IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH

Coram: SHRI DEEP CHANDRA JOSHI,
HON'BLE JUDICIAL MEMBER

SHRI PRASANTA KUMAR MOHANTY,
HON'BLE TECHNICAL MEMBER

IA No. 278/JPR/2019,
IA No. 279/JPR/2021,
IA No. 404/JPR/2022 &
CP No. (IB)- 102/7/JPR/2019

(Application Under Section 7 read with 60(5) of the Insolvency and Bankruptcy Code, 2016 & Rule 11 of the NCLT Rules, 2016)

IN THE MATTER OF:

ANIL KUMAR SHARMA & ANR.

…… FINANCIAL CREDITORS

VERSUS

RIDHIRAJ BUILDERS AND PROMOTERS LLP

……CORPORATE DEBTOR

MEMO OF PARTIES

Anil Kumar Sharma
S/o Late Shri M. L. Sharma
R/o SB-17, Bhawani Singh Road,
Bapu Nagar, Jaipur- 302015 (Rajasthan)

………Applicant No. 1/ Financial Creditor

Ultramed Private Limited
CIN: U51507RJ1986PTC003816
R/o SB-17, Bhawani Singh Road,
Bapu Nagar, Jaipur- 302015 (Rajasthan)

……… Applicant No. 2/ Financial Creditor

VERSUS

Ridhiraj Builders and Promoters LLP
LLPIN: AAB-7510
Registered office at : 166, First Floor,
SLC Tower, Amrapali Marg, Vaishali
Nagar, Jaipur- 302021 (Rajasthan)

……...Respondent / Corporate Debtor

IA No. 278/JPR/2019; IA No. 279/JPR/2021 & IA No. 404/JPR/2022:

Ridhiraj Builders and Promoters LLP
LLPIN: AAB-7510
Registered office at : 166, First Floor,
SLC Tower, Amrapali Marg, Vaishali
Nagar, Jaipur- 302021 (Rajasthan)

………Applicant

VERSUS

Anil Kumar Sharma
S/o Late Shri M. L. Sharma
R/o SB-17, Bhawani Singh Road,
Bapu Nagar, Jaipur- 302015 (Rajasthan)

………Non-Applicant No. 1

Ultramed Private Limited
CIN: U51507RJ1986PTC003816
R/o SB-17, Bhawani Singh Road,
Bapu Nagar, Jaipur- 302015 (Rajasthan)

………Non-Applicant No. 2

For the Financial Creditor : Sandeep Taneja, Adv.
Karan Pratap Singh, Adv.

For the Corporate Debtor : Shivangshu Naval, Adv.
Sakshi Yadav, Adv.

Order Pronounced On:16.11.2022

ORDER

Per: Shri Deep Chandra Joshi, Judicial Member

1. This application has been filed jointly by Mr. Anil Kumar Sharma (‘Applicant No. 1’) and M/s Ultramed Private Limited (‘Applicant No. 2’) against M/s Ridhiraj Builders and Promoters LLP (‘Corporate Debtor’/ ‘Respondent’) under Section 7 of Insolvency and Bankruptcy Code, 2016 (‘IBC’/ the ‘Code’) read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 seeking initiation of the Corporate Insolvency Resolution Process (‘CIRP’), pursuant to default in repayment of loan amount by the Corporate Debtor to the Applicants.
2. The Applicant No. 1 is the Managing Director of the Applicant No. 2 and has been authorised to present this application before this Tribunal on behalf of the Applicant No. 2 vide Board Resolution dated 08.04.2019. The Applicant No. 2 is a company incorporated under the provisions of the Companies Act, 2013 bearing CIN: U51507RJ1986PTC003816. The registered office of the Applicant No. 2 is located at SB-17, Bhawani Singh Road, Jaipur, Rajasthan- 302005.
3. The Corporate Debtor namely M/s Ridhiraj Builders & Promoters LLP is a Limited Liability Partnership incorporated under the Limited Liability Partnership Act, 2008 on 06.09.2013 bearing LLP IN: AAB-7510. The registered address of the Corporate Debtor is located at 166, First Floor, SLC Tower, Amarpali Marg, Vaishali Nagar, Jaipur- 302021.

4. The details of transactions leadings to the filing of this present application averred by the Applicant are as follows:

   a. Mr. Pradeep Kumar Pandya, one of the designated partners of the Corporate Debtor approached the Applicant No. 1 in order to borrow an amount of Rs. 35,00,000/- (Rupees Thirty-Five Lakh) as unsecured loan for business purposes of the Corporate Debtor and proposed to pay interest @ 12 % per annum. The Applicant No. 1 agreed to extend loan with the condition that the same was repayable on demand and an interest rate of 12% will be charged till the complete repayment of the aforesaid amount is made. The amount was disbursed vide Cheque No. 091783 dated 07.08.2015.

   b. Also Mr. Pradeep Kumar Pandya had earlier approached the Applicant No. 2 for availing a loan of Rs. 16,00,000/- (Rupees Sixteen Lakh) for business purposes which was extended vide Cheque No. 096135 dated 24.11.2015 with the condition that the said principal loan amount was repayable on demand and an interest rate of 12% per annum was to be charged on the aforesaid loan amount till the complete repayment.

