

**IN THE NATIONAL COMPANY LAW TRIBUNAL,**

**BENCH,  
KOLKATA**

**C.P (IB) No.964/KB/2020**

**In the matter of**

An application under section 7(1) of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules,2016.

And

**In the matter of:**

- 1. Prarthana Sales Private Limited**, registered under the provisions of the Companies Act, 1956 bearing CIN : U52190WB2011PTC157333, having its registered office at 16, Strand Road, 7<sup>th</sup> Floor, Room No.709A, Kolkata-700001,West Bengal
- 2. Narsingh Mercantile Private Limited**, registered under provisions of the Companies Act, 1956 bearing CIN U51909WB2002PTC094733, having its registered office at 16, Strand Road, 7<sup>th</sup> Floor, Room No.709A Kolkata- 700001, West Bengal

*... Financial Creditors*

Versus

**In the matter of:**

**Burnpur Cement Limited**, registered under the provisions of the Companies Act, 1956 CIN: L27104WB1986PLC040831, having its registered office at village: Palashdiha, Panchgachia Road, Kanyanpur, Asansol, West Bengal- 713341.

*...Corporate Debtor*

Date of hearing : 09/05/2022

Order Pronounced on : 13/06/2022

**Coram:**

***Mr. Rohit Kapoor, Member (Judicial)***

**Mr. Harish Chander Suri, Member (Technical)**

**Counsels appeared through Video Conference**

For F.C : Mr. Anirudh Wadhwa, Adv.  
Mr. Rohit Sharma, PCS  
Mr. Keshav Gulati, Adv.

For C.D : Mr. Ratnanko Banerji, Sr. Adv.  
Mr. Soumabho Ghose, Adv.  
Mr. Soumalya Ganguli, Adv.  
Ms. Tiana Bhattacharya, Adv.  
Ms. Sudarshana Dutta, Adv.

**ORDER**

**Per: Harish Chander Suri, Member (Technical)**

1. The Court is convened by video conference today.
2. This petition under section 7(1) of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules,2016 has been filed by **Prarthana Sales Private Limited** (for short Prarthana) and **Narsingh Mercantile Private Limited** (for short Narsingh) , through its authorised representative Mr. Anand Prakash Kejriwal ( Annexure I, Exhibit B) (hereinafter referred as Financial Creditors) praying for initiation of CIRP against the **Burnpur Cement Limited**, having its registered office at village Palashdiha, Panchgachia Road, Kanyanpur, Asansol, West Bengal-713341 (hereinafter referred as Corporate Debtor).
3. It is submitted that Financial Creditors had granted a loan of Rs.4,25,00,000/- to the Corporate Debtor out of which an amount of Rs.2,15,00,000 has been received from the Corporate Debtor and the balance amount of 2,10,00,000 is due and payable by the Corporate Debtor. The Financial Creditors have submitted that the total amount claimed to be in default is Rs.2,97,82,697, which is inclusive of Rs 87,82,687/- @ 10% per annum till 31.07.2020.In support of its claim, the Financial Creditors have annexed three loan agreements between Prarthana and Corporate Debtor dated 14.04.2014, between Active Commercial

Pvt. Ltd. and Corporate Debtor dated 15.12.2014 and between Nikita Vyapar Pvt Ltd and Corporate Debtor dated 13.11.2014. It is submitted that under three agreements Rs.2,70,00,000/-, Rs. 50,00,000/- and Rs.1,05,00,000/ respectively were to be provided to the Corporate Debtor as Inter Corporate Deposits at an interest rate of 10% per annum with interest payable on quarterly basis.

