IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH (COURT – II)

Item No. 202
CP(IB)-41/ND/2024

IN THE MATTER OF:

Kaliber Associates Pvt. Ltd.
Through its Liquidator, Mr. Mohan Lal Jain
B-1/12, 2nd Floor, Safdarjung Enclave,
New Delhi - 110029 **... Applicant/Financial Creditor**

Versus

West Star Constructions Pvt. Ltd.
No-51 Furniture Block, Kirti Nagar
New Delhi- 110015 **...Respondent/Corporate Debtor**

Under Section: 7 of IBC, 2016

Order delivered on 14.02.2025

CORAM:

SH. ASHOK KUMAR BHARDWAJ, HON'BLE MEMBER (J)
SH. CHARANJEET SINGH GULATI , HON'BLE MEMBER (T)

PRESENT:
For the Applicant : Adv. Anirban Bhattacharya, Adv. Rajeev Chowdhary, Adv. Priyanka Bhatt
For the Respondent :

Hearing Through: VC and Physical (Hybrid) Mode

ORAL ORDER

On 06.03.2024 we passed the following order:-

"The present petition has been preferred by the Liquidator qua M/s Kaliber Associates Private Limited. As can be seen form the pleadings and the material available on record, the audited financial statements of Applicant/FC as on 31.03.2018 could reflect that certain amount of loan and advances were payable by the CD. Such is also reflection in the audited financial statement qua the CD as on 31.03.2020, 31.03.2021 &

31.03.2022. In the wake, the Liquidator qua the FC has preferred the present petition for ordering commencement of CIRP in terms of the provisions of Section 7(5)(a) of IBC, 2016.

2. It is mentioned in para 4 of the petition that the total amount of debt is Rs. one crore disbursed by the FC on 20.11.2010 to Liquidator vide Cheque No. 32001426. The date of default mentioned in the petition is 18.07.2019 Part-IV of the petition reads thus:-

Part - IV

PARTICULARS OF FINANCIAL DEBT

1.	TOTAL AMOUNT OF DEBT GRANTED DATE(S) OF DISBURSEMENT	That as per the records of the Corporate Debtor available with the Liquidator an amount of Rs. 1,00,00,000/- (Rupees One Crore Only) was disbursed by the Financial Creditor as loans and advances to the Corporate Debtor on 20.11.2010 vide Cheque No. 32001426 The disbursement of loans and advances is clearly reflected in the bank statement of the Financial Creditor. A copy of the Bank Statement and copy of the Ledger of the Corporate Debtor as maintained by the Financial Creditor is annexed herewith and marked as **ANNEXURE- 5.**
2.	AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED	**Amount Claimed to be in default:** Rs. 1,00,00,000/- (Rupees One Crore Only). **Date of Default:** 18.07.2019 (Date of Demand letter issued by the IRP) Limitation in normal course would have ended on 18.07.2022. However, vide order dated **23.03.2020** the Hon'ble Supreme Court of India in **"In Re: Cognizance for extension of limitation",** the limitation period stopped running. Further, vide order dated **10.01.2022** passed by the **Hon'ble Supreme Court of India in** "*Miscellaneous Application No.* 21 of 2022 in Miscellaneous Application No. 665 of 2021 in *SMW(C) NO. 3 OF 2020* ***In Re: Cognizance for***

		***extension of limitation*" para 5 ,** *the order dated 23.03.2020 was restored and in continuation of the subsequent orders dated 08.03.2021, 27.04.2021 and 23.09.2021, it was directed that the period from 15.03.2020 till 28.02.2022 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings.".* Therefore, after excluding the said
		period from 15.03.2020 till 28.02.2022, the limitation period would end on 02.07.2024.

3. The Ld. Counsel appearing for the Applicant could draw our attention to the Balance-sheets maintained by the CD as on 31.03.2020, 31.03.2021 & 31.03.2022. The relevant excerpt of the Balance-sheets reads thus:

(Balance sheet 2020)

101

NOTE - 4		in Rs.
OTHER LONG TERM LIABILITIES	As at 31.03.2020	As at 31.03.2019
Security Received from NIIT	26100000.00	26100000.00
Kaliber Associates	10000000.00	10000000.00
Total	36,100,000.00	36,100,000.00

(Balance sheet 2021)

112

NOTE - 4		In Rs.
OTHER LONG TERM LIABILITIES	As at 31.03.2021	As at 31.03.2020
Security Received from NIIT	26100000.00	26100000.00
Kaliber Associates	10000000.00	10000000.00
Total	3,61,00,000.00	3,61,00,000.00

(Balance sheet 2022)

127

NOTE - 4		(Rupees In Hundred"00")
OTHER LONG TERM LIABILITIES	As at 31.03.2022	As at 31.03.2021
Security Received from NIIT	2,61,000.00	2,61,000.00
Kaliber Associates	1,00,000.00	1,00,000.00
Total	3,61,000.00	3,61,000.00

4. With reference to the date of default as mentioned in the record of NeSL as also claimed by the Petitioner, the present petition being filed beyond three years from 18.01.2019 (date of default) may be barred by limitation.