   c. Out of the total Principal loan amount disbursed by the Applicant No. 1, the Corporate Debtor repaid an amount of Rs. 3,50,000/- (Rupees Three Lakh Fifty Thousand) on 12.01.2016 and Rs. 6,50,000/- (Rupees Six Lakh Fifty Thousand) on 31.03.2016. Accordingly, the outstanding principal loan amount was reduced to Rs. 25,00,000/- (Rupees Twenty-Five Lakh). The Corporate Debtor gave a confirmation of accounts vide letter dated 01.04.2016 to the Applicant No. 1 & Applicant No. 2 acknowledging the principal amount due as on 31.03.2016.

d. The Corporate Debtor paid the monthly interest amount of Rs. 25,000/- (@ 12% Per annum) on the remaining principal loan amount of Rs. 25,00,000/- (Rupees Twenty-Five Lakh) up till September, 2016 but failed to make further payment from October, 2016 onwards. However, the Corporate Debtor regularly deducted the TDS on monthly due interest up to 30.06.2018 which is evident form 26AS.

e. With respect to the loan preferred by the Applicant No. 2 amounting to Rs. 16,00,000/- (Rupees Sixteen Lacs), the Corporate Debtor paid interest till September, 2016 but failed to make further payment.

f. As a consequence of the aforementioned default, the Applicants sent legal notices dated 19.03.2019 to the Corporate Debtor and his designated partners demanding the payment of outstanding amount of Rs. 32,25,000/- including interest of Rs. 7,25,000/- due from October, 2016 to February, 2019 and Rs. 16,80,000/- including interest of Rs. 80,000/- from 01.10.2018 to 28.02.2019. The said notices were also e-mailed to the Corporate Debtor on 30.03.2019.

g. The aforesaid details of the loan as reflected in part IV of the application are as follows:

Part IV

<table>
<tr><th colspan="2">Particulars of Financial Debt</th></tr>
<tr><td>Total amount of debt granted

Date(s) of disbursement</td><td><u>Applicant No. 1:</u>
Rs. 25,00,000/- (Reduced principal loan amount as on 01.04.2016)
Date of Disbursement- 17.08.2015 as Rs. 35,00,000/- was disbursed by the Applicant No. 1 through Cheque No. 091783.
<u>Applicant No. 2:</u>
Rs. 16,00,000/- (Total Principal of Loan Amount)
Date of Disbursement- 24.11.2015 as Rs. 16,00,000/- was disbursed by the Applicant No. 2 through Cheque No. 096135.</td></tr>
<tr><td>Amount claimed to be in default and the date on which the default occurred</td><td><u>Applicant No. 1:</u>
Total amount as on 28.02.2019 is Rs. 32,25,000/- the break-up of which is as follows:
• Rs. 25,00,000/- (towards principal loan amount)
• Rs. 7,25,000/- (towards interest amount due from Oct, 2016 to Feb, 2019)
• Date of default: 06.04.2019 (7 days from legal notice served via e-mail dated 30.03.2019)
<u>Applicant No. 2:</u>
Total amount as on 28.02.2019 is Rs. 16,80,000/- the break-up of which is as follows:
• Rs. 16,00,000/- (towards principal loan amount)
• Rs. 80,000/- (towards interest amount due from Oct, 2018 to Feb, 2019)</td></tr>
</table>

	Date of default: 06.04.2019. (7 days from legal notice served via e-mail dated 30.03.2019)

5. Consequent to the notice issued by this Adjudicating Authority, the Respondent filed its reply *vide* Dairy No. 1111/2019 dated 14.06.2019 stating as follows:

   a. The Corporate Debtor has submitted that the joint application preferred by the Applicants alleging non-payment of amount of Rs. 25,00,000/- (Rupees Twenty-Five Lakh) and Rs. 16,00,000/- (Rupees Sixteen Lakh), has been filed without giving any loan agreement on record to prove the fact that a loan was preferred by the Applicants. Further the Applicants have failed to mention the terms and conditions of the alleged loan.

   b. The Corporate Debtor has submitted that M/s Ridhiraj Builders LLP is a sister concern of the Corporate Debtor. Mr. Pradeep Kumar Pandya is a partner in both the above entities. The Applicant No. 1 has had transactions with Mr. Pradeep Kumar Pandya, partner M/s Ridhiraj Builders LLP and M/s Ridhiraj Builders & Promoters LLP considering them as one entity which is reflected from the notice dated 28.09.2017 sent by Applicant No. 1 to Mr. Pradeep Kumar Pandya addressing the issue of termination of Memorandum of Understanding ('MOU') dated 13.08.2015 and settlement of account.

c. On 13.08.2015, a MOU was executed between Applicant No. 1, his brother Mr. Sunil Kumar Sharma (who are owners of the Plot No. 17 as mentioned in the said MOU) and M/s Ridhiraj Builders LLP (sister concern of Ridhiraj Builders & Promoters LLP herein referred to as 'Developer') for development of land and construction of apartments on Plot No. 17 admeasuring 1333.33 square yards situated at Bapu Nagar, Jaipur. The plot was in joint ownership of the Applicant No. 1 and his brother namely Mr. Sunil Kumar Sharma. The Developer paid Rs. 35,00,000/- (Rupees Thirty-Five Lakh) to Applicant No. 1 and Rs. 25,00,000/- (Rupees Twenty-Five Lakh) to Mr. Sunil Kumar Sharma at the time of execution of the said MOU as refundable security deposit which was returnable at the time of completion of the project.

