

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 978 of 2022

(Arising out of Order dated 28.06.2022 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench-I, Kolkata in CP(IB) No.1905/KB/2019)

IN THE MATTER OF:

State Bank of India
Stressed Asset Management Branch,
SAMB-I, Nagaland House, 8th Floor, 11 and 13
Shakespeare Sarani,
Kolkata-700071.

.... Appellant

Vs

N.S. Engineering Projects Pvt. Ltd.
Dakhin Jhapardhan,
ONGC Road, Domjur,
Howrah-711405, West Bengal

.... Respondent

Present:

For Appellant:

**Mr. Krishnan Venugopal, Sr.
Advocate with Mr. Sanjay Kapur, Ms.
Megha Karnwal, Mr. Surya Prakash,
Mr. Arjun Bhatia, Mr. Surya Prakash,
Advocates.**

For Respondents:

**Mr. Ramji Srinivasan, Sr. Advocate,
Mr. Zeeshan Haq, Mr. Animesh
Kumar, Mr. Ram Maroo, Mr. Tanay
Agarwal, Ms. Shruti Pandey, Ms.
Megha Dugar, Advocates**

With

Company Appeal (AT) (Insolvency) No. 1000 of 2022

(Arising out of Order dated 29.06.2022 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench-I, Kolkata in CP(IB) No.1676/KB/2018)

IN THE MATTER OF:

IDBI Bank Ltd.,
IDBI Tower, WTC Complex,
Cuffe Parade, Mumbai – 400005
And having its NMG Department at
44, Shakespeare Sarani,
Kolkata-700017.

.... Appellant

Vs

Abhijeet Integrated Steel Limited
Plot No.6, Small Industrial Area,
De Gaulle Avenue, Durgapur, Bardhaman,
West Bengal – 713212

.... Respondent

Present:

For Appellant:

**Mr. Krishnendu Datta, Sr. Advocate,
Mr. Bishwajit Dubey, Mr. Palash S.
Singhai, Ms. Neha Shivhare, Ms.
Nayani Agarwal, Mr. Rajat Sinha, Ms.
Varsha Himatsingka, Ms. Yashvi
Agarwal, Advocates**

For Respondents:

**Mr. Ramji Srinivasan, Sr. Advocate,
Mr. Sandeep Bajaj, Mr. Devansh Jain,
Ms. Vasudha Chadha, Ms. Shruti
Pandey, Ms. Megha Dugar, Advocates**

With

**Company Appeal (AT) (Ins.) No. 1039 of 2022 &
I.A. No. 3015 of 2022**

(Arising out of Order dated 28.06.2022 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench-I, Kolkata in CP(IB) No.1857/KB/2019)

IN THE MATTER OF:

Punjab National Bank
Registered Office:
Corporate Office Plot No.4,
Sector- 10 Dwarka,
New Delhi-110075

Through

Punjab National Bank
BA-1, Salt Lake, Sector-1,
Kolkata- 700064, West Bengal,
And also at:
SASTRA Division, Zonal Office,
United Tower, 11, Hemanta Basu
Satani, Kolkata-700001

.... Appellant

Vs

N.S. Engineering Projects Pvt. Ltd.
Dakhin Jhapardaha,
ONGC Road, Domjur,
Howrah West Bengal -711405

AND at:

41 A, AJC Bose Road,
Diamond Prestige, 7th Floor,
Room No. 703A, Kolkata- 700017.

.... Respondent

Present:

For Appellant:

**Mr. Rajesh Kumar Gautam, Mr.
Anant Gautam, Mr. Nipun Sharma,
Mr. Vidur Ahluwalia and Mr. Sumit
Sharma, Advocates**

For Respondents:

**Mr. Ramji Srinivasan, Sr. Advocate,
Mr. Zishan Haq, Mr. Tanay Agarwal,
Mr. Animesh Kumar, Mr. Ram Maroo,
Advocates**

J U D G M E N T

ASHOK BHUSHAN, J.

These Appeal(s) have been filed by Financial Creditors, challenging the orders of Adjudicating Authority National Company Law Tribunal, Kolkata Bench-I, Kolkata, by which Section 7 Applications filed by Financial Creditors have been rejected.

2. Company Appeal (AT) (Insolvency) No. 978 of 2022 has been filed against the order dated 28.06.2022 in CP(IB) No.1905/KB/2019 by which order, Section 7 Application filed by State Bank of India against the Corporate Debtor - N.S. Engineering Projects Pvt. Ltd. was rejected. Company Appeal (AT) (Ins.) No. 1039 of 2022 has also been filed against the same order dated 28.06.2022 by which Section 7 Application being CP(IB) No.1857/KB/2019 filed by Punjab National Bank was rejected.

Company Appeal (AT) (Ins.) No. 1000 of 2022 has been filed by the IDBI Bank Ltd., challenging the order dated 29.06.2022, by which order the National Company Law Tribunal, Kolkata Bench – I, Kolkata rejected Section 7 Application filed by IDBI Bank Ltd., relying on order dated 28.06.2022 in State Bank of India vs. N.S. Engineering Projects Pvt. Ltd. For deciding these Appeal(s), it shall be sufficient to notice the facts in Company Appeal (AT) (Insolvency) No. 978 of 2022 and few facts in other two Appeals, which are as follows:

- (i) The Corporate Debtor - N.S. Engineering Projects Pvt. Ltd. was granted credit facility by the State Bank of India from 02.11.2010. Default was committed by the Corporate Debtor in repayment of the financial facilities. The Corporate Debtor has also received financial facilities from Punjab National Bank and South Indian Bank. A Joint Lender Forum (“**JLF**”) was formed by the State Bank of India, Punjab National Bank and South Indian Bank to work out a corrective action plan. On the request of the Borrower and in consideration of the Borrower’s commitment to improve its operation, a Restructuring Package was sanctioned by the Lenders in the JLF meeting held on 29.09.2015, in terms of which the existing financial assistance was to be restructured. A Master Restructuring Agreement (“**MRA**”) was entered into between the State Bank of India, Corporate Debtor, Punjab National

Bank and South Indian Bank on the basis of sanction letters issued by respective Banks in the year 2015.