4. It is submitted that in terms of the loan agreements, the amount became repayable on demand of the Financial Creditors within 10 days from the date of receipt of a demand letter for repaying the loan amount with interest. It is stated that Active and Nikita were amalgamated with Narsingh pursuant to order passed by the Hon'ble Calcutta High Court, sometime in January 2016.
5. It is further stated that on account of the alleged default, the Financial Creditors served a demand notice to the Corporate Debtor on 23.01.2020 asking it to make the outstanding payments. *Vide* letter dated 25.02.2020, the Corporate Debtor denied the said demand of the Financial Creditors and informed them that one UV Assets Reconstruction Company Limited had taken over the management of the Corporate Debtor pursuant to which the previous Board of Directors had resigned from the board. Secondly, it was stated that the Corporate Debtor was of the belief that the said transactions were made with an intention of siphoning the funds and that the company was conducting a detailed forensic audit and other due diligences to find the rationality of the transaction after which it may further take relevant legal actions
6. It is further submitted that the Corporate Debtor had deducted TDS of Rs.96,061/- on interest of Rs.11,35,615/- in the financial year 2014-2015 and 2015-2016, which was paid to the account of Prarthana and a sum of Rs 2,12,209 being TDS on interest of Rs. 25,09,588 to the account of Narsingh.
7. It is submitted that the Financial Creditors have filed Statements titled as "Date of Default along with amount of debts granted by the Financial Creditors along with their respective Dates of Disbursement and workings for computation of

amount and days of default in tabular form” Annexures ‘C’ & ‘D’. As per these tabular statements for both Prarthana and Narsingh, the date of maturity is specified as 10.02.2020 and **dates of default is stated to be 11.02.2020**

8. It is further submitted by the Financial Creditors that in response to the aforesaid letter of the Corporate Debtor, Prarthana in its reply dated 03.03.2020, replied that the change in management of the Corporate Debtor was not relevant with regard to the said transaction and that the documentary evidence indicated that there had been disbursement of funds from their account to the Corporate Debtor. It was also stated that there was no reason as to why the Corporate Debtor must not discharge its obligation of re-paying back the loan. It is further submitted that despite the reminders, the Financial Creditors did not receive any repayment of its loan and thus the Financial Creditors were constrained to initiate Corporate Insolvency Resolution Process against the Corporate Debtor.
9. During these proceedings, the Corporate Debtor filed its reply affidavit of Mr. Pawan Pareek, Director of the Corporate Debtor, and submitted therein that it had availed loan facility from a consortium of lenders comprising of the State Bank of India, Central Bank of India and the United Bank of India (which subsequently merged with Punjab National Bank). It is submitted that by two separate agreements dated 29.03.2019 and 17.05.2019 executed by the Central Bank of India and State Bank of India, the outstanding loans of these banks were assigned in favour of UV Asset Reconstruction Company Limited. Pursuant to Section 9 of the SARFAESI Act, 2002 on or about 01.09.2019, the assignee took over the management of the Corporate Debtor, after which the previous Board of Directors of the Corporate Debtor resigned from the board.
10. It is submitted that after the assignee took over the management of the Corporate Debtor, it came to know about various irregularities and illegalities committed by the erstwhile management of the Corporate Debtor and realised that the loan transaction between the Corporate Debtor and Financial Creditors were merely book entries and there had been no actual advance given to the Corporate Debtor by the Financial Creditors. In support of this, the Corporate

Debtor has put on record an assessment order dated 31.12.2018 passed by the Income tax department under Section 153A read with 144 of Income Tax Act 1961. It is further submitted that the assessment order has been passed against the Corporate Debtor as the assessee. The assessment order relates to the assessment year 2015-16. It provides that during the period under assessment, the Corporate Debtor had, *inter alia*, received an unsecured loan of Rs.2,70,00,000/- from Prarthana (the first Financial Creditor herein). The assessment order further provides that the directors of Prarthana during the year under consideration were Mr. Annand Prasad Kejriwal and Ms Jyoti Kejriwal. Mr. Annand Prasad Kejriwal was also a director during the relevant period in Narsingh (the second Financial Creditor herein), Active and Nikita, both of which companies have subsequently merged with Narsingh. Ms. Jyoti Kejriwal was also a director in the aforesaid four companies. By placing reliance on various paragraphs of this assessment order, the Corporate Debtor has alleged that the so-called loans are not genuine as unsecured loans but sham transactions camouflaged as unsecured loans. The Corporate Debtor has placed reliance on various paragraphs of this assessment order which we have taken note of, as part of our analysis and reasoning.