d. After execution of the said MOU, the Developers started the process of preparing draft of building map. With respect to the same following e-mails were exchanged between the parties:

    i. Drafted Building Plan/Map were shared with the Applicant No. 1 and his brother via e-mail dated 19.10.2015.

    ii. Brother of Applicant No.1 conveyed to Shri Pradeep Kumar Pandya, Partner in Developer Firm, that he wanted to try building plan option from Mr. Lee (another architect) via e-mail dated 12.12.2015.

iii. Developer via e-mail dated 04.01.2016 suggested the Applicant No. 1 and his brother to move fast as building laws might be changed by the government and further wrote that about the issues in the plan/map made by Mr. Lee.

iv. Brother of Applicant No. 1 told the developer to go ahead previous plan/map vide e-mail dated 05.01.2016.

v. The Developer shared the finalized floor plans with the Applicant No. 1 and his brother vide e-mail dated 19.01.2016.

e. The Corporate Debtor has also stated that the Developer faced a lot of issues in getting the maps approved from the authorities due to the fact that Mr. Sunil Kumar Sharma is living in America and was not able to sign the documents on a daily basis as and when required. The Developer requested the brother of the Applicant No. 1 via email dated 23.03.2016 to provide a power of attorney in favour of the Applicant No. 1 for purposes of submitting documents/ papers and applications for approval of map whereas Shri Sunil Kumar Sharma refused to the same via email dated 31.03.2016. Further Shri Sunil Kumar Sharma insisted on certain changes in building plans during his visit in December 2016, however, the same was not viable in view of change of policy of the government. Thereafter, Shri Sunil Kumar Sharma via e-mail dated 17.04.2017 suggested to change the plan of making a residential project to developing a Medical Imaging Centre to provide MRI, CT, US, mammography and X-Ray facilities on certain area of the plot and the rest could be developed as doctor's offices/flats. The Developer in response to the same via e-mail dated 22.04.2017 pointed out that due to restriction imposed by Rajasthan High Court on height of multi-storied buildings only upto four flows in the city was permissible. The Developer also agreed to the idea suggested by Shri Sunil Kumar Sharma to start making floor plans and begin planning of a medical centre and apartments. This shows that the Developer tried its best to get the approval of the maps with the consent of the Applicant No. 1 and his brother. These facts show that serious issues and disputes took place between the Applicant No. 1, his brother and the Developer with respect to the delay in development over the premises as per MOU dated 13.08.2015.

f. The Corporate Debtor states that even though the delay in building process was caused by the Applicant No. 1 and his brother, Mr. Pradeep Kumar Pandya received a legal notice dated 28.09.2017 wherein the Applicant No. 1 intended to terminate the MOU dated 13.08.2015 on pre-text of non-compliance of sub clause (e) of clause 4. The Applicant has further in its notice admitted that the money transaction of the Applicant No. 1 and Applicant No. 2 with Shri Pradeep Kumar Pandya is in relation with the property mentioned in MOU dated 13.08.2015 treating of all of them as one entity. The said notice was given by the Applicant No. 1 to Shri Pradeep Kumar Pandya wholly on false and unfound facts having the intention to anyhow retain Rs. 60,00,000/- (Rupees Sixty Lakh) which was taken as refundable security advance at the time of execution of MOU dated 13.08.2015. Also, the additional amount of Rs. 18,00,000/- (Rupees Eighteen Lakh) was taken as loan by the Applicant No. 1 from the Developers. Shri Pradeep Kumar Pandya replied to the said notice vide letter dated 11.10.2017. The Corporate Debtor has contended that unilateral termination of contract has no sanctity in eye of law and no right vests with the Applicant No. 1 alone to terminate the MOU.

g. With the aim to resolve the dispute, Shri Pradeep Kumar Pandya sent e-mails to the Applicant No. 1. The Applicant No.1 and his brother agreed to go ahead with the revised MOU suggested by the Applicant No. 1 and his brother on 07.06.2018, which was shared via email dated 23.07.2018. Thereafter, in August 2018, Applicant No.1's sister informed Shri Pradeep Kumar Pandya that a family dispute is ongoing with regard to the property lined up to be developed. The dispute remained unresolved between the parties even though 5 months had passed after settling new terms of the MOU. A new MOU was sent through email dated 16.01.2019 but nothing else has been done in furtherance to resolve the family dispute and other issues.

h. It is also mentioned by the Corporate Debtor that the Applicant No. 1 took loan of Rs. 18,00,000/- @ 12% from Developers. The total amount which is due to be paid by the Applicant No.1 as on 12.06.2019 is Rs. 84,52,094/- (Rupees Eighty-Four Lakh Fifty-Two Thousand Ninety-Four Only). The aforesaid amount includes Rs. 60,00,000/- (Rupees Sixty Lakh) and Rs. 18,00,000/- (Rupees Eighteen Lakh) with interest @ 12% amounting to a total of Rs. 24,52,094/- (Rupees Twenty-Four Lakh Fifty-Two Thousand Ninety-Four Only). A civil suit has also been preferred by Shri Pradeep Kumar Pandya relating to the disputed matter which is pending before Civil Court, Jaipur.

i. The Corporate Debtor has submitted that the amount as alleged by the Applicants does not fall under financial debt and the applicants do not fall in the category of Financial Creditors as per Section 5(8) and Section 5(7) of the Code. In the instant case, it cannot be said that there was a debt which became due and there was subsequent failure on part of the Respondent in making default of repayment of the amount. Also, the Applicant has in his ledger reflected the said amount as a Long Term Loan, until the amount demanded by the Creditor from the borrower and borrower fails in making payment, in such circumstances, the borrower does not become wilful defaulter under law. Since, there was no demand, no occasion has arisen in the present matter to initiate CIRP of the Corporate Debtor.

