NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH COURT VI

Item No. P2.

C.P. (IB)/222(MB)2025

CORAM:

SHRI SAMEER KAKAR
HON'BLE MEMBER (TECHNICAL)

SHRI NILESH SHARMA
HON'BLE MEMBER (JUDICIAL)

ORDER SHEET OF HEARING (HYBRID) DATED **25.08.2025**

NAME OF THE PARTIES: **Sanjay Subhash Katira**

Vs

NV Autospares Private Limited

Under Section 7 of the IBC.

ORDER

The case is fixed for pronouncement of the order. The order is pronounced in the open court, *vide* separate order. Detailed order is being uploaded on the NCLT portal today.

Sd/-
SAMEER KAKAR
MEMBER (TECHNICAL)

Sd/-
NILESH SHARMA
MEMBER (JUDICIAL)

//VM//

IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH-VI

C.P.(IB)/222/MB/2025

[Under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016]

SANJAY SUBHASH KATIRA

Premier Road, 605, Palmyra Building

Skyline Oasis, Vidyavihar (West),

Mumbai- 400086, Maharashtra.

…Financial Creditor/Applicant

Vs.

NV AUTOSPARES PRIVATE LIMITED

[CIN No: U34300MH2005PTC241861]

Plot No. 36/1 & 2, MIDC, Satpur

Nasik-422007, Maharashtra.

...Corporate Debtor/Respondent

Pronounced on: 25.08.2025

CORAM:

HON'BLE SHRI NILESH SHARMA, MEMBER (JUDICIAL)

HON'BLE SHRI SAMEER KAKAR, MEMBER (TECHNICAL)

Appearances: Hybrid

Financial Creditor: PCA Mr. Tarun Arora.

Corporate Debtor: Adv. Mr. Nausher Kohli a/w Adv. Ankit Pitti i/b S&T Legal

ORDER

1. BACKGROUND

1.1 This is an Application bearing C.P. (IB) No. 222/MB/2025 filed on 21.02.2025 by Sanjay Subhash Katira, the Applicant (FC), under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "the Code") read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as "the AAA Rules") initiation of Corporate Insolvency Resolution Process (CIRP) against NV Autospares Private Limited, the Corporate Debtor (CD).

1.2 The Applicant, is high-net-worth individual engaged in the business of manufacturing and supplying auto components. The CD is a company registered under the provisions of the Companies Act, 1956 (now, the Companies Act, 2013). The CD is in the business of manufacturing, sale and supply of the auto components and ancillary products.

1.3 The Applicant has relied on the following documents:

i. Company Master Data of the CD as available with MCA

ii. Copies of Order-in-Original dated 01.05.2023 and Order-in-Appeal dated 04.01.2024

iii. Copy of Complaint dated 10.02.2022 and written submission

iv. Copy of Writ Petition, written statement and Interim Order dated 29.05.2024

v. Copies of latest financial statements of the CD

vi. NeSL Record of Default - Form-C.

2. AVERMENTS OF FINANCIAL CREDITOR

2.1 As per Part-IV of the Application, the amount claimed to be in default is Rs.1,20,71,271.42 (One Crore Twenty Lakh Seventy-One Thousand Two Hundred Seventy-One Rupees and Forty-Two Paisa), which includes the principal amount of Rs.1,00,51,017/- (One Crore Fifty-One Thousand and Seventeen Rupees) and interest of Rs.20,20,254.42/- (Twenty Lakh Twenty Thousand Two Hundred Fifty-Four Rupees and Forty-Two Paisa) as on 04.01.2025.

2.2 The date of default as stated in Part-IV is 06.02.2024.

2.3 The Applicant submits that this matter arises from the Order dated 04.01.2024 (hereinafter referred to as 'Order-in-Appeal') passed by the Ld. Regional Director, MCA, Western Region, Mumbai. This order has originated from the Order dated 01.05.2023 (hereinafter referred to as 'Order-in-Original') passed by ROC, Mumbai and this was pursuant to the Complaint dated 10.02.2022 lodged by the Applicant. The Order-in-Original was passed under Section 42 read with Section 454 of the Companies Act, 2013. The Order-in-Original is produced below along with Section 42 of the Companies Act:

> ***"a. The company is directed to refund all the monies to the complainants along with interest at the rate of twelve per cent per annum as per the provisions of section 42(6) of the Act, within 30 days from the date of order as per the provisions of section 42(10) of the Act.***
>
> *b. The penalty amount shall be remitted by the company through MCA21 portal within 60 days from the date of Order. The Company needs to file INC-28 as per the provisions of the Act, attaching the copy of adjudication order along with payment challans.*

c. Any person aggrieved by the order of Adjudicating Authority under sub-section (3) of Section 454 may prefer an appeal to the Regional Director having jurisdiction in matter.

d. Every appeal under sub-section (5) of Section 454 shall be filed within 60 days from the date on which the copy of order made by the Adjudicating Authority is received by the aggrieved person and shall be in such form, manner and be accompanied by such fee as may be prescribed.

e. As per section 454(8)(i), where a company fails to comply with the Order made under sub-section (3) or Sub-section (7) as the case may be, within a period of 90 days from the date of receipt of the copy of the Order, the Company shal1 be punishable with fine which shall not be less than twenty-five thousand, but which may extend to five lakh rupees.

f. Where an officer of a company or any other person who is in default fails to comply with the order made under sun-section (3) or sub-section (7), as the case may be; within a period of 90 days from the date of receipt of the order, such officer shall be punishable with imprisonment which may extend to six months or with the fine which shall not be less than twenty five thousand rupees but which may extend to one lakh or with both.

g. This order is without prejudice to the rights available to this office to initiate separate actions including but not limited to the penal actions for contraventions of related, incidental and/or continuing offences/contraventions.

h. The delay for issuance of the order if any is due to complexity of the issue and time taken by the respondents to submit their replies and examinations of the issues involved."

Section 42 of The Companies Act, 2013

42. Offer or invitation for subscription of securities on private placement*:* -

(1) A company may, subject to the provisions of this section, make a private placement of securities.

(2) A private placement shall be made only to a select group of persons who have been identified by the Board (herein referred to as identified persons), whose number shall not exceed fifty or such higher number as may be prescribed excluding the qualified institutional buyers and employees of the company being offered securities under a scheme of employees stock option in terms of

provisions of clause (b) of sub-section (1) of section 62, in a financial year subject to such conditions as may be prescribed.

(3) A company making private placement shall issue private placement offer and application in such form and manner as may be prescribed to identified persons, whose names and addresses are recorded by the company in such manner as may be prescribed:

Provided that the private placement offer and application shall not carry any right of renunciation.

Explanation I.-- "private placement" means any offer or invitation to subscribe or issue of securities to a select group of persons by a company (other than by way of public offer) through private placement offer-cum-application, which satisfies the conditions specified in this section.

Explanation II.-- "qualified institutional buyer" means the qualified institutional buyer as defined in the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009, as amended from time to time, made under the Securities and Exchange Board of India Act, 1992, (15 of 1992).

Explanation III.-- If a company, listed or unlisted, makes an offer to allot or invites subscription, or allots, or enters into an agreement to allot, securities to more than the prescribed number of persons, whether the payment for the securities has been received or not or whether the company intends to list its securities or not on any recognised stock exchange in or outside India, the same shall be deemed to be an offer to the public and shall accordingly be governed by the provisions of Part I of this Chapter.

(4) Every identified person willing to subscribe to the private placement issue shall apply in the private placement and application issued to such person alongwith subscription money paid either by cheque or demand draft or other banking channel and not by cash:

Provided that a company shall not utilise monies raised through private placement unless allotment is made and the return of allotment is filed with the Registrar in accordance with sub-section (8).

(5) No fresh offer or invitation under this section shall be made unless the allotments with respect to any offer or invitation made earlier have been completed or that offer or invitation has been withdrawn or abandoned by the company:

Provided that, subject to the maximum number of identified persons under sub-section (2), a company may, at any time, make more than one issue of securities to such class of identified persons as may be prescribed.

(6) A company making an offer or invitation under this section shall allot its securities within sixty days from the date of receipt of the application money for such securities and if the company is not able to allot the securities within that period, it shall repay the application money to the subscribers within fifteen days from the expiry of sixty days and if the company fails to repay the application money within the aforesaid period, it shall be liable to repay that money with interest at the rate of twelve per cent. per annum from the expiry of the sixtieth day:

Provided that monies received on application under this section shall be kept in a separate bank account in a scheduled bank and shall not be utilised for any purpose other than--

(a) for adjustment against allotment of securities; or

(b) for the repayment of monies where the company is unable to allot securities.

(7) No company issuing securities under this section shall release any public advertisements or utilise any media, marketing or distribution channels or agents to inform the public at large about such an issue.

(8) A company making any allotment of securities under this section, shall file with the Registrar a return of allotment within fifteen days from the date of the allotment in such manner as may be prescribed, including a complete list of all allottees, with their full names, addresses, number of securities allotted and such other relevant information as may be prescribed.