- (ii) By a letter dated 11.02.2016, the State Bank of India issued a Sanction Letter, by which letter it renewed the credit facility sanctioned to Corporate Debtor on certain terms and conditions. On 31.03.2017, the Corporate Debtor executed balance confirmation letter in favour of State Bank of India, confirming the correctness of debt balance of Rs.37,28,20,668.36 as on 31.03.2017 along with further interest thereto.
- (iii) The Corporate Debtor committed default, hence the account of Corporate Debtor declared NPA by the State Bank of India on 28.06.2017.
- (iv) The Corporate Debtor filed a Civil Suit No.188 of 2017 on 16.08.2017 impleading the State Bank of India, Punjab National bank and South Indian Bank seeking various reliefs, including a Decree for a sum of Rs.117.59 crores and suit was also for a mandatory injunction.
- (v) On 20.09.2017, State Bank of India issued demand notice, calling upon the Corporate Debtor to pay a sum of Rs.39,46,43,964.00/- upto 18.09.2017 with further interest. The State Bank of India also filed OA No.69 of 2018 on 22.02.2018 before the Debt Recovery Tribunal, Kolkata.

- (vi) On 31.10.2019, the State Bank of India filed CP(IB) No.1905 of 2019 under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the “**IBC**”) against the Corporate Debtor before the NCLT, Kolkata Bench. The Corporate Debtor on 27.02.2020 also filed an Application under Section 65 in the above case, which Application was replied by the Financial Creditor.
- (vii) On 28.06.2022, by the impugned order the Adjudicating Authority rejected the Section 7 Application.

3. The facts relating to Punjab National Bank in Company Appeal (AT) (Ins.) No. 1039 of 2022 also needs to be noted separately, which are:

- (i) A credit facility was extended by Punjab National Bank to the Corporate Debtor in the year 2013. The Corporate Debtor applied for debt restructuring in the year 2015 and restructuring credit facility was permitted and Master Restructuring Agreement dated 29.09.2015 was executed. On 04.07.2016 the Punjab National Bank sanctioned certain working Capital Limit/ Working Capital Term Loan, Funding of Interest Term Loan for both Phase -1 and Phase – II. The Corporate Debtor enjoyed the above credit facility and availed and utilized the loan facilities but did not adhere to the agreed terms and conditions. On 29.12.2017, the Corporate Debtor acknowledged and admitted its liabilities towards the Punjab National Bank.

- (ii) The Punjab National Bank classified the Corporate Debtor as NPA on 30.06.2018. Despite various notices, the Corporate Debtor failed to repay the dues. A notice under Section 13, sub-section (2) of the SARFAESI Act, 2002 was issued on 27.07.2018 by Punjab national Bank.
- (iii) On 23.09.2019, the Punjab National Bank filed CP(IB) 1857/KB/2019 under Section 7 before the Adjudicating Authority. The Corporate Debtor filed a reply to the Section 7 Application, which Application came to be dismissed on 28.06.2022 as noted above.

4. Few facts giving rise to Company Appeal (AT) (Insolvency) No. 1000 of 2022 also need to be noted:

- (i) In the year 2011, the Corporate Debtor – Abhijeet Integrated Steel Ltd. approached the lenders, including IDBI Bank Ltd. for availing financial assistance for setting up a green field project comprising a 1.2 MTPA Benefication and Pelletisation Plant in the state of Jharkhand for an estimated cost of INR 575 crores to be funded on debt-to-equity ratio of 2:1. The IDBI Bank issued sanction letter on 25.03.2011 granting its in-principle approval for a term loan of INR 100 crores for setting up the Project. The other lenders have also issued various sanction orders.
- (ii) On 25.02.2011, a Common Loan Agreement was entered into between Abhijeet Integrated Steel Ltd., Lenders and IDBI

Trusteeship Services Ltd. The other Agreements were also executed on the same day entered between lenders and Security Trusteeship. The Abhijeet Integrated Steel Ltd. entered into an Indenture of Mortgage and Pledge of Shares. The Lenders' Independent Engineer M/s Development Consultants Pvt. Ltd. issued a certificate to the Appellant for disbursement towards the Project.

- (iii) The Central Bureau of Investigation filed a first information report against Mr. Manoj Jayaswal, one of the Directors of the Corporate Debtor and Jas Infrastructure & Pvt. Ltd., one of the group companies of the Corporate Debtor for coal block allocation.
- (iv) Joint Lenders' Meeting ("**JLM**") was held on 12.10.2012, 26.07.2013, 08.02.2014. In the JLM meeting held on 08.02.2014, Abhijeet Integrated Steel Ltd. informed the Lenders that it has decided to sell its majority stake to Uttam Galva Steel Limited ("**UGSL**"). On 02.06.2016, UGSL submitted a proposal to acquire the entire stake in the Project and bring in additional equity. The IDBI Bank Ltd. disbursed a total amount of INR 68,84,89,080/- to the Corporate Debtor on 27.09.2014.
- (v) The Corporate Debtor defaulted in repayment of interest on the principal for three consecutive months from October 2014. Hence, the loan account was declared as NPA on 30.12.2014.