6. The Applicant filed its rejoinder vide Diary No. 1173/2019 dated 01.07.2019 submitting the following:

   a. The Corporate Debtor has denied its liability on the basis of dispute allegedly arising in relation to a MOU dated 13.08.2015 whereas admittedly the Respondent is not a party to the said MOU. The Respondent has projected two distinct transactions by the two separate legal entities with Applicant No. 1 as one joint transactions. It is further submitted that since M/s Ridhiraj Builders LLP and the Respondent i.e. M/s Ridhiraj Builders and Promoters LLP are separate legal entities, the notice dated 28.09.2017 issued by the Applicant No. 1 cannot consider the above entities as one entity. Hence, the separate transactions between different entities cannot be said to be a composite transaction.

   b. The Applicant also submits that the existence of dispute has no relevance in the matter of default of a financial debt. The Applicant has relied on the judgment of the Hon'ble Supreme court in the matter of

Innoventive Industries Ltd. Vs. ICICI Bank and Ors., (2018) 1 SCC 407 wherein the following has been observed:

> *"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."*

c. The Applicant has submitted that the Respondent has not disputed the following facts in its reply: (i) the Applicants had extended unsecured loan to the Respondent; (ii) the said loan was given through cheques; (iii) the Respondent confirmed the outstanding amount as on 31.03.2016 vide its letters dated 01.04.2016; (iv) the interest amount was paid on the said amount; (v) the respondent deducted TDS on interest amount u/s 194A of the Income Tax Act, 1961; (vi) the Applicants through separate legal notices dated 19.03.2019 demanding repayment of the outstanding amount; and (vii) Despite the service of the demand notice, the Corporate Debtor has not repaid the amount due to the Applicants.

d. The Applicant has submitted that the Loan was repayable on demand. The Applicants served legal notices dated 19.03.2019 calling upon the Respondent and its designated partners to repay the principal loan amount along with due interest as on 28.02.2019. Hence, the amount became due as soon as demand was made.

e. The execution of MOU between the Applicant No. 1 and the Developer is a separate transaction and has nothing to do with the transaction of loan amount given to the Corporate Debtor. Both the transactions were set-up on different terms at different time with different legal entity and for distinct purposes. The transaction of Applicant No. 1 with the Developer is related to the development of a property whereas the transaction with the Corporate Debtor is a pure and simple transaction of extending the loan amount. The Applicant has further submitted that civil suit was filed subsequent to the filing of the present application by the Applicants.

7. The Applicant has preferred 2 sets of written submissions vide Diary No. 1363/2022 dated 05.05.2022 and Diary No. 2909/2022 dated 30.09.2022, which state the following:

a. The Applicant has submitted that under Section 7 of the Code, this Tribunal is to satisfy itself only on two aspects i.e. first, existence of debt which is due/payable and second, occurrence of default. The

Corporate Debtor had acknowledged the balance confirmation of accounts that can be regarded as a valid and unequivocal acknowledgement of debt. Also, as the debt was repayable on demand, default occurred on the non-payment of demand.

b. The Applicant reiterated that the civil suit filed by Shri Pradeep Kumar Pandya is pending and the Corporate Debtor is not a party to the said suit. Also, the abovementioned suit was filed after the filing of this Application on 13.05.2019 and the said suit has nothing to do with the loan transaction between the Applicants and the Corporate Debtor. The suit does not mention any composite transaction between the parties to the case with respect to the MOU dated 13.08.2015. The Applicant states that it is imperative to know that once financial debt has been established an occurrence of default has been proved, existence or non-existence of dispute is of no consequence in deciding the application under Section 7 of IBC.

c. The Applicant has submitted that at the time of granting financial assistance, it was mutually agreed that the loan amount shall be repayable on demand. It is a settled position of law that in case any loan has been given without fixing any date of repayment the said loan would be repayable on demand. Also, it has been contended that written loan agreement is not a pre-requisite for establishing the existence of a debt and occurrence of default. The Applicant has relied on the case of the Hon'ble NCLAT in *BDH Industries Ltd vs. Mars Remedies Pvt Ltd, [Company Appeal (AT)(Insolvency) No. 936 of 2020* to state that an explicit agreement is not a pre-requisite to prove disbursement of a loan. Hence, in the present case there was a loan and the same was repayable on demand.

d. The Applicant has contended that the WhatsApp Message dated 04.09.2019 annexed by the Corporate Debtor is a forged and fabricated document which was never sent by the Applicant No. 1. The same was not accompanied with the valid certificate under Section 65 D of Indian Evidence Act and hence is not admissible as evident.

e. The Applicant has also submitted that solvency of the Corporate Debtor has no bearing while adjudication of the application under Section 7 of the IBC. There is no presumption that a solvent company cannot make defaults therefore, the Corporate Debtor cannot hide under cloak of solvency in order to escape the clutches of CIRP. Moreover, the Balance sheet as annexed with the application shows that the Corporate Debtor is facing loss of Rs. 5,97,30,202/- as against the partners fixed capital of Rs. 10,00,000/- thereby establishing that the Corporate Debtor is not a solvent entity.