(9) If a company defaults in filing the return of allotment within the period prescribed under subsection (8), the company, its promoters and directors shall be liable to a penalty for each default of one thousand rupees for each day during which such default continues but not exceeding twenty-five lakh rupees.

(10) Subject to sub-section (11), if a company makes an offer or accepts monies in contravention of this section, the company, its promoters and directors shall be liable for a penalty which may extend to the amount raised through the private placement or two crore rupees, whichever is lower, and the company shall also refund all monies with interest as specified in sub-section (6) to subscribers within a period of thirty days of the order imposing the penalty.

(11) Notwithstanding anything contained in sub-section (9) and sub-section (10), any private placement issue not made in compliance of the provisions of sub-section (2) shall be deemed to be a public offer and all the provisions of this Act and the Securities Contracts (Regulation) Act, 1956 (42 of 1956) and the Securities and Exchange Board of India Act, 1992 (15 of 1992) shall be applicable.]

2.4 The ROC in Order-in-Original ordered the CD to refund the share application money (pending allotment) along with interest at the rate of 12% p.a. The Applicant being one of the prospective investors having invested the amount that is in default is entitled to the aforementioned refund. Further, Rs.4,00,00,000/- was levied on the CD for contravening the provisions of Section 42 of the Companies Act.

2.5 It is submitted that the CD preferred an appeal against the Order-in-Original before the RD. The RD vested with the powers of the Appellate Authority confirmed the Order-in-Original, except the penalty was reduced to Rs.4,00,000/- by granting the 'small-company' status to the CD. Therefore, by the virtue of the Order-in-Appeal, the CD was ordered to refund the share application money along with the interest at the rate of 12% p.a. within a period of 30 days from the date of the Order. Therefore, it is submitted that by virtue of the Order-in-Appeal and further by virtue of Section 2(31) of the Act, the 'Share Application Money Pending Allotment' stood classified as 'Deposit' and as a result the Applicant steps in the shoes of the financial creditor. Copy of Order-in-Original dared 01.05.2023 and Order-in-Appeal dated 04.01.2024 is annexed as **Annexure A-2** and Copy of Complaint dated 10.02.2022 is annexed as **Annexure A-3.** The Order-in-Appeal is produced below:

> *"15. In view of above, the said appeal/ application is hereby disposed of and the appellants are hereby –*
> *a. Directed to Pay the Adjudication Fees which have been 'Modified' by the Regional Director' at para 15(a)(i) & (ii) (as per the above table) with the direction to pay within 90 days from the date of receipt of this order.*
>
> *b. 'Confirmed' the ROC Adjudication Order dt 01/05/2023 to refund the share application money amounting to Rs. l3,92,19,042/- to the complainant(s)/ person(s) who have deposited the share application*

money with the company along with interest at the rate of twelve percent as per the provisions of Section 42(10) of the Act within 30 days from the date of receipt of this order.

16. Registrar of Companies, Mumbai is directed to proceed further under Section 454(8) of the Companies Act, 2013 and file prosecution against the company and officers in default for violation of Section 42 of the Companies Act, 2013, if the appellants fail to comply with Para 17(a) & (b) above."

2.6 Despite the binding direction, the CD has not repaid the share application money to the Applicant. The facts show that during FY 2016-17 and FY 2017-18, the CD faced serious liquidity problems and due to this the CD was unable to honor the banking commitments. As a result, its bank account was classified as a Non-Performing Asset (NPA) by the Central Bank of India on 01.10.2017. Consequently, the company defaulted on supplier payments and statutory dues. This led to a freeze and lien on its banking operations. To revive the business, the CD asked the Applicant for financial support, claiming it could restore the company. Following this, and after reaching a mutual agreement, the Applicant and other investors provided funds.

2.7 This money was initially used to settle external debts. Due to banking restrictions, statutory NOCs were needed before opening a designated account for allotment purposes as required under Section 42. After the discharge of outside liabilities and after seeking necessary NOC's and/or approvals, a separate bank account was opened and remaining share application money was infused therein in adherence to the provisions of Section 42 of the Act. Later, the share application money was properly reflected in the balance sheet under the section "Share Application Money Pending Allotment."

2.8 However, despite clear assurances the CD did not issue shares in lieu of the investment. The ROC search of the documents and on perusal of the Auditor's

and the Board Report for respective years it became evident that the CD had kept the monies as 'Share Application Money Pending Allotment'. Therefore, the investors mutually agreed to initiate the appropriate legal action against the CD and as a result, a Complaint was filed on 10.02.2022 before the ROC. The ROC issued the show-cause notice dated 06.01.2023 to the CD and its existing directors i.e., Mr. Kailas Laxman Ahire and Mrs. Alka Kailas Ahire. The CD filed reply affidavit on 21.02.2023 and made an appearance before the ROC on 23.03.2023. It is submitted that the ROC after going through the filings and after having heard the parties in detail passed the speaking Order-in-Original on 01.05.2023. Aggrieved by the non-compliance of the Order-in-Original the parties preferred an Appeal on 21.06.2023. Thereafter, in the said appeal the order in original was confirmed, however, ----- was reduced to Rs. 4 crore vide order dated 04.01.2024

2.9 Thereafter, the CD invoked Writ jurisdiction of the Hon'ble High court of Judicature at Bombay under Article 226/227 of the Constitution of India and filed Civil Writ Petition No. 5201 of 2024 on 18.03.2024. The Hon'ble High Court, *vide* interim order dated 29.05.2024, granted an ad-interim stay only against coercive action for non-payment of penalty and not against recovery of share application money. Copy of interim order dated 29.05.2024 is annexed as **Annexure A-4** to the petition**.**

2.10 The Applicant has stated the grounds of invoking Section 7 of the Code being that the Auditors of the CD took note of the infusion and made a qualification that the allotment pending is in contravention of Section 42 of the Companies Act and therefore, a qualified Audit Report was issued. The CD by way of Board Report took note of the qualification and addressed it stating that the decision

to issue shares shall be taken as per its convenience. Copies of latest financial reports are annexed as **Annexure A-5** to the petition.

2.11 The Applicant has attached tabular calculation of the amount along with interest as **Annexure A-6** and NeSL record of default in Form-C as **Annexure A-7.**

2.12 It is further submitted that the present application under Section 7 of the Code is not barred by the interim order dated 29.05.2024 passed by the Hon'ble Bombay High Court, as it seeks resolution and not recovery of money.

3. CONTENTIONS OF CORPORATE DEBTOR

3.1 The CD filed Affidavit-in-Reply on 03.04.2025 and affirmed by Mr. Kailas Laxman Ahire – Director and Principal Officer of the CD *vide* Board Resolution dated 13.03.2025.

3.2 The CD has stated that the Application is not maintainable either in law or in facts and the Applicant has abused the process of law. The Application has not been filed as per the provisions of the Code.

3.3 The Applicant's case is that the alleged debt was paid by the Applicant to the CD as a share application and the said alleged debt is nothing but "share application money (pending allotment)". It is a settled position of law that the Share Application Money is not a "financial debt" and no application under Section 7 with respect to the said share application money is maintainable. The same has been duly held by various Benches of NCLT across the country and the Hon'ble NCLAT.

3.4 It is stated that "financial debt" has been defined under Section 5(8) of the Code. Amounts raised by way of share application money are not covered in the transactions covered by sub-clauses (a) to (i) of Section 5(8) of the Code. The

alleged debt of the Applicant being share application money does not come within the ambit of "financial debt" at all. As such, neither the said Applicant is a "financial creditor" nor is the alleged debt a "financial debt". The instant application is thus not maintainable and is liable to be dismissed.

3.5 In the said application it has been alleged that the "Share Application Money Pending Allotment" stood classified as "deposit" and as such, the Applicant steps in the shoes of the financial creditor. The said contention is untenable in law. It is evident from above that the share application money is not "financial debt". Even otherwise, upon a bare reading of Section 42 of the Companies Act, 2013 it is clear that several statutory compliances are required to be met prior to issue of shares on private placement basis. Section 42(2) of the Companies Act stipulates the requirement of issue of private placement offer letter in such cases. From the records available, it is evident that the CD had not issued any such private placement offer letter to the Applicant.

3.6 It is stated that from Rule 2(c)(vii) of The Companies (Acceptance of Deposits) Rules, 2014 ("CADR Rules, 2014") and the explanatory clause appended thereto, it becomes clear that it refers to any amount received and held pursuant to an offer made in accordance with the provisions of the Companies Act, 2013 towards subscription to any securities, including share application money. It is stated that Rule 2 of CADR Rules envisages that only if any amount is received pursuant to any private placement offer made in accordance with the provisions of the Companies Act, 2013 and no shares are allotted qua that amount, only then the sum becomes a "deposit". When no proof of any private placement offers made in accordance with the provisions of the Companies Act, 2013 has

been placed on record by the Applicant, the CADR Rules cannot be held to be applicable.