A JLM was held on 02.01.2015 wherein it was observed that actual progress was not commensurate with the disbursements made by them.

- (vi) On 15.06.2015, the Appellant issued a demand notice to the Abhijeet Integrated Steel Ltd. that it had failed to pay the principal amount to INR 64,84,89,080/- together with interest. The IDBI Bank Ltd. suspended the unpaid principal amount of INR 29.15 crores. The JLM granted time to UGSL to submit a final proposal. The UGSL failed to submit a proposal. The proposal of OPG Group was not accepted.
- (vii) On 04.07.2017, the IDBI Bank Ltd. issued a statutory demand notice under Section 13, sub-section (2) of the SARFAESI Act and also filed an Application before the Debt Recovery Tribunal on 12.07.2017.
- (viii) An Application under Section 7 of the IBC was filed by IDBI Bank Ltd. on 19.12.2018, claiming an amount of INR 130,18,96,014/- towards unpaid principal and interest.
- (ix) By an order dated 29.06.2022, Section 7 Application filed by the Appellant was dismissed, relying on the view taken by the Adjudicating Authority in State Bank of India vs. N.S. Engineering Projects Pvt. Ltd. in CP(IB) No.1905/KB/2019.
- (x) Aggrieved against the order dated 29.06.2022, the Company Appeal (AT) (Insolvency) No. 1000 of 2022 has been filed.

5. We have heard Shri Krishnan Venugopal, learned Senior Advocate for the State Bank of India; Shri Rajesh Kumar Gautam, learned Advocate has appeared for Punjab National Bank and Shri Krishnendu Datta, learned Senior Advocate and Shri Bishwajit Dubey, have appeared for IDBI Bank Ltd. Shri Ramji Srinivasan, learned Senior Advocate has appeared for the Respondents both N.S. Engineering Projects Pvt. Ltd. and Abhijeet Integrated Steel Ltd.

6. Shri Krishnan Venugopal, learned Senior Counsel appearing for State Bank of India, challenging the order of Adjudicating Authority rejecting Section 7 Application, submits that Adjudicating Authority committed error in rejecting the Application on the ground of contributory negligence on the part of Financial Creditors, which was beyond the scope of inquiry of Section 7. The finding of Adjudicating Authority that due to non-disbursement of part of financial assistance sanctioned by the Financial Creditors, there is contributory negligence, hence, Section 7 Application cannot be admitted, is totally contrary to the Scheme of the Section 7. The cause of default on the part of the Financial Creditor is not relevant for rejecting the Section 7 Application. It is submitted that the opinion expressed by the Adjudicating Authority that there was contributory negligence on the part of Financial Creditors is also incorrect. The Corporate Debtor having failed to perform its part under the Agreement, further disbursement could not be made by the Financial Creditors. It is submitted that 'debt' and 'default' on the part of Corporate Debtor was fully proved, there being clear acknowledgement of debt by the

Corporate Debtor. Filing of suit by the Corporate Debtor in the Calcutta High Court, claiming decree of Rs.117 crores and injunction against the Financial Creditors was not relevant for rejecting Section 7 Application. The Corporate Debtor never complied the conditions on which restructuring of debt was granted. The Adjudicating Authority while deciding Section 7 Application has to look into the 'debt' and 'default' and it having proved that 'debt' and 'default' has been committed by the Corporate Debtor, Section 7 Application was required to be admitted. The Adjudicating Authority committed error in rejecting Section 7 Application.

7. Shri Rajesh Kumar Gautam, learned Counsel for the Punjab National Bank has also relied on the submission of Shri Krishnan Venugopal. It is further submitted that 'debt' and 'default' having not been disputed by the Corporate Debtor or by the Adjudicating Authority, the Adjudicating Authority committed error in rejecting Section 7 Application. The Adjudicating Authority cannot go into the issue of reason for default while deciding Section 7 Application. Reliance placed by the Corporate Debtor before the Adjudicating Authority on Civil Suit No.188 of 2017 filed by the Corporate Debtor against the Consortium of Lenders is wholly misplaced and misconceived.

8. Shri Krishnendu Datta, learned Senior Counsel appearing for IDBI Bank Ltd. submitted that the view taken by the Adjudicating Authority in State Bank of India vs. N.S. Engineering Projects Pvt. Ltd. is not a correct view. The 'debt' and 'default' having been proved, the Adjudicating Authority was required to admit Section 7 Application. The Adjudicating

