

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH, COURT II**

I.A./2973/2022

In
CP(IB)/1027/(MB)/2022

*Application filed under section 60(5) of
Insolvency and Bankruptcy Code, 2016
and Rule 11 of the National Company Law
Tribunal Rules, 2016.*

Jayaswal Neco Industries Limited

...Applicant

V/s

Abhiruchi Vision Private Limited

... Respondent

In the matter of

Abhiruchi Vision Private Limited

...Financial Creditor

V/s

Jayaswal Neco Industries Limited

...Corporate Debtor

Order Pronounced on:- 09.02.2023

Coram:

Hon'ble Member (Judicial) : Justice P.N. Deshmukh (Retd.)

Hon'ble Member (Technical) : Mr. Shyam Babu Gautam

Appearances (through video conferencing)

For the Applicant/Corporate Debtor : Mr. Janak Dwarkadas, Sr. Counsel
Mr. Zal Andhyarujina, Sr. Counsel
Mr. Rohan Kadam, Counsel

For the Respondent/Financial Creditor: Adv. Sandeep Bajaj a/w
Adv. Mr. Devansh Jain

ORDER

Per- Justice P.N. Deshmukh (Retd.), Member Judicial

1. This is an Interlocutory Application 2973/2022 filed by Jayaswal Neco Industries Limited (Corporate Debtor in the main Petition) under section 60(5) of IBC, 2016 and Rule 11 of NCLT Rules, 2016 against Abhiruchi Vision Private Limited (Financial Creditor in the main Petition), seeking an order dismissing the Company Petition (IB)/1027/2022 filed by the Financial Creditor under section 7 of IBC, 2016 for initiation of corporate insolvency resolution process against the Applicant.

The Applicant has further prayed that in case the above-mentioned prayer seeking dismissal of the main Company Petition is rejected, an Order permitting the Applicant to file its Affidavit in Reply on the merits of Company Petition be allowed. However, during the course of arguments, the Ld. Counsel for the Respondent/Financial Creditor requested to reserve the main Company Petition along with this interlocutory application for orders. In response to this, the Ld. Senior Counsel for the Applicant/Corporate Debtor submitted that the present Interlocutory application is challenging the main petition only on the ground of maintainability and not on

merits. Further, it was submitted that it is a settled law that issue of maintainability is to be dealt before going on merits of the case and requested to reserve only the interlocutory application for orders. After hearing both the parties in detail, this bench has reserved the IA/2973/2022 in C.P.(IB)/1027(MB)/2022 for orders on 31.01.2023.

2. On perusal of the Interlocutory Application, it reveals that Abhiruchi Vision Private Limited (“AVPL/Financial Creditor”) has filed the application under section 7 of the IBC, 2016 for initiation of corporate insolvency resolution process against Jayaswal Neco Industries Limited (“JNIL/Applicant”). In response to this, the Corporate Debtor/Applicant has filed the present IA and has denied all the allegations and the contentions pleaded in the Section 7 Application and submitted that it is a gross abuse of process and is not maintainable and seeks a dismissal of the same. Moreover, the Applicant/Corporate Debtor has reserved its right to file a Reply addressing the merits of the Section 7 Application.
3. On further perusal of this Application, it is clear that CIAL and JNIL were group companies and formed part of the Jayaswal Family. On 31.07.2008, an Indenture of Family Settlement (“IFS”) was agreed between the members of the Jayaswal Family. Neither CIAL nor JNIL were parties to this Agreement. Under the IFS, the assets owned by B.L. Shaw were divided amongst B.L. Shaw, Arbind Kumar Jayaswal and Mr Ramesh Kumar Jayaswal (“BLS Group”) and Mr Manoj Kumar

Jayaswal and his sons (“MKJ Group”). Under the IFS, the Jayaswal family agreed that JNIL would be allotted to the BLS Group and that CIAL was allotted to the MKJ Group. In addition to this understanding, the IFS also contemplated as under;