3.7 The Applicant has placed heavy reliance on the order dated 01.05.2023 passed by the ROC, Mumbai and the order dated 04.01.2024 passed by the RD, Mumbai which is incorrect and misplaced. The CD filed a Writ petition no. 5201 of 2024 in the matter of NV Autospares Pvt. Ltd. vs. The Regional Director, Western Region, Ministry of Corporate Affairs, Mumbai and Ors, before the Hon'ble High Court of Judicature at Bombay, *inter alia*, challenging the order dated 04.01.2024 passed by the RD. The Hon'ble High Court *vide* order dated 29.05.2024 has stayed the order dated 04.01.2024 with respect to payment of penalty and has granted liberty to the CD to move the Hon'ble High Court, in case Clause 15(b) of the order dated 04.01.2024 is pressed. Since the writ petition is still pending before the Hon'ble High Court, being a continuation of the proceedings, the orders of ROC and RD cannot be relied upon and the same have not yet attained finality. The Applicant has approached this Tribunal under Section 7 of the Code with respect to an alleged debt which is already under challenge and sub-judice before the Hon'ble High Court.

3.8 It is also pertinent to mention that nowhere in the entire application has the Applicant mentioned the alleged "date of default". It is stated that in an application under Section 7 of the Code, the Adjudicating Authority is required to adjudicate on the basis of "debt" and "default'. Thus, the date of default becomes extremely crucial while considering an application under Section 7 of the Code.

3.9 The definition of 'debt' and 'default' is enumerated in section 3(11) and 3(12) of the Code, and that the financial debt has to be in the shape of liability and non-

payment of such liability in the given time would cause default. In the present situation again, no date of default is made out and as such, neither the said transaction is in the shape of a financial debt nor any commercial effect of borrowing is evidenced and nor any default is made out.

4. REJOINDER:

4.1 The Applicant filed the Rejoinder on 09.04.2025. The Applicant submits that the matter was well adjudicated by the ROC and RD and the CD was well represented before the aforementioned adjudicating and appellate authorities. After giving the opportunities of being heard and after considering the detailed arguments that were made verbally and in writing the detailed respective orders were passed in the matter.

4.2 The Hon'ble Bombay High Court, through its interim order dated 29.05.2024, only gave temporary relief by allowing the penalty amount to be deposited in court. It did not stay the RD's order in its entirety. The CD's claim otherwise is misleading and incorrect. The RD's order has confirmed both the debt and default.

4.3 The Applicant submits that the Application is complete in all respect and clearly mentions the default date as 06.02.2024 i.e. 30 days from receipt of the RD's order. Further, it is undisputed that the service of the Petition was made twice i.e. on 21.01.2025 and again on 11.03.2025. The second service dated 11.03.2025 was made in compliance with the Tribunal's interim order dated 26.02.2025 and therefore, a technical reason is not a valid defense.

4.4 The adjudication of the 'Share Application Money Pending Allotment,' as a deposit under the provisions of the Companies Act read with non-compliance

Order of the RD cements the Debt and Default. The Applicant rightfully claims the position of financial creditor.

4.5 The Order passed by the RD was also based on undisputed acknowledgments made by the CD. However, the CD appears to have willfully omitted or concealed these acknowledgments in the Reply with mala fide intentions.

5. WRITTEN SUBMISSIONS OF FINANCIAL CREDITOR

5.1 The Applicant has in its written submission submitted that the Audit Report continues to remain qualified till date and the adjoining Board Report unconditionally and unequivocally acknowledges and admits that the share application money was received and no allotment was made.

5.2 The Applicant further submits that law laid down by Hon'ble Supreme Court in ***Sundeep Kumar Bafna v. State of Maharashtra & Anr. ([2014] 4 S.C.R 486)***, the earlier judgement should be held as binding precedent, unless the later judgement has considered the earlier judgment and has overruled the same. The judgment of Hon'ble Bombay High Court in Manmohan Kapani and Hon'ble NCLAT in Kushan Mitra and Uniexcel Ltd., holds as binding precedent.

5.3 The Applicant has relied on the following judgments:

i. Asset Reconstruction Company (India) Limited vs. Bishal Jaiswal & Anr. (Civil Appeal No. 323 of 2021)

ii. Nagindas Ramdas vs. Dalpatram Icharam @Brijram and Ors. [1974 SCC (1) 242]

iii. Kushan Mitra vs. Mr. Amit Goel & CMYK Printech Limited in (Company Appeal (AT) (Insolvency) No. 128 of 2021)

iv. Shobori Ganguli vs. Amit Goel & Ors. (Civil Appeal No. 2661 of 2022)

v. Uniexcel Developers Pvt. Ltd. vs. Uniexcel Ltd. (Company Appeal (AT) (Insolvency) No. 962 of 2019)

6. WRITTEN SUBMISSIONS OF CORPORATE DEBTOR

6.1 The CD has filed written submissions and has relied on the following judgments:

a. *Share Application Money Pending Allotment Cannot Be Treated a Financial Debt under section 5(8) of the Code:* As per the judgment in ***Murlidhar Vincom Pvt. Ltd. Vs Skoda (India) Pvt. Ltd. In Company appeal (AT) (Insolvency) No. 1334 of 2024*** of NCLAT, it was held that share application pending allotment does not constitute financial debt. The judgement being the latest three-member bench of the Hon'ble NCLAT, commands binding precedential value and cannot be disregarded on the ground of having been rendered per incuriam.

b. The CD has further relied on the Hon'ble NCLAT and NCLT judgments in,

i. Pramod Sharma Vs. Karanaya Heartcare Pvt. Ltd. (Company Appeal (AT) (Insolvency) No. 426 of 2022),

ii. Rahul Maroo Vs. Bruck Pharma Pvt. Ltd. (Company Appeal (AT) (Insolvency) No. 1156 of 2022),

iii. Mittson Fille Enterprise (acting through its partner, Mrs. Neha Choudhary Vs Sammaan Ventures Limited, (CP (IB) No. 147/KB/2023), Hon'ble NCLT Kolkata and;

iv. Naman Global Impex Private Limited Vs Rathod Pharmachem Private Limited, (CP (IB) 110/NCLT/AHM/2021), Hon'ble NCLT Ahmedabad.

6.2 It is submitted that in case of conflicting judgements of equal strength, the later will prevail over the earlier. It is settled law that in the case of conflicting judgments of co-equal Benches, the latter judgment will prevail. The Hon'ble Karnataka High Court in D.V. Lakshmana Rao v. State of Karnataka & Ors. in Writ Petition No. 25795 of 2000, has held:

"14. It is now well settled that if there are two conflicting judgment of the Supreme Court, of benches with equal number of Judges, then the latter will prevail over the earlier…."

7. ANALYSIS AND FINDINGS

7.1 We have heard both the Ld. Counsels and have perused the records as placed before us. Our findings in the matter are as under: -

7.2 The Applicant has claimed that the Share Application Pending Allotment is a financial debt by virtue of the ROC order dated 01.05.2023 and RD order dated 04.01.2024 as the CD defaulted in issuing the shares to the Applicant. The CD failed to comply with the RD's order dated 04.01.2024 and hence, the Applicant has made this Application under Section 7 of the Code.

7.3 In support of its contentions for existence of debt and default, the Applicant has attached the following documents along with the Application:

(i) Copy of order in original dated 01.05.2023 passed by Ld. Registrar of Companies, Mumbai as per which the Respondent/CD was directed to refund all the monies to the Applicant, along with interest at the rate of

12% p.a. as provided under section 42(6) of the Companies Act (Act), within 30 days from the date of order as per the provisions of section 42(10) of the Act. The order further provided for payment of penalty amounting to Rs. 4 Crore by the CD within 60 days from the date of the order. The said amount was levied on the CD for contravening the provisions of Section 42 of the Act.

(ii) The said order of Ld. ROC, Mumbai is attached from page Nos. 38 to 63 of the Application. On page No. 41 (internal page 4 of the order) of the Application, the details of share application money provided by the complainant investors including by the Applicant Mr. Sanjay Katira have been given. The order of Ld. ROC in regard to refund of monies along with interest is given in para G(a) on page 48 of the Application (internal page 11 of the order of Ld. ROC).

(iii) Copy of order in Appeal dated 04.01.2024 passed by the Ld. Regional Director (RD), MCA Western Region, Mumbai in appeal filed by the Respondent/CD against the order of Ld. ROC dated 01.05.2023. Vide the said order, the Ld. RD confirmed the order in original except that the penalty amount was reduced to Rs. 4 Lakh by granting the 'small company' status to the CD. As a result, the Respondent/CD was directed to refund the share application money along with the interest at the rate of 12% p.a. within a period of 30 days from the date of the order.

(iv) An interim order of Hon'ble Bombay High Court dated 29.05.2024 in Writ Petition No. 5201 of 2024. Vide the said interim order, Hon'ble Bombay High Court granted an ad-interim stay only against coercive action for non-payment of penalty and not against recovery of share application money, with respect to which the Hon'ble Bombay High Court has only granted the liberty to the CD to move, in case recovery of the share

application money is pressed. The respondent has, however, not brought anything on record to demonstrate that it has moved any application before Hon'ble Bombay High Court or that any order has been passed by Hon'ble Bombay High Court in this regard.

