midtown,
Elphinstone Road, Senapati Bapat Marg,
Mumbai – 400013.

...Respondent No. 1

2. Mack Star Marketing Private Limited

1102, 11th Floor, Tower B, Peninsula Business
Park, Lower Parel, Mumbai – 400013.

...Respondent No. 2

For Appellant:

Mr. Krishnendu Datta, Sr. Advocate with Mr. Vividh Tandon, Mr. Prakshal Jain, Ms. Angelika Awasthi, Mr. Dhruv Dewan and Mr. Nitesh Jain, Advocates.

For Respondent No. 1: Mr. Abhinav Vasisht, Sr. Advocate with Mr. Chitranshul A. Sinha, Mr. Jaskaran S. Bhatia and Ms. Priya, Advocates for R-1.

WITH

COMPANY APPEAL (AT) (INSOLVENCY) No. 927 of 2021

&

I.A. No. 1534 of 2022

(Arising out of Order dated 27th October, 2021 passed by National Company Law Tribunal, Mumbai Bench, Court III, in IA(.B.C)/2290(MB)2021 in I.A.(I.B.C.)2292/2021 in I.A.(I.B.C.)2396/2021 in C.P. (IB) No.- 1621/IBC/MB/2019).

IN THE MATTER OF:

**Ocean Deity Investment Holdings Limited,
PCC**

Ebene House, Hotel Avenue, 33,
Cybercity, Ebene, 7221, Mauritius

...Appellant

Versus

1. Suraksha Asset Reconstruction Limited

20th Floor, "A" Wing, Naman Midtown,
Elphinstone Road, Senapati Bapat Marg,
Mumbai – 400013.

...Respondent No. 1

**2. Mack Star Marketing Private Limited
Through its Interim Resolution Professional –
Mr. Avinash Shukla**

1102, 11th Floor, Tower B, Peninsula Business
Park, Lower Parel, Mumbai – 400013.

...Respondent No. 2

3. Mr. Saurabh Kumar Tikmani

KPMG Restructuring Services LLP,
1st Floor, Lodha Excelus, Apollo Mills Compound,
NM Joshi Marg, Mumbai – 400011.

...Respondent No. 3

For Appellant: Mr. Krishnendu Datta, Sr. Advocate with
Mr. Vividh Tandon, Mr. Prakshal Jain,
Ms. Angelika Awasthi, Mr. Dhruv Dewan and
Mr. Nitesh Jain, Advocates.

For Respondent No. 1: Mr. Abhinav Vasisht, Sr. Advocate with Mr.
Chitranshul A. Sinha, Mr. Jaskaran S. Bhatia
and Ms. Namrata Mohapatra, Advocates for R-1.

For IRP: Ms. Meghna Rao, Advocate for IRP – Avinash
Shukla.

J U D G E M E N T

[Per; Shreesha Merla, Member (T)]

1. Challenge in *Comp. App. (AT) (Ins.) No. 795 of 2021* is to the Impugned Order dated 20.09.2021, passed by the Learned Adjudicating Authority (National Company Law Tribunal, Mumbai Bench, Court III), in C.P. (IB) No.- 1621/IBC/MB/2019 whereby, the Adjudicating Authority has admitted the Section 7 Application preferred by M/s. Suraksha Asset Reconstruction Limited/(the 'Financial Creditor') against M/s. Mack Star Marketing Private Limited/(hereinafter referred to as the 'Mack Star'), observing as follows:

“6. Though admitting the debt, the Corporate Debtor has advanced the following arguments:

a) That the loan is sham and that the promoters/shareholders (Wadhawan) of the Corporate Debtor have frauded one of the shareholders of the Company i.e. Ocean Deity Investment Holdings Limited (PCC).

b) The Corporate Debtor mentioned that the loan amount disbursed to them were allegedly Siphoned Off to various HDIL entities and was used to repay the loans by these entities to Yes Bank Limited.

7. The bench notes that the Corporate Debtor is a body Corporate and has independent identity distinct from the shareholders. The Bench also notes that the Corporate Debtor had borrowed the money and it must be repaid. Since the Corporate Debtor had borrowed the money, it cannot take a plea of intra shareholders dispute or allegation of internal wrong doings by the constituent shareholders as a reason for not meeting its repayment obligation.

8. Further, the alleged misuse on unauthorized use of the Term Loans by the constitutes of the Corporate Debtor does not in any way negate the existence of Financial Debt and the right of the Financial Creditor to recover the loans even assuming that the Corporate Debtor had diverted the money and misused the Term Loans. It does not discharge the Corporate Debtor of it is indebtedness in respect of loans and does not absolve the Corporate Debtor from repaying the same.

9. In any case, the Term Loans have been reflected in the balance sheet of the Corporate Debtor and is reflected in the CIBIL Report. The facts of the case clearly and unbiasedly shows that there is a Financial Debt in terms of section 5(8) of IBC, 2016 and there is default in terms of Section 3(12) of the IBC, 2016 by the present Corporate Debtor.

10. In view of the Bench admits this Petition to Initiate Corporate Insolvency Resolution Process against the Corporate Debtor by admitting the Petition under Section 7 of the IBC.”

2. In the Impugned Order, the Adjudicating Authority has also given its findings in I.A. 1740/2020, wherein the ‘Corporate Debtor’ has raised the

question of maintainability on the ground that the Term Loans extended by M/s. Yes Bank Limited ('Yes Bank') is vitiated with fraud. For the same reasons, as specified in the Petition CP 1621/2019, the Adjudicating Authority dismissed this Application also.

3. Briefly put, M/s. Suraksha Asset Reconstruction Private Limited ('Suraksha') the Assignee of the loans given by Yes Bank preferred Section 7 Application under the Insolvency and Bankruptcy Code, 2016, (hereinafter referred to as 'The Code') against Mack Star, on the ground that there were defaults in payment of four Term Loans, out of the six Term Loan transactions executed between Mack Star and Yes Bank. The details of these four Term Loans are as follows:

I. Term Loan III was a sum of Rs.7,60,00,000/- and was disbursed on 12.11.2012.

II. Term Loan IV was for a sum of Rs.40,00,00,000/- and was disbursed in 5 tranches on 29.03.2014, 30.04.2014, 29.05.2014, 28.06.2014 and 26.07.2014.

III. Term Loan V was for a sum of Rs.40,00,00,000/- and was disbursed on 29.09.2015.

IV. Term Loan VI was for a sum of Rs.60,00,00,000/- and was disbursed in 6 tranches on 07.01.2016, 29.01.2016, 26.02.2016, 23.03.2016, 26.04.2016 and 25.05.2016."

4. It was stated that the principal amount due as on 15.03.2019, under these four term-loans is about Rs.1,33,48,70,378/- and the interest thereon as on 15.03.2019, is Rs.26,18,96,795/- totalling to Rs.1,59,67,40,173/-.