- a. *Clause 7(1) of the IFS, provided that the Strip Mill Division ("Division") of CIAL would be demerged from CIAL and subsequently merged into JNIL. Under Clause 18 of the IFS, the process of demerger was to be completed by the parties within a period of 90 days from 31.07.2008. During this interregnum, it was agreed that the Division would be leased and run by NIL till the demerger was completed.*
- b. *The IFS recorded that the MKJ Group (through CIAL) had borrowed from various banks and financial institutions for running the Division. CIAL being the borrower, was bound to repay the lenders.*
- c. *Further, under clause 7 (1) of the IFS, the parties had agreed that subject to the demerger process being completed within 90 days and the MKJ Group adhering to the terms of the IFS, the MKJ Group through CIAL would repay the lenders of the Division from the lease rental accruals paid by JNIL for operating the Division. Thus, the Division stood allotted to the BLS Group under the IFS in view of the MKJ Group having received consideration under the IFS and it was expressly agreed between the parties that the aforesaid arrangement was purely for the commercial convenience of the parties to the IFS and was in no way connected to the actual repayment to the lenders of the Division.*

Based on the representations made by the MKJ Group and the terms of the IFS, the BLS Group through JNIL commenced making payment of the lease rentals to the MKJ Group through CIAL in 2008. In turn, CIAL would forward these sums to its lenders against its borrowings that it had taken in respect of the Strip Mill Division. *Further*, under the IFS, the demerger was to be completed within 90 days from 31.07.2008 i.e. on or before 29.10.2008.

Inspite of this express understanding, the MKJ Group reneged on their obligations to complete the demerger within time and breached the terms and conditions of IFS. They dragged on the demerger process for nearly 5 years. As a result, whilst the BLS Group continued to operate the Division as per the understanding under the IFS, the delay caused by the MKJ Group in completing the demerger process caused huge losses to the former in terms of cost of operations, security and maintenance of the Division coupled with the fact that it could not take any term loans and working capital to run or modernize the Division. In these circumstances, JNIL was constrained to stop making payments to CIAL.

4. Further, on 09.05.2011, the MKJ Group filed Special Civil Suit No. 584/2011 before the 3rd Joint Civil Judge, Senior Division, Nagpur against the BLS Group (“MKJ Civil Suit”) seeking a declaration that the non-payment of the monthly instalments (inclusive of principal and interest repayments) owed by CIAL to the lenders of the Division by the BLS Group

from August 2010, was illegal and contrary to the IFS. The MKJ Group also sought an amount of INR 30,82,04,954/- being the amounts due from August 2010 till March 2011. The BLS Group filed an application under Section 8 of the Arbitration and Conciliation Act, 1996, seeking to dismiss the MKJ Suit as not maintainable in view of the arbitration agreement contained in Clause 27 of the IFS. The aforesaid Section 8 Application was initially dismissed by the Civil Judge by an Order dated 13.05.2011, which was subsequently reversed by the Hon'ble Bombay High Court by an Order dated 28.07.2011. In the meantime, and in view of MKJ Group continuously breaching the IFS, the BLS Group was constrained to invoke arbitration under Clause 27 of the IFS. On June 20, 2011, the BLS Group filed an application under Section 11 of the Arbitration Act, before the Hon'ble Bombay High Court, for appointment of an arbitrator. On 12.08.2011, the Hon'ble Bombay High Court appointed Justice V.C. Daga (Retd.) and the BLS Group filed its Statement of Claim before the Sole Arbitrator wherein it claimed a sum of IN 831.81 Crores (inclusive of interest till October 31, 2014) towards various claims including expenses, assumed returns, refunds of monies and TDS, term deposit returns, etc., arising due to the MKJ Group's delay in completion of demerger of the Division.

In response to this, the MKJ Group filed a Counter Claim before the Sole Arbitrator seeking a direction against the BLS Group to make payment of INR 45.41 Crores towards the monthly instalments (inclusive of principal and interest repayments) to be paid by CIAL to the lenders of the Division.