(v) Balance Sheet of the CD for FY 2021-2022, which reflects as 'Share Application money pending Allotment' an amount of Rs.13,92,19,042/-. The Applicant has also annexed the Independent Auditors Report for the year ended 31.03.2021, which states the following at '**Annexure-A Para-ix of the Independent Auditors Report'** at Page no. 865, "*According to information and explanation given to us, the company did not raise any money by way of initial public offer or further public offer (including debt instruments) or term loans during the year which is harmful to the interest of company. Hence, the provisions of Clause (ix) of the Order are not applicable to the Company. However, there are sum of Rs.13,92,19,042/- are credited towards share application money, details of which are given in the notes of the accounts separately, but the company has not allotted any shares to the respective persons."*

7.4 In our view, the Applicant has been able to establish with the help of above documents that there was a debt exceeding Rs. 1 Crore disbursed by the applicant to the CD, which has remained unpaid and with respect to the same the CD has committed a default.

7.5 Though, the applicant has been able to establish the existence of debt as well as the default on the part of the Respondent/CD, the CD has raised the following issues while opposing the admission of the Application filed:

(i) Pursuant to the Rule 2(c)(7) of the CADR Rule, 2014 and the explanatory clause appended thereto, if any amount is received pursuant to any private

placement offer made in accordance with the provisions of the Companies Act, 2013 and no shares are allotted qua that amount, only then the sum becomes a deposit and in this matter no proof of any private placement offer made in accordance with the provisions of the Companies Act, has been placed on record by the CD and therefore, the CADR Rules cannot be held to be applicable.

(ii) The Writ Petition filed before Hon'ble Bombay High Court by the Respondent/CD is still pending and the same being a continuation of the proceedings, the orders of ROC and RD cannot be relied upon and the same have not attained finality. The Application under Section 7 has been filed with respect to an alleged debt which is already under challenge and *sub-judice* before the Hon'ble Bombay High Court.

(iii) There is no date of default mentioned in the Application and that the above transaction is neither in the shape of a financial debt nor any commercial effect of borrowing is evidenced and nor any default is made out.

7.6 In the following paragraphs, we have considered the above issues raised by the Respondent/CD:

(i) In regard to the issue as stated in para 7.5 (i), in our view, for the purpose of considering the application under Sections 7 of IBC for admission, what is relevant is whether the amount claimed by the Applicant is a financial debt and not whether the said debt is to be treated as a "deposit" under the provisions of the Companies Act, 2013 read with CADR Rules. In any case, let us first examine whether the argument of the CD that the if any amount is received pursuant to any private placement offer made in accordance with the provisions of the Companies Act, 2013 and no shares are allotted qua that amount, only then the sum becomes a deposit. For examining that let us

consider the definition of the word “deposit” under Section 2(31) of the Companies Act, 2013, Rule 2(c) (7) of the CADR Rules and the explanatory clause appended thereto, which are reproduced hereunder :

(ii). The definition of deposit under Section 2(31) of the Companies Act is as follows: -

“deposit” includes any receipt of money by way of deposit or loan or in any other form by a company, but does not include such categories of amount as may be prescribed in consultation with the Reserve Bank of India;

(iii) Ministry of Corporate Affairs has *vide* G.S.R. 256 (E) dated 31.03.2014 issued the Companies (Acceptance of Deposits) Rules, 2014 (CADR Rules). Rule 2 (c) of the said Rules states as below: -

© “deposit” includes any receipt of money by way of deposit or loan or in any other form, by a company, but does not include-

(vii) Any amount received and held pursuant to an offer made in asccordance with the provisions of the Act towards subscription to any securities, including share application money or advance towards allotment of securities pending allotment, so long as such amount is appropriated only against the amount due on allotment of the securities applied for;

Explanation. – For the purposes of this sub clause, it is hereby clarified that –

(a) Without prejudice to any other liability or action, if the securities for which application money or advance for such securities was received cannot be allotted within sixty days from the date receipt of the application money or

advance for such securities and such application money or advance is not refunded to the subscribers within fifteen days from the date completion of sixty days, such amount shall be treated as a deposit under these Rules

(b) Any adjustment of amount for any other purpose shall not be treated as refund. ”

(i) The definition of the word “deposit” as given in Section 2(31) of the Companies Act, 2013 and in Rule 2 Clause (c) as reproduced above includes within its fold any receipt of money by way of deposit or loan or in any other form by a company. As such, the said definition is very wide and includes any type of receipt of money whether the same is by way of deposit or loan or in any other form.

(ii) The Clause (c) however excludes certain amounts received by the Company from the definition of the word “deposit”.

(iii) Sub-clause (vii) of these exclusions states that any amount received and held pursuant to an offer made in accordance with the provisions of the Companies Act, 2013 towards subscription to any securities, including share application money or advance towards allotment of securities pending allotment shall not be considered as deposit so long as such amount is appropriated only against the amount due on allotment of the securities applied for.

(iv) The correct interpretation of the Section 2(31) of the Companies Act, 2013 and Rule 2 Clause (c) of the CADR Rules read with sub- clause (vii) of the exclusions, would be that all sums of money received in whatever form by a Company, including towards share application money or advance towards allotment of securities pending allotment, whether pursuant to an offer made in accordance with the provisions of the Companies Act, 2013 or not, shall be treated as a “deposit”,

however, sub-clause (vii) of exclusions states that the amount received pursuant to an offer made in accordance with the provisions of Companies Act, 2013 towards subscription to any securities, including share application money or advance towards allotment of securities pending allotment, shall not be treated as a “deposit” so long as the such amount is appropriated only against the amount due on allotment of securities. In other words, if the share application money or advance towards allotment of securities, if received pursuant to an offer made in accordance with the provisions of the Act towards subscription to any securities, will be treated as “deposit” if the same is not appropriated against the amount due on allotment of securities applied for. The same means that there are two cumulative requirements for exclusion of share application money and advance against allotment of securities from the term “deposit” and they are (a) the amount should be received pursuant to an offer made in accordance with the provisions of Companies Act, 2013 and (b) the said amount is appropriated only against the amount due on allotment of the securities applied for. If any of these two requirements are not met i.e. the amount of share application money or advance towards allotment of securities pending allotment is not received pursuant to an offer made in accordance with the provisions of Companies Act, 2013 or if the amount so received is not appropriated towards the amount due on allotment of the securities applied for, the exclusion as per sub-clause (vii) will not be applicable and the amount of share application money or advance towards allotment of securities, in such a situation, will not be excluded from the ambit of “deposit” and will fall within the ambit of the same.

(v) Now let us examine the Explanation to Sub-clause (vii) of Clause (c) of Rule 2. The said explanation (clause (a) of the Explanation) states that if the securities for which application money or advance for such securities was received cannot be allotted within sixty days from the date of receipt of the application money or advance for such securities and such application money or advance is not refunded to the subscribers within 15 days from the date of completion of sixty days, such amount shall be treated as a deposit under these Rules.

(vi) The objective of the said clause appears to be to plug the loophole wherein the Companies keep the deposits received in the form of share application money or advance received against allotment of shares pending for a long period of time taking shelter under sub-clause (vii) on the ground that the said amount will be ultimately appropriated against the amount due on allotment of securities without making compliance with the CADR Rules. As such, the explanation provides that if shares are not allotted within 60 days of receipt of application money or advances against allotment, the amount received will have to be refunded within 15 days from the expiry of 60 days and in case the said refund is not so made, the amount of application money or advance against allotment of securities will be treated as “deposit” and the consequences as per the said CADR Rules will follow.

(vii) In view of the above, we are of the view that the contention of the CD that if the amount is received pursuant to any private placement offer made in accordance with the provisions of the Companies Act, 2013 and no shares are allotted qua that amount, only then the sum becomes a deposit is not the right interpretation and that even if the amount of share application money or advance against securities is received

without following the provisions of the Companies Act, 2013 i.e. the said amount is not received pursuant to an offer made in accordance with the provisions of the Companies Act, 2013, the same shall be treated as a deposit and the consequences of not following the CADR Rules will apply.

(viii) However, as has been stated earlier, in our view the relevant issue is whether the amount in question falls within the definition of financial debt as per the provisions of IBC and not whether the said amount is to be treated as a deposit under the provisions of Companies Act, 2013. The difference between these two terms is that “deposit” includes any receipt of money, whether the same is against consideration for the time value of money or not, however, “financial debt” under the provisions of IBC includes only those disbursements, which are made against the consideration for the time value of money. We will examine the said aspect in the subsequent part of this order.

7.7 The second issue raised by the CD is that the Section 7 Application has been made with respect of an alleged debt, which is already under challenge and sub-judice before the Hon’ble Bombay High Court in a writ petition filed by the CD.

7.8 In regard to the said issue, the judgement made by Hon’ble NCLAT in the matter of ***A. Maheshwaran Vs. Stressed Assets Stabilitisation Fund & Anr and in Company Appeal (AT) (Insolvency) No. 954 of 2019*** *vide* order dated 16.09.2019 is relevant wherein the Hon’ble NCLAT has held that if the debt amount is disputed and the amount is more than the threshold amount, application u/s 7 is maintainable and that exact amount of claim will be considered at the stage of CIRP by the IRP or the RP, as the case may be.