5. Submissions of the Learned Sr. Counsels Dr. Abhishek Mannu Singhvi & Mr. Krishnendu Datta in (Ocean Deity Investment Holdings Limited)/Comp. App. (AT) (Ins.) No. 795/2021:

- It is submitted that CBI had lodged an FIR on 23.09.2020 against Yes Bank officials, Housing Development Infrastructure Limited ('HDIL'), its Promoters, Wadhawans and other individuals who were collectively accused for cheating Mack Star and the Appellant/Ocean Deity Investment Holdings Limited ('Ocean Deity') by way of these collusive transactions; that after several months of the Enforcement Directorate ('ED') having arrested Mr. Rana Kapoor, the Promoter of Yes Bank for conspiring with HDIL Promoter to cheat Mack Star, the Adjudicating Authority has passed the Order dated 20.09.2021. The Adjudicating Authority, despite having the attachment Orders and the EDs prosecution Complaint against the Promoters of Yes Bank and HDIL, did not address these issues and also did not take any cognizance of the findings of CBI and ED regarding the Criminal Conspiracy between Yes Bank and HDIL to evergreen the stressed loans of Yes Bank.
- Both CBI and ED have independently concluded that there was a Criminal Conspiracy, pursuant to which act, there was a three steps circular flow of funds from Yes Bank, whereby Rs.147Crores/- have fraudulently been disbursed in the name of Mack Star; the amount was disbursed to Yes Bank Accounts of HDIL Group Companies; these loan amounts from Yes Bank Accounts of HDIL Group Companies i.e.,

Rs.146Crores/- were used for discharging the earlier loans availed by the financially stressed HDIL Group Companies from Yes Bank. These findings were completely ignored by the Adjudicating Authority while passing the Impugned Order.

- It was submitted that Rs.140Crores/- of these Term Loans of Rs.147.6Crores/- was sanctioned by Yes Bank in Mack Star's name for the purpose of renovating and refurbishing 'Kaledonia' a brand-new building that was barely two years old and has been constructed at a total cost of Rs.140 Crores/-. It is contended that Rs.100 Crores/- was disbursed by Yes Bank to Mack Star, even before any of the Related Loan Agreements were signed; that a Term Loan of Rs.40 Crores/- disbursed by Yes Bank in Mack Star's name was credited directly to HDILs Yes Bank Account instead of being credited to Mack Star's Account. Yes Bank continued disbursing these term-loans in Mack Star's name despite being notified by the Appellant in writing that their HDIL Affiliate Company Wadhawans were not authroised to avail any loans on Mack Star's behalf.
- It is strenuously argued that 99.18% of the amounts disbursed by Yes Bank in Mack Star's name was routed back to Yes Bank, within a few minutes of their disbursal, by Yes Bank Officials.
- Suraksha filed the Section 7 Petition on 22.04.2019, a month after the Appellant had lodged a Criminal Complaint dated 05.03.2019 with the Economic Offences Department being Mumbai Police, against Yes Bank, Suraksha and HDIL Promoters in relation to the illegal term-

loans. Mack Star repeatedly issued letters to Yes Bank and Suraksha requesting copies of the Loan Account Statements between 2016 and 2019, but both Yes Bank and Suraksha refused to accede to these requests only to withhold the evidence that 99.18% of the Loan Amounts were routed back to Yes Bank. It was only after the filing of the Section 7 Application, that the Appellant discovered that Yes Bank was the main beneficiary of these term-loans.

- When the Appellant discovered that loans had been orchestrated by HDIL Promoters in Mack Star's name, the Appellant was not *prima facie* aware that Yes Bank a premier Banking Institutions, had acted in bad faith and therefore between 2016 & 2018, the Appellant prayed to resolve the disputes regarding the term-loans by engaging in settlement discussions with Mr. Rana Kapoor and other HDIL Promoters.
- Had the sham loans been merely an intra-shareholder matter, there would be no question of registration of an FIR against the officials of the Yes Bank. The Learned Sr. Counsel brought to the notice of this Tribunal that apart from Mr. Rana Kapoor, three other senior Members of Yes Bank Management were named in the Enforcement Case and none of these Members charged with money laundering were ever shareholders of Mack Star and therefore this fraud cannot be characterized as an 'intra-shareholder' dispute.
- Learned Sr. Counsel drew our attention to the Provisional Attachment Orders providing details of its comprehensive investigation into this

loan fraud and unequivocally concluded that Yes Bank has illegally sanctioned a loan which is a result of conspiracy between Mr. Rana Kapoor and Wadhawan of HDIL;

“2.9 Further, in January 2016, the investors realized that the Wadhawans had taken fraudulent loans from the YES Bank in the name of M/s Mack Star Marketing Pvt Ltd. They informed YES Bank Ltd. Even after this YES Bank Ltd. disbursed 3 instalments of loan amounting to Rs.19.60 Crore to Mack Star's account on 23.03.2016, 26.04.2016 & 25.05.2016...

2.11 That unknown officials of Yes Bank dishonestly ignored the terms of Mack Star's Articles that expressly prohibited Mack Star from availing any loans without the approval of its majority shareholder (i.e. the Investor)..."

- The Provisional Attachment Orders have been confirmed vide Orders passed by PMLA Adjudicating Authority. Learned Sr. Counsel drew our attention to para 9(5) of the Order dated 10.09.2021 confirming the Provisional Attachment Orders dated 08.02.2021 wherein it was held that the Senior Management of the Yes Bank was already to this fraud.
- Learned Sr. Counsel placed reliance on the Written Submissions filed by Mr. Venkatavarthan Iyengar, a former Director on the Board of Mack Star (appointed by the Wadhawans), filed in Comm. Suit No. 298 of 2020 preferred by Mack Star and the Appellant before the Hon'ble High Court of Bombay, seeking a declaration that the loans were 'void ab initio'. The Learned Sr. Counsel relied on the following paragraphs of the said Written Statement:

“6. The HDIL Group had over time availed of loans amounting to several thousand crores from Yes Bank

for land acquisition and real estate development. Yes Bank was the primary banker and lender to the HDIL Group and in such capacity, wielded a significant amount of influence over the HDIL Promoters. Due to deterioration of market conditions.. the HDIL Group was under severe financial stress and found itself unable to make repayments of loans to lenders.

7. Due to defaults in repayment of loans availed by various HDIL Group Companies, some of the other lenders to these companies classified their accounts as NPAs. However, Yes Bank was not willing to recognize loans as NPAs since such classification would have capital provisioning consequences for Yes Bank.....

9. In 2011, Yes Bank entered into an arrangement with HDIL Promoters to sanction loans in Mack Star's name, the proceeds of which loans could be used to repay loans availed by various HDIL Group Companies from Yes Bank. Yes Bank knew Plaintiff No.1's consent was required for these loans but also knew that Plaintiff No.1, which played a passive role in Mack Star's affairs, would not have any commercial incentive to approve evergreening of potential NPAs on Yes Bank's loan book....

10. The HDIL Promoters, being heavily dependent on Yes Bank for meeting HDIL's financial requirements...succumbed to pressure from Yes Bank to enter into this arrangement....

11. ...Yes Bank never carried out any due diligence on Mack Star's need for funds and the ultimate end-use because they knew that the ultimate use was to finance loan repayments by the HDIL Group Companies.

13. ..the benefit of this arrangement accrued solely to Yes Bank, which was able to evade the applicable capital provisioning norms by evergreening its loans instead of declaring them as NPAs... Yes Bank is mischaracterizing facts by pretending to be a bona fide lender....

24. ...when funds were credited to Mack Star's Yes bank account and subsequently transferred to HDIL Group companies, such transfers were often initiated

by Yes Bank using instructions obtained by them before disbursal of the loans....”