11. It is seen from the record that the Corporate Debtor relies on the records maintained by the RoC in alleging that the Financial Creditors are essentially shell companies and they have common directors as well as common registered office.
12. Learned Counsel for the Corporate Debtor seeks to rely and emphasize on the principle/maxim "*in pari delicto*" which in common parlance means that a party cannot seek the assistance of the Court to enforce a transaction which is illegal.
13. In the reply affidavit, the Corporate Debtor further alleged that the Financial Creditors are not registered as Non-Banking Financial Corporations. In addition to this for the purpose of being engaged in the business of advancing loan, companies are required to obtain license under the Bengal Money Lenders Act, 1940. These requisites having not been met by the Financial Creditors, loan could not have been granted by them. It is further submitted that since the

primary objective of neither of the Financial Creditors is to advance loans or providing financial assistance, the said transaction of the Financial Creditors of advancing loan to the Corporate Debtor is beyond the Memorandum of Association of the Financial Creditors and hence *void ab initio* making the loans not legally enforceable. It can be seen that the forensic audit report in respect of the Corporate Debtor was prepared by one M/s Hary Kurup and Associates (Chartered Accountants) and it has been filed by Corporate Debtor along with its reply to the petition. The said report covered the period 01.04.2011 to 30.09.2019. Thereafter, the Corporate Debtor sought leave of this Adjudicating Authority to place the final Forensic Audit report dated 14.01.2021 on record claiming that the forensic audit report was a draft report. Such leave was granted by this Adjudicating Authority *vide* order dated **19.03.2021** pursuant to which supplementary affidavit was filed placing on record the Final Forensic Audit Report dated 14.01.2021. The Corporate Debtor has relied on this report for alleging irregularities in the operation and affairs of the Corporate Debtor as willful actions on part of the erstwhile management resulting in the diversion of funds and sham transactions being undertaken.

14. Financial Creditors in their rejoinder to the affidavit in reply have stated that the proceedings leading to the assessment order are only confined between the assessee and tax authority which cannot be binding on them and since the order has only made reference to the loan transaction between the Corporate Debtor and Prarthana with nothing being stated in regard to the loan transaction between Corporate Debtor and Narsingh, a default of Rs.1,55,00,000/- can still be made out against the Corporate Debtor, which is in itself sufficient to trigger CIRP proceedings against the Corporate Debtor.
15. It is pertinent to mention that Active Commercial Pvt. Ltd., Nikita Vyapar Pvt. Ltd. and two other companies were merged with Narsingh Pvt.Ltd. pursuant to a scheme of amalgamation approved by the Hon'ble High Court of Calcutta on 5<sup>th</sup> January, 2016 in petition no. 155/2015. It is submitted that in accordance with the said scheme and orders passed by the Hon'ble High Court of Calcutta on 5<sup>th</sup> January, 2016, all rights, liabilities etc. of the merged companies were

transferred to Narsingh including those arising from the above mentioned loan agreements dated 13<sup>th</sup> October, 2014 and 15<sup>th</sup> December, 2014. It is submitted that accordingly the Financial Creditors have filed the application under section 7 of the Code.

16. It is submitted by the Financial Creditors that for admitting an application under Section 7 of Code, mere evidence of default having taken place is required and as per the bank account statements placed on record, there is sufficient material to admit the application of the Financial Creditors. It is submitted that since the loan agreements have been duly attested and were granted in the form of Inter-Corporate Deposits, against the consideration of time value of money i.e., at an interest rate of 10% per annum payable on quarterly basis, the present Petition is fully maintainable.
17. The Financial Creditors have further submitted, while refuting allegations of the loan transaction being sham or invalid, that when a party knowingly accepts the benefits of a contract, it is estopped to deny the validity and binding effect of the contract. As regards the Forensic Audit Report, it stated in the Rejoinder as well as reply to the supplementary affidavit, that it has been prepared by the new management of the Corporate Debtor in regard to the alleged mis-deeds and mala fide conduct of the erstwhile management and cannot be relied upon. It stated that there is nothing in the audit report, which would have any bearing on the loan transactions.
18. The Financial Creditors have finally submitted that a single loan to the Corporate Debtor cannot be the basis to conclude that the Financial Creditors are carrying on the business of money lending or need to register as an NBFC or stand in violation of any other provisions of law since the same does not have any bearing on the proceedings under IBC.
19. We have given a patient hearing to Learned Counsel for the parties and have perused the pleadings filed by the parties.