Nevertheless, as can be seen from the Balance-sheet maintained by the CD as on 31.03.2022, the amount of debt has been acknowledged thus in terms of the view taken by the Hon'ble Supreme Court in ***Dena Bank vs. C. Shivakumar Reddy and Anr.*** *in Civil Appeal No. 1650 of 2020, the period of limitation would be reckoned from the date when the amount of debt is acknowledged by the CD. In the present case, in all the Balance-sheets maintained as on 31.03.2020, 31.03.2021 & 31.03.2022, the CD could acknowledge the amount of debt.*

5. Additionally, the Petitioner has also placed on record the default certificate/report procured by him from NeSL, where the amount of debt and default are reported. The relevant excerpt of the report of NeSL at page no. 144 of the petition reads thus:

NeSL NATIONAL E-GOVERNANCE SERVICES LIMITED

PART B

(History of all filing of information received by IU for the same UDI, whether regular debt or default, and the status of authentication by the party)

History of submission and Authentication in respect of M/s WESTSTAR CONSTRUCTIONS PRIVATE LIMITED (Debtor)

Unique Debt Identifier :AACCK3483G_39

Date of Submission	13-12-2023 13:53:13
Type of Submission	Default Submission
Submission ID	1
Submitted by (CREDITOR)	M/s KALIBER ASSOCIATES PRIVATE LIMITED
Debtor	M/s WESTSTAR CONSTRUCTIONS PRIVATE LIMITED
Default Amount	10000000.00
Status of Authentication by Debtor	DEEMED TO BE AUTHENTICATED
Authentication Completed on	29-12-2023 00:08:07

6. As there was no appearance on behalf of the CD despite service of notice, on 26.02.2024, we had directed the proceedings set ex-parte qua him. Today again there is no appearance on behalf of the CD. Thus, there is no material on record to rebut the stand taken in the petition.

7. As could be ruled by the Hon'ble NCLAT in ***Vipul Himlatal Shah vs. Teco Industries*** *in Company Appeal (AT) (Insolvency) No. 470 of 2022*

[(2022) ibclaw.in 379 NCLAT], the report of information utility (NeSL) is sufficient evidence to arrive at the conclusion qua the amount of debt and default. Para 16 of the order reads thus:

> *"**16.** In the light of the detailed discussion as above, it is clear that in case the record of Information Utility shows that there is a debt which is in default, the Adjudicating Authority or the Appellate Authority are not required to further examine the record maintained by the Information Utility, moreso when the record of the Information Utility is deemed authenticated and no dispute or refutation of said record has been done by the corporate debtor earlier. We also note that in the judgment of **Rushabh Civil Contractors Pvt. Ltd. vs. Centrio Lifespaces Ltd. (supra)**, which has been cited by the Learned Counsel for Appellant, the record that formed the basis for financial debt and default was found to be forged and fabricated, which is not the case in the present appeal. Therefore, this judgment does not come to the rescue of the Appellant."*

*8. Also in **M/s Innoventive Industries Ltd. vs. ICICI Bank & Anr.** in Civil Appeal Nos. 8337-8338 of 2017, the Hon'ble Supreme Court ruled that it is no matter that the debt is disputed so long as the debt is due and is payable. In the said case, the Hon'ble Supreme Court also ruled that what are the parameters the Adjudicating Authority while examining the petition under Section 7 of IBC, 2016 is that there is an amount of debt which is defaulted to be paid. The relevant excerpt of the judgment reads thus:*

> *"28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor – it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars*

of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in part III, particulars of the financial debt in part IV and documents, records and evidence of default in part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.

XXX

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

9. We can see from Section 7(5)(a) of IBC, 2016, while considering the petition filed under Section 7(1) of IBC, 2016, what we need to say that there is an amount of debt which is defaulted to be paid, the application

is complete in all respects and the IP suggested by the Petitioner to be appointed as IRP is not facing any disciplinary proceedings. On perusal of the record we find that there is no deficiency or infirmity in the application. The IP proposed by the Applicant is not facing any disciplinary proceedings. The relevant excerpt of the declaration at page no. 149 of the petition made by the IP to this effect reads thus:

> *"(iv) certify that there are no disciplinary proceedings pending against me with the Board or [name of the insolvency professional agency he is a member of*
>
> *(v) affirm that I am eligible to be appointed as a resolution professional in respect of the corporate debtor in accordance with the provisions of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016;*
>
> *(vi) make the following disclosures in accordance with the code of conduct for insolvency professionals as set out in the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016;"*

10. For the purpose of proof/evidence of debt a reference can be made to the Regulation 8 of IBBI (CIRP) Regulations, 2016. In Regulation 8(a) of the regulations, it has been specifically provided that the NeSL report/certificate is one of the proof which can be relied upon as sufficient evidence to arrive at the conclusion that the amount of debt has been disbursed and there is default in payment of the same. The other evidences which are referred to in the Regulation are the financial contract regarding disbursement of the debt, the disbursement of same as per commitment made to the CD, the order of Tribunal, if any, and the financial accounts showing default in repayment of debt. In the present case our attention could be drawn to NeSL certificate and the Balance-sheet in terms of which the amount of debt could be acknowledged by the CD.