Further, in another judgement in the matter of ***Karan Goel Vs. M/s Pasupati Jewellers and Anr, in Company Appeal (AT) (Insolvency) No. 1021 of 2019*** *vide* order dated 01.10.2019, Hon'ble NCLAT held that merely because a suit has been filed by the Appellant and the same is pending, the same is not a ground to reject the application u/s 7 of the Code. Pre-existing dispute cannot be a subject matter of Section 7, though it may be relevant u/s 9 of the Code.

7.9 The relevant portion of the A. Maheshwaran judgment (supra) of Hon'ble NCLAT is reproduced hereunder:

> *" 6. From the aforesaid background, it is evident that even if a debt is disputed, if the amount is more than Rupees One Lakh, the application under Section 7 is maintainable. What is the exact amount of claim, that is only considered at the stage of the 'Corporate Insolvency Resolution Process', when the 'Interim Resolution Professional' after collating the claims, including the claim of the Respondent, may ascertain what amount is payable to the Respondent."*

7.10 The relevant portion of the Karan Goel judgment (supra) of Hon'ble NCLAT is reproduced hereunder:

> *"From the aforesaid finding of the Hon'ble Supreme Court, it is clear that once the Adjudicating Authority is satisfied on the basis of records that Company Appeal (AT) (Insolvency) No. 1021 of 2019 Page 5 of 5 the debt is payable and there is default, the Adjudicating Authority is required to admit the application. The Respondent – M/s Pashupati Jewellers having enclosed the copy of the 'Corporate Guarantee and Undertaking' Agreement dated 7th April, 2017 instituted on e-Stamp, issued by Government of National Capital Territory of Delhi, it was not open to the Adjudicating Authority to deliberate on the issue whether e-Stamp is a forged document or*

not. Merely because a suit has been filed by the Appellant and pending, cannot be a ground to reject the application under Section 7 of the I&B Code. Pre-existing dispute cannot be a subject matter of Section 7, though it may be relevant under Section 9 of the I&B Code."

7.11 In view of the said two judgements, we are of the view that the second issue raised by the CD does not hold any water and that the Application u/s Section 7 of Code can proceed even if there is a dispute pending with respect to the liability claimed by the Applicant in the Application. Moreover, Hon'ble Bombay High Court has not stayed the order passed by the RD in regard to the refund of share application money and has only stayed the order of the Ld. RD only with respect to the payment of Adjudication Fee. Further, it has been stated earlier that the amount of Share Application Money has been admitted by the CD in its Balance Sheet for the year ended 31.03.2022. In view of the same, we reject the second issue raised by the CD.

7.12 With regard to the third issue i.e. there is no date of default mentioned in Application and that the transaction in question is neither in the shape of a financial debt nor any commercial effect of borrowing is evident nor any default is made out, we are of the view that the statement made by the CD that no date of default is mentioned in the Application is incorrect as the application in Part-IV clearly states that the default date is 06.02.2024 which is 30 days from receipt of the RDs order. Further, with the support of the documents attached along with the Application, the Applicant has established that there is a debt exceeding the threshold amount of Rs. One Crore, with respect to which there is an admission by the CD in its balance sheet for the year ended 31.03.2022 and also the CD has not brought any evidence on record to prove that the

share application money has been repaid by it to the Applicant. In regard to the subsequent part of the third issue i.e. the transaction in question is neither in the shape of a financial debt nor any commercial effect of borrowing is evidenced, our findings are contained in subsequent part of this order.

7.13 The issue which remains to be examined is whether the share application pending allotment is a financial debt. The Applicant has relied on the two member Bench judgment of Hon'ble NCLAT, New Delhi, dated 16.12.2021 in ***Company Appeal (AT) (Insolvency) No. 128 of 2021, Kushan Mitra vs. Mr. Amit Goel & CMYK Printech Limited*** wherein it was held that, "*Share Application Money in the event of non-allotment of shares, attracts interest under Section 42(6) of the Companies Act, 2013 and therefore falls within the ambit of definition of Financial Debt as defined under Section 5(8) of the Code"***.** The relevant portion of the said judgment is reproduced hereunder:

> ***"7. Assessment***
>
> - *Whether 'Share Application Money' in the event of non-allotment of shares, be treated as 'Loan/Debt' and whether such an amount falls under the definition of 'Financial Debt' as defined under Section 5(8) of the Code.*
> - *Whether Statutory accrual of interest under Section 42(6) of the Companies Act, 2013, be construed as 'consideration for time value of money', to qualify the requirement of ''Financial Debt'' as defined under the Code.*
>
> *For better understanding of the case, we find it relevant to reproduce the definition of 'Debt' as defined under Section 3(11) of the Code, the definition of 'Financial Creditor' as defined under Section 5(7) of the Code and*

also the definition of 'Financial Debt' as defined under Section 5(8) of the Code which read as hereunder: -

"Section 3

(11) *Debt means a liability or obligation in respect of a claim which is due from any person and includes a 'Financial Debt' and operational debt;"*

"Section 5

(7) *financial creditor means any person to whom a 'Financial Debt' is owed and includes a person to whom such debt has been legally assigned or transferred to;*

(8) *'Financial Debt' means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes –*

(a) money borrowed against the payment of interest;

(b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;

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

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

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

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

[Explanation----For the purposes of this subclause,--

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

(ii) the expressions, allottee and real estate project shall have the meanings respectively assigned to them in clauses

(d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);

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

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

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

(Emphasis Supplied)

"15 The Hon'ble Supreme Court of India in "Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited Vs. Axis Limited and Ors." (2020) 8 SCC 401 in para 46, 50 and 50.1 has held as under:

"The essentials for financial debt and financial creditor

46. Applying the aforementioned fundamental principles to the definition occurring in Section 5(8) of the Code, we have not an iota of doubt that for a debt to become 'financial debt' for the purpose of Part II of the Code, the basic elements are that it ought to be a disbursal against the consideration for time value of money. It may include any of the methods for raising money or incurring liability by the modes prescribed in sub-clauses (a) to (f) of Section 5(8); it may also include any derivative transaction or counter-indemnity obligation as per sub-clauses (g) and (h) of Section 5(8); and it may also be the amount of any liability in respect of any of the guarantee or indemnity for any of the

items referred to in sub-clauses (a) to (h). The requirement of existence of a debt, which is disbursed against the consideration for the time value of money, in our view, remains an essential part even in respect of any of the transactions/dealings stated in subclauses (a) to (i) of Section 5(8), even if it is not necessarily stated therein. In any case, the definition, by its very frame, cannot be read so

expansive, rather infinitely wide, that the root requirements of 'disbursement' against 'the consideration for the time value of money' could be forsaken in the manner that any transaction could stand alone to become a financial debt. In other words, any of the transactions stated in the said sub-clauses (a) to (i) of Section 5(8) would be falling within the ambit of 'financial debt' only if it carries the essential elements stated in the principal clause or at least has the features which could be traced to such essential elements in the principal clause. In yet other words, the essential element of disbursal, and that too against the consideration for time value of money, needs to be found in the genesis of any debt before it may be treated as 'financial debt' within the meaning of Section 5(8) of the Code. This debt may be of any nature but a part of it is always required to be carrying, or corresponding to, or at least having some traces of disbursal against consideration for the time value of money 50. A conjoint reading of the statutory provisions with the enunciation of this Court in Swiss Ribbons (supra), leaves nothing to doubt that in the scheme of the IBC, what is intended by the expression 'financial creditor' is a person who has direct engagement in the functioning of the corporate debtor; who is involved right from the beginning while assessing the viability of the corporate debtor; who would engage in restructuring of the loan as well as in reorganisation of the corporate debtor's business when there is financial stress. In other words, the financial creditor, by its own direct involvement in a functional existence of corporate debtor, acquires unique position, who could be entrusted with the task of ensuring the sustenance and growth of the corporate debtor, akin to that of a guardian. In the context of insolvency resolution process, this class of stakeholders namely, financial creditors, is entrusted by the legislature with such a role that it would look forward to ensure that the corporate debtor is rejuvenated and gets back to its wheels with reasonable capacity of repaying its debts and to attend on its other obligations. Protection of the rights of all other stakeholders, including other creditors, would obviously be concomitant of such resurgence of the corporate debtor.

50.1 Keeping the objectives of the Code in view, the position and role of a person having only security interest over the assets of the corporate debtor could easily be contrasted with the role of a financial creditor because the former shall have only the interest of realising the value of its security (there being no other stakes involved and least any stake in the corporate debtor's growth or equitable liquidation) while the latter would, apart from looking at safeguards of its own interests, would also and simultaneously be interested in rejuvenation, revival and growth of the corporate debtor. Thus understood, it is clear that if the former i.e., a person having only security interest over the assets of the corporate debtor is also included as a financial creditor and thereby allowed to have its say in the processes contemplated by Part II of the Code, the growth and revival of the corporate debtor may be the casualty. Such result would defeat the very objective and purpose of the Code, particularly of the provisions aimed at corporate insolvency resolution.