20. Having given our careful consideration to the arguments made, the only real issue for determination in this matter is whether there exists financial debt, which can constitute the basis for filing a petition under section 7 of the Code against the Corporate Debtor. On this issue, while the Financial Creditors have contended that the financial debt is valid and undisputed, the Corporate Debtor has argued that the debt is sham and collusive and the present petition is thus liable to be dismissed.
21. In support of the argument that a Financial Debt was disbursed, the Financial Creditors have relied upon the loan agreements dated 14.04.2014, 15.12.2014 and 13.10.2014 along with bank statements of Prarthana, Active and Narsingh. On the other hand, the Corporate Debtor, in support of its contention that the debt in question is a sham, collusive and non-enforceable, has placed reliance on Income Tax Assessment order dated 31.12.2018 and Forensic Audit Report dated 14.01.2021. At the outset, we may deal with the preliminary objection raised by the Corporate Debtor that the instant petition jointly filed by the two Financial Creditors cannot be entertained. This contention is unmerited in view of the fact that Section 7(1) provides that "*a financial creditor either by itself or jointly with other Financial Creditors ... may file an application for initiating CIRP against a Corporate Debtor...*". As such, there is no infirmity in the present joint petition filed by the two Financial Creditors. Whether or not a financial debt exists, it is a question touching upon the merits of the competing claims of the parties and is being decided separately. We accordingly reject this arguments of the Corporate Debtor and are proceeding to decide the matter on the merits.
22. Before proceeding further, it is relevant to take notice of the decision of Hon'ble Supreme Court dated 01.02.2021 in the case of **Phoenix Arc Private Limited vs Spade Financial Services Limited & Ors.** (Civil Appeal No. 2842 of 2020).
23. In this case, CIRP was initiated against AKME Projects Limited (Corporate Debtor). While the matter was before the NCLT, two financial creditors, Phoenix ARC Private Limited and Yes Bank Limited, filed applications seeking the

exclusion of two entities, AAA Landmark Private Limited and Spade Financial Services Private Limited from the CoC on the ground that they were not financial creditors. The Adjudicating Authority after analysis of the underlying facts held that the transaction pertaining to giving of inter corporate deposits by Spade and AAA to Corporate Debtor appeared to be collusive and did not qualify as financial debt for the purposes of IBC. Having held so, the Adjudicating Authority did not venture to consider if they were related parties. In appeal, the NCLAT proceeded on the basis that it was an “*admitted position that AAA and Spade were Financial Creditors*”, however it went on to hold that they are related parties and must be excluded from the CoC. Against the said decision of the NCLAT, both parties appealed to the Hon’ble Supreme Court.

24. The Hon’ble Supreme Court, at the outset, found error in the finding of the NCLAT that it was an admitted position that AAA and Spade are Financial Creditors. After holding as above, the Hon’ble Supreme Court examined the underlying facts and accepted the findings of the Adjudicating Authority that the transactions in question between the corporate debtor and financial creditors were collusive. The Hon’ble Supreme Court also relied upon the Forensic Report prepared by Ernst & Young. After examination of the facts, the Apex Court agreed with the Adjudicating Authority and held that the alleged debt was an eyewash and collusive in nature and thus would not make Spade and AAA Financial Creditors of the Corporate Debtor. The relevant observations from the order of the Hon’ble Supreme Court are as under:

*46. The above discussion shows that money advanced as debt should be in the receipt of the borrower. The borrower is obligated to return the money or its equivalent along with the consideration for a time value of money, which is the compensation or price payable for the period of time for which the money is lent. **A transaction which is sham or collusive would only create an illusion that money has been disbursed to a borrower with the object of receiving consideration in the form of time value of money, when in fact the parties have entered into the transaction with a different or an ulterior motive. In other words, the real agreement between the parties is something other than advancing a financial debt.....***

48 The IBC has made provisions for identifying, annulling or disregarding “avoidable transactions” which distressed companies may have undertaken to hamper recovery of creditors in the event of the initiation of CIRP. Such avoidable transactions include: (i) preferential transactions under Section 43 of the IBC; (ii) undervalued transactions under Section 45(2) of the IBC; (iii) transactions defrauding creditors under Section 49 of the IBC; and (iv) extortionate transactions under Section 50 of the IBC. 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.

52 Since the commercial arrangements between Spade and AAA, and the Corporate Debtor were **collusive in nature, they would not constitute a ‘financial debt’**. Hence, Spade and AAA are not financial creditors of the Corporate Debtor.

(emphasis supplied)

25. We have kept the above *dictum* of the Hon'ble Supreme Court in mind while deciding the present issue. In this background, our analysis of the facts and documents on records is as below.