- It is submitted that the Adjudicating Authority is silent about the findings of these investigations in the Impugned Order.
- It is argued that both CBI and ED are Statutory Bodies and the results of the investigations arrived by them read together with the determination made by PMLA Adjudicating Authority ought not to have been ignored by the Adjudicating Authority, before considering the ‘Admission’ of the Section 7 Petition.
- The illegality attached to the loans in question is also passed on to Suraksha. It is the Assignee of the loans and today Suraksha cannot disentitle itself from taking any action on such fraud ridden disbursement, the entire foundation of the ‘Financial Debt’ is tainted with fraud and therefore the Adjudicating Authority ignored that these loans were sham transactions erroneously applied the dictum of the Hon’ble Supreme Court in **‘Innoventive Industries Limited’ Vs. ‘ICICI Bank & Anr.’, (2018) 1 SCC 407.**
- The Deputy Director of ED had addressed a letter dated 20.12.2021 to the IRP of Mack Star about the ED investigations into these loans and sought information about the status of proceedings relating to these loans. In this letter ED stated that the loans were sanctioned illegally in the name of Mack Star but were actually of HDIL Group Companies.
- The loans were never used for the sanctioned purpose as Yes bank diverted the funds from the sanctioned end-use. This is evidenced in

the end-use Certificate dated 16.10.2015 procured by Yes Bank for Rs.40 Crores/- loan sanctioned by Yes Bank for renovation of a building owned by Mack Star. Instead of disbursing this loan of Rs.40 Crores/- to Mack Star for the sanctioned end-use of renovation, Yes bank had actually credited this amount directly to HDIL's Yes Bank Account and within a few months debited Rs.39.7Crores/- towards payments of HDIL's prior debts to Yes Bank. Therefore, the issue in the present case is whether a 'legally valid debt' is owed to Yes Bank.

- The Annual Reports for 2014-15, 2015-16 and 2016-17 pertain to the period when Wadhawans were in control of Mack Star and during this period, the foreign shareholder of Mack Star, the Appellant herein had no say in its affairs. The Board Meetings were 'paper meetings' and the Appellant's Directors were not given any Notice of these Meetings. It is submitted that even the Statutory Auditor of Mack Star was an accomplice to this fraud and has not only been named in CBI's FIR but has also been arrested by the Economic Offences Wing for delaying the Wadhawans discovery of the PMC Bank fraud. However, even during this period, Mack Star's Statutory Auditor caveated the Auditor's Report for 2015-16 and 2016-17 by observing that certain Financial Transactions have been carried out without the majority shareholders knowledge in violation of the Investment Agreement that has been entered into amongst the Shareholders.
- The Appellant reconstituted the Board of Mack Star on 01.09.2017 by removing all Wadhawan directors from Mack Star Board. Since the

Financial Year 2017-18 all of Mack Star Annual Reports explicitly state that Yes Bank defrauded Mack Star and loans were fraudulently obtained by the erstwhile management of Mack Star (HDIL Promoter) in collusion with Yes Bank. It is further submitted that there are six separate references in Mack Star's Annual Report for 2019-20 to the Yes Bank loans, being illegal. Learned Counsel relied on the Judgement of the Hon'ble Supreme Court in '**Asset Reconstruction Company India Ltd.' Vs. 'Bishal Jaswal and Ors.', (2021) 6 SCC 366**, wherein the Hon'ble Supreme Court has observed that every entry would not amount to an acknowledgement of debt as it is not uncommon to have an entry in the Balance Sheet with notes annexed, forming part of the Balance Sheet and that it would depend on the facts of each case whether such an entry would amount to an 'acknowledgement of debt'.

- All these transactions were orchestrated without the knowledge of the Investor or the Investor's Directors which has been clearly stated in the FIR registered by the CBI against the officials of the Yes Bank and also in the written statement filed by Mr. Iyengar, one of the Wadhawan Directors of the Mack Star Board. It is stated by him that all Mack Star Board Meetings were shown on paper to pass Resolutions as may be required and the intimation of Board Meetings were not given to the Directors.
- The AGM Resolution dated 29.05.2014 and the Form MGT – 7 were signed by Mr. Iyengar, the Wadhawan Director who has already

admitted to the fraud played by Yes Bank on Mack Star in his statement filed in the Suit before the Hon'ble High Court of Bombay. The Adjudicating Authority has relied on the fact that the Appellant had 82.17% common shares of Mack Star during the relevant period and therefore must have attended the AGM dated 29.05.2014 for the shareholder participation to reach 99.96%. It is contended by the Learned Counsel that this is completely false and misleading, as at the time of the AGM on 29.05.2014, the Appellant had only 1000 common shares of Mack Star and was primarily holding preference shares of Mack Star. It was only in September 2014, subsequent to this Meeting, that the preference shares held by the Appellant were converted into common shares. Therefore, any inference drawn from the Appellant holding common shares of Mack Star to the attendance of 99.96% in the AGM, implying that the Appellant had voted, is only intended to mislead the Tribunal.

- Learned Sr. Counsel contended that the extracts of the Board Resolutions relied upon by Suraksha, are fabricated records of imaginary Board Meetings and in fact two of the Directors Mr. Amanpreet Singh and Mr. Iyengar have admitted in the statements recorded on 09.02.2021 and 10.02.2021 under Sections 50(2) and 50(3) of the PMLA, that they had never attended any such Board Meetings of Mack Star.
- Yes Bank assigned the loans to a trust named Suraksha in pursuant to a same transaction. Yes Bank owns 85% of the units/security

receipts issued by this trust and Suraksha owns only 15% of the unit/security receipts and even this acquisition of Suraksha's, 15% interest was indirectly financed by a 'near-zero cost' loan from Yes Bank. Despite assigning the loans on 29.09.2017, Yes Bank was engaging in settlement discussions relating to the loans in June and July 2018, which clearly demonstrates that the 'Assignment' was a sham.

- Lastly, Learned Sr. Counsel Dr. Singhvi vehemently contended that the Insolvency Application was defective in as much as Mr. Tikmani who was appointed as the IRP resigned in May 2019; an email was sent by Suraksha on 13.09.2021 only to create a fraudulent paper trail to conceal the fact that the Application was defective; that Mr. Tikmani has withdrawn his consent and Mr. Shailen Shah had also withdrawn his consent on 01.09.2021; Mr. Tikmani has withdrawn his consent on 13th May itself and therefore Mr. Shailen Shah was nominated in his place; but Suraksha in their Reply to I.A. 2221/2021 falsely stated that Mr. Tikmani has withdrawn his consent *after* the Admission Order was passed by the Adjudicating Authority, which makes it evident that Suraksha is admitting to cover a fatal lacuna in its Insolvency Application, which remained a defective one as per Section 7(3)(b) of the Code from 01.09.2021 to 20.09.2021, the date on which the Adjudicating Authority passed the Order 'Admitting' the Application. The subsequent Order 27.10.2021 passed by the Learned Adjudicating Authority appointing Mr. Shukla as the IRP cannot

operate retrospectively to cure the aforesaid deficiency in the Insolvency Application.

6. Submissions of the Learned Sr. Counsel Mr. Ramji Srinivasan/the first Respondent/Suraksha:

- It is submitted that the Appellant/('Ocean Deity') is a majority shareholder in Mack Star holding 82.17% shares in Mack Star; as per Form MGT – 7 filed for the FY 2014–15. The 12th Annual General Meeting of Mack Star held on 29.05.2014, approved the Resolution of borrowing limits of Mack Star and was passed by 99.6% of the Members; the Appellant being the majority shareholder had clearly participated and approved the Resolution giving consent to the Board of Directors of Mack Star to borrow sums of money as deemed necessary up to Rs.1000 Crores/-.
- The Appellant was fully aware of the borrowings and also authorised the Board of Directors to give effect to such borrowings by way of the 12th AGM. Hence there was no requirement to go behind the Resolutions passed as the same was believed to be true by virtue of doctrine of 'indoor management'.
- The footnote of the Balance Sheet of Mack Star for the Financial Year 2020 reflecting an amount of Rs.1,27,53,55,000/- admits that the said amount was obtained from Yes Bank. It is an admitted fact from the Balance Sheet that the money was advanced by Yes Bank to Mack Star and the loans have not yet been repaid. The Learned Counsel placed reliance on the ratio of the Judgements of the Hon'ble Supreme

