IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH

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

SHRI RAJEEV MEHROTRA,
HON'BLE TECHNICAL MEMBER

IA No. 381/JPR/2023
& CP No. (IB)- 75/7/JPR/2022

(Under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)

MEMO OF PARTIES

BANK OF BARODA
Branch Office at Bank of Baroda,
ROSARB, 2nd floor, Baroda
Bhawan, 13 Airport Plaza,
Durgapura, Tonk Road,
Jaipur, Rajasthan – 302018

...Financial Creditor/ Applicant

VERSUS

M/s U.N. AUTOMOBILES PVT. LTD.
CIN: U51109RJ1997PTC014506
UN Workshop, Govardhan Vilas, N.H.8,
Valicha Udaipur, Rajasthan – 313001

...Corporate Debtor/ Respondent

Sd/-

Sd/-

AND IN THE MATTER OF:
IA No. 381/JPR/2023

M/S U.N. AUTOMOBILES PVT. LTD.
Through director Mr. Amit Prakash Gupta
UN Workshop, Govardhan Vilas, N.H.8,
Valicha Udaipur (Raj.) – 313001.

.... Applicant

Versus

BANK OF BARODA
ROSARB, 13 Airport Plaza, Durgapura
Road, Jaipur (Raj.) – 302018.

.... Non Applicant

For Financial Creditor	:	Anubha Singh, Adv.
For Corporate Debtor	:	Sandeep Taneja, Adv. Karan Partap Singh, Adv.

Order Pronounced On:28.08.2024

ORDER

Per: Shri Rajeev Mehrotra, Technical Member

1. The Company Petition bearing *CP No. 75/7/JPR/2022* has been filed by *Bank of Baroda* ('Financial Creditor'/ 'Bank') against the Corporate Debtor, namely, *M/s U. N. Automobiles Private Limited* ('Corporate Debtor') under section 7 of the Insolvency and Bankruptcy Code, 2016 ('IBC'/ 'Code') read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating

Sd-   Sd-

Authority) Rules, 2016 seeking initiation of the Corporate Insolvency Resolution Process ('CIRP') of the Corporate Debtor on account of default in repayment of the outstanding loan amount.

2. The Corporate Debtor is a Private Limited Company incorporated on 22.12.1997 and duly registered with the Registrar of Companies, Jaipur, having Identification No. U51109RJ1997PTC014506. The registered office of the Corporate Debtor is situated at U.N. Workshop, Govardhan Vilas N.H.8, Valicha Udaipur- 313001 (Rajasthan). The authorized share capital of the Corporate Debtor is Rs. 15,00,00,000/- (Rupees Fifteen Crores Only) and the paid-up share capital is Rs. 13,83,69,500/- (Rupees Thirteen Crore Eighty-Three Lakh Sixty-Nine Thousand Five Hundred Only). The same has been verified from the online database maintained by the Ministry of Corporate Affairs.

3. The details of the transactions leading to the filing of the Company Petition bearing *CP No. (IB)- 75/7/JPR/2022* as averred by the Financial Creditor are as follows:

   3.1 The Financial Creditor had preferred the instant Application under Section 7 of the Code against the Corporate Debtor due to default in repayment of the loan by the Corporate Debtor.

   3.2 Initially, the Corporate Debtor availed a credit facility to the tune of Rs. 35 Crore from *State Bank of India*. Subsequently, the Corporate

Sd-　　　Sd-

Debtor approached the Financial Creditor i.e., *Bank of Baroda*, for takeover of the aforementioned loan in the year 2010. Accordingly, the Financial Creditor granted loans to the tune of Rs. 35 Crores for a period of 12 months *vide* sanction letter dated 21.05.2010 and the same was secured by way of mortgage and deed of Guarantee by one of the directors of the Corporate Debtor. The details of the loans advanced by the Financial Creditor are as follows: -

Nature of Facility	**Proposed Limits (Amount: in Rs.)**
Corporate loan	15,00,00,000/-
Cash Credit	20,00,00,000/-
Total Exposure	**35,00,00,000/-**

3.3 Thereafter, the Corporate Debtor again approached the Financial Creditor for taking over the loan amounting to Rs. 2.76 Crores from *Udaipur Urban Cooperative Bank* and the same was secured by a composite guarantee deed executed by one of the directors of the company.