Authority has gone wrong in observing that in order to be satisfied in terms of provisions of Section 7(5) of the Code, the role of the petitioning creditor in the alleged default must also be examined. The Adjudicating Authority is not entitled to examine the reason for commission of default under Section 7 of the Code, when the requirement of 'debt' and 'default' have been clearly established. Shri Datta further submitted that ratio of judgment in N.S. Engineering would still not be applicable in the case of the Appellant, since there are clearly several distinguishable facts. Shri Datta submits that Adjudicating Authority while rejecting Section 7 Application filed by the IDBI Bank Ltd. has not even noticed the facts of the present case. There was clear admission by the Abhijeet Integrated Steel Ltd. of the 'debt' and 'default' as per the Audited Financial Statements for the financial years 2015-16 and 2016-17. In para-10 of the reply in the present Appeal, the Corporate Debtor has categorically stated that the Appellant has already disbursed INR 52.45 crores out of the sanctioned limit of INR 100 crores and due to default committed in payment, the Corporate Debtor account has been declared NPA. The submission of the Corporate Debtor that Appellant is attempting to take away the Promoters Company into Corporate Insolvency Resolution Process ("**CIRP**") even when CD has not committed any default, is wholly incorrect. The Promoters themselves suggested the Appellant to consider restructuring of Corporate Debtor's debt. In the JLM held on 08.02.2014, Promoters themselves have proposed to sell their majority stake in the Corporate Debtor to new investor i.e. UGSL and proposed Swiss Challenge Method for selling their stake in

the Corporate Debtor, as is clear from JLM dated 08.02.2014 and 05.06.2014. The 'debt' and 'default' on the part of the Corporate Debtor having been established in terms of Section 7 Application, the Adjudicating Authority ought to have admitted Section 7 Application. The Appellant was fully entitled to adjust the due interest from the sums to be disbursed to the Borrower and the sums so deducted or adjusted were deemed to be disbursement made by the lenders as per Clause 2.8. The observation of the Adjudicating Authority that Appellant has played a contributory role in commission of default is wholly incorrect. The Appellant performed its obligations under the Agreement. The rights and obligations of each Consortium of Lenders under the Agreement are independent. A Lender is only responsible for its own obligation and if one Lender fails to perform its obligation, other Lenders cannot be held responsible for the same. The Appellant being Financial Creditor has statutory right to initiate Section 7 proceedings. The Appellant has not breached any obligation under the Agreement. The Corporate Debtor is not entitled for any disbursement after the account has been classified as NPA in the books of the lenders.

9. Shri Ramji Srinivasan, learned Senior Counsel appearing for both N.S. Engineering Projects Pvt. Ltd. and Abhijeet Integrated Steel Ltd. refuting the submissions made by learned Counsel for the State Bank of India, Punjab National Bank and IDBI Bank Ltd., submits that it was the Financial Creditors, who have to be blamed for non-disbursing of the sanctioned amounts to the Corporate Debtor, which led to financial distress to the Corporate Debtor. The Financial Creditors cannot take benefit of

their own wrong. There is default by the Lenders and not by the Corporate Debtor. In terms of Master Restructuring Agreement, the Promoters of the Corporate Debtor infused further capital, but the Consortium of Banks, including the State Bank of India and Punjab National Bank did not release any working capital, due to which the unit could not be operated commercially to generate revenue required to commence repayment of the dues of the lenders. In the above circumstances, the Respondent – Corporate Debtor has filed a Suit in the Calcutta High Court for declaration that Lender Banks have failed to perform their obligation and have wrongfully proceeded to declare the account of Corporate Debtor as NPA. Decree for damages suffered has also been prayed for. The written statement filed by the Appellant (State Bank of India) in the Suit consists of bare denials. It is incorrect to suggest that Corporate Debtor has filed the suit pre-empting the filing of a Section 7 Application. In fact, Section 7 Application filed by the Appellant(s) is an afterthought and counter blast to the Suit filed by the Corporate Debtor. The object of Company Petition was not to seek resolution of corporate insolvency, but to render the Suit infructuous. The expression “may” in Section 7, sub-section 5 of the IBC clearly confers an absolute discretion. In appropriate case, like the present case, the Adjudicating Authority was well within its jurisdiction to reject the Application. The breaches committed by the Appellant(s) and the Consortium Lender were sufficient to refuse the admission of Section 7 Application. It is submitted that breach on the part of the Lenders to disburse loans, attracts Section 54 of the Indian Contract Act, 1872. Shri

Ramji Srinivasan has placed reliance on judgment of the Hon'ble Supreme Court in ***Gujarat State Financial Corporation vs. Lotus Hotels Pvt. Ltd. – (1983) 3 SCC 379***. The Civil Suit has bearing on Section 7 Application. The Suit was filed nearly two years ago prior to filing of Section 7 Application. Issues framed in the Suit relate to question of default and to whom such default is attributable. 'Debt' and 'default' has not been admitted and the Corporate Debtor has stated that Appellant is in default having failed to disburse the amount in terms of Master Restructuring Agreement. It is fundamental principle of jurisprudence that a person cannot be allowed to take advantage of his own wrong. It is held by the Hon'ble Supreme Court that if debt is not payable in law or in fact, the same will not amount to a 'debt' or 'default'. The order of Adjudicating Authority does not warrant any interference.

10. Coming to the case of Abhijeet Integrated Steel Ltd., Shri Ramji Srinivasan submits that default committed by the Lenders cannot be said to be default committed by Abhijeet Integrated Steel Ltd. The Banks after carrying out the study of the Corporate Debtor have sanctioned the financial facility. The Lenders committed disbursement of INR 200 crores, but they have disbursed only INR 100 crores. Shri Ramji Srinivasan, however, has been candid in his submission that Abhijeet Integrated Steel Ltd.'s facts should have been considered a little more. It is submitted that mutual reciprocal promises need to be enforced.