Court in ***‘Innoventive Industries Limited’ Vs. ‘ICICI Bank & Anr.’*** (2018) 1 SCC 407, in ***E.S. Krishnamurthy & Ors.’ Vs. ‘Bharath Hitich Builders Pvt. Ltd.’***, (2022) 3 SCC 161; in ***‘Orator Marketing Pvt. Ltd. Vs. ‘Samtex Designz Private Limited’, 2021 SCC OnLine SC 513.***

- In the instant case, there is a ‘debt’ and a ‘default’ ‘due and payable’ and the fact that the loan amount was reflecting in the Balance Sheet of Mack Star as well as in the CIBIL Report, more than satisfy the existence of a debt which is outstanding. It is submitted that the scope of the Code is very limited and is not concerned with the end use of the debt. It only envisages the existence of a debt, that the debt is ‘due and payable’ and lastly that there is a default in payment of debt.
- It is argued that this Appeal is not maintainable as Suraksha is merely an Assignee of the loans of Yes Bank and is not concerned with the allegations raised in the Appeal against Yes Bank. Further the Appellant has not disputed the receipt and default of the Term Loans III to VI. As the date is admitted there is no scope of going into any dispute under Section 7 of the Code.
- There is no final adjudication by Civil or Criminal Courts pertaining to the purported disputes raised by the Plan. The suit filed in the Hon’ble High Court of Bombay in 2020 is nothing but an attempt to hinder the Resolution Process. In fact, the Hon’ble High Court of Bombay refused to pass an Interim Order pertaining to the loan facility which

demonstrates that there was no *prima facie* case in favour of Mack Star. Mack Star was also making all efforts to settle the debts as can be seen from the various emails exchanged between the parties.

- The Articles of Association of Mack Star do explicitly bar Mack Star from raising funds from Financial Institutions. Suraksha cannot be dragged into the matter where there is an intra-shareholders dispute between the investors and HDIL Promoters. Moreover, 'borrowings of funds' is an activity specifically mentioned in the Memorandum of Association of Mack Star as being a part of authorized business of Mack Star. Having full knowledge of the 'debt', the Appellant did not take any steps to challenge the said transactions until the filing of the Section 7 Application.
- Yes Bank vide Assignment Agreement dated 29.09.2017 assigned the Financial Assets of Mack Star which contain Term Loans III to VI together with the underlying security interest including all rights, title and interest thereof in favour of Suraksha, with security receipts in the ratio 85:15. Yes Bank has no stake in Suraksha and the shareholding structure of Suraksha shows that 92% of the equity shares were held by one Mr. Sudhir Walia and the remaining 8% are held by Lakshadweep Investment and Private Limited and therefore Suraksha cannot be said to be the alter ego of Yes Bank.
- Suraksha is not concerned with the ongoing investment by ED, CBI, EOW and also with the confirmation of POA. The Appellant cannot place reliance on the ongoing investigations.

- Section 65 of the Code cannot be invoked in the present case as the Financial Creditor is mandated to nominate a Resolution Professional in Form-1. It is denied that Suraksha initiated CIRP with any fraudulent intent and therefore Section 65 of the Code cannot be attracted.
- The Hon'ble Supreme Court in '**Orator Marketing Private Limited**' **Vs. 'Samtex Designz Private Limited', 2021 SCC OnLine SC 513**, has clearly reiterated that the trigger of initiation of CIRP under Section 7 of Code is the occurrence of the default by the 'Corporate Debtor'
- Having filed the written submissions on 30.08.2021, Mack Star cannot be allowed to take plea that they were not given a reasonable opportunity of being heard as their senior Counsel did not advance his arguments.
- The Appellant is only attempting to mislead this Tribunal by mentioning that the Loan Agreement was solely executed for the purpose of renovating and refurbishment of 'Kaledonia', in fact the Application of funds by borrower for any other purpose can never extinguish the Debtor/Creditor relationship nor discharge the obligation of Debtor to repay the funds utilized.

Assessment:

7. At the outset, it is salient to note the key conclusions raised by the Statutory Bodies, Investigating Agencies, CBI and ED and also the conclusions drawn by PMLA Adjudicating Authority, a quasi-judicial body,

which have an unswerving and direct bearing on the ‘nature of financial transactions’ entered into between the parties and the outcome of the Section 7 Application. The four Term Loans in question which are stated to be the amounts ‘due and payable’ by the Respondent/Suraksha are detailed as hereunder:

I. Term Loan III was a sum of Rs.7,60,00,000/- and was disbursed on 12.11.2012.

II. Term Loan IV was for a sum of Rs.40,00,00,000/- and was disbursed in 5 tranches on 29.03.2014, 30.04.2014, 29.05.2014, 28.06.2014 and 26.07.2014.

III. Term Loan V was for a sum of Rs.40,00,00,000/- and was disbursed on 29.09.2015.

IV. Term Loan VI was for a sum of Rs.60,00,00,000/- and was disbursed in 6 tranches on 07.01.2016, 29.01.2016, 26.02.2016, 23.03.2016, 26.04.2016 and 25.05.2016.”

8. It is important to peruse the table depicting the flow of funds together with the relevant dates to understand whether there was any circular movement of funds. The said table is reproduced as hereunder:

Term Loan	Disbursal Date	Amount of Loan Disbursed to Mack Star (INR Crs.)	Amount Diverted from Mack Star by Yes Bank (INR Crs.)	Company of HDIL Group to which the funds were diverted	Amount immediately routed back to Yes Bank (INR Crs.)
III	12.11.12	7,600	7,983	HDIL	7,983
IV	29.03.14	8,000	0,000	See Below	
IV	30.03.14	0,000	8,000	Privilege Power	
IV	30.03.14	8,000	8,000	Privilege Power	

IV	29.05.14	9,000	8,000	Privilege Power	39,350
IV	28.06.14	10,000	10,000	Privilege Power	
IV	26.07.14	5,000	5,000	Privilege Power	
V	23.09.15	40,000	40,000	HDIL	39,700
VI	07.01.16	27,000	26,050	Sapphire	25,919
VI	29.01.16	6,000	6,100	Privilege Power	6,100
VI	26.02.16	7,100	6,500	Privilege Power	6,500
VI	29.02.16	0,000	0,300	HDIL	0,293
VI	23.03.16	6,500	6,500	Privilege Power	6,500
VI	23.03.16	3,500	4,000	HDIL	4,136
VI	26.04.16	6,600	6,000	Privilege Power	6,600
VI	25.05.16	3,000	3,000	Privilege Power	3,000
Total		147,300	146,033		146,091

9. It is significant to mention that the aforestated table is *not disputed* by the Respondent. Interestingly Rs.40 Crores/- was disbursed by Yes Bank directly to the Bank Account of Wadhawans HDIL instead of Mack Stars Bank Account and this fact too is *not disputed*. We find force in the submissions of the Learned Sr. Counsel Dr. Singhvi that out of the total loans of Rs.147 Crores/-, 140 Crores/- relating to Term Loans IV V & VI were sanctioned for the purpose of renovating Kaledonia which is a brand new building and barely two years old, constructed at a cost of Rs.100 Crores/-. The material on record does not show any undertaking obtained from the Appellant prior to the disbursement of these loans. It is also seen from the record that Yes Bank continued disbursing the loans even *after* the Appellant addressed a letter to Yes Bank on 18.03.2016 stating that the Wadhawans were not authorized to avail these loans as per the terms of Mack Star's Articles of Association. It is

depicted from the aforementioned table that more than 99% of the loan amount disbursed by Yes Bank were routed back to Yes Bank as repayment of HDIL's Debts, on the 'same day', if not, on the next working day a very short period.