As can be seen from Section 5(8) of the Code and also the aforenoted principals laid down in "Anuj Jain" (supra), consideration for time value of money is an essential element for the amount to fall within the ambit of Financial Debt. The debt may be of any nature but a part of it is always required to be carrying, or corresponding to, or at least having some traces for disbursal against consideration for time value of money.

16. The Key Feature of a Financial Transaction as contemplated under Section 5(8) is 'consideration for time value of money'. In other words, the legislature has included such financial transactions in the definition of 'Financial Debt' which are usually for sum of money received today to be paid over a period of time in a single or series of payments in the future. In Black's Law Dictionary the expression 'Time Value' has been defined 'as the price associated with the length of time that an investor must wait until an investment matures or the related income is earned'.

17. In the instant case, allotment of equity shares on preferential basis by Private Placement Offer was done and subsequently revoked. The allotment of shares is evident under Form PAS-5, Form PAS-4, the

Board Resolution dated 01.08.2018, the Special Resolution dated 25.08.2018 and the Board Resolution dated 11.09.2018. Subsequently vide a Board Resolution dated 10.05.2019, the allotment made in favour of First Respondent was declared as invalid and void ab initio. Therefore, we are of the considered view that the money given by the First Respondent indeed falls within the definition of Share Application Money. 18. To understand the nature of transaction involving a Share Application Money it is necessary to see how Section 42(6) of the Act and the Companies (Acceptance of Deposits) Rules, 2014 treat the Share Application Money. The relevant parts of the Act and the Deposit Rules have been reproduced in Paragraphs 12 to 15 above. It is clear from the reading of Section 42 of the Companies Act, 2013 and the Deposit Rules that if the Shares are not allotted 24 within 60 days of receiving the Share Application Money, and if the refund does not take place within 15 days form the expiry of 60 days time limit, then this amount will be treated as a 'Deposit', advanced to the Company, which has to be returned by the Company at the rate of 12 percent per annum from the expiry of the 60th day. Thus the concerned person would get compensation for the time value of money given by him to the Company which changes the nature and character of the money so given. Although the amount was initially paid towards Shares, since the allotment was revoked, the equity did not materialise. ***Thereafter, by operation of law, Section 42(6) of the Companies Act, 2013, the amount has statutorily been given the character of loan with interest. Same is the case of amounts paid as optionally convertible debentures. They may initially be seen as Debt and later, upon conversion the same amount becomes equity. Hence, when under law, the amount has been treated as a loan, we hold that refund of Share Application Money, in the event of non-allotment of shares attracts interest as provided for under Section 42(6) of the Act and therefore qualifies the essential ingredients of Section 5(8) of the Code in terms of consideration paid for time value of money and therefore falls within definition of the ambit of 'Financial Debt' as defined under Section 5(8) of the Code. Therefore, we hold that the Debt is a 'Financial Debt'***

> ***and hence we are of the considered view that the ratio of "Radha Exports India Private Limited" (supra) and "Sesa Goa Limited and Ors. (Supra) is not applicable to the facts of this case****. Further, a three Judge Bench of this Tribunal in Uniexcel Developers Pvt. Ltd. Vs. Uniexcel Ltd., Company Appeal (AT) Ins. No. 962 of 2019 has concurred with the finding of the Adjudicating Authority and held that in case of non-refund of Share Application Money 25 within 60 days of receipt of the money, the money will be treated as Deposit and would change its character to fall within the definition of 'Financial Debt'.*
>
> *20. For all the aforenoted reasons, we are of the considered view that Share Application Money in the event of non-allotment of shares, attracts interest under Section 42(6) of the Companies Act, 2013 and therefore falls within the ambit of definition of 'Financial Debt' as defined under Section 5(8) of the Code."*

7.14 In para 18 of the above judgment, Hon'ble NCLAT has held that as per section 42 of the Companies Act, 2013 and the deposit rules, if the shares are not allotted within 60 days of receiving the share application money, and if the refund does not take place within 15 days from the expiry of 60 days' time limit, then this amount will be treated as 'deposit' advanced to the Company, which has to be returned by the company @ 12% p.a. from the expiry of the 60th day, and therefore the concerned person would get compensation for the time value of money given by him to the company which changes the nature and character of the money so given.

7.15 In the above judgment, Hon'ble NCLAT has further held that although the amount was initially paid towards shares, since the allotment was revoked, the equity did not materialise, and thereafter by operation of law i.e. as per section 42(6) of Companies Act, 2013 the amount has statutorily been given the character of loans with interest. It was further stated that the same is the case

of amounts paid as optionally convertible debenture, which may initially be seen as debt and later, upon conversion, the same amount becomes equity. Hence, when under law, the amount has been treated as a loan, i.e. the refund of share application money in the event of non-allotment of shares, attracts interest as provided for under section 42(6) and therefore, qualifies the essential ingredients of section 5(8) of the Code in terms of consideration paid for time value of money and therefore falls within the definition of 'financial debt' as defined under section 5 (8) of the Code.

7.16 In the present matter the application has been filed based on order of Ld. RD dated 04.01.2024, vide which the Ld. RD directed the CD to refund the share application money amounting to Rs.13,92,19,042/- to the complainants/persons who have deposited the share application money with the company, which include the Applicant herein for a principal amount of Rs. 1,00,51,017/-, along with interest at the rate of 12% as per the provisions of section 42(10) of the Companies Act, 2013, within 30 days from the date of receipt of this order. Along with interest the total claim in the application is Rs. 1,20,71,271/-, which has not been paid by the CD and therefore, there has been a default on the part of the CD in making payment of the same. As per the above referred judgment the refund of share application money, in the event of non-allotment of shares, attracts interest as per the rate specified in section 42(6) of the companies Act, 2013 and therefore, the same qualifies the essential ingredients of section 5(8) of the Code in terms of consideration paid for time value of money and therefore, false within the definition of the "Financial Debt" as defined under section 5(8) of the Code. In the present case, the applicant is entitled to receive refund of the share application money

along with interest at the rate of 12% p.a. pursuant to Section 42(10) of Companies Act, 2013, in regard to which Ld. ROC has passed an order, which has been confirmed by Ld. RD in appeal filed by the CD, and therefore, we are of the view that amount claimed by the Applicant in the Application qualifies to be a "Financial Debt" as per section 5(8) of the Code.

7.17 To contradict this judgment the CD placed reliance on the judgment of Hon'ble NCLAT, New Delhi in ***Murlidhar Vincom Pvt. Ltd. Vs Skoda (India) Pvt. Ltd.*** in ***Company appeal (AT) (Insolvency) No. 1334 of 2024*** dated 26.11.2024 and submitted that it was held that share application pending allotment does not constitute financial debt. The Ld. Counsel for the CD argued that the said judgement being the latest judgment delivered by three-member bench of the Hon'ble NCLAT, commands binding precedential value and cannot be disregarded on the ground of having been rendered per incuriam.

7.18 The relevant portion of the said judgment is reproduced hereunder:

> *"11 When we look at Rule 2(c)(vii) of the CADR Rules, 2014 and the explanatory clause appended thereto, it becomes clear that it refers to any amount received and held pursuant to an offer made in accordance with the provisions of the Companies Act, 2013 towards subscription to any securities, including share application money. It flows therefrom that for the aforementioned CADR Rules to be attracted in respect of share application money, there has to be a clear nexus to show that the share application money amount was advanced in conformity with the relevant provisions of the Companies Act, 2013. When we look at Section 42 of the Companies Act, 2013 it is clear that several statutory compliances are required to be met prior to issue of shares on private placement basis. Section 42(2) of the Companies Act stipulates the requirement of issue of private placement offer letter in such cases. From the records available on file, we do not find that the Corporate Debtor had issued any such private placement offer letter to the Appellant. There is no evidence of any valid concluded agreement*

between the two parties with respect to allotment of shares. Hence, the amount which was advanced by the Appellant cannot be treated to be amount in response to the private placement offer. Rule 2 of CADR Rules envisages that only if any amount is received pursuant to any private placement offer made in accordance with the provisions of the Companies Act, 2013 and no shares are allotted qua that amount, only then the sum becomes a deposit. When no proof of any private placement offer made in accordance with the provisions of the Companies Act, 2013 has been placed on record by the Appellant, the CADR Rules cannot be held to be applicable. Since the amount advanced cannot Company Appeal (AT) (Insolvency) No. 1334 of 2024 be related to Section 42 of the Companies Act, the applicability of Section 42(6) cannot be pressed as is being sought by the Appellant in the present case.

12. We would also like to add here that the Kushan Mitra judgment supra cannot come to the aid of the Appellant since the above judgment of this Tribunal was challenged before the Hon'ble Supreme Court of India in Shobori Ganguly Vs Amit Goel and Ors. in Civil Appeal No. 4333 of 2022 and a stay has been put on this judgment. On the other hand, the Adjudicating Authority has relied on the precedent laid down in a subsequent three-bench judgment of this Tribunal in Promod Sharma judgment supra wherein it has been held that the amount given as share application money did not constitute a financial debt under Section 5(8) of the IBC.