8. The Respondent has preferred 2 written submissions vide Diary No. 1326/2022 dated 02.05.2022 and Diary No. 2902/2022 dated 30.09.2022 stating as below:

   a. The Applicant No. 1 had transactions with Mr. Pradeep Kumar Pandya, designated partner in the Corporate Debtor and Developer, considering them as one entity which is reflected in Legal Notice dated 28.09.2017 wherein the issue of termination of the MOU and settlement of accounts is addressed by the Applicant no. 1 as a common and composite issue.

   b. The Corporate Debtor submits that the Applicant always considered and intended the Corporate Debtor and Developer as one entity and was only concerned with Mr. Pradeep Kumar Pandya for all purposes and dealings relating to himself and his company i.e. Applicant No. 2. The fact is that the Applicant No. 1, Anil Kumar Sharma had issued a notice dated 28.09.2017 to Mr. Pradeep Kumar Pandya, Partner of M/s Ridhiraj Builders LLP seeking return of monies given by him and his company to the Corporate Debtor. The Corporate Debtor has stressed on the act of the Applicant wherein the notice dated 28.09.2017 is addressed to Mr. Pradeep Kumar Pandya, Partner in M/s Ridhiraj Builders LLP to prove that the Applicants have considered the Corporate Debtor and the Developer as one entity; thereby treating it the transactions as one composite transaction.

c. The Corporate Debtor also states that the real nature of the transaction is not that of a financial debt. In the said notice, the Applicant No. 1 has admitted that at the time of execution of MOU dated 13.08.2015, Mr. Pandya as partner in the Developer Firm, had given Rs. 35,00,000/- (Rupees Thirty-Five Lacs Only) to the Applicant No. 1 which was subsequently credited to the Applicant No.1's Bank Account. Subsequent to the credit of Rs. 35,00,000/- (Rupees Thirty-Five Lacs Only) on 17.08.2015, the Applicant transferred the same amount to the Corporate Debtor on 20.08.2015. For ease of reference, the Corporate Debtor has summarised the transactions between the parties in a tabular form which is construed as follows:

Sr. No.	***Paid by***	***Amount***	***Paid to***	***Date***
1.	Developer	Rs. 35,00,000/-	Applicant No.1	13.08.2015
2.	Developer	Rs. 25,00,000/-	Brother of Applicant No. 1	13.08.2015
3.	Applicant No. 1	Rs. 35,00,000/-	Corporate Debtor	17.08.2015
4.	Applicant No. 2	Rs. 16,00,000/-	Corporate Debtor	24.11.2015
5.	Developer	Rs. 18,00,000/-	Applicant No. 1	07.10.2016
6.	Corporate Debtor	Rs. 3,50,000/-	Applicant No. 1	12.01.2016
7.	Corporate Debtor	Rs. 6,50,000/-	Applicant No. 1	31.03.2016

d. The total amount paid by the Corporate Debtor and Developer to the

Applicant No. 1 amounts to Rs. 63,00,000/- (Rupees Sixty-Three Lac) whereas the amount paid by the Applicants to the Corporate Debtor is Rs. 51,00,000/- (Rupees Fifty-One Lac). Out of the said amount the Applicant is claiming an amount of Rs. 41,00,000/- (Rupees Forty-One Lac) as Rs. 10,00,000/- (Rupees Ten Lakh Only) has already been repaid by the Corporate Debtor on 12.01.2016 and 31.03.2016. Thus, both the issues i.e. issue of exchange of amount between the parties and the development of plot/property under the MOU dated 13.08.2015 have always been connected and consequently treated as composite transaction.

e. The Corporate Debtor has contended that unearthing of the real nature of the transactions is of utmost importance in the present case. For the same reliance has been placed on the judgment of the Hon'ble Supreme Court in *Phoenix Arc Pvt. Ltd. Vs. Spade Financial Services Ltd. and Ors. (2021) 3 SCC 475* wherein it has been held that *"the IBC recognizes that for the success of an insolvency regime, the real nature of the transactions has to be unearthed in order to prevent any person from taking undue benefit of its provisions to the detriment of the rights of legitimate creditors".* This observation has been relied on by the Hon'ble NCLAT in the matters of *Shree Ambica Rice Mill vs. Kaneri Agro Industries Ltd., MANU/NL/0265/2021* and *Pawan Kumar* *vs. Utsav Securities Pvt. Ltd. & Ors. MANU/NL/0307/2021* while holding that even if the Application under section 7 meets all the requirements, then also the Adjudicating Authority has to exercise discretion carefully to prevent and protect the Corporate Debtor from being dragged into CIRP mala fide. The Adjudicating Authority is thus required to investigate the nature of the transaction so as to prevent the creditors from taking undue benefit of provisions of IBC.

f. The Corporate Debtor has expressed that real nature of the Applicants is not to initiate Insolvency Resolution but to avoid the performance of MOU with the Developer and to fraudulently escape or avoid repayment of the advance monies received by the Applicant no. 1 under the said MoU.