#### **Loan given by Prarthana to the Corporate Debtor**

- i. In the application u/s 7 filed by the Financial Creditors, under the caption “facts of the case” it has been alleged that a loan to the tune of Rs 55,00,000 was provided to the Corporate Debtor by Prarthana.
- ii. In part IV of the application where particular of the financial debt has to be provided, it is stated that amount of loan granted by the Financial Creditor is 4,25,00,000 out of which an amount of Rs 2,50,00,000 has been received from the Corporate Debtor and the balance amount of Rs 2,10,00,00 is due and payable by the Corporate Debtor. These figures of 4,25,00,000, Rs 2,15,00,000 and Rs. 2,10,00,000 have been given jointly for both Financial Creditors.
- iii. The Loan Agreement dated 14.04.2014 provides that Prarthna has agreed to grant a loan of Rs 2,17,00,000 to the Corporate Debtor through net

banking channel. The Loan Agreement provides that the amount borrowed by the Corporate Debtor shall be construed as Inter Corporate deposit. It further provides that the same shall be repaid on demand of Prarthna. The Interest Rate is 10% per annum payable quarterly. The Loan Agreement except the specific particulars, in material terms, is identical with the loan agreement of Active and Nikita.

iv. The bank statements of Prarthana for its account maintained with Kotak Mahindra Bank and HDFC Bank have been placed on record. We have scrutinized the entries in the bank statement. From the Kotak Bank Account, an amount of Rs 60,00,000 appears to have been paid to the Corporate Debtor on 16.04.2014. Another amount of Rs 65,00,000 was credited to the Corporate Debtor on 16.04.2014. On 17.04.2014 a total amount of 12,50,00,000 was credited back from the Corporate Debtor to Prarthana Sales Pvt Ltd. Likewise, from the HDFC bank account statement, it appears an amount of Rs 35,00,000 was credited on 15.10.2014. Another amount of Rs 40,00,000 was credited to Corporate Debtor on the same day. On 17.10.2014, there is a reverse entry of 75,00,000 from the Corporate Debtor to the Financial Creditor.

v. The “amount claimed to be in default and the date on which the default occurred” the principal amount is stated to be Rs.70,00,000/- (by addition of 50,00,000 and 20,00,000 respectively) and the date of disbursement is 03.11.2014 and 18.12.2014. This table makes no reference to the other amounts disbursed to Prarthana and receipts by Prarthana, as is borne out from Prarthna’s bank statements.

#### **Loan given by Active to the Corporate Debtor**

- (i) In the application u/s 7 filed by the Financial Creditors, under the caption “facts of the case” no particulars of the loan provided by Active have been given. It appears that the details of Active and Nikita have been subsumed within the debt of Narsingh.

- (ii) In part IV of the application where particular of the financial debt has to be provided, it is stated that amount of debt granted by the Financial Creditor is 4,25,00,000 out of which an amount of Rs 2,50,00,000 has been received from the Corporate Debtor and the balance amount of Rs 2,10,00,00 is due and payable by the Corporate Debtor. These figures of 4,25,00,000, Rs 2,15,00,000 and Rs. 2,10,00,000 have been given jointly for both FC's.
- (iii) The Loan Agreement dated 15.12.2014 provides that Active has agreed to grant loan of Rs 50,00,000/- to the Corporate Debtor through net- banking channels. The Loan Agreement provides that the amount borrowed by the Corporate Debtor shall be construed as Inter Corporate deposit. It further provides that the same shall be repaid on demand of Active. The interest rate is 10% per annum payable quarterly. The Loan Agreement except the specific particulars, in material terms, is identical with the loan agreement of Prarthana and Nikita.
- (iv) The bank statement of Active for its account maintained with HDFC Bank discloses that an amount of Rs 50,00,000 was transferred to the Corporate Debtor on 18.12.2014. Since the complete bank statement has not been filed, we are unable to see, if there are any further transactions between the parties thereafter.
- (v) In Annexure D, which is titled as "amount claimed to be in default and the date on which the default occurred", while the name of Active is not specifically mentioned, it states that an amount of Rs 50,00,000 was disbursed on 18.12.2015. The statement also shows that the last date of receipt of interest was 13.01.2015.