11. In view of the aforementioned we have no hesitation in ordering the commencement of CIRP qua the CD. Ordered accordingly.

12. ***In the wake, moratorium as provided under Section 14 of IBC, 2016 is declared qua the CD*** *and as a necessary consequence thereof the following prohibitions are imposed, which must be followed by all and sundry:*

(a) The institution of suits or continuation of pending suits or proceedings against the Respondent including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) Transferring, encumbering, alienating or disposing of by the Respondent any of its assets or any legal right or beneficial interest therein;

(c) Any action to foreclose, recover or enforce any security interest created by the Respondent in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

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

13. As proposed by the Petitioner, Mr. Saurab Sharma, having Registration No.-IBBI/IPA-001/IP-P-02550/2021-2022/13951 and Email: sk04sharma@gmail.com, is appointed as IRP, subject to the condition that no disciplinary proceeding is pending against him and disclosures as required under IBBI Regulations, 2016 are made by him within a period of one week from this Order. It is further ordered that:
Mr. Saurab Sharma, IRP (Registration No. IBBI/IPA-001/IP-P-02550/2021-2022/13951) shall take charge of the CIRP of the Corporate Debtor with immediate effect and would take steps as mandated under the IBC specifically under Section 15, 17, 18, 20 and 21 of IBC, 2016 read

with extend provisions of IBBI (Insolvency Resolution of Corporate Persons) Regulations, 2016.

14. The Petitioner is directed to deposit Rs. 2,00,000/- only with the IRP to meet the immediate expenses. The amount, however, will be subject to adjustment by the Committee of Creditors as accounted for by Interim Resolution Professional and shall be paid back to the Financial Creditor.

15. A copy of this Order shall immediately be communicated by the Registry/Court Officer of this Tribunal to the Petitioner /Financial Creditor, the Respondent/Corporate Debtor and the IRP mentioned above.

16. In addition, a copy of this Order shall also be forwarded by the Registry/Court Officer of this Tribunal to the IBBI for their records."

2. The order was challenged before Hon'ble NCLAT in Company Appeal (AT) (Insolvency) No. 666/2024. Taking the view that this Tribunal did not deal with nature of transaction before admitting the petition under Section 7 of IBC, 2016, Hon'ble NCLAT passed the order dated 23.09.2024, relevant excerpt of the which reads thus:-

*"**23.** The Appellant has also brought on the record the Financial Statement of Corporate Debtor which has also been referred to in the Section 7 Application filed by the Respondent Company. Financial Statement of the Corporate Debtor, there is Note No. 3 which deals with long-term borrowings and Note 4 deals with the other long-term liabilities. Note 6 deals with the short-term borrowings. It is useful to extract the Balance Sheet of the Corporate Debtor as on 31.03.2019, Note 3 to Note 9 which is as follows:*

NOTE NO. 3

LONG TERM BORROWINGS ***in Rs.***

	31st March 2020	***31st March 2019***

A. Term Loans

B. Deposits:

a) From Related Parties:

S.C. Garments Pvt Ltd	*14685000.00*	*14658000.00*
Sewa International Fashions Ltd.	*20684100.00*	*20570800.00*
b) From others		
Nischay Finvest Pvt Ltd	*500000.00*	*500000.00*
Total Long Term Borrowings	***35869100.00***	***35755800.00***

NOTE – 4

OHER LONG TERM LIABILITIES	***As at 31.03.2020***	***As at 31.03.2019***
Security Received from NIIT	*26100000.00*	*26100000.00*
Kaliber Associates	*10000000.00*	*10000000.00*
Total	***36,100,000.00***	***36,100,000.00***

NOTE – 5

LONG TERM PROVISIONS	***Also at 31.03.2020***	***Also at 31.03.2019***
	NIL	*NIL*

NOTE – 6

SHORT TERM BORROWINGS	***Also at 31.03.2020***	***Also at 31.03.2019***
a) Loans and advances from related parties	-	-
b) Deposits	-	-
Total	-	-

NOTE – 7

Trade Payables	***Also at 31.03.2020***	***Also at 31.03.2019***
	-	-
	-	-
	-	-

NOTE – 8

OTHER CURRENT LIABILITIES	***Also at 31.03.2020***	***Also at 31.03.2019***
Cheque Issue but Not Present into Bank	-	-
	-	-

NOTE – 9

	Also at 31.03.2020	Also at 31.03.2019
SHORT TERM PROVISIONS		
(a) Provision for employee benefits:	-	-
	-	-
(b) Others		
Audit Fees Payable	*227,506.00*	*199,926.00*
	227,506.00	**199,926.00**
Total Provisions	**227,506.00**	**199,926.00**

24. *When we look into the Financial Statement of the Corporate Debtor, it is clear that long-term borrowings are separately provided for and other long-term liabilities are separately mentioned in Note 4 and with regard to two entries under other long-term liabilities, it is mentioned as:*