11. We have considered the submission of learned Counsel for the parties and have perused the records.

12. Before entering into respective submission of learned Counsel for the parties, we need to notice the reasons given by the Adjudicating Authority while rejecting Section 7 Application filed by the State Bank of India and Punjab National Bank by its order dated 28.06.2022. The Adjudicating Authority after noticing the respective submissions of the parties, in paragraph 5.7 has observed that there was no reason for the Financial Creditor not to disburse the amounts in terms of the sanction letters. In paragraph 5.7 and 5.8, following has been observed:

“5.7. Even the LIE Report commissioned by the Financial Creditor does not point to any failure on the part of the Corporate Debtor or its promoters to perform its obligations in terms of the sanction letter. Therefore, there was no reason whatsoever for the Financial Creditor not to disburse the amounts in terms of the sanction letters. There is no denial of the fact, either in the pleadings or during arguments, that the Financial Creditor did not effect disbursements in terms of the sanction letters.

5.8. We also note the specific averment in the reply affidavit, that the arrangement with the Financial Creditor failed since the Financial Creditor did not provide the sanction in terms of its appraisal note. Further, due to the continued breaches of the Financial Creditor, the repayment of the Term Loan for Phase II began even before the working capital for Phase II was sanctioned by the Financial Creditor. The debts of the Corporate Debtor had to be restructured by the Financial Creditor and other consortium members due to their failure to

disburse the committed amounts of loan as per the JLF agreement and the assessment note prepared by the Financial Creditor.”

13. The Adjudicating Authority has further relied on the Suit filed by the Corporate Debtor in the Calcutta High Court, which according to the Adjudicating Authority will result in determination of the default inasmuch as there will be an adjudication also on whether the Corporate Debtor has discharged from its obligations. In paragraph 5.12, following has been observed:

“5.12 The adjudication of the suit by the Hon’ble Calcutta High Court will result in determination of the default, inasmuch as there will be an adjudication also on whether the Corporate Debtor is discharged from its obligations. We wonder why, after all the intervening years when the accounts were apparently declared as NPA with effect from 28.06.2017, the Financial Creditor waited for two more years before initiating the present proceedings. We restrain ourselves on commenting on the reasons due to connected lis pendens.”

14. The Adjudicating Authority in paragraph 5.14 held that when Financial Creditor, by its own acts of omission and commission, contributes to the default on the part of the Corporate Debtor, Application under Section 7 may not be admitted.

15. The Hon'ble Supreme Court has had occasion to examine the contours of Section 7 Application. The Hon'ble Supreme Court in ***Innoventive Industries Limited vs. ICICI Bank and Anr.- (2018) 1 SCC 407*** had noted the Scheme of Section 7 of the Code and also contrasted it with the Scheme under Section 8 and 9. Paragraphs 28 and 29 of the judgment of the Hon'ble Supreme Court is as follows:

“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.

29. *The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing—i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.”*

16. The Hon'ble Supreme Court in the above case has observed that the moment Adjudicating Authority is satisfied that default has occurred, the Application must be admitted, unless it is incomplete. From the facts, which we have noticed above in these Appeal(s), there is no denial to the sanction of financial facilities to the respective Corporate Debtors and restructuring of the debt on account of default committed by the Corporate Debtors. It is further on the record that the Corporate Debtors were unable to carry out its repayment obligation as per Restructuring Agreement. The Corporate Debtor, in its reply to Section 7 Application has relied on the Suit filed in the Calcutta High Court. We need to notice the prayers made by N.S. Engineering Projects Pvt. Ltd. in CS No.188 of 2017 filed in the High Court of Calcutta. In the suit, N.S. Engineering Projects Pvt. Ltd. has prayed for following reliefs:

“The Plaintiff prays for leave under Order 11, Rule 2 of the Code of Civil Procedure and claims:-

- a) Decree for a sum of Rs.117.59 crores from the defendants jointly and severally as claimed in paragraph 77 of the plaint;*
- b) Interest on the aforesaid claim @ 18% per annum from 1st August 2017 till the decree is passed and further interest @ 18% per annum from the date of decree until the realization of the decretal amount of any other rate of interest as this Hon'ble Court may deem fit and proper.*
- c) Declaration that the purported NPA status as ascribed to the account of the plaintiff is bad, illegal and not binding on the plaintiff;*

- d) *Mandatory injunction directing the defendant No.1 to restore the plaintiff's account to the status prior to the purported declaration of NPA;*
- e) *Declaration that the alleged default in repayment with respect to the plaintiff's account with the defendant No.1 are attributable to the breaches of the defendant No.1 and that the defendant No.1 is not entitled to obtain any benefit, privilege, advantage or right arising out of such alleged defaults;*
- f) *Decree for perpetual injunction restraining the defendant No.1 from either declaring the plaintiff's account as NPA and/or to take any step and/ or further steps with regard thereto;*
- g) *Further interest;*
- h) *Cost;”*

17. From the judgment of the Adjudicating Authority as noticed above in State Bank of India's case, it is clear that Adjudicating Authority has based its decision of rejecting Section 7 Application on the ground that the default committed by the Corporate Debtor in restructuring its debt, there is contributory negligence by the State Bank of India as well as Punjab National Bank. The fact that certain portion of sanction amount of financial facilities could not be disbursed by the Financial Creditors can be ground for rejecting Section 7 Application has already been answered by the Hon'ble Supreme Court in its judgment in ***Innoventive Industries Limited*** (supra). We need to notice some submissions, which were raised before the Hon'ble Supreme Court in *Innoventive Industries Limited* and the views, which were expressed by the Hon'ble Supreme Court in the above case. In