3.4 The Corporate Debtor sought increase in the cash credit facility from Rs. 20 Crores to 27.50 Crores and an additional stand by Cash Credit limit of Rs. 2.75 Crores. The aforementioned request was allowed by the Financial Creditor *vide* Sanction Letter dated 23.08.2011. The

Sd-   Sd-

revised loan facilities extended by the Financial Creditor to the Corporate Debtor are as follows:-

Nature of Facility	***Limit (Rs in Lacs)***	***Remark***
Corporate Loan I	*1286*	*Renewed at run down balance from limit of Rs. 1500 lac*
Corporate Loan II	*256*	*Renewed at run down balance from limit of Rs. 276 Lac*
Cash Credit	*2750*	*Increased from Rs. 2000 Lac to Rs. 2750 Lac*
Stand by Cash Credit Limit	*275*	*Fresh Sanction*
Total	***4567/-***	

3.5 The Corporate Debtor further requested the Financial Creditor for grant of Rs. 4 Crore for a period of 60 days. The Financial Creditor sanctioned the said amount *vide* Sanction Letter dated 09.02.2012. The credit facilities extended by the Financial Creditor stood revised accordingly, and the same is reproduced hereunder:-

Nature of Facility	***Revised Limit (In Crore)***	***Old Limit (In Crore)***
Corporate Loan I	*11.78*	*12.86*
Corporate Loan II	*1.43*	*2.56*
Cash Credit	*27.50*	*27.50*
Stand by Cash Credit Limit	*2.75*	*2.75*
AdHoc Cash Credit Limit	*4.00*	*Fresh Sanction*
Total	*47.46*	*45.67*

3.6 It was submitted that all the aforementioned credit facilities were secured by the Corporate Debtor by mortgaging the properties as

Sd-

Sd-

provided under Schedule-A of the present Application with the Financial Creditor.

3.7 The Corporate Debtor defaulted in the repayment of the aforementioned loan facilities. Thereafter, the Financial Creditor filed an Application before the Debt Recovery Tribunal, Jaipur ('DRT'), bearing no. *O.A. No. 10/2014* wherein the Financial Creditor has claimed the following amount:-

Nature of Facility	***Total Amount payable as on 20.11.2013 (Rs.)***	***Further Interest to be paid on the respective balance outstanding stated under column (c) @ per annum stated hereunder to be calculated on monthly rest.***
Corporate Loan I	*14,68,21,300/-*	*15.75%*
Corporate Loan II	*2,35,70,869/-*	*15.75%*
Cash Credit Account (relating to Commercial Vehicle Segment)	*30,17,91,516/-*	*15.75%*
Cash Credit Account (relating to Passenger Car Segment)	*9,23,05,031/-*	*15.75%*
Total	*56,44,88,716/-*	

3.8 In the meantime, the Corporate Debtor entered into a One-Time Settlement ('OTS') *vide* Compromise Sanction Letter dated 24.12.2015 and the same was filed before the Hon'ble Debt Recovery Tribunal, Jaipur. The Debt Recovery Tribunal, Jaipur issued a consent

Sd-

Sd-

Recovery Certificate *vide* its Order dated 28.01.2016 in *O.A. No. 10/2014*.

3.9 Thereafter, the Corporate Debtor and the Financial Creditor filed a joint miscellaneous Application before the Debt Recovery Tribunal seeking modification of the Order dated 28.01.2016 and modification of condition no. 15 in the Compromise Sanction Letter. The DRT, Jaipur issued the amended Consent Recovery Certificate on 30.03.2016. For ease of reference, the modified condition no. 15 is reproduced hereunder:-

> *"Issue provisional NOC, if required, to facilitate deal for sale of property, provided the Purchaser agrees for depositing the sale amount directly with our Bank in ESCROW Account and at the specific request of the borrower company for entering into any JV for redevelopment or conversion of land, provisional NOC will be issued to facilitate the conversion/redevelopment of land."*

3.10 The Corporate Debtor made the following part payments towards the credit facilities extended by the Financial Creditor:

Sr. No.	***Date***	***Amount Received***	***Particulars***
1.	*11.09.2019*	*2,62,35,000/-*	*Being amt. received as per DRT order 31.07.2019 & 02.09.2019*
2.	*10.12.2019*	*1,48,00,000/-*	*Amt. transferred from ESCROW account*
3.	*02.11.2021*	*20,00,000/-*	*NPA recovery*
4.	*24.11.2021*	*1,25,00,000/-*	*NPA recovery*
5.	*29.01.2022*	*1,95,00,000/-*	*NPA Recovery*
6.	*31.01.2022*	*8,10,000/-*	*NPA Recovery*

Sd-

Sd-

7.	*30.07.2022* *16.08.2022* *26.10.2022*	*1,25,00,000/-* *82,70,000/-* *6,12,02,000/-*	*Public Auction by Bank done on 28.07.2022 under SARFAESI Act*
	Total	*13,42,05,500/-*	

3.11 It was submitted that the Corporate Debtor failed to adhere to the terms of repayment as provided in the Consent Recovery Certificate. Thus, the Financial Creditor simultaneously took action under SARFAESI Act, 2002 against the Corporate Debtor for recovery of the outstanding amount.

3.12 It was contended that as on date, the outstanding amount in default is Rs. 192,92,07,828/- (Rupees One Ninety-Two Crore Ninety-Two Lakhs Seven Thousand Eight Hundred Twenty-Eight Only). The relevant details as enumerated under Part IV of the instant Application are reproduced hereunder:

Part IV

PARTICULARS OF FINANCIAL DEBT

1.	Total Amount of debt, Details of Transactions on Account of which Debt fell Due, And the date from which such debt fell due	**Total Amount of Financial Debt:** Rs. 192,92,07,828/- (Rupees One Ninety-Two Crore Ninety-Two Lakhs Seven Thousand Eight Hundred Twenty-Eight Only) as on 31.10.2022 plus future interest @ 15.75% (per Annum) as per amended consent recovery certificate dated 30.03.2016 issued by DRT, Jaipur.

Sd- Sd-

		The date of default is taken to be 31.01.2022, as last date of payment received from the Corporate Debtor is 31.01.2022 **Details of Transaction:** **Date from Which such Debt Due:** The due date of the debt is 30.03.2016.
2.	Amount claimed to be in default and the date on which the default occurred	**Amount Claimed to be in Default:** Rs. 192,92,07,828/- (Rupees One Ninety-Two Crore Ninety-Two Lakhs Seven Thousand Eight Hundred Twenty-Eight Only) as of 31.10.2022 plus future interest @ 15.75% (per Annum). The date of default is taken to be 31.01.2022, as the last date of payment received from the Corporate Debtor is 31.01.2022.

4. The Corporate Debtor filed a Reply to the Application *vide* Dairy No. 807/2023 dated 28.03.2023 wherein it raised the following contentions:-

4.1 The Corporate Debtor contended that the present Application has been filed without any authorization. In the absence of any Power of Attorney, Letter of Authorisation, or any other similar documents, the Application filed under Section 7 is not maintainable.

4.2 The Corporate Debtor contended that no default as alleged by the Financial Creditor has taken place. It was pointed out that a Consent

Sd- Sd-

Recovery Certificate was passed by the DRT *vide* Order dated 28.01.2016 and the same was modified on the joint application of the parties *vide* Order dated 30.03.2016. As per the compromise, the Corporate Debtor had to sell the properties or enter into Joint Venture/Development Agreement w.r.t the properties which were mortgaged with the Financial Creditor and the sale proceeds received from the same were to be deposited with the Financial Creditor. The Financial Creditor thwarted the efforts of the Corporate Debtor to sell the properties and rendered the adherence to the terms and conditions of the compromise impossible.

4.3 It was submitted that on the one hand the Financial Creditor failed to adhere to the terms of the Compromise and on the other, it frustrated the Compromise *vide* letters dated 01.09.2018, 06.09.2018, and 18.09.2018. Further, the Corporate Debtor, on multiple occasions, has requested the Financial Creditor to restore the compromise, however, no heed was paid to the said request.