g. The Corporate Debtor has reiterated that the transactions in question do not constitute financial debt for the purposes of section 5(8) of the Code as there is no financial contract according to clause (d) of sub rule (1) of Rule 3 of the Insolvency and Bankruptcy (Application of Adjudicating Authority) Rules, 2016. No financial contract or like document has been placed on record by the Applicants in support of the alleged financial debt or the terms and conditions, if any, of the alleged loan, its repayment, interest, tenure, etc. The Applicants have asserted that the TDS was deducted by the Respondent on the said amount. However, in the case of *Prayag Polytech Pvt. Ltd. vs. Gem Batteries Pvt. Ltd), MANU/NL/0467/2019* the Hon'ble NCLAT, has held that *"in the absence of the financial contract between the parties, the financial debt described under section 5(8) of the code cannot be ascertained and merely pointing out that TDS was deducted by the Corporate Debtor would not be sufficient to conclude that there was any financial debt"*. Thus, in the absence of any financial debt money never became due and thus there possibly could not be any "default" as defined under Section 3(12) of the IBC. Thus, the present petition deserves to be dismissed by this Ld. Tribunal as frivolous.

h. The Corporate Debtor has further stated that the Applicant No. 1 is not authorised to lend money as per the Rajasthan Money Lender's Act, 1963. Section 5 of the 1963 Act states that the money lenders are not to carry on business of money lending except under 'license' or in accordance with the terms of license. The Applicant has admitted that he is on the business of earning interest by lending money to people. However, no document on record shows that the Applicant had license to lend money and thus the assertion made by him in the petition regarding grant of loan to Respondent is entirely without any authority. Also, no board resolution has been placed on record as per which the Applicant No. 2 (Ultramed Pvt. Ltd.) granted the 'alleged loan' to the Respondent.

i. The Corporate Debtor has lastly relied on the WhatsApp message dated 04.09.2019 which the Applicant No. 1 sent to Mr. Pradeep Kumar Pandya and Mr. Kunal Jain which has been annexed with *IA No. 279/JPR/2021*. The said messaged clearly established that the Applicant No. 1 is trying to wriggle out of monies from the Respondent in the garb of filing a frivolous application before this Tribunal. The said message was only placed on record by the vide *IA No. 279/JPR/2021* as prior to that the parties were trying to amicably settle their disputes.

9. During the pendency of the proceedings, certain Applications have also been moved by the parties to the case. The Corporate Debtor moved an application bearing *IA No. 278/JPR/2019* under Rule 11 of NCLT Rules, 2016 read with Order 7 Rule 11 of Code of Civil Procedure along with Section 65 of the Code for Rejection of the main Application. In the said IA, the Applicant had sought dismissal of Section 7 Application filed by the Financial Creditors on grounds of being premature, untenable, non-maintainable, patently misconceived and without any valid cause of action. The said application has pointed out objections to the main petition which were mentioned in the reply of the Corporate Debtor as well. The Applicants have preferred reply to the said Application as well.

10. Thereafter, another application bearing *IA No. 279/JPR/2021* was moved whereby the Corporate Debtor sought to place on record certain documents and events in favour of its submissions along with certificate under Section 65B of the Indian Evidence Act, 1872 with respect to the WhatsApp messages presented by the Corporate Debtor. The Financial Creditor preferred reply to the application and sought dismissal of the same.

11. Later, the Corporate Debtor moved another application bearing *IA No. 404/JPR/2022* vide Diary No. 2590/2022 dated 30.08.2022 under Section 340 of the Code of Criminal Procedure read with Rule 11 of the NCLT Rules, 2016. In the said application the Corporate Debtor has prayed to initiate suitable proceedings against the Applicant No. 1 in accordance with Section 340 of the Code of Criminal Procedure, 1973 with respect to the statement made by the Applicant No. 1 regarding the WhatsApp message dated 04.09.2019. Thus, all these Applications are being considered with the main Application.

12. We have heard the Learned Counsels for the parties and perused the averments made in the Application, Reply, Additional Affidavits and the Documents enclosed with the Application.

13. The registered office of the Corporate Debtor is situated in Jaipur, therefore this Adjudicating Authority has jurisdiction to entertain and try this Application. Further, the Applicant has alleged that the default occurred on

06.04.2019 and the Application was filed under Section 7 of the Code on 03.05.2019; therefore, in view of the same this matter is filed within the prescribed limitation period. The Applicants have filed the present application jointly claiming a default of Rs. 49,05,000/- (Rupees Forty-Nine Lakh Five Thousand) i.e. Rs. 32,25,000/- (Rupees Thirty-Two Lakh Twenty-Five Thousand Only) as against Applicant No. 1 and Rs. 16,80,000/- (Rupees Sixteen Lakh Eighty Thousand Only) as against Applicant No. 2.

14. To perceive the matter at hand, it is important to take notice of the MOU dated 13.08.2015. The said MOU was executed between the Applicant No. 1, his brother Shri Sunil Kumar Sharma and M/s Ridhiraj Builders LLP (Sister concern of the Corporate Debtor) to develop a piece of land situated at Bapu Nagar, Jaipur into a residential building. The said MOU also reads that the Developer will provide a total sum of Rs. 2.5 Crore as interest free refundable security deposit which will be refunded back by the owners i.e. the Applicant No. 1 and Shri Sunil Kumar Sharma, after the completion of the project. The schedule provided stated that Rs. 50,00,000/- (Rupees Fifty Lacs) will be paid as refundable security deposit to the owners (Rs. 25,00,000/- each to both the owners) at the time of execution of the MOU and further the Developer would provide an additional amount of Rs. 10,00,000/- (Rupees Ten Lac) to the Applicant No. 1.