Thus, the same claim was an issue for consideration before the Sole Arbitrator. The MKJ Group also filed an application under section 17 of the Arbitration Act seeking interim reliefs for the same amounts. This Application too was dismissed by the Sole Arbitrator on 24.07.2012. The MKJ Group never challenged this Order and the same became operative and binding. The amount of INR 45.41 Crores claimed by the MKJ Group in its Counter Claim forms a part of the alleged amount claimed by AVPL in the present Section 7 Application.

5. In 2013, the Scheme of Arrangement (“the Scheme”) under sections 391 to 394 of the Companies Act, 1956 between JNIL and CIAL providing for merger of the Division (Demerged undertaking) was sanctioned by the Hon’ble Bombay High Court and the Hon’ble Calcutta High Court vide their orders dated 16.09.2013 and 16.04.2013 respectively. The appointed date of the scheme was 01.04.2008, and the same became effective on 20.11.2013, when the certified copy of the scheme was filed before the ROC. Subsequently, after the completion of the demerger process, the BLS Group made repayments (inclusive of principal and interest) to the lenders of the Division since the same stood transferred in favor of JNIL.

Further, arbitration proceedings were pending, and at the request of the MKJ Group, the BLS Group through JNIL, sent an email on 27.03.2014, to the MKJ Group acting through CIAL, recording a credit balance of INR 104,43,67,346.75 towards the Division as on 27.03.2014. The BLS Group also recorded that there was a debit balance of IN 8,85,61,253.57,

receivable from the MKJ Group. Similarly, at the request of the MKJ Group, the BLS Group through JNIL also sent an email to the MKJ Group through CIAL on 08.07.2014 confirming the balance of the CIAL Division as INR 102,26,78,728/-.

AVPL has contended that the aforesaid emails dated 27.03.2014, and July 08.07.2014, constitute an alleged admission by JNIL towards any dues payable by JNIL to AVPL. On 26.11.2014, the MKJ Group filed an application under section 31(6) of the Arbitration Act, inter alia, seeking directions against the BLS Group to perform under the IFS by commencing the payment through JNIL of the instalments (inclusive of principal and interest repayments) due to the lenders of the Division. Specifically, in that Application, the MKJ Group claimed that the BLS Group through JNIL, was liable to pay a sum of INR 102,26,78,728/-. The Section 31 (6) Application dated 26.11.2014, was dismissed by the Sole Arbitrator on 23.09.2016. The MKJ Group did not appeal this Order and the same became operative and binding.

6. On 03.03.2015, CIAL through its advocates, issued a winding up notice to JNIL under Section 434 of the Companies Act, 1956, claiming the alleged sum on account of the alleged non-payment of the dues (inclusive of principal and interest repayments) of the lenders of the Division under the IFS. The JNIL through its advocates responded on 31.03.2015, and disputed CIAL's alleged claim for INR 102,26,78,728/- inter alia, on the grounds that the alleged claim was not payable and, in any event, was the subject matter of the pending Arbitration

Proceedings. On 05.04.2015, CIAL filed the Winding Up Petition against JNIL based on the alleged unpaid amount of INR 102,26,78,728/- towards the dues of the lenders of the Division. JNIL filed its Reply dated 16.06.2015, to the Winding Up Petition, disputing the claim and in any event, was the subject matter of the pending Arbitration Proceedings. CIAL filed a Rejoinder dated 24.07.2015 and rely upon the Orders dated 15.10.2015, 29.01.2016 passed by the Hon'ble Bombay High Court and the Order dated 29.03.2016, passed by the Hon'ble Supreme Court for their true and correct interpretation.

Thereafter on 30.09.2015, JNIL filed Civil Suit No. 710 of 2015 against CIAL ("BLS Civil Suit") inter alia, seeking (i) a declaration that CIAL delayed the demerger process deliberately and caused a loss to the tune of INR 694.56 Crores, (ii) a permanent injunction directing CIAL to pay an amount of INR 5.71 Crores towards TDS benefits pertaining to the strip Mill, and (iii) 18% interest from the date of filing of the suit till the actual realization of the outstanding amount. The BLS Civil Suit is pending as on date. Further, during the pendency of the Winding up Petition and the Arbitration Proceedings, CIAL and AVPL executed a Deed of Assignment ("Assignment Agreement").