10. We find it apposite to detail the 'Results of Investigation' by the ED:

"8.1 It has been revealed that Yes Bank Ltd. had illegally sanctioned the loan of Rs.202.1 Crores approximately to M/s. Mack Star Marketing Pvt. Ltd. which is joint venture of DE Shaw Group and promoters of HDIL Group... It is important to mention here that DE Shaw Group holds 83.36% shares in M/s. Mack Star Marketing Pvt. Ltd. whereas promoters of HDIL holds only 16.64% shares. However, in the instant case, Mr. Sarang Wadhawan & Mr. Rakesh Wadhawan who were having very strong relationship with Mr. Rana Kapoor got sanctioned the loan of Rs.202.1Crores to the above said JV without knowledge/approval of DE Shaw group.... It is clearly established that Wadhawans had connived with Mr. Rana Kapoor for illegal sanction of the loan of Rs.202.1 Crore without permission of the Investor....."

8.6 It is also revealed that the Wadhawans of HDIL connived with Mr. Rana Kapoor of Yes Bank and fraudulently got sanctioned the loan of more than Rs.200 Crore to Mack Star.... But, immediately after its sanction, the entire loan amount was siphoned off by the Wadhawans through their HDIL group companies to Yes Bank again for settling the HDIL group companies' earlier loans taken from Yes Bank. Actually, these loans were on the verge of turning into NPA. This was the reason, this fraud was done by Wadhawans of HDIL in connivance with Mr. Rana Kapoor....."

(Emphasis Supplied)

11. The relevant excerpt of PMLA Adjudicating Authority Confirmation Order is reproduced as follows:

“...when the DE Shaw Group realized that the Wadhawans had taken fraudulent loans from the Yes Bank in the name of Mack Star, they informed Yes Bank about this. However, even after getting informed, Yes Bank Ltd. disbursed 3 installments of loan amounting to Rs.19.60 Crore to Mack Star’s account..... Three of such loans amounting to Rs.140 Crore had been sanctioned to the Mack Star for the purpose of expenditure for modification, renovation & refurbishment of ‘Kaledonia Property and other Capex in Company. The purpose assigned for these loans was fictitious because Kaledonia was a newly constructed building and that total cost of construction was only Rs.100 Crore. The actual purpose for sanctioning and disbursement of loans was to.... Evergreen the accounts of HDIL with Yes bank to save them from becoming NPA. The entire circulation of funds was happening within the Yes Bank System (i.e. loans disbursed by Yes Bank into Mack Star’s Yes Bank account were immediately diverted to Yes bank accounts of HDIL group companies, which used these funds on the same day to discharge liabilities owed by these HDIL group companies to Yes Bank) and therefore, higher management of Yes Bank was very much aware about the illegal dealings and was party to the whole scheme.”

(Emphasis Supplied)

12. It is also material to examine the submissions of Mr. Venkatavarthan N. Iyengar, former Director on the Board of Mack Star, appointed by the Wadhawans, in the Comm. Suit No. 298/2020, filed by Mack Star and the Appellant herein, before the Hon’ble High Court of Bombay, seeking a declaration that the loans were *void ab initio*. The germane extracts related to the issue on hand is reproduced as hereunder:

“6. The HDIL Group had over time availed of loans amounting to several thousand crores from Yes Bank for land acquisition and real estate development. Yes Bank was the primary banker and lender to the HDIL Group and in such capacity, wielded a significant amount of influence over the HDIL Promoters. Due to

deterioration of market conditions.. the HDIL Group was under severe financial stress and found itself unable to make repayments of loans to lenders.

7. Due to defaults in repayment of loans availed by various HDIL Group Companies, some of the other lenders to these companies classified their accounts as NPAs. However, Yes Bank was not willing to recognize loans as NPAs since such classification would have capital provisioning consequences for Yes Bank.....

9. In 2011, Yes Bank entered into an arrangement with HDIL Promoters to sanction loans in Mack Star's name, the proceeds of which loans could be used to repay loans availed by various HDIL Group Companies from Yes Bank. Yes Bank knew Plaintiff No.1's consent was required for these loans but also knew that Plaintiff No.1, which played a passive role in Mack Star's affairs, would not have any commercial incentive to approve evergreening of potential NPAs on Yes Bank's loan book....

10. The HDIL Promoters, being heavily dependent on Yes Bank for meeting HDIL's financial requirements...succumbed to pressure from Yes Bank to enter into this arrangement....

11. ...Yes Bank never carried out any due diligence on Mack Star's need for funds and the ultimate end-use because they knew that the ultimate use was to finance loan repayments by the HDIL Group Companies.

13. ..the benefit of this arrangement accrued solely to Yes Bank, which was able to evade the applicable capital provisioning norms by evergreening its loans instead of declaring them as NPAs... Yes Bank is mischaracterizing facts by pretending to be a bona fide lender....

24. ...when funds were credited to Mack Star's Yes bank account and subsequently transferred to HDIL Group companies, such transfers were often initiated by Yes Bank using instructions obtained by them before disbursal of the loans....”

(Emphasis Supplied)

13. From the results of the investigations by ED, the ‘Attachment Order’ passed by PMLA Adjudicating Authority and also the FIR lodged by CBI read together with the material on record establishes that Yes Bank disbursed these loans to Mack Star ignoring the terms of Mack Star’s Articles of Association which expressly prohibit Mack Star from availing any loans without the approval of its majority shareholders. The investigation reveals that more than 99% of the loan amount disbursed was used in order to discharge the liabilities owned by Wadhawans HDIL Group to Yes Bank and was never put to use by Mack Star.

14. At this juncture, we address to the contention of the Learned Sr. Counsel Mr. Ramji Srinivasan that the Appellant being the majority shareholder had clearly participated and approved the Resolution, giving consent to the Board of Directors of Mack Star to borrow sums of money as deemed necessary and therefore now cannot turn around and say that the Appellant was unaware of these financial transactions. Mr. Ramji Srinivasan vehemently contended that the footnote of the Balance Sheet of the Mack Star for the Financial Year 2020 reflects the amount of Rs.1,27,53,55,000/- admitting that the said amount was obtained from the Yes Bank and therefore what needs to be seen is whether there is a ‘debt’ and ‘default’ as envisaged by the Hon’ble Apex court in **‘M/s. Innoventive Industries Ltd.’ (Supra)**. It is the case of the Respondent that the Adjudicating Authority need not delve into the question of whether the ‘debt’ is disputed or not as long as the debt is ‘due and payable’. Learned Counsel also placed reliance on the ratio of the Hon’ble Supreme Court in **‘Orator Marketing Private**

Limited’ (Supra), in support of his case that as long as the loan amount is reflecting in the Balance Sheet of the ‘Corporate Debtor’ and specifies the existence of a debt, the scope of the Code is very limited and this Tribunal need not be concerned with the end use of the debts. He relied on para 30 of **‘M/s. Innoventive Industries Ltd.’ (Supra)** which is reproduced as hereunder:

“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 on application and not otherwise.”

15. The Annual Report of Mack Star for the Financial Year 2019-20 has a note/caveat below which reads as hereunder:

*“**This amount represents the loan obtained fraudulently by the Erstwhile Management from Yes Bank in collusion with Yes bank to evergreen loan facilities extended by Yes Bank to HDIL and its group companies. This loan was recorded by the Erstwhile Management in the books of accounts of the Company whilst the funds purportedly borrowed by the Company from Yes Bank were either disbursed to HDIL or siphoned off by the Erstwhile Management to HDIL and its group companies.*

In relation to these loans disbursed to the Company by Yes Bank, the Company has filed a civil suit before the Hon’ble High Court of Bombay (Commercial Suit (L) No. 1233 of 2019) on 16th November, 2019, against Yes Bank and certain other parties. The Company has made detailed submissions before the Hon’ble Court with evidence alleging fraud on the part

of Yes Bank in disbursing the said loans. To that extent, the liability of the Company to repay this Indebtedness is uncertain.”