15. The Applicant No. 1 has alleged that it disbursed an amount of Rs. 35,00,000/- (Rupees Thirty-Five Lakh Only) to the Corporate Debtor vide Cheque No. 091783 dated 17.08.2015 as loan with the condition that the same is repayable on demand with an interest rate of 12% and the Applicant No. 2 disbursed an amount of Rs. 16,00,000/- (Rupees Sixteen Lakh Only) to the Corporate Debtor vide Cheque No. 096135 dated 21.11.2015. The Applicants have annexed statements of accounts with the Application. It is seen from the statement of the Applicant No. 1 that an amount of Rs. 35,00,000/- (Rupees Thirty-Five Lakh Only) was credited to his account and thereafter the same was disbursed to the Corporate Debtor. From the Statement of the Applicant No. 2, it is seen that an amount of Rs. 16,00,000/- (Rupees Sixteen Lakh Only) was paid to the Corporate Debtor whereas there is an entry of credit of Rs. 18,00,000/- (Rupees Eighteen Lakh Only) in the statements of the Applicant No. 1, which has been alleged by the Corporate Debtor as repayment of the loan disbursed by the Applicant No. 2 to the Corporate Debtor. Also, it is seen from the statement of the Applicant No. 1 that an amount of Rs. 3,50,000/- was credited by the Developer; Rs. 3,50,000/- was credited to the account of the Applicant No. 1 by the Corporate Debtor and Rs. 6,50,000/- was credited by the Corporate Debtor. The Applicant has admitted that the Corporate Debtor repaid an amount of Rs. 10,00,000/- (Rupees Ten Lakh Only) on 12.01.2016 and

31.03.2016 and therefore, the Applicant No. 1 is claiming Rs. 25,00,000/- (Rupees Twenty-Five Lac) as principal amount. Although, on the same date i.e. 31.03.2016, the account of the Applicant was debited with the same amount i.e. Rs. 6,50,000/- (Rupees Six Lakh Fifty Thousand Only). Hence, it is seen that there is abundance of transactions between the Applicant No.1, the Developer (sister concern of the Corporate Debtor) and the Corporate Debtor itself.

16. Certain notices have been exchanged between the parties. The Applicants have placed the notices dated 19.03.2019, addressed to the Corporate Debtor and its partners including Mr. Pradeep Kumar Pandya wherein the Applicants have demanded the repayment of the principal loan; thereby making the amount due. The Corporate Debtor has also placed certain notices on record i.e. notice dated 28.09.2017 preferred by the Applicant No. 1 to Mr. Pradeep Kumar Pandya, partner in Developer Firm requesting payment of Rs. 25,00,000/- (Rupees Twenty-Five Lac) which was advanced by the Applicant No. 1 and Rs. 16,00,000/- (Rupees Sixteen Lakh Only) which was advanced by the Applicant No. 2 to the to the recipient of the notice. Reply of the said notice was preferred by Mr. Pradeep Kumar Pandya, partner M/s Ridhiraj Builders LLP to the Applicant No. 1 on 11.10.2017. Hence, it is evident that, first, a notice for termination of MOU and recovery of money was addressed to Mr. Pradeep Kumar Pandya,

partner M/s Ridhiraj Builders LLP on 28.09.2017; which was replied to vide notice dated 11.10.2017. Consequently, the notice dated 19.03.2019 was preferred this time to the Corporate Debtor claiming repayment of the alleged loan.

17. From the aforesaid exchange of payment and notices between the Applicants, Corporate Debtor and the Developer, it is important to note that M/s Ridhiraj Builders LLP (Developer) is a sister concern of M/s Ridhiraj Builders and Promoters, LLP (Corporate Debtor), so as to apprehend the nature of the transfer of monies which has taken place between the parties. The chain of transaction between the parties concerned i.e. the Applicants, the Corporate Debtor and the Developer appear to be intermingled. Basic genesis of the transactions stems from the MOU dated 13.08.2015 which was executed between the Applicant No.1, his brother and the Developer. It is evident that the Developer paid Rs. 35,00,000/- (Rupees Thirty-Five Lakh Only) to the Applicant No. 1 as refundable security deposit. The same amount of Rs. 35,00,000/- (Rupees Thirty-Five Lakh Only) was paid by the Applicant No. 1 to the Corporate Debtor which has been alleged as loan. Mere glimpse of this transaction shows that the same money which was paid by the sister concern of the Corporate Debtor has been transferred back to the Corporate Debtor. Whereas the Applicant No. 1 has tried to shadow the said transaction in the nature of a loan whereas it is clearly just an

artifice scheme to initiate CIRP of the Corporate Debtor.

18. With respect to the transaction undertaken by the Applicant No. 2 amounting to Rs. 16,00,000/- (Rupees Sixteen Lakh Only) with the Corporate Debtor, there is a congruent transaction wherein the Developer has transferred Rs. 18,00,000/- (Rupees Eighteen Lakh Only) to the Applicant No. 1. The Applicants have not differentiated between the Developer and the Corporate Debtor in its notices or transactions. It is obvious that the transactions have taken place corollary to the execution of the MOU. For the purpose of transparency it is noted that the Applicant No. 2 is an entity which is controlled by the Applicant No. 1. The quintessential thing to notice in the said matter is that the Corporate Debtor and the Developer combined as a group have paid Rs. 63,00,000/- (Rupees Sixty-Three Lakh) to the Applicants whereas the Applicants have paid Rs. 51,00,000/- (Rupees Fifty-One Lakh) to the Corporate Debtor and the Developer.