4.4 Being aggrieved by the conduct of the Financial Creditor, the Corporate Debtor approached the Hon'ble Rajasthan High Court by filing a Writ Petition bearing no. *S.B.C.W.P. 15514/2018* titled as *UN Automobiles Pvt. Ltd. & Ors. v/s Bank of Baroda.* The Hon'ble High Court *vide* its Order dated 12.10.2018 disposed the aforementioned Writ Petition with

Sd-

Sd-

the observation that violation of terms of the compromise settlement by the Financial Creditor is to be adjudicated upon by the Debt Recovery Tribunal.

4.5 In pursuance of the directions given by the Hon'ble Rajasthan High Court, the Corporate Debtor approached the DRT, Jaipur and filed a miscellaneous application bearing no. *(MA) No. 81/2018* seeking inter alia the restoration of the compromise and setting aside of the letters of Financial Creditor dated 01.09.2018, 06.09.2018 and 18.09.2018.

4.6 Moreover, during the pendency of the aforementioned MA, the Corporate Debtor has sold its numerous properties/ assets, after taking the leave of the DRT and has deposited the proceeds of sale with the Financial Creditor. In lieu of the payments being made by the Corporate Debtor to the Financial Creditor, Financial Creditor is issuing No Objection Certificates for selling the properties. Thus, the Financial Creditor is operating in the manner envisaged in the Compromise. Further, the Financial Creditor has granted an NOC on 04.03.2023 to the Corporate Debtor in compliance of the directions of the DRT. It was contended that on the one hand the Financial Creditor is accepting the payments from the Corporate Debtor and on the other it is alleging default and has filed the instant Petition.

Sd-

Sd-

4.7 In view of the pendency of *(MA) No. 81/2018* wherein the restoration and revival of the compromise is pending adjudication before the Ld. DRT, Jaipur, under no circumstances a default, as defined under Section 3(12) of the IBC, 2016 can be said to be committed by the Respondent. Therefore, the instant Petition is not maintainable and warrants dismissal.

4.8 It was contended that the Financial Creditor has not filed the financial information with the information utility as mandated under the IBC, 2016 and the Rules made thereunder.

4.9 Further, without compromising the argument qua non-occurrence of default, the Corporate Debtor submitted that the present Petition is barred by limitation. In the part IV of the Petition, it has been stated that the debt fell due on 30.03.2016 and the date of default is 31.01.2022. Thus, the debt is barred by limitation. Furthermore, it has been contended that the Financial Creditor has wrongly calculated the amount claimed in Part IV of the Petition and the same is not supported by any documentary evidence.

4.10 The Corporate Debtor has contended that it is a solvent entity and initiating the CIRP against it will go against the spirit of the Code.

5. The Corporate Debtor has filed an Additional Affidavit *vide* Diary No. 1056/2023 dated 27.04.2023 wherein the Corporate Debtor reiterated the

Sd-

Sd-

submissions made in the Reply and filed the Orders passed in the *(MA) No. 81/2018* by the Ld. DRT.

6. The Corporate Debtor has filed another Additional Affidavit *vide* Diary No. 1411/2023 dated 02.06.2023 wherein the Corporate Debtor reiterated its earlier submissions and filed a copy of the Order dated 23.05.2023 passed by the Ld. DRT in *(MA) No. 81/2018*. The relevant extracts of the Order dated 23.05.2023 passed by the Ld. DRT are reproduced hereunder:-

> *"69. So, considering all the cumulative effects, the grounds and evidence, so filed on record, I am of the view that the Applicant, is entitled for a period of 12 months in order to complete the repayment of remaining amount as per OTS/Settlement and the repayment schedule shall start from the date of this Order.*
>
> ...
>
> *71. It is clarified that both the parties shall follow the terms & conditions of OTS/Settlement/Consent Recovery Certificate and Respondent Bank, shall provide all assistance, if the Applicant comes with a proposal to sell the subject plots, which is more than the value, so obtained by the Bank."*

7. The Financial Creditor has filed an Additional Affidavit *vide* Diary No. 1632/2023 dated 03.07.2023 wherein it has filed the copies of record of information utility filed by the Bank with National E-Governance Services Limited ('NeSL') in relation to the default committed by the Corporate Debtor.

Sd-

Sd-

8. The Corporate Debtor filed a Counter Affidavit *vide* Diary No. 1677/2023 dated 12.07.2023 to the Additional Affidavit of the Financial Creditor filed *vide* Diary No. 1632/2023 dated 03.07.2023. It was contended in the Counter Affidavit that the Financial Creditor has not filed any authorization letter and thus, the NeSL certificate filed by the Financial Creditor cannot be taken on record.