13.In sum, we do not find any infirmity in the order of the Adjudicating Authority rejecting the Section 7 application of the Appellant. It shall however remain open to the Appellant to seek refund/recovery of the share application money in appropriate proceedings before an appropriate forum in accordance with law. There is no merit in the Appeal. The Appeal is dismissed"

7.19 A perusal of the above paragraphs reflects that in the Murlidhar Vincom matter the CD had not issued any private placement offer to the appellant and there was no evidence of any valid concluded agreement between the two parties with respect to the allotment of shares and therefore the amount so advanced

was not treated as the amount in response to the private placement offer. Hon'ble NCLAT held that Rule 2 of CADR Rules envisages that only if the amount is received pursuant to any private placement offer made in accordance with the provisions of Companies Act, 2013 and no shares are allotted qua the said amount, only then the sum becomes a deposit. Hon'ble NCLAT further held that since the amount advanced cannot be related to section 42 of the Companies Act, the applicability of section 42 (6) cannot be pressed as was being pressed by the Appellant in that case.

7.20 In the said judgment Hon'ble NCLAT also referred to the Kushan Mitra Judgment, however, it held that as the said judgment was challenged before the Hon'ble Supreme Court of India in *Shobori Ganguly vs. Amit Goel and others in Civil Appeal No. 4333 of 2022* and a stay had been put on the said judgment, the said judgment could not come to the aid of the appellant in the said matter.

7.21 At this stage, we find that the Kushan Mitra judgment supra which was challenged before the Hon'ble Supreme Court of India in *Shobori Ganguly Vs Amit Goel and Ors. in Civil Appeal Diary No. 4333 of 2022 now Civil Appeal No. 2661 of 2022 with Civil Appeal No. 2662 of 2022* were disposed of on 29.07.2025 in view of the settlement agreement arrived at between the parties in that case. Therefore, the stay of the order of Kushan Mitra supra in the *Civil Appeal No. 2661 of 2022 with Civil Appeal No. 2662 of 2022* ceases to exist.

7.22 After considering the judgment in the matter of Murlidhar Vincom, we are of the view that the above case is based on distinguishable facts. It is seen that in ***Murlidhar Vincom*** matter there was no determination by the ROC or RD under Section 42(6) and 42(10) of the Companies Act, 2013. In addition, in

the present case Ld. ROC *vide* order dated 01.05.2023 has adjudicated as under,

> ***"a. The company is directed to refund all the monies to the complainants along with interest at the rate of twelve per cent per annum as per the provisions of section 42(6) of the Act, within 30 days from the date of order as per the provisions of section 42(10) of the Act.***
> *b. The penalty amount shall be remitted by the company through MCA21 portal within 60 days from the date of Order. The Company needs to file INC-28 as per the provisions of the Act, attaching the copy of adjudication order along with payment challans.*
> *……"*

7.23 The said order was taken in appeal before Ld. RD who *vide* order dated 04.01.2024 has ordered as under: -

> *"15. In view of above, the said appeal/ application is hereby disposed of and the appellants are hereby –*
> *a. Directed to Pay the Adjudication Fees which have been 'Modified' by the Regional Director' at para 15(a)(i) & (ii) (as per the above table) with the direction to pay within 90 days from the date of receipt of this order.*
>
> *b. 'Confirmed' the ROC Adjudication Order dt 01/05/2023 to refund the share application money amounting to Rs. l3,92,19,042/- to the complainant(s)/ person(s) who have deposited the share application money with the company along with interest at the rate of twelve percent as per the provisions of Section 42(10) of the Act within 30 days from the date of receipt of this order.*
>
> *16. Registrar of Companies, Mumbai is directed to proceed further under Section 454(8) of the Companies Act, 2013 and file prosecution against the company and officers in default for violation of Section 42 of the Companies Act, 2013, if the appellants fail to comply with Para 17(a) & (b) above."*

7.24 It may be seen from the above that in the present case the order passed by Ld. ROC as well as by Ld. RD is under sub-section (10) of Section 42 of the

Companies Act, 2013 and the said sub-section is applicable when a company makes an offer or accepts money in contravention of section 42, besides making liable the company, its promoter and directors for penalty, the said sub-section imposes an obligation on the Company to refund all monies with interest as specified in sub-section 6 (i.e. at the rate of 12% p.a.) to subscribers within a period of 30 days of the order imposing the penalty. As such, the said sub-section covers a situation where a company has raised money in contravention of section 42, which includes contravention of sub-section (3) i.e. where the share Application money is raised without issue of a private placement offer. Sub-section (10) of section 42 is again reproduced hereunder:

> *"(10) **Subject to sub-section (11), if a company makes an offer or accepts monies in contravention of this section, the company, its promoters and directors shall be liable for a penalty which may extend to the amount raised through the private placement or two crore rupees, whichever is lower, and the company shall also refund all monies with interest as specified in sub-section (6) to subscribers within a period of thirty days of the order imposing the penalty".***

7.25 In the Murlidhar Vincom judgment, Hon'ble NCLAT has considered whether the share application money pending allotment received not in responses to a private placement offer can be treated as a deposit under the CADR Rules, and whether Section 42 (6) of the Companies Act, 2013 will be applicable. Hon'ble NCLAT based on the same held that the said amount of share application money is not to be treated as a deposit under the CADR Rules, and therefore, section 42(6) will not be applicable. However, the case of the

Applicant is based on orders made by the ROC as well as the Ld. RD, who have directed the CD to refund the share application money along with interest. The said order has been made under section 42(10) and not under section 42(6) of the Companies Act. Sub-section (6) of Section 42 deals with a situation where shares are not allotted within the time period of 60 days from the date of receipt of share application money, which is received pursuant to an offer or invitation made under section 42. However, section 10 of sub section 42 deals with a situation where share application money in contravention of section 42 i.e. the same is received not pursuant to any private placement offer. In our view, therefore, the Murlidhar Vincom judgment will not be applicable in the present case and that the judgment passed by the Hon'ble NCLAT in Kushan Mitra matter will apply and according to the same the share application money refundable along with interest at the rate of 12% p.a. under section 42(10) of the Companies Act, 2013 qualifies to be a "Financial Debt" as it has the essential element of consideration for the time value money. Further, in line with the reasoning given by Hon'ble NCLAT in the Kushan Mitra judgment, as per section 42(10) of the Companies Act, the share application money assumes the character of a debt after it becomes refundable as per the said section.

7.26 The CD had raised the contention that the CD has filed Writ Petition No. 5201 of 2024 in the matter of NV Autospares Pvt. Ltd. vs. The Regional Director, Western Region, Ministry of Corporate Affairs, Mumbai and Ors, before the Hon'ble High Court of Judicature at Bombay, *inter alia*, challenging the order dated 04.01.2024 passed by the RD. The Hon'ble High Court of Bombay *vide*

order dated 29.05.2024 has not stayed the above actions of order of RD and has merely stated as follows,

> *"(c) Subject to the Petitioner depositing in this Court, the amount payable under clause 15(a), which according to the Petitioner is quantified at Rs.4,00,000/'-, within a period of four weeks from today, there shall be ad-interim stay to Clause 15(a) of the impugned order dated 04.01.2024. It is clarified that in case the amount is not deposited as stipulated, the ad-interim stay shall stand vacated.*
>
> *(d) Liberty to move, in case Clause 15(b) of the impugned order (about recovery of the share application money) is pressed."*

7.27 As such Hon'ble Bombay High Court has vide the above order granted an ad-interim stay to clause 15(a) of the order of Ld. RD dated 04.01.2024, which relates to the payment of Adjudication Fee modified by the Ld. RD to Rs. 4,00,000/-, subject to deposit of the said amount 4 lakh with the Hon'ble Court within a period of four weeks. However, there is no stay in regard to the clause 15(b) of the said order of Ld. RD, which relates to the refund of share application money amounting to Rs. 13.92 crores along with interest at the rate of 12% as per the provisions of section 42(10) of the Companies Act, within 30 days from the date of receipt of the order of CD by the Company. In regard to the said clause, however, Hon'ble High Court has granted liberty to the petitioner company to move before the Hon'ble High Court in case recovery of the share application money is pressed.