NOTE – 4

OHER LONG TERM LIABILITIES	As at 31.03.2020	As at 31.03.2019
Security Received from NIIT	*26100000.00*	*26100000.00*
Kaliber Associates	*10000000.00*	*10000000.00*
Total	**36,100,000.00**	**36,100,000.00**

25. *The above entry indicates that Corporate Debtor in its Balance Sheet has not shown the amount as borrowing rather the said amount has been shown as security receipt from M/s. Kalibre Associates Pvt. Ltd.*

26. *Learned Counsel for the Respondent relying on the Judgment of the Hon'ble Supreme Court in the matter of* ***`Global Credit Capital Ltd. & Anr.' Vs. `Sach Marketing Pvt. Ltd. & Anr.'*** *reported in* ***2024 SCC OnLine SC 649****, submits that even the security can be treated to be a Financial Debt. Learned Counsel for the Appellant has relied on Paragraphs 14, 17 & 18 of the Judgment, which are as follows:*

> ***"14.*** *Where one party owes a debt to another and when the creditor is claiming under a written agreement/arrangement providing for rendering 'service', the debt is an operational debt only if the claim subject matter of the debt has some*

connection or co-relation with the 'service' subject matter of the transaction. The written document cannot be taken for its face value. Therefore, it is necessary to determine the real nature of the transaction on a plain reading of the agreements. What is surprising is that for acting as a Sales Promoter of the beer manufactured by a corporate debtor, only a sum of Rs. 4,000/- per month was made payable to the first respondent. Apart from the sum of Rs. 4,000/- per month, there is no commission payable to the first respondent on the quantity of sales. Clause (6) provides for termination of the appointment by giving thirty days' notice. Though clause (10) provides for the payment of the security deposit by the first respondent, it is pertinent to note that there is no clause for the forfeiture of the security deposit. The amount specified in clause (10) has no correlation whatsoever with the performance of the other conditions of the contract by the first respondent. As there is no clause regarding forfeiture of the security deposit or part thereof, the corporate debtor was liable to refund the security deposit after the period specified therein was over with interest @21% per annum. Since the security deposit payment had no correlation with any other clause under the agreements, as held by the NCLAT, the security deposit amounts represent debts covered by subsection (11) of Section 3 of the IBC. The reason is that the right of the first respondent to seek a refund of the security deposit with interest is a claim within the meaning of subsection (6) of Section 3 of the IBC as the first respondent is seeking a right to payment of the deposit amount with interest. Therefore, there is no manner of doubt that there is a debt in the form of a security deposit mentioned in the said two agreements.

17. *To decide whether the second condition had been fulfilled, it is necessary to refer to the factual findings recorded in the impugned judgment. The NCLAT has referred to the letter dated 26th October 2017 addressed by the corporate debtor to the first respondent. We have perused a copy of the said letter annexed to the counter. By the said letter, the corporate debtor informed the first respondent that for the year 2016-2017, the corporate debtor had provided the interest amounting to Rs. 18,06,000/- in the books of the corporate debtor and that the sum will be credited to the account of the*

first respondent on the date of payment of TDS. In paragraph 21 of the impugned judgment, it is held that the financial statement of the first respondent for the Financial Year 2017-2018 shows revenue from the interest on the security deposit. It is also held that the amounts were treated as long-term loans and advances in the financial statement of the corporate debtor for the Financial Year 2015-2016. Moreover, in the financial statement of the corporate debtor for the Financial Year 2016-2017, the amounts paid by the first respondent were shown as "other long-term liabilities". Therefore, if the letter mentioned above and the financial statements of the corporate debtor are considered, it is evident that the amount raised under the said two agreements has the commercial effect of borrowing as the corporate debtor treated the said amount as borrowed from the first respondent.

18. *Therefore, we have no hesitation in concurring with the NCLAT's view that the amounts covered by security deposits under the agreements constitute financial debt. As it is a financial debt owed by the first respondent, sub-section (7) of Section 5 of the IBC makes the first respondent a financial creditor."*

27. *From Paragraph 4 of the above Judgment of the Hon'ble Supreme Court, it is clear that Hon'ble Supreme Court has held that it is necessary to find out the real nature of the transaction to find out the nature of debt. The said Judgment of the Hon'ble Supreme Court was rendered after considering the Written Agreement between the Parties and considering the terms and conditions, one of the Agreements term was that the minimum security of ₹53,15,000/- with a Company which will carry interest @21% p.a. and further interest was to be provided on ₹7,85,850/- @21%. In the present case, there is no consideration of transaction as a Security Deposit by the Adjudicating Authority and without there being any consideration by the Adjudicating Authority on the nature of the transaction, we are not able to accept submission of the Counsel for the Respondent that even if the amount is treated as a Security Deposit, it will be a Financial Debt. As held by the Hon'ble Supreme Court in* ***`Global***

Credit Capital Ltd. & Anr.' (Supra), *the real nature of the transaction has to be found out before coming to the conclusion that whether debt is a Financial Debt or not?*