16. Learned Sr. Counsel Mr. Krishnendu Datta drew our attention to these references in Mack Star’s Annual Report for Financial Year 2019–20 wherein it was clear that Mack Star has denied the existence of any such debt. Merely because the amounts are reflected in the Balance Sheet it cannot be directly construed as an acknowledgement of debt if there is a note in the Balance Sheet which states otherwise indicating that there is a caveat/footnote that such an entry would not amount to any ‘acknowledgement of debt’. We place reliance on the observations made by the Hon’ble Supreme Court in **‘Asset Reconstruction Company India Ltd.’ Vs. ‘Bishal Jaswal & Ors.’, (2020) 16 SCC 366**, in which the Hon’ble Apex Court has observed as follows:

“21... In fact, it is not uncommon to have an entry in a balance sheet with notes annexed to or forming part of such balance sheet, or in the auditor’s report which must be read along with the balance sheet, indicating that such entry would not amount to an acknowledgement of debt for reasons given in the said note.

35....it would depend on the facts of each case as to whether an entry made in a balance sheet qua any particular creditor is unequivocal or has been entered into caveats, which then has to be examined on a case by case basis to establish whether an acknowledgement of liability has, in fact, been made..”

17. Therefore, the contention of the Learned Counsel appearing for the first Respondent that the amounts which are reflected in the Balance Sheet have to be taken as clear ‘acknowledgement of debt’ is unsustainable

especially keeping in view the that there was a caveat mentioned in the Balance Sheet and therefore we are of the earnest view that the ratio of **‘Asset Reconstruction Company India Ltd.’ (Supra)**, is applicable to the facts of this case. Though the Balance Sheet is of the year 2019-20, it cannot dilute the fact that the loan amounts were indeed disputed. Further it is seen from the record that the AGM Resolution dated 29.05.2014 and form MGT – 7 were signed by Mr. Iyengar i.e., the Wadhawan Director, who in his written statement has admitted that Yes Bank had entered into an arrangement with Wadhawan and to sanction loan in Mack Star's name, the proceeds of which loans was to be used to repay loans availed by the various HDIL Group Companies back to Yes Bank. Learned Sr. Counsel Mr. Srinivasan contended that 99.96% of Mack Star's common shareholders had attended the AGM on 29.05.2014 and since the Appellant/Ocean Deity held 82.17% common shares of Mack Star the Appellant had attended the AGM on 29.05.2014 for the shareholder participation to be 99.96%. We find force in the submissions of Learned Sr. Counsel Mr. Krishnendu Dutta, based on the material on record, that Ocean Deity held only 1000 common shares of Mack Star as on 29.05.2014 and it was only in September 2014 that Rs.1,05,19,470/- preference shares held by the Appellant were converted into common shares and therefore Ocean Deity became 82.17% shareholder of Mack Star *‘only in September 2014’*. Therefore, we are of the considered view that the inference drawn by the Appellant holding that the AGM was attended and the Resolution approved by the Appellant herein, cannot be sustained. Be that as it may, the record shows that two of the directors Mr.

Amanpreet Singh and Mr. Iyengar have admitted in the statements recorded under Section 50(2) & 50(3) of the PMLA that they have never attended any of these Board Meetings of Mack Star. The same is also reflected in the final Order of the PMLA Adjudicating Authority dated 10.09.2021. Keeping in view the documentary evidence on record, read with the findings of the Statutory Bodies and the observations made by CBI, we are of the earnest view that the loans were sanctioned in the name of Mack Star by Yes Bank; the said loan amounts were diverted to HDIL which in turn used those amounts to pay back Yes Bank for the loans taken by them. The circular movement of funds shows that most of the loan amount was used in order to discharge liabilities owned by HDIL Group and the Wadhawans to Yes Bank. *It is also not understood as to how without any instruction from Mack Star, Rs.40 Crores/- which was disbursed in the name of Mack Star on 23.09.2015 was diverted on the same day to HDIL.*

18. The aforementioned conclusions by the premier Investigating Agencies are germane to the issue on hand as what has to be seen by this Tribunal is whether these loan amounts are payable in law and can be defined as 'Financial Debt' as defined under Section 5(8) of the Code. Section 5(8) of the Code reads as follows:

"5(8) "financial debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes—

(a) money borrowed against the payment of interest;
(b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;

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

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

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

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

[Explanation.—For the purposes of this sub-clause,—

(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

(ii) the expressions, “allottee” and “real estate project” shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]

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

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

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

19. Section 5(8) defines financial debt as a debt along with interest, if any, which is disbursed against the consideration for the time value of money.

The two vital requisites from this definition are that firstly, there has to be debt that is disbursed and secondly, consideration for time value of money. According to Black's Law Dictionary, disbursement is defined as:

1. *The act of paying out money, commonly from a fund or in settlement of a debt or account payable.*
2. *The money paid; an amount of money given for a particular purpose.*

20. It is apposite to refer to the judgment of the Hon'ble Supreme Court in the case of **'Phoenix Arc Pvt. Ltd.' Vs. 'Spade Financial Services Ltd. & Ors.'**, (2021) 3 SCC 475, decided on 01st February, 2021 wherein it was held as under:

"G.3.2 Financial Creditor and Financial Debt

43. Under Section 5(7) of the IBC, a person can be categorised as a financial creditor if a financial debt is owed to it. Section 5(8) of the IBC stipulates that the essential ingredient of a financial debt is disbursement against consideration for the time value of money. This Court, speaking through Justice Rohinton F Nariman, in Swiss Ribbons Pvt. Ltd. v. Union of India¹⁰ has held:

"42. A perusal of the definition of "financial creditor" and "financial debt" makes it clear that a financial debt is a debt together with interest, if any, which is disbursed against the consideration for time value of money. It may further be money that is borrowed or raised in any of the manners prescribed in Section 5(8) or otherwise, as Section 5(8) is an inclusive definition. On the other hand, an "operational debt" would include a claim in respect of the provision of goods or services, including employment, or a debt in respect of payment of dues arising under any law and payable to the Government or any local authority."

44. In this context, it would be relevant to discuss the meaning of the terms "disburse" and "time value of money" used in the principal clause of Section 5(8) of the IBC. This Court has interpreted the term

“disbursal” in *Pioneer Urban Land and Infrastructure Ltd vs. Union of India*¹¹ in the following terms:

“70. The definition of “financial debt” in Section 5(8) then goes on to state that a “debt” must be “disbursed” against the consideration for time value of money. “Disbursement” is defined in *Black's Law Dictionary* (10th Edn.) to mean:

“1. The act of paying out money, commonly from a fund or in settlement of a debt or account payable. 2. The money so paid; an amount of money given for a particular purpose.”

71. In the present context, it is clear that the expression “disburse” would refer to the payment of instalments by the allottee to the real estate developer for the particular purpose of funding the real estate project in which the allottee is to be allotted a flat/apartment. The expression “disbursed” refers to money which has been paid against consideration for the “time value of money”. In short, the “disbursal” must be money and must be against consideration for the “time value of money”, meaning thereby, the fact that such money is now no longer with the lender, but is with the borrower, who then utilises the money....”