#### **Loan given by Nikita to the Corporate Debtor**

- (i) In the application u/s 7 filed by the Financial Creditors, under the caption "facts of the case" no particulars of the loan provided by Nikita have been specifically provided. It appears that the details of Nikita have been subsumed within the purported debt of Narsingh.

- (ii) In part IV of the application where particulars of the financial debt have to be provided, it is stated that amount of loan granted by the Financial Creditor is Rs 4,25,00,000 out of which an amount of Rs 2,50,00,000 has been received from the Corporate Debtor and the balance amount of Rs 2,10,00,00 is due and payable by the Corporate Debtor. These figures of 4,25,00,000, Rs 2,15,00,000 and Rs. 2,10,00,000 have been given jointly for both Financial Creditors.
- (iii) The Loan Agreement dated 13.10.2014 provides that Nikita has agreed to grant a loan of Rs 1,05,00,000 to the Corporate Debtor through net banking channel. The Loan Agreement provides that the amount borrowed by the Corporate Debtor shall be construed as Inter Corporate deposit. It further provides that the same shall be repaid on demand of Nikita. The Interest Rate is 10% per annum payable quarterly. The Loan Agreement except the specific particulars, in material terms, is identical with the loan agreement of Prarthana and Active.
- (iv) Bank statement of Nikita have not been placed on record.
- (v) In Annexure C, which is titled as “amount claimed to be in default and the date on which the default occurred”, the name of Nikita is not specifically mentioned. It appears that while the loan agreement was with Nikita, the amount of Rs1,05,00,000/- was not disbursed by Nikita but by Narsingh.

#### **Loan given by Narsingh to the Corporate Debtor**

- (i) In the application u/s 7 filed by the Financial Creditors, under the “facts of the case” it has been alleged that a loan to the tune of Rs 1,05,00,000 was provided to the Corporate Debtor by Narsingh.
- (ii) In part IV of the application where particular of the financial debt have to be provided, it is stated that amount of debt granted by the Financial Creditors is 4,25,00,000 out of which an amount of Rs 2,50,00,000 has been received from the Corporate Debtor and the balance amount of Rs 2,10,00,00 is due and payable by the Corporate Debtor. These figures of 4,25,00,000, Rs

2,15,00,000 and Rs. 2,10,00,000 have been given jointly for both Financial Creditors.

- (iii) There is no loan agreement with Narsingh.
- (vi) The bank statement of Narsingh with HDFC Bank for the period 14.10.2014 till 22.01.2015 only has been placed on record. This discloses that an amount of Rs 1,05,00,000 was remitted to the Corporate Debtor. Perhaps this was done on behalf of Nikita since there is no loan agreement between Narsingh and Corporate Debtor. Since the complete bank statement has not been filed, we are unable to see, if there are any further transactions between the parties thereafter.
- (vii) In Annexure C, which is titled as “amount claimed to be in default and the date on which the default occurred”, discloses that Narsingh remitted Rs. 1,05,00,000 on three different dates and the interest has been received from 2014-15, 2015-16 and 2016-17.
26. The above analysis takes us to the Assessment Order dated 31.12.2018 passed by the Income Tax department against the Corporate Debtor. As detailed above, the income tax department had carried out a raid in the premises of Corporate Debtor which led to seizure of material which showed the assessee i.e., Corporate Debtor had *inter alia* received an unsecured loan of Rs 2,70,00,000 from Prarthna. The assessment order further records that the assessee was asked to produce all details of the loan taken from Prarthana however, the assessee had failed to provide any information. The income tax department on its own investigation unearthed that the directors of Prarthana were Mr. Anand Prakash Kejriwal and Ms Jyoti Kejriwal. Mr. Anand Prakash Kejriwal and Ms. Jyoti Kejriwal were also the directors of Narsingh, Active and Nikita. After noting the above details, the assessment order in para 6.3 (b) notes as under:-

It will be appropriate to take notice of the commonly known notorious facts about the modus operandi of converting ***the unaccounted funds by different companies by taking unsecured loan from willing dubious entities. These entities are mere paper/shell companies having no real business activity and incorporated for the purpose of providing***

**unsecured loan to different beneficiary companies in the form of share capital, unsecured loan, etc in lieu of commission. Further an analysis of bank statement of such companies revealed that every single credit to the account was correspondingly followed by a debit either on the same day or near about dates.** This pattern is repeated in the entire period. Hence, the real and actual source of all such credits is not readily ascertainable in view of layering of money. **In the present case of the assessee, same modus operandi was followed.**