28. *In the facts of the present case, the Adjudicating Authority in the Impugned Order has relied on record of default by NeSL and held that Report is sufficient evidence to arrive at the conclusion to an amount of debt. There can be no dispute that report of NeSL is an important piece of evidence, but in the facts of the present case where the Corporate Debtor has no opportunity to place its defence, it cannot be said that reliance on NeSL Certificate was conclusive evidence to come to the conclusion that there was a Financial Debt.*

29. *Adjudicating Authority in Paragraph 3 of the Order has noticed the Balance Sheets maintained by the Corporate Debtor. Although the Balance Sheets have been noticed, but the Adjudicating Authority failed to notice that long-term borrowing and long-term liabilities have been mentioned under two different heads. Hence, non-mention of the amount of ₹1,00,00,000/- under the heading long-term borrowing has to be given some meaning and purpose. Long-term liabilities can be different kind of liabilities which may be an Operational Debt, Financial Debt or any other nature of debt. However, the real nature of transaction between the parties needs to be examined and adjudicated by the Adjudicating Authority before admitting Section 7 Application.*

30. *In the present case, the Corporate Debtor unfortunately could not appear before the Adjudicating Authority to raise his defence, hence in the facts of the present case, we are of the view that ends of justice be served in remitting the matter before the Adjudicating Authority for fresh consideration with liberty to the Appellant to file its Reply within three weeks. We are satisfied that there is no appropriate consideration of the real nature of transaction on basis of which Section 7 Application was filed by the Adjudicating Authority.*

31. *Learned Counsel for the Respondent has also placed reliance on the Judgment of this Tribunal in the matter of* ***`Arunkumar Jayantilal Muchhala' Vs. `Awaita Properties Pvt. Ltd. & Anr.'*** *in* ***Comp. App. (AT) (Ins.) No. 121/2023.*** *From the Paragraph 18 of the Judgment it is noted that the amount has been shown under the heading of long-term borrowing that unsecured loan Related Parties. In Paragraph 18 of the Judgment following was observed:*

> *"18. In the present case, the Respondent No. 1 has submitted a bank certificate to substantiate the disbursal of funds to the Corporate Debtor and validated the same with the Annual Reports and Balance Sheets of the Corporate Debtor to show that it was a loan. Respondent No. 1 has placed on record the Balance Sheet of the Corporate Debtor wherein this amount has been shown under the head of 'Long Term Borrowings - Unsecured loan from Related Parties'. This clearly evidences that the disbursal was a loan. Even the notice sent by the Respondent No. 1 on 20.02.2018 as placed at pages 58- 59 of the APB clearly stated that they had extended a loan to the Corporate Debtor to meet its working capital requirements repayable on demand at an interest rate of 15% p.a. Keeping in mind that there was no document/agreement in respect of the loan amount, it is quite natural that there was no document/agreement which determined the payment of interest and the rate of interest but that cannot be a ground for assuming that the loan was not interest-bearing. It is an undisputed fact that the Respondent No. 1 has not placed on record any document which shows that the disbursal made was in the nature of loan wherein interest was specifically payable. Be that as it may, we are of the considered opinion that the IBC does not provide for any prescriptive requirement for the Financial Creditor to place on record formal written agreements/documents between the parties to establish that the disbursal made was in the form of loan with interest. Given this background we therefore find that the Adjudicating Authority committed no error in holding that there was a financial debt owed by the Corporate Debtor to Respondent No. 1."*

32. *The Financial Statement of Financial Creditor where it is mentioned as loan and advances and the Financial Statement of Corporate Debtor where it is mentioned as long-term liabilities have already been noticed by us in proceeding Paragraph of this Judgment. As observed, there is no appropriate consideration by the Adjudicating Authority, regarding nature of debt and without completely looking to the Balance Sheets of the Corporate Debtor, Adjudicating Authority has admitted Section 7 Application relying on only NeSL Report.*

33. *Learned Counsel for the Respondent has also relied on the Judgment of this Tribunal in the matter of* ***`Vipul Himatlal Shah & Anr.' Vs. `Teco Industries & Anr.'*** *in* ***Comp. App. (AT) (Ins.) No. 470/2022.*** *This Tribunal in Paragraph 16 has observed that the Adjudicating Authority or Appellate Authority are not required to further examine the record maintained by the Information Utility, more so when the record on the Information Utility is deemed authenticated and no dispute or refutation of the said record has been done by the Corporate Debtor earlier. In the present case as noticed above, Appellant unfortunately, could not appear before the Adjudicating Authority and case proceeded Ex-Parte against him. Undoubtedly Report of the NeSL is relevant evidence, but it cannot be conclusive proof for nature of transaction. A three Member Bench of this Tribunal in the matter of* ***`Dheeraj Wadhawan' Vs. `Yes Bank Ltd. & Anr.'*** *in* ***Comp. App. (AT) (Ins.) No. 953 of 2021,*** *decided on 16.03.2022, while dealing with information recorded in the Information Utility had observed that record of Information Utility is relevant but record of Information Utility is not conclusive proof. Following was held in Paragraph 31 of the Judgment:*

> ***"31.*** *As noted above, there being no default by the principal borrower on 01.08.2019, all subsequent action by the Bank on the alleged default dated 01.08.2019 are unsustainable. Hence, information recorded in the information utility on the strength of loan recall notice dated 18.11.2019 in no manner*

can be read as material to prove that default was committed by the Bank on 01.08.2019. Under the statutory scheme, the record of information utility is relevant but record of information utility is not conclusive proof of any default and a Corporate Debtor is always at liberty to disapprove the statement as contained in the information utility record."