(Emphasis Supplied)

21. Hon’ble Supreme Court in another matter of **‘Anuj Jain IRP for Jaypee Infratech Ltd.’ Vs. ‘Axis Bank Ltd.’, (2020) 8 SCC 401**, examined in detail the ingredients of Section 5(8) in para 43 of the Judgment and held that:

“43.....
.....The requirement of existence of a debt, which is disbursed against the consideration for the time value of money, in our view, remains an essential part even in respect of any of the transactions/dealings stated in sub-clauses (a) to (i) of Section 5(8), even if it is not necessarily stated therein. In any case, the definition, by its very frame, cannot be read so expansive, rather infinitely wide, that the root requirements of ‘disbursement’ against ‘the consideration for the time value of money’ could

be forsaken in the manner that any transaction could stand alone to become a financial debt. In other words, any of the transactions stated in the said subclauses (a) to (i) of Section 5(8) would be falling within the ambit of 'financial debt' only if it carries the essential elements stated in the principal clause or at least has the features which could be traced to such essential elements in the principal clause. In yet other words, the essential element of disbursal, and that too against the consideration for time value of money, needs to be found in the genesis of any debt before it may be treated as 'financial debt' within the meaning of Section 5(8) of the Code. This debt may be of any nature but a part of it is always required to be carrying, or corresponding to, or at least having some traces of disbursal against consideration for the time value of money."

In the light of the aforesaid pronouncement of the Hon'ble Supreme Court, we have examined the facts of this case.

22. The term disbursement has been interpreted clearly in the case of ***'Pioneer Urban Land and Infrastructure Ltd.' Vs. 'Union of India', (2019) 8 SCC 416***, which held that the "disbursal" must be money and must be against consideration for the 'time value of money'. Such money should no longer be with the lender, but with the borrower, who then utilizes the money for the correct purpose it is intended for. In the instant case, the money disbursed by Yes Bank was not utilized for the purpose intended for.

23. It is also apposite at this stage to reproduce the letter dated 20.12.2021 addressed by the Deputy Director of the Directorate of Enforcement to the IRP of Mack Star stating that *'Yes Bank had illegally sanctioned the loans of Rs.202.1Crores/- in the name of Mack Star as per*

collusion and criminal conspiracy of Yes Bank and the HDIL Group Companies':

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Annexure A to Appellant's rejoinder to IRP's reply in Appeal 927 of 2021 @ Pg. 17



प्रवर्तन निदेशालय/ Directorate of Enforcement
मुंबई आंचलिक कार्यालय-I / Mumbai Zonal Office-I
विदेशी मुद्रा प्रबंधन अधिनियम / Foreign Exchange Management Act
धनशोधन नियारण अधिनियम / Prevention of Money Laundering Act
वित्तमंत्रालय - राजस्व विभाग/ Ministry of Finance - Department of Revenue
भारतसरकार / Government of India

Mumbai Zonal Office-I,
Kaiser-I-Hind Building,
Fourth Floor, Currimbhoy Road,
Ballard Estate, Mumbai-400 001
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मुंबई आंचलिक कार्यालय-I,
कैसर -ए-हिन्द बिल्डिंग
4th Floor करीमभाई रोड
बल्लार्ड एस्टेट, मुंबई- ४००००१
दूरभाष : 22622040, फैक्स : २२६२२२८४

F No. ECIR/MBZO-I/39/2021/Misc-3

Dated 20.12.2021

To,
Shri Saurabh Kumar Tikmani,
Interim Resolution Professional,
C/o Mack Star Marketing Pvt. Ltd.,
1102, 11th Floor,
Peninsula Business Park,
Lower Parel, Mumbai-400013.

Sir,

Sub:- Investigation under PMLA, 2002 in the case of M/s Mack Star Marketing
Pvt. Ltd.,-reg.

Please refer to the investigation being conducted by the Directorate of Enforcement under Prevention of Money laundering Act (PMLA), 2002 vide ECIR/MBZO-I/39/2020 in M/s Mack Star Marketing against the promoters of Housing Development & Infrastructure Ltd (HDIL), their associates and others. The investigation is with regard to certain term loans granted by Yes bank in the name of Mack Star Marketing Pvt. Ltd. and a few related transactions. During the course of investigation, Ex. CEO & MD of Yes bank Mr. Rana Kapoor was arrested 27.01.2021. From the investigation conducted so far in this case, it is revealed that-

- i) Yes Bank had illegally sanctioned loans of Rs. 202.1 Crore in the name of Mack Star Marketing Pvt. Ltd. as per collusion and criminal conspiracy of Mr. Rana Kapoor with Mr. Rakesh Wadhawan and Mr. Sarang Wadhawan of HDIL;
- ii) Approximately the entire amount of the said loan was siphoned off to HDIL group companies to be used for repayment of earlier loans of HDIL group companies from Yes bank;
- iii) Thus, the liability of repaying these loans, sanctioned illegally in the name of Mack Star Marketing Pvt. Ltd. was actually of HDIL group companies.

You are requested to intimate the status of proceedings at your end to the undersigned with regard to the said term loan facilities.

Yours Sincerely,

(Akash Shrikhande)
Deputy Director

Encl:- For reference copy of Prosecution Complaint
No. 404/2021 filed by ED in this matter is enclosed

(Emphasis Supplied)

24. In view of this overwhelming evidence and conclusion by Statutory Bodies which are independent agencies we are of the considered view that these financial transactions have to be examined on the touchstone of the ratio laid down by the Hon'ble Supreme Court in '**Phoenix ARC Private Limited' Vs. 'Spade Financial Services Ltd. & Ors.', (2021) 3 SCC 475,** wherein the Hon'ble Apex Court has observed that '*collusive transaction does not lead to a creation of 'Financial Debt' under Section 5(8) of the Code*'. One among several disbursements, in the instant case, is Rs.40 Crores/- that was disbursed by Yes Bank in Mack Star's name and directly credited to HDIL account without any specific instructions from Mack Star. Rs.140 Crores/- out of Rs.147.6 Crores/- was sanctioned by Yes Bank in Mack Star's name for the purpose of renovating '*Kaledonia*' a two year old building constructed at a cost of Rs.100 Crore/-; more than 99% of the amount was disbursed by Yes Bank in the name of Mack Star's was routed back to Yes Bank either on the same day or without a very short period. Therefore, we are of the considered view that the subject commercial transactions were collusive in nature and are squarely covered by the observations made by the Hon'ble Apex Court in '**Phoenix ARC Pvt. Ltd.' (Supra)**. As we hold that these transactions were collusive in nature, they do not fall within the ambit of the definition of 'Financial Debt' as defined under Section 5(8) of the Code and therefore Suraksha, the Assignee, cannot be termed as a 'Financial Creditor' as defined under Section 5(7) of the Code. We are also conscious of the fact that the loan was assigned to Suraksha on 29.09.2017, and almost a year later during June 2018, Yes Bank was engaging in settlement talks

with Mack Star and further merely two weeks after the Criminal Complaint was lodged, Suraksha issued a Demand Notice under IBC to Mack Star.

25. Lastly, we address to the argument of the Learned Sr. Counsel Mr. Srinivasan that the Adjudicating Authority was right in concluding that as far as there is a 'debt' and a 'default' and amount is 'due and payable', the Section 7 'Admission' is inevitable and the scope of the Code is very limited.

The Hon'ble Supreme Court in '**Vidarbha Industries Power Ltd.' Vs. 'Axis**

Bank Ltd'. 2022 SCC Online SC 841 has observed as follows:

"88. Ordinarily, the Adjudicating Authority (NCLT) would have to exercise its discretion to admit an application under Section 7 of the IBC of the IBC and initiate CIRP on satisfaction of the existence of a financial debt and default on the part of the Corporate Debtor in payment of the debt, unless there are good reasons not to admit the petition.

89. The Adjudicating Authority (NCLT) has to consider the grounds made out by the Corporate Debtor against admission, on its own merits. For example when admission is opposed on the ground of existence of an award or a decree in favour of the Corporate Debtor, and the Awarded/decretal amount exceeds the amount of the debt, the Adjudicating Authority would have to exercise its discretion under Section 7(5)(a) of the IBC to keep the admission of the application of the Financial Creditor in abeyance, unless there is good reason not to do so. The Adjudicating Authority may, for example, admit the application of the Financial Creditor, notwithstanding any award or decree, if the Award/Decretal amount is incapable of realisation. The example is only illustrative.