7. On 12.04.2017, AVPL filed CP (IB) No.717/MAH/2017 before this Tribunal against JNIL under Section 7 of the IBC based on an amount of INR 102,26,78,728/- on account of the alleged non-payment of the dues inclusive of principal and

interest repayments) to the lenders of the Division under the IFS. AVPL withdrew CP (IB) No. 717/(MAH)/2017 admittedly due to the pendency of the Winding Up Petition. This Hon'ble Tribunal passed an Order dated 01.05.2017 and disposed of CP(IB)No.717/MAH/2017 as withdrawn with "liberty to proceed in accordance with law". On 04.05.2017, AVPL filed an application for impleadment before the Hon'ble Bombay High Court inter alia seeking to be transposed in CIAL's place. On 25.02.2021, CIAL withdrew the Winding Up proceedings that were pending before the Hon'ble Bombay High Court. Whilst permitting this withdrawal, the Hon'ble Bombay High Court only granted liberty to CIAL to the extent expressed in the Order. No liberty was granted to AVPL. Thereafter on 23.07.2021, the BLS Group and the MKJ Group filed a Joint Pursis before the Sole Arbitrator. This Pursis recorded that the parties had settled all their disputes and were withdrawing all claims and counter claims made against each other including the claims relating to payments in respect of the Division that were to be paid by the BLS Group through JNIL to the MKJ Group through CIAL, including the alleged cause action arising out of INR 102,26,78,728 mentioned in the Section 7 Application. Accordingly, on 07.08.2021, the Sole Arbitrator passed an Order permitting withdrawal of all claims and counterclaims and recorded that the parties have settled their disputes amicably. On this basis, the Ld. Sole Arbitrator was pleased to terminate the Arbitration Proceedings.

8. Further, the Applicant has submitted that the Petition is not maintainable and has argued the following reasons:

a. The Financial Creditor/AVPL's right to institute these proceedings has been extinguished by its withdrawal of a prior Section 7 Application filed before this Hon'ble Tribunal on the same cause of action and the withdrawal of winding up proceedings on the same cause of action filed by its assignor (Corporate Ispat Alloys Limited/CIAL) as well as its predecessor. AVPL had earlier filed and subsequently withdrawn a prior Section 7 application [CP (IB) No. 717/(MAH)/2017] against the Applicant for the same cause of action. AVPL withdrew this Application on 01.05.2017, on account of the pendency of winding up proceedings (Company Petition No.11/2015) filed by CIAL against the Applicant on the same cause of action before the Hon'ble Bombay High Court, Nagpur Bench. Thereafter, the Financial Creditor filed an impleadment application in the Winding Up proceedings. By withdrawing the Section 7 Application before this Hon'ble Tribunal and filing an impleadment application before the High Court, AVPL/Financial Creditor accepted that Section 7 proceedings before this Hon'ble Tribunal was not the appropriate remedy.

b. In spite of filing an impleadment application in the Winding Up proceedings before the Hon'ble Bombay High Court, AVPL neither moved that application nor did it prosecute the same. It thus elected to have its assignor CIAL continue as

Petitioner and permitted CIAL's prosecution of those winding up proceedings at its behest. AVPL consciously chose not to prosecute its impleadment application and it elected to have CIAL prosecuting the winding up proceedings in the High Court so, it is bound by the results of that litigation as prosecuted by CIAL. On 25.02.2021, the Winding Up Petition was withdrawn by CIAL. Whilst recording this withdrawal, the High Court only granted liberty to CIAL "*avail appropriate remedy*" and AVPL was not granted any liberty. In these circumstances, AVPL is bound by the withdrawal Orders passed by this Hon'ble Tribunal and by the High Court. No liberty was expressly granted by the High Court to AVPL to pursue these proceedings or to avail of appropriate remedies. These proceedings are consequently not maintainable at all. *A Fortiori*, AVPL has no right to pursue any Section 7 Application and/or any other proceeding and the same stands extinguished in law.