19. The Applicant has preferred an acknowledgement of receipt by the Corporate Debtor which states the balance amount as Rs. 25,00,000/- (Rupees Twenty-Five Lakh Only). It is observed that since the account of the Corporate Debtor with the Developer is different, the ledger account of the Corporate Debtor does not take into consideration the security amount of Rs. 35,00,000/- (Rupees Thirty-Five Lakh Only) which was paid by the

Developer. It is clear-cut that the said security refund was returned to the Corporate Debtor as the Developer is the sister concern of the Corporate Debtor. As discussed earlier, the Developer was required to pay Rs. 35,00,000/- (Rupees Thirty-Five Lakh Only) to the Corporate Debtor. Since the whole security refund amount was returned to the Corporate Debtor, the Corporate Debtor signed on the confirmation of account as Rs. 10,00,000/- (Rupees Ten Lakh Only) was already paid to the Applicant No. 1 in lieu of the refundable Security Deposit.

20. The Corporate Debtor has annexed e-mails exchanged between the parties to the MOU explaining the delay caused in carrying out the development activities as enumerated in the MOU and subsequent revising of the terms of the MOU. Also, it is seen that a Civil Suit was preferred by the Developer against the Applicant No. 1 praying issuance of permanent injunction against the Applicant No. 1 and prohibiting him not to initiate any construction, sale, transfer, mortgage etc on the disputed property. During the pendency of this Application, the Additional Munsiff cum Metropolitan Magistrate No. 3, Jaipur passed a stay order dated 04.12.2021 which has been annexed via Diary No. 1326/2022 dated 02.05.2022. The Applicant has alleged that existence of dispute has no relevance in the matter of default of a financial debt and to substantiate the same it has relied on the judgment of the Hon'ble Supreme Court in *Innoventive Industries Ltd vs.*

ICICI Bank and Ors. (2018) 1 SCC 407. The said judgment differentiates scheme laid down under Section 7 and Section 8 of the Code wherein the Operational Creditor on occurrence of default has to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in the Code whereas under Section 7 it does not matter that the debt is disputed so long as debt is payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. The judgment also states that while passing an order under Section 7 of the Code, the Adjudicating Authority has to be satisfied that a default has occurred and a debt may not be due if it is not payable in law or in fact. In the matter at hand, it appears that there is no debt from the nature of the transactions carried between the parties to the case.

21. The basic ingredients to be looked into while passing an order under Section 7 of the code is: (i) there must be a disbursal of loan amount, such dispersal should be made for a consideration of time value of money; (ii) when the debt (whole or any part of instalment) becomes due and payable and; (iii) the same is not paid by the Corporate Debtor i.e., default committed by the Corporate Debtor. In the matter at hand, no written financial contract has been placed before us to set out the terms and conditions of the said loan as envisaged under Rule 3(d) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. The Hon'ble

Supreme Court has in *Phoenix Arc Pvt. Ltd. Vs. Spade Financial Services Ltd. and Ors. (2021) 3 SCC 475* held that in order to prevent any person from taking undue benefit of the Code, the real nature of the transactions have to be unearthed. In the absence of a written document indicating the purpose of the transaction, the transaction cannot be presumed to be in the nature of a loan. The same transpires from the judgment of the Hon'ble NCLAT in *Prayag Polytech Pvt. Ltd. vs. Gem Batteries Pvt. Ltd. Company Appeal (AT)(Insolvency) No. 713 of 2019.* Moreover, it is noteworthy that without any financial contract, we cannot possibly presume that a loan was preferred to the Corporate Debtor which is the same amount as that of the security deposit which was received from the Developer by the Applicant No. 1. The intention of the Applicants to digress from the MOU is clear from the facts presented before us. Even though it seems that the transactions were an outcome of the MOU, the involvement of the Corporate Debtor is equal to that of the Developer i.e. both the entities have been treated as one at the time of transferring monies and notices.

22. It has been held time and again in judgments that deducting TDS does not amount to acknowledgement of Debt. TDS can be deducted for various reasons and mere payment of TDS towards interest payable does not amount to acknowledgement of debt. The same cannot be treated as an acknowledgement of debt, more so a default of the alleged loan. It appears

that the Applicants have attempted to kickstart the CIRP for purposes other than the resolution of the Corporate Debtor, which is not permissible under the IBC 2016.

23. Therefore, we are not inclined to commence CIRP of the Corporate Debtor. The Order in the present matter is made in terms of Section 7 of IBC, 2016 and based on the facts and pleadings submitted by the parties in the instant case and shall not prejudice any matter or proceedings between the parties, if any, before any other Court, Tribunal or any judicial or other authority.

24. Hence, the Application is dismissed. In view of the foregoing, all pending IAs are disposed off accordingly.

DEEP CHANDRA JOSHI

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Date: 2022.11.16 18:04:12 +05'30'

DEEP CHANDRA JOSHI,
JUDICIAL MEMBER

PRASANTA KUMAR MOHANTY

Digitally signed by PRASANTA KUMAR MOHANTY
Date: 2022.11.16 18:48:48 +05'30'

PRASANTA KUMAR MOHANTY,
TECHNICAL MEMBER