(emphasis supplied)

27. The Income Tax department further found that Prarthana was a paper/ shell company of one Mr. Sandeep Surekha who is referred to as an entry operator / accommodation entry provider. The subsequent relevant observations from the Income Tax order are as below:-

“6.3.d. During the course of this proceeding notice u/s 133(6) of the Act was issued to Divya J Electronics Pvt Ltd, M/s NGPS Solution Pvt Ltd, **M/s Prarthana Sales Pvt Ltd** & M/s Ranbhumi Marketing Pvt Ltd production of evidences related to transaction in form of unsecured loan. **But no plausible explanation has been received from the parties.** The assessee was, thereafter, asked to substantiate its claim of unsecured loan by producing the said party along with supporting documents and evidences but no compliance was made from the assessee end.

As per seized material, the assessee company received unsecured loan of Rs. 3,30,00,000/- from the above mentioned companies.

....

7.a On overall consideration of facts and circumstances of the case and as per above discussion, **the amounts claimed to be received by the assessee are not in any way genuine unsecured loans. They are nothing but arranged affairs being pre-ordained series of transactions and tax evasion device where money laundering transactions have been camouflaged as unsecured loan.**

7.b The agreement about real transactions takes place in secret and direct evidence about such discreet transaction/agreement would be not available to the department in the normal circumstances during assessment proceedings. The result of these transactions **was designed in such a way that in this transaction unaccounted money was to be brought in the business by the assessee.** The Legislature cannot take care of every device and scheme misused to evade taxation. It is for the implementing authorities to investigate the nature of the sophisticated legal devices adopted by the taxpayer to evade or avoid tax and consider whether the situation created by the devices could be related to the avoidance of the payment of taxes. The modus operandi adopted by the assessee has been

found to be a method of evading taxes being non-genuine transactions without being verifiable.

7.c These are, by nature 'make believe transactions which do not deserve to be accepted as genuine. **The truth or genuineness of such transactions must prevail over the smoke screen, created by way pre-meditated series of steps taken by the assessee, with a view to imparting a colour of genuineness and character of commercial nature, to such unsecured loan transactions.**

7.d **The unsecured loan was taken by the assessee from companies who did not have own fund, any business and physical asset. If we look behind these transactions then it is clear that the sole purpose for which the transactions were done was to generate capital in the business and in that event the assessee has to be made liable to pay taxes which it would have paid but for the arrangement of these transactions.**

7.g The assessee has not deliberately produced the lenders who gave unsecured loans to the assessee to stop the further investigation which may result in examination of the bank accounts and book of accounts of the three lender **companies which are basically shell/paper/khokha companies. There has been a mushrooming growth of professional entry operators in the country but more particularly in Kolkata, who provide such unsecured loan for a commission.** Assessee's non-cooperation and evasive tactics proves its conduct.

(emphasis supplied)

28. Ultimately, the Income Tax department held that the Corporate Debtor (assessee) had failed to establish the genuineness of the transactions and in exercise of its power u/s 68 of the Income Tax Act, added Rs 3,30,00,000 as income of the assessee.
29. We may note here that the finding in the assessment order that “.... *every single credit to the account was correspondingly followed by a matching debit either on the same day or nearby dates.....*” applies to the present facts since at least on two occasions amounts that were credited to the account of the Corporate Debtor were paid back on the very next day. For instance, Rs. 1,25,00,000 remitted by Prarthana (in two instalments of Rs 60,00,000 and Rs 65,00,000) to Corporate Debtor were credited back into the account of Prarthna by the Corporate Debtor on the very next day. The same methodology was repeated when Rs 75,00,000 debited from the account of Prarthana on

15.10.2014 were paid back by Corporate Debtor on 17.10.2014.

30. As per the MCA Records filed by the Corporate debtor, both the Financial Creditors have a common registered address i.e., 16, Strand Road 7<sup>th</sup> Floor, Room No-709A, Kolkata WB 700001. The Corporate Debtor has also placed on record the Forensic Audit report dated 14.01.2021 which mentions in paragraph 16.1.1.1 that the analysis of financial statements of the Corporate Debtor reveals that it had repaid/adjusted unsecured loans/operational debts during FY 2015-16 and 2016-17 amounting to preferential transactions as below.