- c. Without prejudice and notwithstanding the patent illegality of it bringing this Application, AVPL's claim is founded on an Indenture of Family Settlement dated 31.07.2008 ("IFS") between the Manoj Kumar Jayaswal Group and the BL Shaw Group. Neither AVPL nor its predecessor and/or JNIL were parties to this IFS. AVPL's claim which is admittedly founded on the IFS was in fact the subject matter of arbitration proceedings between the Manoj Kumar Jayaswal Group and the BL Shaw Group. Those Arbitration Proceedings have also been disposed-off as withdrawn on 07.08.2021 and all

the claims and counterclaims (including the alleged cause of action) of the respective parties stood amicably withdrawn without liberty. In these premises, there is no question of AVPL maintaining a claim founded on the IFS when the disputes arising out of the very same contract have been amicably fully compromised and withdrawn.

9. The Applicant has further submitted that JNIL is a listed entity with a market capitalization of around INR 26.00 Billion and more than 10,000 (direct and indirect) employees. JNIL has a Net Turnover of INR 5958.55 Crores in FY 2021-22 and a Net Profit After Tax of IN 2247.76 crores in FY 2021-22. JNIL also reported a Tangible Net Worth of INR 1780.86 Crores as on 31.03.2022. The Section 7 Application is evidently nothing but an ill-concealed and mala fide attempt to harass and coerce JNIL into paying monies which are not due in law. In these circumstances, the Applicant respectfully submits that Section 7 Application is to be dismissed as non-maintainable.
10. In response to this, the Respondent/Financial Creditor has filed a detailed reply and has submitted that the application under reply is an abuse of the process of law and is liable to be dismissed at the threshold itself. The Corporate Debtor in the present case, despite grant of opportunity for filing of the reply to the application under section 7 of the Code has cautiously elected to not file any response. In such circumstances, the right to file reply to the application ought to be closed. Moreover, the application under reply is liable to be dismissed

on merits and the same has been filed only as a tactic to delay the adjudication of the section 7 application filed by the Financial Creditor.

11. The Corporate Debtor has submitted in relation to the contention that the right to file the present proceedings has been extinguished by the withdrawal of a prior section 7 application filed before this Tribunal. At the very outset, it is imperative to state herein that in the application under reply, the Corporate Debtor has not denied its liability towards the Financial Creditor. The Corporate Debtor has in fact admitted to the liability towards the Financial Debt. In paragraph 18 of the application itself, the admission of liability is clear. The admission of liability has also been made by the Corporate Debtor in its books of accounts, which is continuing till date. Further, apart from taking technical objections in relation to the maintainability of the application under section 7 of the Code, no cogent ground has been taken to show how the debt is not due. The Corporate Debtor, with a view to mislead this Learned Adjudicating Authority has without complete disclosure of facts, proceeded to make false assertions with a view to delay the proceedings. This Learned Adjudicating Authority vide order dated 01.05.2017 permitted the Applicant to withdraw the petition with a liberty to proceed in accordance with law. Pursuant to the liberty granted by this Learned Adjudicating Authority, the Financial Creditor, immediately on 04.05.2017 proceeded to file an application before the Hon'ble High Court of Judicature at Bombay, Nagpur Bench in the

pending matter. During the pendency of the matter, even before the application for Impleadment of the Financial Creditor could be decided, the said petition was withdrawn by the Petitioner vide order dated 25.02.2021 wherein the Petitioner was granted liberty to all remedies available to it in respect of its claim.

In view of the Judgment passed by the Hon'ble Supreme Court of India, in the case of **A. Navinchadra Steel Pvt. Lid Vs. SREI Equipment Finance Limited & Ors 2021 SCC OnLine SC 149**, the Financial Creditor has proceeded to file the present petition. It is submitted that there is no bar on filing the present petition as there has been no adjudication on merits. Further, in absence of a proceeding pending before the Hon'ble High Court, the Financial Creditor is at liberty to take appropriate proceedings as are available in law. Thus, there is no ground for extinguishment of proceedings in law and the application under section 7 is maintainable.