34. *The Adjudicating Authority has to advert to nature of transaction for coming to the conclusion that there is a Financial Debt on basis of which Section 7 Application can be admitted. More so, when in the present case, it is not even the case of the Respondent that there was any interest payable, no material has been shown to prove that the amount given to the Corporate Debtor of ₹1,00,00,000/- was disbursement towards time value of money. Amount is of ₹1,00,00,000/- is shown right from 2010 to 2020 and in the Balance Sheet of the Corporate Debtor, the amount is shown as Security amount as long-term liability.*

35. *From the facts as noticed above, we are satisfied that ends of justice be served in remitting the matter for fresh consideration before the Adjudicating Authority, with liberty to the Appellant to file a Reply within 3 weeks from today.*

36. *In result, Appeal is allowed Order dated 06.03.2024 is set aside. Appellant is allowed three weeks time to file a Reply to Section 7 Application before the Adjudicating Authority. The Respondent under Section 7 Application will also have opportunity to file a Rejoinder to the Reply within two weeks thereafter. Parties may request the Adjudicating Authority to fix a date after six weeks for fresh consideration of Section 7 Application. We make it clear that our observations made in the Orders have been made only for purposes of deciding the Appeal and may not be treated any conclusive opinion on the issues which are open to consideration in Section 7 Application. Adjudicating Authority may*

proceed to decide Section 7 Application in accordance with law, without being influenced by any of the observations made in this Appeal."

3. Today having drawn our attention to the balance sheet qua the Financial Creditor as also that of Corporate Debtor, the Ld. Counsel for the Financial Creditor submitted that the amount of Rs. 1,00,00,000/- reflected in the balance sheet of both the parties is necessarily a financial facility extended to Corporate Debtor. Mr. Battacharya further submitted that the Financial Creditor being under liquidation and the petition being filed by the Liquidator, one has to go by the available record only. The relevant excerpt of the FS/Accounting Standard of Financial Creditor and Corporate Debtor referred to by the Ld. Counsel for the Financial Creditor reads thus:-

8.4. Other Long-term liabilities

This should be classified into:

a) Trade payables; and
b) Others.

8.4.1 A payable shall be classified as 'trade payable' if it is in respect of amount due on account of goods purchased or services received in the normal course of business. As per the Old Schedule VI, the term 'sundry creditors' included amounts due in respect of goods purchased or services received or in respect of other contractual obligations as well. Hence, amounts due under contractual obligations can no longer be included within Trade payables. Such items may include dues payables in respect of statutory obligations like contribution to provident fund, purchase of fixed assets, contractually reimbursable expenses, interest accrued on trade payables, etc. Such payables should be classified as "others" and each such item should be disclosed nature-wise. However, Acceptances should be disclosed as part of trade payables in terms of the Schedule III.

8.4.2 The Micro, Small and Medium Enterprises Development (MSMED) Act, 2006 however, requires specified disclosures to be made in the annual Financial Statements of the buyer wherever such Financial Statements are required to be audited under any law. Though not specifically required by the Schedule III, such disclosures will still be required to be made in the annual Financial Statements.

8.4.3 The following disclosures are required under Sec 22 of MSMED Act 2006 under the Chapter on Delayed Payments to Micro and Small Enterprises:

(a) the principal amount and the interest due thereon (to be shown separately) remaining unpaid to any supplier as at the end of accounting year;

(b) the amount of interest paid by the buyer under MSMED Act, 2006 along with the amounts of the payment made to the supplier beyond the appointed day during each accounting year;

(c) the amount of interest due and payable for the period (where the principal has been paid but interest under the MSMED Act, 2006 not paid);

(d) The amount of interest accrued and remaining unpaid at the end of accounting year; and

(e) The amount of further interest due and payable even in the succeeding year, until such date when the interest dues as above are actually paid to the small enterprise, for the purpose of disallowance as a deductible expenditure under section 23.

The terms "appointed day", "buyer", "enterprise", "micro enterprise", "small enterprise" and" supplier", shall be as defined under clauses (b), (d), (e), (h), (m) and (n) respectively of section 2 of the Micro, Small and Medium Enterprises Development Act, 2006.

8.5. Long-Term Provisions

8.5.1This should be classified into provision for employee benefits and others specifying the nature. Provision for employee benefits should be bifurcated into long-term (non-current) and other current and the long-term portion is disclosed under this para. All long-term provisions, other than those related to employee benefits should be disclosed separately based on their nature. Such items would include Provision for warranties etc. While AS-15*Employee Benefits* governs the measurement of various employee benefit obligations, their classification as current and non-current liability will be governed by the criteria laid down in the Schedule III. Accordingly, a liability is classified as current if a company does not have an unconditional right as on the Balance Sheet date to defer its settlement for 12 months after the reporting date. Each company will need to apply these criteria to its specific facts and circumstances and decide an appropriate classification for its employee benefit obligations.