Innoventive Industries Limited, a Section 7 Application was filed by the Financial Creditors. Nineteen Banking entities had extended credit to the Innoventive Industries Ltd. In the above case also restructuring proposal given by the Corporate Debtor was approved in the meeting of Joint Lenders Forum. A Restructuring Agreement was entered into on 09.09.2014, under which funds were to be infused by the creditors and certain obligations were to be met by the debtors. Insolvency resolution process was set in motion by filing a Section 7 Application. In reply to Section 7 Application, Corporate Debtor took plea that under the Maharashtra Relief Undertakings (Special Provisions) Act, 1958, all liabilities of the Corporate Debtor except certain liabilities and remedies for enforcement thereof were temporarily suspended, hence the Application under Section 7 could not have been filed. The Corporate Debtor also filed a second application taking another plea that owing to non-release of funds under Master Restructuring Agreement, the Corporate Debtor was unable to pay back its debts as envisaged. It was pleaded that no default has been committed by the Corporate Debtor. The above plea raised by the Corporate Debtor has been noted by the Hon'ble Supreme Court in paragraph 5 of the judgment, which is as follows:

“5. On this date, a second application was filed by the appellant in which a different plea was taken. This time, the appellant pleaded that owing to non-release of funds under MRA, the appellant was unable to pay back its debts as envisaged. Further, it repaid only some amounts to five lenders, who, according to the appellant, complied with their obligations under MRA. In the

aforsaid circumstances, it was pleaded that no default was committed by it.”

18. In the above case, NCLT has held that Code would prevail against the Maharashtra Act and admitted Section 7 Application, which order was unsuccessfully challenged before the Appellate Tribunal. The NCLT by a separate order on a clarification application has held that the plea raised by the Corporate Debtor in Section 7 Application was belatedly raised and not maintainable. The Appellate Tribunal has also concurred with the view taken by the Adjudicating Authority. Before the Hon'ble Supreme Court, challenging the judgment of the Adjudicating Authority and the Appellate Tribunal, arguments were raised. The Hon'ble Supreme Court in the above judgment has also held that it is of no matter that the debt is disputed so long as the debt is due and payable. In paragraph 30 of the judgment, following has been laid down:

“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.”

19. The submission, which was pressed by the Corporate Debtor before the Adjudicating Authority and the Appellate Tribunal regarding non-releasing of funds under MRA was also pressed before the Hon'ble Supreme Court. The Hon'ble Supreme Court although held that Adjudicating Authority and Appellate Tribunal were right in not going into this contention, but also proceeded to examine the submission. The Hon'ble Supreme Court looked into the different clauses of MRA. The Hon'ble Supreme Court has relied on Clause 10(t) in the MRA, which has been reflected in paragraph 63 and ultimately held that obligation of the Corporate Debtor was unconditional and did not depend upon infusing of funds by the creditors. In paragraph 63 and 64 of the judgment, which clinches the issue, following has been laid down:

“63. Even otherwise, Shri Salve took us through MRA in great detail. Dr Singhvi did likewise to buttress his point of view that having promised to infuse funds into the appellant, not a single naya paisa was ever disbursed. According to us, one particular clause in MRA is determinative on the merits of this case, even if we were to go into the same. Under Article V entitled “Representations and Warranties”, Clause 20(t) states as follows:

“(t) Nature of Obligations

The obligations under this Agreement and the other restructuring documents constitute direct, unconditional and general obligations of the borrower and the reconstituted facilities, rank at least pari passu as to priority of payment to all

other unsubordinated indebtedness of the borrower other than any priority established under applicable law.”

64. *The obligation of the corporate debtor was, therefore, unconditional and did not depend upon infusing of funds by the creditors into the appellant Company. Also, the argument taken for the first time before us that no debt was in fact due under MRA as it has not fallen due (owing to the default of the secured creditor) is not something that can be countenanced at this stage of the proceedings. In this view of the matter, we are of the considered view that the Tribunal and the Appellate Tribunal were right in admitting the application filed by the financial creditor ICICI Bank Ltd.”*

20. N.S. Engineering Projects Pvt. Ltd. itself has brought on record the Master Restructuring Agreement as Annexure R-34 in Company Appeal (AT) (Insolvency) No. 978 of 2022. We have looked into the MRA and there is identical Clause in the MRA dated 29.09.2015 entered between the Corporate Debtor and the Lenders, i.e., Clause (u) under Article-V. Clause (u) is as follows:

“(u) Nature of Obligations. The obligations under this Agreement and the other Restructuring Documents constitute direct, unconditional and general obligations of the Borrower and rank at least paripassu as to priority of payment to all other unsubordinated indebtedness of the Borrower other than any priority established under law.”

21. The Clause (u) of the Restructuring Agreement entered between the parties is in the identical words as Clause 20(t), which was noticed by the Hon'ble Supreme Court in Innoventive Industries Ltd. The Hon'ble Supreme Court in Innoventive Industries Ltd. having held that **“The Obligation of the corporate debtor was, therefore, unconditional and did not depend upon infusing of funds by the creditors into the appellant company”** is a declaration of law in reference to an Application under Section 7. The view taken by the Adjudicating Authority in the impugned order dated 28.06.2022 is clearly not in consonance with the law declared by the Hon'ble Supreme Court in Innoventive Industries Ltd. (supra). This alone is sufficient to set aside the impugned order passed by the Adjudicating Authority.