12. The Corporate Debtor has further submitted that the present proceedings are not maintainable as the Claim of Financial Creditor emanates from an Indenture of Family Settlement between one Manoj Kumar Jayaswal Group and BL Shaw Group, which was a subject matter of arbitration which stood amicably disposed of as withdrawn on 07.08.2021. The said submission of the Corporate Debtor is also misguided. In this regard, it is submitted that the Corporate Debtor has itself submitted and admitted in its application that the Financial Creditor and the Corporate Debtor were not parties to the alleged Indenture of Family Settlement. Thus, once it has been

admitted that the neither the Corporate Debtor or the Financial Creditor were parties to the alleged Family Settlement, no reliance can be placed on any settlement made therein or any proceeding initiated therein, to deny the legitimate claim of the Financial Creditor.

Further, the alleged pursis, filed by the Corporate Debtor to show that the alleged Arbitration has been withdrawn does not contain the signatures of the Financial Creditor. Thus, in no manner can it be said that the claim of the Financial Creditor is disputed. Moreover, the Corporate has repeatedly in its books of account and its emails dated 27.03.2014 and 08.072014 admitted its liability to make payments to the Financial Creditor completely precludes the Corporate Debtor from contending that the Financial Creditor's is not maintainable as it arises from an Indenture of Family Settlement.

13. In response to the reply filed by the Respondent/Financial Creditor, the Applicant has filed an affidavit in Rejoinder and has denied each and every statement, contention, averment, submission and/or allegation made in reply and which is contrary to the present application. It is submitted that the allegations raised in the reply are wholly misconceived, baseless and are devoid of any merit, and as such, are liable to be dismissed forthwith. JNIL denies that it has admitted its liability towards AVPL, as alleged or at all. JNIL denies that it has admitted any liability towards AVPL in its books of accounts, as alleged or at all. Further submitted that the

Hon'ble Supreme Court of India and the Hon'ble Bombay High Court has recently inter alia, held that an application raising a jurisdictional issue is required to be decided before proceedings with the Section 7 Application on merits. JNIL further submits that despite filing the Impleadment Application, AVPL neither moved nor prosecuted the same for almost five years. Having taken no effective steps in the Winding Up Proceedings, AVPL virtually elected and permitted CIAL to withdraw the proceedings and thus must be bound by its results. Moreover, only CIAL was granted liberty to proceed in accordance with law and this liberty was not given to AVPL. The multiplicity of proceedings on the same alleged debt makes it manifestly clear that both AVPL and CIAL have engaged in forum shopping. It is well within the rights of AVPL to challenge the order of withdrawal passed by the Bombay High Court, given that the same was passed without the Maintainability Application for Impleadment having been heard and after the alleged debt had already been assigned to AVPL by CIAL. However, AVPL has no locus to challenge the same before this Hon'ble Tribunal or plead the same contentions before a new forum.

JNIL denies that AVPL has any legitimate claim against them. JNIL submits that there is no question of AVPL maintaining a claim founded on the IFS when the disputes arising out of the very same contract have been mutually compromised and withdrawn. Moreover, JNIL reiterates that the Section 31 (6) Application dated 26.11.2014, filed by the MKJ Group before the Sole Arbitrator on the same alleged cause of action, was dismissed by the Sole Arbitrator on

23.09.2016. JNIL further denies that AVPL's alleged claim in the Section 7 Application is different from that of the MKJ Group and BLS Group in the Arbitration Proceedings. JNIL denies that the AVPL's alleged claim is not disputed or that it has admitted its liability to AVPL either in the emails dated 27.03.2014 or 08.07.2014, as alleged or at all. JNIL denies that that it has admitted the alleged liability to make payments to AVPL in its books of account, or at all. JNIL submits that the alleged claim and alleged cause of action are disputed and have admittedly been the subject matter of disputes and litigation filed between the MKJ Group and BLS Group as also by CIAL (AVPL's admitted predecessor in title of the alleged debt) had filed a Winding Up Petition based on the very same alleged cause of action and claim, which was withdrawn.