X X X

NOTE NO. 3
LONG TERM BORROWINGS — **in Rs.**

	31st March 2020	31st March 2019
A.Term Loans	-	-
B. Deposits:		
a) From Related Parties:	-	-
S.C. Garments Pvt Ltd	14685000.00	14685000.00
Sewa International Fashions Ltd	20684100.00	20570800.00
b) From others		
Nischay Finvest Pvt Ltd	500000.00	500000.00
Total Long Term Borrowings	**35869100.00**	**35755800.00**

As per our report of even date
FOR V S G & CO.
CHARTERED ACCOUNTANTS
[FRN : 0011900N]

SD/-
CA VINOD KUMAR JAIN
(PROP)
M.NO : 090584
Place: SONIPAT
Date : 02/12/2020

FOR WEST STAR CONSTRUCTIONS PRIVATE LIMITED

SD/-
SUMANA VERMA
(DIRECTOR)
DIN : 01448591

SD/-
SUBHASH C. CHAUHAN
(DIRECTOR)
DIN : 01825114

NOTE - 4 **101** in Rs.

OTHER LONG TERM LIABILITIES	As at 31.03.2020	As at 31.03.2019
Security Received from NIIT	26100000.00	26100000.00
Kaliber Associates	10000000.00	10000000.00
Total	36,100,000.00	36,100,000.00

NOTE -5

LONG TERM PROVISIONS	As at 31.03.2020	As at 31.03.2019
	NIL	NIL

NOTE - 6

SHORT TERM BORROWINGS	As at 31.03.2020	As at 31.03.2019
a) Loans and advances from related parties	-	-
b) Deposits	-	-
Total	-	-

NOTE - 7

Trade Payables	As at 31.03.2020	As at 31.03.2019
	-	-
	-	-
	-	-

NOTE-8

OTHER CURRENT LIABILITIES	As at 31.03.2020	As at 31.03.2019
Cheque Issued but Not Present into Bank	-	-
	-	-

NOTE - 9

SHORT TERM PROVISIONS	As at 31.03.2020	As at 31.03.2019
(a) Provision for employee benefits:	-	-
	-	-
(b) Others		
Audit Fees Payable	227,506.00	199,926.00
	227,506.00	199,926.00
Total Provisions	227,506.00	199,926.00

As per our report of even date
FOR V S G & CO.
CHARTERED ACCOUNTANTS
[FRN : 0011900N]

SD/-
CA VINOD KUMAR JAIN
(PROP)
M.NO : 090584
Place: SONIPAT
Date : 02/12/2020

FOR WEST STAR CONSTRUCTIONS PRIVATE LIMITED

SD/-
SUMANA VERMA
(DIRECTOR)
DIN : 01448591

SD/-
SUBHASH C. CHAUHAN
(DIRECTOR)
DIN : 01825114

4. Mr. Jain, Ld. Counsel for the Corporate Debtor submitted that in the balance sheet of the Corporate Debtor the amount of long term borrowing and long term liabilities are mentioned under two separate heads and the amount of Rs. 1,00,00,000/- has not been mentioned under the head of long term borrowing, thus cannot be treated as an amount of financial facility extended by the Financial Creditor to Corporate Debtor.

5. To buttress the plea further, he referred to Clause 8.4 of the accounting standard followed by the Corporate Debtor (ibid).

6. With reference to the aforementioned the Ld. Counsel for the Corporate Debtor submitted that the amount of Rs. 1,00,00,000/- should be covered under the head trades payable. Such plea raised by him cannot be accepted for the simple reason that it is nowhere the plea of the Corporate Debtor that Financial Creditor extended any service or made any supply to the Corporate Debtor qua which the trade payable are there in the record, rather Mr. Bhattacharya could draw our attention to the proof of claim submitted by the Corporate Debtor before the Creditor on 27.09.2024. The relevant excerpt reads thus:-

6.	DETAILS OF HOW AND WHEN DEBT INCURRED	That the Operational Creditor was enagaged in the business operation related to providing consultancy services in the real estate business. In October 2010, the Corporate Debtor approached and engaged the Operational Creditor to provide specific research services. Consequently, the Operational Creditor conducted comprehensive research for the Corporate Debtor's commercial project/real estate on behalf of the Respondent. As part of the initial terms of the arrangement, it was mutually agreed that the Corporate Debtor would pay a security amount of ₹1,00,00,000/- to the Operational Creditor. This payment was to secure the services to be rendered by the Operational Creditor. Subsequently, the Operational Creditor undertook and completed two years of rigorous research work, in line with the scope and instructions provided by the Corporate Debtor. Upon completion of the research and consultancy work, the total fee for the services rendered was determined to be ₹1,20,00,000/- (excluding taxes). On 20.11.2010, the Corporate Debtor made an advance payment of ₹1,00,00,000/- (excluding taxes), leaving an outstanding balance of ₹20,00,000/- due upon the completion of the services. The services were duly completed by the Operational Creditor on 15.12.2012. However, despite the fulfilment of its obligations by the Operational Creditor, the Corporate Debtor has failed to pay the remaining ₹20,00,000/-, which continues to remain unpaid