22. We may also notice that Hon'ble Supreme Court while considering the Scheme of the IBC, i.e., an Application under Section 7 of the IBC had considered the claim of set-off or counterclaim in **Swiss Ribbons Pvt. Ltd. & Anr. vs. Union of India and Ors. – (2019) 4 SCC 17**. The Hon'ble Supreme Court has held that claim of set-off will be considered at the time of filing of proofs of claim during the resolution process. In paragraph 61 and 63, following has been laid down:

“61. Insofar as set-off and counterclaim is concerned, a set-off of amounts due from financial creditors is a rarity. Usually, financial debts point only in one way—amounts lent have to be repaid. However, it is not as if a legitimate set-off is not to be considered at all. Such set-off may be considered at the stage of filing of proof of claims during the resolution process by the resolution professional, his

decision being subject to challenge before the adjudicating authority under Section 60.

63. *Equally, counterclaims, by their very definition, are independent rights which are not taken away by the Code but are preserved for the stage of admission of claims during the resolution plan. Also, there is nothing in the Code which interdicts the corporate debtor from pursuing such counterclaims in other judicial fora.”*

23. The Hon’ble Supreme Court in Swiss Ribbons also has noted the four reasons which were submitted by the learned Solicitor General for this shift in the legislative policy from inability to pay debts to determination of default. One of the reasons, which was pressed before the Hon’ble Supreme Court in the said judgment was that in a situation of financial stress, the cause of default is not relevant. We may notice paragraph 64 of the judgment, which is as follows:

“64. The trigger for a financial creditor's application is non-payment of dues when they arise under loan agreements. It is for this reason that Section 433(e) of the Companies Act, 1956 has been repealed by the Code and a change in approach has been brought about. Legislative policy now is to move away from the concept of “inability to pay debts” to “determination of default”. The said shift enables the financial creditor to prove, based upon solid documentary evidence, that there was an obligation to pay the debt and that the debtor has failed in such obligation. Four policy reasons have been stated by the learned Solicitor General for this shift in legislative policy:

64.1. *First is predictability and certainty.*

64.2. *Secondly, the paramount interest to be safeguarded is that of the corporate debtor and admission into the insolvency resolution process does not prejudice such interest but, in fact, protects it.*

64.3. *Thirdly, in a situation of financial stress, the cause of default is not relevant; protecting the economic interest of the corporate debtor is more relevant.*

64.4. *Fourthly, the trigger that would lead to liquidation can only be upon failure of the resolution process.”*

24. Under the Scheme of IBC, when a Corporate Debtor is unable to pay its debt, which becomes payable, it is a warning signal for Corporate Debtor and when an Application is filed by a Financial Creditor to initiate CIRP under Section 7 and there are ample material that Corporate Debtor is unable to pay its debt and has committed default, the Adjudicating Authority is not required to go into the reasons of default and ignore the real status of the Corporate Debtor and close its eyes to the fact that the Corporate Debtor needs insolvency resolution. Red signal having been flagged by the Applicant, ignoring the precarious financial situation and status of the Corporate Debtor and not taking remedial action to bring back the Corporate Debtor on its track by adopting resolution process as per IBC and reject the Application on the reasons of default, is clearly contrary to the whole Scheme of the IBC. There being sufficient material before the Adjudicating Authority that consistent defaults have been committed by the Corporate Debtor and it is unable to pay its debt, rejection of Section 7 Application on the ground that for default committed by the Corporate

Debtor, the Financial Creditors have also to be blamed is closing the eyes to the Scheme of the insolvency resolution.

25. Shri Ramji Srinivasan has placed much reliance on the judgment of ***Park Energy Pvt. Ltd. vs. Syndicate Bank and Anr. – (2020) SCC online NCLAT 637***. In the above judgment, we have noticed that this Tribunal has returned a finding that no default was committed by the Corporate Debtor, since the amount which was to be paid to Financial Creditors, i.e., Syndicate Bank, who had only 1.64% stake of the total value of the debt owed by the Corporate Debtor to all the Financial Creditors, could have been very well paid from the Trust Retention Account, where there was sufficient money, hence, it cannot be held that any default was committed by the Corporate Debtor. Following are the observations made by this Tribunal in the above judgment:

“...It further appears from record that the stake of Respondent No. 1 - Syndicate Bank (Financial Creditor) barely extends to 1.64% of the total debt. Viewed in this context, the only conclusion deducible from record is that the default cannot be attributed to the Corporate Debtor as the money deposited with the TRA Account was already available for release but its release was regulated in terms of the ‘Punjab National Bank Consortium Inter-se Agreement’ r/w Trust Retention Account (TRA) Agreement’. May be the Lead Bank was not justified in insisting upon issue of Letter of Credit as a precondition for release of payment in favour of Respondent No. 1, but that does not in any manner be read as an act of default on the part of Corporate Debtor

who has, in compliance of the terms of the aforesaid agreements made over its entire collection in the TRA Account as per terms of the Agreement. It would therefore be difficult to hold that a default has occurred on the part of the Corporate Debtor. Non-release of money out of the entire collection of Corporate Debtor does not render the Corporate Debtor liable for default who has performed his part of the contract. The fault lies somewhere else. In the inter-se dispute of Financial Creditors, Respondent No. 1 may have faced discrimination as regards release of money from TRA Account but that would not render the Corporate Debtor accountable for default.”