14. While arguing the matter, Ld. Senior Counsel has argued few more contentions and same have been filed through detailed written submission. The Ld. Senior Counsel made his submission that the Section 6 of the Code which reads as follows;

“6. Where any corporate debtor commits a default, a financial creditor, an operational creditor or the corporate debtor itself may initiate corporate insolvency resolution process in respect of such corporate debtor in the manner as provided under this Chapter”

Thus, Section 6 postulates that the corporate insolvency resolution process can be initiated only when there is a **default by the Corporate Debtor** and **such a default enables a Financial Creditor or Operational Creditor to initiate proceedings.**

Further relied on Section 3(12) defines default to mean, “non-payment of debt when whole or any part or installment of the amount of debt **has become due or payable** and is not paid by the debtor or the corporate debtor as the case may be”

Similarly, Section 3 (11) defines “debt” to mean, “**a liability or obligation in respect of a claim which is due from any person** and includes a financial debt and operational debt.” Therefore, it is incumbent upon a Creditor to establish the following basic twin jurisdictional facts that a '**debt**' is **due and there has been a 'default'** and **the debt in question is either a 'financial debt' or an 'operational debt'**. Where either requirement is absent, the Petition must be dismissed at the threshold. In the present case, the Petitioner claims to be a 'financial creditor'. However, the requisite jurisdictional facts for invoking this Tribunal's jurisdiction are glaringly absent. The Ld. Senior Counsel again submitted that the claim made by the present Petitioner emanates from an Indenture of Family Settlement dated 31.07.2008, between the members of the Jayaswal Family i.e. the BLS Group and the MKJ Group. The same alleged debt was the subject matter of arbitration proceedings which has already been amicably settled and compromised by the parties.

15. Further argued that there is no “financial debt” owed within the meaning of section 5 (8) of the Code; The “sine qua non” of every “financial debt” is that there must be a disbursement of money against time value vis-à-vis the Corporate Debtor. Money must be disbursed by the Petitioner and received by the Corporate Debtor against the consideration of time value of money. The Petitioner's case is that its assignor, CIAL has paid certain banks and financial institutions money against the loan availed by strip mill division and which it claims that the Respondent was liable to pay the Petitioner. There has been no disbursement to the Respondent and no money has been received by the latter against time value of money. The Petitioner's own Ledger Statements present ex-facie evidence that no disbursements have been made to the Corporate Debtor against time value of money.

Further by virtue of an assignment, the Petitioner merely steps into the shoes of its assignor CIAL. It cannot claim higher rights in law. Whilst the Petitioner enjoys the benefits of the assignment, it is also bound by the liabilities and equities emanating from the conduct of its Assignor CIAL. The Petitioner's entire claim emanates from the Indenture of Family Settlement executed between the members of Jayaswal Family who were also the promoters of CIAL namely the BL Shaw Group and the Manoj Kumar Jayaswal Group (“MKJ Group”). The Petitioner cannot have it both ways. It has stepped into the shoes of its assignee CIAL and is bound by the former's conduct and deed. It has neither challenged nor has it alleged that the debt could not have been sued in arbitration. In these

circumstances, it was bound to the outcome of the arbitration and the amicable compromise that followed.

The Ld. Counsel relied on the Judgement of the Hon'ble NCLAT in ***Dr. B.V.S Lakshmi v. Geometrix Laser Solutions Private Limited (2017 SC Online NCLAT 531)***, wherein the Financial Creditor sought admission of a 'financial debt' on the basis of admissions in the balance sheet of the Corporate Debtor. In spite of this position, the Hon'ble NCLAT upheld the Order of dismissal since the Appellant had failed to establish disbursement to the Corporate Debtor against the consideration for time value of money. Moreover, same was followed by this Tribunal in *Sudhir T Deshpande v. Dhanada Corporation Ltd (CP IB 4671/MB/2018)*. In that case, the Tribunal categorically held that without proof of disbursement, the said amount could not be claimed as a "financial debt". The real nature of the transaction in the present case must be examined. Once the real nature is looked into, it is clear that there is no 'financial debt' owed. There has been no disbursement of money against time value to the Corporate Debtor. The Respondent has not received any such money. The alleged claim emanates from a Family Settlement between members of the Jayaswal Family and the inter-se obligations between them.