NOTARY
Debajyoti Behuria
Advocate
Regn. No. 19716
Period: 24/02/2020
to 24/02/2025
Central Delhi
GOVT. OF INDIA

7. As can be seen from the aforementioned the plea of the Corporate Debtor is that in October, 2010, it had approached and engaged Operational Creditor to provide specific research services. Consequently, the Operational Creditor conducted comprehensive research for Corporate Debtor for real estate project on behalf of the Respondent and as part of initial terms of the arrangement it was mutually agreed that the Corporate Debtor would pay a security amount of Rs. 1,00,00,000/- to Operational Creditor. According to Corporate Debtor the payment of Rs. 1,00,00,000/- was to secure the services to be rendered by the Operational Creditor. Besides, the Corporate Debtor has taken a plea that upon the completion of research and consultancy work total fees was determined as Rs. 1,20,00,000/- while the Corporate Debtor had made an advance payment of Rs. 1,00,00,000/-. From the stand taken in the aforementioned claim, it can be seen that at one place the Corporate Debtor has described Rs. 1,00,00,000/- as security amount and at another place he has described the same as advance paid by it. Thus, Corporate Debtor itself is not clear about the plea taken by it. The stand taken on behalf of the Corporate Debtor does not inspire any confidence. On the other hand in the balance sheet of Financial Creditor the amount has been shown as an amount of loan and advance. The Corporate Debtor is also unable to explain that how the amount of advance could be shown in the balance sheet as a long term liability. Besides we are unable to appreciate that if way back in the year 2012 the Financial Creditor was liable to pay Rs. 20,00,000/- to Corporate Debtor, how in the balance sheet of year 2021, the Corporate Debtor could show long term liability to pay the amount of Rs. 1,00,00,000/- to the Financial Creditor. In the totality of the facts and

circumstances of the case we are inclined to accept the plea raised on behalf of the Financial Creditor that once in the balance sheet of Financial Creditor the amount is shown as loan and advances and the liability is acknowledged in the balance sheet of the Corporate Debtor, the amount of Rs. 1,00,00,000/- has to be accepted as financial facility extended by the Financial Creditor to the Corporate Debtor. Thus, the transaction being of financial nature and there being no merit in the plea raised on behalf of the Corporate Debtor we admit the application. We may also be not oblivious of the fact that in terms of the provisions of Section 5(8) of IBC, even the liability other than loan facility can also be financial liability. As far as final value of money is concerned the loss of value of money on passage of time is also time value. Section 5(8) of the IBC, 2016 reads thus:-

*"**5. Definitions**—*

.....

(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;"

8. In view of the aforementioned, **we are left with no option but to admit the present application. Order accordingly. In the wake, moratorium provided under Section 14 of IBC, 2016 is declared qua the CD** and as a necessary consequence thereof the following prohibitions are imposed, which must be followed by all and sundry:

(a) The institution of suits or continuation of pending suits or proceedings against the Respondent including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority:

(b) Transferring, encumbering, alienating or disposing of by the Respondent any of its assets or any legal right or beneficial interest therein;

(c) Any action to foreclose, recover or enforce any security interest created by the Respondent in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

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

9. As proposed by the Petitioner **Mr. Saurab Sharma** having Registration No. IBBI/IPA-001/IP-P02550/2021-2022/13951 & email sk04sharma@gmail.com is appointed as IRP, subject to the condition that no disciplinary proceeding is pending against him and disclosures as required under IBBI Regulations, 2016 are made by him within a period of one week from this Order. It is further ordered that Mr. Saurab Sharma shall take charge of the CIRP of the Corporate Debtor with immediate effect and would take steps as mandated under the IBC specifically under Section 15, 17, 18, 20 and 21 of IBC, 2016 read with extend provisions of IBBI (Insolvency Resolution of Corporate Persons) Regulations, 2016.

10. The Petitioner is directed to deposit Rs. 2,00,000/- only with the IRP to meet the immediate expenses. The amount, however, will be subject to

adjustment by the Committee of Creditors as accounted for by Interim Resolution Professional and shall be paid back to the Financial Creditor.

11. A copy of this Order shall immediately be communicated by the Registry/Court Officer of this Tribunal to the Petitioner /Financial Creditor, the Respondent/Corporate Debtor and the IRP mentioned above.

12. In addition, a copy of this Order shall also be forwarded by the Registry/Court Officer of this Tribunal to the IBBI for their records.

Sd/-
(CHARANJEET SINGH GULATI)
MEMBER (T)

Sd/-
(ASHOK KUMAR BHARDWAJ)
MEMBER (J)

Iqraa Wasi/Ruchita