90. In this case, the Adjudicating Authority (NCLT) has simply brushed aside the case of the Appellant that an amount of Rs. 1,730 Crores was realizable by the Appellant in terms of the order passed by APTEL in favour of the Appellant, with the cursory observation that disputes if any between the Appellant and the recipient of electricity or between

the Appellant and the Electricity Regulatory Commission were inconsequential.

91. We are clearly of the view that the Adjudicating Authority (NCLT) as also the Appellate Tribunal (NCLAT) fell in error in holding that once it was found that a debt existed and a Corporate Debtor was in default in payment of the debt there would be no option to the Adjudicating Authority (NCLT) but to admit the petition under Section 7 of the IBC.”

(Emphasis Supplied)

26. In this case, the Adjudicating Authority simply brushed aside the results of the investigation and more surprisingly the Impugned Order is completely silent on this issue.

27. Keeping in view all the aforementioned Judgements and the documentary evidence on record, we are of the earnest view that merely because there is a ‘debt’ and a ‘default’ it cannot be construed that a Section 7 Application is *required* to be admitted. The Adjudicating Authority ought to have examined the ‘*nature of these financial transactions*’ having regard to the Investigation Reports which were filed by the Appellant herein, the violation of the Articles of Association and assessed whether the transactions were collusive in nature or not and *used its discretion* whether to admit such an Application or not, keeping in view the scope and objective of the Code. It is appropriate at this juncture, to rely on the Judgement of the Hon’ble Supreme Court in **‘Embassy Property Development Pvt. Ltd.’ Vs. ‘State of Karnataka’ (2020) 13 SCC 308**, in which the Hon’ble Apex Court has clearly noted that the Adjudicating Authority has the jurisdiction to enquire into allegations of fraud when there is a *prima facie* case of fraudulent initiation of CIRP.

28. The chequered history of the loan transactions and collusive arrangements indulged by Yes Bank demonstrate that the Term Loans disbursed in the name of Mack Star is an ‘eye-wash’ and Yes Bank has disbursed these loans with an ulterior motive. Having observed so, we hold that the Assignment to Suraksha is not a bona fide one, peculiar to the facts of the attendant case and the loan amounts do not satisfy the essential requisites of a ‘Financial Debt’ as envisaged under the Code. This Tribunal observed that the fundamental scope & objective of IBC is ‘Resolution’ and ‘Maximization of Assets’ and not ‘Recovery’ of loans which do not strictly fall within the definition of ‘Financial Debt’ as defined under Section 5(8) of the Code.

29. For all the aforementioned reasons, we allow this Appeal and set aside the Impugned Order passed by the Learned Adjudicating Authority (National Company Law Tribunal, Mumbai Bench, Court III), on 20.09.2021. In effect, Order(s) passed by Ld. Adjudicating Authority appointing ‘Interim Resolution Professional’, declaring moratorium, freezing of account and all other Order(s) passed by Adjudicating Authority pursuant to the Impugned Order, are set aside. The Adjudicating Authority will now close the proceedings. The ‘Corporate Debtor’ is released from all the rigours of law and is allowed to function independently through its Board of Directors with immediate effect. Needless to add, the IRP fees/costs if any, shall be borne by Suraksha.

30. I.A. 1332 of 2022 in *Comp. App. (AT) (Ins.) No. 795/2021* stands infructuous and is disposed of accordingly.

Company Appeal (AT) (Insolvency) No. 806/2021
&
I.A. No. 2221/2021

31. This Appeal is preferred by the Managing Director of Mack Star challenging the Impugned Order of the Adjudicating Authority and the I.A. 1740 of 2020/the Maintainability Application in C.P. (IB) No.-1621/2019, whereby the Section 7 Application preferred against Mack Star was admitted.

32. In addition to other submissions, it is the main case of the Appellant that the 'Maintainability Application' was not heard at length and that on the date of the final hearing, the Sr. Counsel was also not present and could not be heard. However, since the grounds raised with respect to Admission of the Section 7 Application are similar to the ones raised/submitted in *Comp. App. (AT) (Ins.) 795/2021*, for the same reasons, this Appeal is also allowed and Order of the Adjudicating Authority is set aside.

33. I.A. 2221 of 2021 in *Comp. App. (AT) (Ins.) No. 806/2021* stands infructuous and is disposed of accordingly.

Company Appeal (AT) (Ins.) No. 927/2021
&
I.A. No. 1534/2022

34. This Appeal is preferred by Ocean Deity Investment Holdings Limited, challenging the Impugned Order dated 27.10.2021 passed by the Learned Adjudicating Authority (National Company Law, Tribunal, Mumbai Bench, Court-III) in IA 2290/2021, IA 2292/2021 and IA 2396/2021 in C.P. (IB) No.- 1621/IBC/MB/2019 filed by Mr. Tikmani/IRP on 05.10.2021, seeking to be replaced as IRP; by Suraksha seeking replacement of Mr. Tikamani

and appointment of Mr. Avinash Shukla as IRP respectively. IA 2396/2021 was disposed of as infructuous in view of the Orders passed in IA 2292/2021 & IA 2290/2021.

35. It is the main case of the Appellant that the Section 7 Application is defective with respect to nomination of the IRP as the nominated IRP Mr. Shailen Shah resigned on 01.09.2021 after the Adjudicating Authority has reserved the Judgement on 24.08.2021 and thereafter Suraksha had secured the consent of the new IRP, Mr. Avinash Shukla and sought his appointment as IRP from the Adjudicating Authority which was allowed on 27.10.2021. It was strenuously argued by Dr. Singhvi that no explanation has come forthwith from Suraksha justifying the misrepresentation that Mr. Tikmani has withdrawn his consent on 30.09.2021 and that Suraksha falsely stated that Mr. Tikmani has withdrawn his consent after the Admission Order was passed. It is argued that Mr. Tikmani had withdrawn his consent on 13.05.2019 itself and that there was no IRP in the case from 01.09.2021 to 20.09.2021.

36. It was strenuously contended by the Learned Sr. Counsel Mr. Srinivasan that Mr. Tikmani had vide letter dated 13.05.2019 withdrawn his consent and gave a no objection for appointment of Mr. Shailen Shah as the new IRP; that amended Form-5 was permitted by the Adjudicating Authority vide Order dated 28.05.2019 and therefore on 03.06.2019 Suraksha filed an amended Section 7 Application to reflect the change of name from Suraksha Asset Reconstruction Private Limited to Suraksha Asset Reconstruction Limited and subsequently filed Form-2 nominating Mr. Shailen Shah as the

IRP. It is contended that Suraksha filed Written Submissions on 01.09.2021 before the Adjudicating Authority and the nominated IRP Mr. Shailen Shah had in the evening vide email dated 01.09.2021, on the very same day, withdrawn his consent and subsequently on 20.09.2021, the Section 7 Application was 'Admitted'.

37. As *Company Appeals (AT) (Ins.) No. 795 & 806 of 2021* are allowed and the Admission of the Section 7 itself is set aside, we do not wish to address this hyper-technical issue of whether there was any gap in the appointment of an IRP, when two of them had withdrawn their consent, rendering the Application to be defective, or otherwise.

38. Hence, *Comp. App. (AT) (Ins.) 927/2021* is disposed of accordingly.

39. I.A. 1534 of 2022 in *Comp. App. (AT) (Ins.) No. 927/2021* stands infructuous and is disposed of accordingly.

[Justice Anant Bijay Singh]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

NEW DELHI
08th September, 2022
Himanshu