26. The judgment of the Park Energy Pvt. Ltd., does not notice paragraphs 63 and 64 of the Innoventive Industries Ltd. of the Hon’ble Supreme Court. We, thus, are of the view that judgment of this Tribunal in Park Energy Pvt. Ltd. does not render any help to the Respondent in the facts of present case.

27. The learned Counsel for the Respondent has placed reliance on the judgment of the Hon’ble Supreme Court in **Gujarat State Financial Corporation vs. Lotus Hotels Pvt. Ltd. – (1983) 3 SCC 379**. It is submitted that Hon’ble Supreme Court has held that the Gujarat undertaking was bound by the principle of promissory estoppel. It further held that the Government undertaking cannot back out from its promise held out to the contracting party, which incurred expenditure and suffered liabilities. In the case of Gujarat State Financial Corporation, the Appeal was filed against the judgment of the High Court in a Writ Petition filed

under Article 226. The Writ Petition was filed by the Respondent Lotus Hotels Pvt. Ltd. praying for a Writ of Mandamus directing the Appellant to disburse the promised loan to the Company in accordance with its letter of offer dated July 24, 1978, followed by the agreement dated February 1, 1979. The Writ Petition was allowed issuing the direction as prayed for and LPA was dismissed, against which an Appeal was filed before the Hon'ble Supreme Court. The Hon'ble Apex Court in the said judgment laid down following in paragraph 13:

“13. Now if appellant entered into a solemn contract in discharge and performance of its statutory duty and the respondent acted upon it, the statutory corporation cannot be allowed to act arbitrarily so as to cause harm and injury, flowing from its unreasonable conduct, to the respondent. In such a situation, the court is not powerless from holding the appellant to its promise and it can be enforced by a writ of mandamus directing it to perform its statutory duty. A petition under Article 226 of the Constitution would certainly lie to direct performance of a statutory duty by “other authority” as envisaged by Article 12.”

28. The Hon'ble Apex Court has held that petition under Article 226 of the Constitution would certainly lie to direct performance of a statutory due by “other authority”. There cannot be any quarrel to the proposition laid down by the Hon'ble Supreme Court in the above judgment. The above case was a case where Writ Petition was filed for Writ of Mandamus on the principle of promissory estoppel and the High Court found the State

Undertaking was bound by that promissory estoppel. Present is a case where Section 7 Application has been filed by the Financial Creditors claiming 'debt' and 'default' on the Corporate Debtor. As noted above, Suit was filed by the Corporate Debtor in the Calcutta High Court, where various reliefs have been claimed as noted above. The reliefs claimed in Suit filed in the Calcutta High Court by the Corporate Debtor against the Financial Creditors is a separate issue, which is for adjudication of the High Court. In the Suit, it can be at best held that Corporate Debtor has raised certain claims against the Financial Creditors, which are yet to be determined, but the mere fact that Corporate Debtor has raised certain claims against the Financial Creditors cannot be a ground to not consider the Section 7 Application.

29. The Adjudicating Authority in the impugned order as noted above has observed that adjudication of the Suit by the High Court will result in determination of the default. The determination by the High Court can at best be for the purposes of Suit filed in the High Court and cannot be reasoned for not entertaining Section 7 Application filed by Financial Creditors claiming default on the part of Corporate Debtor. We are of the view that Adjudicating Authority erred in relying on Suit filed by the Corporate Debtor in the Calcutta High Court for rejecting Section 7 Application. Reliance on filing of a Suit by the Corporate Debtor was not relevant for rejecting Section 7 Application.

30. Now we come to the submission of Shri Krishnendu Datta made on behalf of IDBI Bank Ltd. that there are several other distinguishable facts in the case of IDBI from the N.S. Engineering Projects Pvt. Ltd. case. It is submitted that leaving the view of the Adjudicating Authority in N.S. Engineering Projects Pvt. Ltd. aside, there were other distinguishable facts in the case, which had not been noticed by the Adjudicating Authority in its order rejecting Section 7 Application. Suffice, to say that we having already held that view of the Adjudicating Authority in the State Bank of India vs. N.S. Engineering Projects Pvt. Ltd. in the impugned order dated 28.06.2022 being a flawed view, which is unsustainable, we see no necessity to enter into other submissions raised by Shri Krishnendu Datta to distinguish his case from N.S. Engineering Projects Pvt. Ltd. in order dated 29.06.2022, by which Adjudicating Authority rejected the Section 7 Application of IDBI Bank Ltd. Only reason given by the Adjudicating Authority is the view taken by the Adjudicating Authority in State Bank of India vs. N.S. Engineering Projects Pvt. Ltd., which is reflected in paragraph 5.2. The order passed by the Adjudicating Authority dated 29.06.2022, which is essentially based on judgment of the Adjudicating Authority in State Bank of India vs. N.S. Engineering Projects Pvt. Ltd. cannot be sustained.

31. We, thus, are of the view that both the orders of Adjudicating Authority dated 28.06.2022 and 29.06.2022 are unsustainable and are set aside. The Appellant(s) have made out a case for admission of their Section

7 Application and Adjudicating Authority committed error in rejecting Section 7 Application.

32. In result, we allow the Appeal(s), set aside the impugned order dated 28.06.2022 and 29.06.2022 and direct the Adjudicating Authority to pass an order of admission and other consequential orders within a period of 30 days from the date of copy of this order placed before the Adjudicating Authority. Parties shall bear their own costs.

**[Justice Ashok Bhushan]
Chairperson**

**[Barun Mitra]
Member (Technical)**

NEW DELHI

3rd February, 2023

Ashwani