7.28 The Respondent/CD has not brought on record any documents to show that it has moved before the Hon'ble Bombay High Court in regard to the filing of the present Petition under the provisions of IBC, nor it has brought any order of Hon'ble High Court on record to demonstrate that the Hon'ble Bombay High Court has passed any stay order on the present proceedings. Moreover,

Hon'ble Supreme Court of India has in a number of matters including in the recent judgment in the matter of ***HPCL Bio-Fuels Ltd. vs Shahaji Bhanudas Bhad (2024) ibclaw.in288SC***, held that the object of initiation of insolvency proceedings under Code is to seek rehabilitation of the CD by appointment of a new management and that insolvency proceedings are fundamentally different from proceedings for recovery of debt such as a suit for recovery of money, execution of decree or claims for amount due under arbitration etc. The relevant portion of the said judgement is reproduced below:

> *"105. The last distinguishing feature is that, a recovery proceeding be it a suit or arbitration is initiated by a creditor where an amount is due and is unpaid by a debtor, in other words the intention behind initiating a recovery proceeding is simpliciter for the full recovery of amount which is unpaid to it. However, in an insolvency proceeding there is no guarantee of recovery of the entire debt. A creditor opts for insolvency where an amount of such threshold is unpaid, that the creditor has an apprehension that the debtor in its current state and under the existing management in all likelihood will be unable to repay that debt in the future i.e., there is no likely prospect of any recovery, and thus it would be beneficial to take the risk of initiating insolvency which even though does not guarantee full recovery, in order for a new management to take over the corporate debtor and to recover at least some amount of debt before it is too late. Thus, the underlying intention behind initiating insolvency is not with the intention of recovering the amount owed to it, but rather with the intention that the corporate debtor is resolved / rehabilitated through a new management as soon as possible before it becomes unviable with no prospect of any meaningful recovery of its dues in the near future."*

7.29 The Hon'ble Supreme Court has in another matter i.e. in the matter of ***Jaypee Kensington Boulevard Apartments Welfare Assn. v. NBCC (India) Ltd., reported in (2022) 1 SCC 401*** (which is also referred to in the HPCL Bio-Fuels judgment) held that the focus of IBC was more on ensuring the revival and continuation of the corporate debtor rather than mere recovery of the debt owed by the corporate debtor to its creditors. The relevant observations read as under: -

> *"88.2. In the judgment delivered on 25-1-2019 in Swiss Ribbons (P) Ltd. v. Union of India82 (hereinafter also referred to as the case of "Swiss Ribbons"), this Court traversed through the historical background and scheme of the Code in the wake of challenge to the constitutional validity of various provisions therein. One part of such challenge had been founded on the ground that the classification between "financial creditor" and "operational creditor" was discriminatory and violative of Article 14 of the Constitution of India. This ground as also Page 63 of 79 several other grounds pertaining to various provisions of the Code were rejected by this Court after elaborate dilation on the vast variety of rival contentions. In the course, this Court took note, inter alia, of the pre-existing state of law as also the objects and reasons for enactment of the Code. While observing that focus of the Code was to ensure revival and continuation of the corporate debtor, where liquidation would be the last resort, this Court pointed out that on its scheme and framework, the Code was a beneficial legislation to put the corporate debtor on its feet, and not a mere recovery legislation for the creditors."*
>
> *(Emphasis supplied)*

7.30 Therefore, from all the above observations, we find that the share application pending allotment, which has become refundable as per sub-section (10) of section 42 of the companies Act, 2013 is a "Financial Debt" under Section 5(8) of IBC 2016. Consequently, the Applicant is a 'Financial Creditor' under

Section 5(7) of the Code. We also hold that the CD has committed a default with respect to the said “Financial Debt”.

7.31 The CD has further relied on the Hon’ble NCLAT in ***Pramod Sharma Vs. Karanaya Heartcare Pvt. Ltd. (Company Appeal (AT) (Insolvency) No. 426 of 2022)*** where the court had held that, unallotted share application money could not be classified as a financial debt under IBC as the principal amount was refunded to the Appellant and no interest was paid to the Appellant which *inter alia* did not transform into a deposit. This case is not applicable to the present case, as the Applicant has not received any amount from the CD and also there are orders of the RD and ROC which supports the Applicant’s case. In ***Rahul Maroo Vs. Bruck Pharma Pvt. Ltd. (Company Appeal (AT) (Insolvency) No. 1156 of 2022),*** it was held that, there is nothing on the record to indicate that the company at any time has issued a private placement offer. Appellant has not brought any material on record to indicate that company at any time has issued private placement offer and in pursuance of which Appellant has made any application of allotment of shares. There being no material brought on the record to indicate that the amount of Rs.2.6 Crore was advanced by the Appellant in pursuance of any offer of private placement invited by the company. This case is misplaced by the CD as the facts in the case are distinguishable as the Applicant in the instant case has advanced money to the CD and pursuant to which the CD has not allotted the shares to the Applicant. In the case of ***Mittson Fille Enterprise (acting through its partner, Mrs. Neha Choudhary Vs Sammaan Ventures Limited, (CP (IB) No. 147/KB/2023), Hon’ble NCLT Kolkata and; Naman Global Impex Private Limited Vs Rathod Pharmachem Private Limited, (CP (IB)***

110/NCLT/AHM/2021), Hon'ble NCLT Ahmedabad**,** the courts in these cases have findings on the similar observations on the NCLAT judgments as has been referred and dealt above and therefore, it is the considered view that the NCLT judgments are also misplaced by the CD on similar grounds as stated above.

7.32 Further, the date of default mentioned in Part-IV of the Application as 06.02.2024 which has been disputed by the CD. The Applicant has calculated this date of default as 30 days from the date of order of the RD i.e., 04.01.2024.

7.33 We are of the view that from the date of order of the RD, the amount of Rs. Rs.1,20,71,271.42 as claimed in the present application has assumed the status of financial debt, which is in excess of Rs. 1 Crore, being the threshold amount under Section 4 of the Code.

7.34 The Applicant has proposed the name of M/s. DiMax Restructuring Pvt. Ltd. to act as the Interim Resolution Professional (IRP) and has given his declaration in Form 2, *inter alia*, stating that no disciplinary proceeding is pending against him. The Applicant has provided his valid AFA in Form B valid till 31.12.2025.

7.35 We find that the Applicant has fulfilled the requisites of Section 7 along with necessary documents to prove the disbursement and default and therefore, the Application is complete and deserve to be admitted.

7.36 We make it clear that at this stage we have not crystalized the amount as claimed in this Application, the same is left to be collated by the IRP.

ORDER

In view of the aforesaid findings, Application bearing C.P.(IB) No. 222/MB/2025 filed under Section 7 of the Code by Mr. Sanjay Subhash Katira, the Financial Creditor, for initiating CIRP in respect of **NV Autospares Private Limited**, the Corporate Debtor is hereby **admitted.**

We further declare moratorium under Section 14 of the Code with consequential directions as mentioned below: -

I. We prohibit-

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

b) transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;

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

d) the recovery of any property by an owner or lessor where such property is occupied by or in possession of the Corporate Debtor.

II. That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period.

III. That the order of moratorium shall have effect from the date of this order till the completion of the CIRP or until this Tribunal approves the resolution plan under Section 31(1) of the Code or passes an order for the liquidation of the Corporate Debtor under Section 33 thereof, as the case may be.

IV. That the public announcement of the CIRP shall be made in immediately as specified under Section 13 of the Code read with Regulation 6 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and other Rules and Regulations made thereunder.

V. That this Bench hereby appoints **DiMax Restructuring Private Limited,** a registered Insolvency Professional Agency having Registration Number **IBBI/IPE-0172/IPA-3/2024-2025/50087** and e-mail address info@dimax.in having valid Authorisation for Assignment up to 31.12.2025 as the IRP to carry out the functions under the Code.

VI. That the fee payable to IRP/RP shall be in accordance with such Regulations/Circulars/ Directions as may be issued by the IBBI.

VII. That during the CIRP Period, the management of the Corporate Debtor shall vest in the IRP or, as the case may be, the RP in terms of Section 17 or Section 25, as the case may be, of the Code. The officers and managers of the Corporate Debtor the Corporate Debtor is directed to provide effective assistance to the IRP as and when he takes charge of the assets and management of the Corporate Debtor. Coercive steps will follow against them under the provisions of the Code read with Rule 11 of the NCLT Rules for any violation of law.

VIII. That the IRP/IP shall submit to this Tribunal periodical reports with regard to the progress of the CIRP in respect of the Corporate Debtor.

IX. In exercise of the powers under Rule 11 of the NCLT Rules, 2016, the Applicant is directed to deposit a sum of Rs.3,00,000/- (Rupees Three Lakh) with the IRP to meet the initial CIRP cost arising out of issuing public notice and inviting claims, etc. The amount so deposited shall be interim finance and paid back to the Applicant on priority upon the funds available with IRP/RP from the Committee of Creditors (CoC). The expenses incurred by IRP out of this fund are subject to approval by the CoC.

X. A copy of this Order be sent to the Registrar of Companies, Maharashtra, Mumbai for updating the Master Data of the Corporate Debtor.

XI. A copy of the Order shall also be forwarded to the IBBI for record and dissemination on their website.

XII. The Registry is directed to immediately communicate this Order to the Applicant, the Corporate Debtor and the IRP by way of Speed Post, e-mail and WhatsApp.

XIII. **Compliance report of the order by Designated Registrar is to be submitted today.**

Sd/-

SAMEER KAKAR
MEMBER (TECHNICAL)

Sd/-

NILESH SHARMA
MEMBER (JUDICIAL)

//VB/VM//