S. No.	Party Name	Amount Repaid
1.	Nikita Vyapaar Private Ltd.	1.12 Crore
2.	Narsingh Mercentile Pvt Ltd.	0.07 Crore
3.	Prarthana Sales Pvt Ltd.	0.05 Crore
4.	Active Commercial Pvt Ltd	0.53 Crore

31. In addition to the above, there are other circumstances which prompt and compel us to conclude that there is something more than what meets the eye. These circumstances are:-

- (i) All loan agreements are of the year 2014. They are almost identically worded except with respect to details of the lenders and the quantum of amounts to be disbursed.
- (ii) All loan agreements postulate giving of unsecured loans. It is also unusual that there is no tenure for repayment of the loans and all of them are repayable on demand.

(iii) Nothing is forthcoming from the Financial Creditors(except a bare statement that the loans were given as inter corporate deposits) about the purpose for which the loans were disbursed. This is despite a pointed objection taken by the Corporate Debtor that the Financial Creditors are not registered as NBFC's or registered under the Bengal Money Lenders Act, 1940, nor their Memorandum permits granting such loans, and as such could not have provided the loans. No explanation on this count has also come forth from the Financial Creditors.

(iv) The Financial Creditors have also not provided any details of their operations, business and other relevant credentials despite adverse observations made against Prarthana in the Income tax assessment order to the effect that it is a shell/paper company involved in giving of collusive loans as accommodation entries.

(v) All four companies involved namely Prarthana, Active, Nikita and Narsingh had common directors at the relevant point of time. The registered office of both financial creditors is also the same.

(vi) No explanation has come forward from the Financial Creditors about the disbursements made by Prarthana on 16.04.2014 and 17.10.2014 which were immediately paid back by Corporate Debtor in a day or two. This factum of receipt and immediate payback has been taken notice by income tax department as "*commonly known modus operandi of converting the unaccounted funds by different companies by taking unsecured loan from willing dubious entities*".

(vii) Another unexplained fact is that even though as per the Financial Creditors' own case, the Corporate Debtor had stopped paying interest from 2015-16 and 2016-17, there is not a single correspondence on record from Financial Creditors alleging default, seeking repayment of their monies back or even checking on status of their outstanding amounts. In other words, even though the default had

taken place as far back as 2016-2017, no steps appear to have been taken by Financial Creditors who suddenly took action to seek repayment in the year 2020. This unexplained slumber by the Financial Creditors for over four years does not inspire confidence and is inconsistent with the normal conduct expected of a bona fide lender.

32. The aforesaid facts do really cast serious doubts on the genuineness of the transactions alleged to be financial debt by the Financial Creditors. The facts regarding existence of Financial Debt, disbursement and default do not reconcile with the documents placed on record. On top of this, as stated above the Assessment Order passed in respect of the Corporate Debtor and the Forensic Audit Report further strengthen the suspicion in respect of the authenticity and *bona fides* of the transactions in question. The Financial Creditor has argued that the Assessment Order is only applicable with regards to assessee and does not bind the Financial Creditors. It is further contended that the same only speaks of Prarthna. This objection is unwarranted. We have not held that the Income tax Assessment Order is binding on this Tribunal. We are of the view that the entire gamut of facts, the interrelationship between the Financial Creditors (and Nikita and Active which merged into Narsingh), the forensic Audit Report and the analysis of the facts that we have done above, leave us unpersuaded to commence CIRP against the Corporate Debtor.
33. We cannot therefore in exercise of our summary jurisdiction under the Code, conclude that a *bona fide* Financial Debt exists. For this reason, this petition under Section 7(1) of the Code is not maintainable and hence we reject the Petition. We have not, and this Order should not be seen as expressing any opinion on the other remedies, if any, available to the Financial creditors to ventilate their grievances in accordance with law.
34. C.P.(IB) No. 964/KB/2020 is accordingly dismissed.
35. Certified copy of the order may be issued to all the concerned parties, if applied

for, upon compliance with all requisite formalities.

**(Harish Chander Suri)**  
**Member (Technical)**

**( Rohit Kapoor)**  
**Member (Judicial)**

Order signed on, this 13<sup>th</sup> day of June, 2022

PJ