16. The Respondent/Financial Creditor has also filed a written statement and has submitted other than the reply that in terms with the Scheme of Merger, the Appointed Date as well as the Record Date were fixed as 01.04.2008. Further, on and from the Appointed Date until the Effective Date, CIAL was to carry

on the business operations of the Strip Mill Division for and on behalf of the Corporate Debtor. In view thereof, the Corporate Debtor cannot contend that there was no written contract or written arrangement between the Corporate Debtor and CIAL i.e., the predecessor in interest of the Financial Creditor. CIAL had made payments to the lenders of Strip Mill Division of CIAL which was merged with the Corporate Debtor, it was understood between the parties that the said amounts would be treated as a loan between the parties. It was for the said reason that the Corporate Debtor vide email dated 27.03.2014 and 08.07.2014 had admitted and acknowledged its indebtedness to CIAL, however the Corporate Debtor had wrongly restricted its admission to a sum of Rs. 102,26,78,728/- instead of Rs. 104,43,67,347.94/-, stating that the same was the amount outstanding and payable to CIAL after reconciliation of its Accounts for the FY 2013-2014.

Further, the Corporate Debtor in its balance sheets for 2013-14 onwards till date has acknowledged its liability to repay the said amount of Rs. 104,43,67,347.94/- to CIAL. The same is shown as an Unsecured Loan in the balance sheet of the Corporate Debtor for FY 2013-14 and as such, it is covered under the definition of a Financial Debt as defined under Section 5(8) of the Code. Further referred the matter of **ARCIL Vs. Bishal Jaiswal**, the Hon'ble Supreme Court has held that entries in the books of accounts and balance sheets of the Corporate Debtor amount to an acknowledgment of liability. The Corporate Debtor is, therefore, estopped from making an assertion that the said amount is not a Financial Debt.

17. After hearing both the parties and on perusal of the IA/2973/2022 including other material on record, we are of the view that a liability or obligation in respect of a claim must be “due” before it is a “debt”. Thus, both “debt” and “default” require the claim to be “due” and not all “defaults” enable a party to initiate insolvency proceedings. In the present case the claim made by the Respondent/Financial Creditor emanates from an Indenture of Family Settlement dated 31st July 2008, between the members of the Jayaswal Family i.e. The BLS Group and the MKJ Group. The same alleged debt was the subject matter of arbitration proceedings which has already been amicably settled and compromised by the parties. Once the alleged debt has been compromised and/or amicably settled, there is nothing which can be said to be due and payable from the Corporate Debtor.

Further, CIAL has paid certain banks and financial institutions money against the loan availed by strip mill division and which it claims that Applicant/Corporate Debtor was liable to pay the Petitioner. There has been no disbursement to the Applicant/Corporate Debtor and no money has been received against time value of money. The Petitioner's own Ledger Statements ex-facie evidence that no disbursements have been made to the Corporate Debtor against time value of money. So, we rely on ***Vejas Power Projects v Vaayu Infrastructure LLP (Company Appeal (AT) Insolvency No. 815 of 2022)*** wherein, Hon'ble NCLAT upheld that there has been no financial debt since there had been no disbursal against time value. The principles laid down in 'Vejas'

case squarely apply here. So, in view of above, we are of the opinion that the present Interlocutory Application is to be allowed. Hence, the **IA/2973/2022** is ***allowed*** and **CP(IB)/1027/(MB)/2022** is dismissed as non-maintainable, without going into merits.

Since the section 7 Petition is dismissed, therefore **IA/365/2023** is ***dismissed as infructuous***.

Sd/-

Sd/-

SHYAM BABU GAUTAM
(MEMBER TECHNICAL)

JUSTICE P.N. DESHMUKH
(MEMBER JUDICIAL)