9. Further, the Corporate Debtor has filed an Interlocutory Application bearing no. *IA(IBC) No.381/JPR/2023 vide* Dairy No. 1676/2023 dated 12.07.2023 under Section 60(5) of the Code read with Rule 11 of NCLT Rules, 2016 inter-alia seeking the following reliefs:-

   I. *"The proceedings in the captioned petition be deferred till the final disposal of the S.B. Civil Writ Petition No. 8690/2023, which is pending adjudication before the Hon'ble Rajasthan High Court, Jaipur Bench.*

   II. *The documents filed along with the present application be taken on record"*

10. The facts of the Application bearing *IA No. 381/JPR/2023* as contended by the Corporate Debtor are as follows:

    10.1 The Corporate Debtor filed a Miscellaneous Application *(MA) No. 81/2018* before the DRT for restoration of the compromise sanctioned and quashing of the letters of the Financial Creditor dated

Sd-　　　　　　　　Sd-

01.09.2018, 06.09.2018, and 18.09.2018. The Ld. DRT *vide* its Order dated 23.05.2023 in the *(MA) No. 81/2018* extended the period of compromise by 12 months in order to complete the repayment of remaining amount as per OTS/Settlement by the Corporate Debtor to the Financial Creditor.

10.2 The Financial Creditor assailed the Order dated 23.05.2023 passed by Ld. DRT in *(MA) No. 81/2018* by filing a Writ Petition bearing *S.B.C.W 8690/2023* before the Hon'ble Rajasthan High Court. The Financial Creditor also filed a Stay Application before the Hon'ble High Court bearing no. *S.B. Civil Misc. Stay Application No. 8206/2023*.

10.3 The Hon'ble High Court *vide* its Order dated 02.06.2023 in *S.B.C.W 8690/2023* stayed the operation of the Order of the Ld. DRT dated 23.05.2023 passed in *(MA) No. 81/2018*. A copy of the Order of the Hon'ble High Court dated 02.06.2023 has been annexed as Annexure-A/3 of the instant I.A.

10.4 Taking into account the aforementioned facts and circumstances, it is amply evident that the Hon'ble High Court has not quashed the Order of the Ld. DRT dated 23.05.2023, rather, the Writ Petition is pending at the initial stage. Moreover, it is a settled principle of law

Sd-

Sd-

that a stay order does not wipe out the existence of any order but merely stays the operation of an order for a temporary basis.

10.5 Further, the Financial Creditor in the relief clause of the Stay Application has specifically sought the relief that the pendency of the Writ Petition would not impair or prejudice the captioned insolvency petition filed by the Financial Creditor. The Hon'ble High Court has not granted the aforesaid relief as sought by the Financial Creditor. The said relief makes it apparent that the Financial Creditor was aware of the fact that the Order of the Ld. DRT dated 23.05.2023 has significant bearing on the proceedings before this Adjudicating Authority. Further, mere stay of the Order of the DRT by the Hon'ble High Court will not entitle the Financial Creditor to pursue the proceedings before this Adjudicating Authority. Thus, it is prayed that the insolvency petition be deferred till the final disposal of the *S.B. Civil Writ Petition No. 8690/2023*.

11. The Corporate Debtor filed its Written Arguments *vide* Diary No. 1579/2024 dated 27.06.2024 wherein it reiterated its earlier submissions and placed reliance upon the following Judgments:-

11.1. *Shree Chamundi Mopeds Ltd. v/s Church of South India Trust Association CSI Cinod Secretariat, Madras AIR 1992 SC 1439*

11.2. *Kanoria Chemicals & Industries Ltd. & Ors. v/s UP State Electricity Boards & Ors (1997) 5 SCC 772*

Sd-

Sd-

11.3. *State of UP through Secretary v/s Prem Chopra 2022 SCC OnLine SC 1770*

11.4. *Ramdas Dutta v/s IDBI Bank Ltd. & Ors. 2023 SCC OnLine NCLAT 1306*

11.5. *M.K. Dhir & Ors. v/s Punjab National Bank & Ors 2022 SCC OnLine NCLAT 32*

12. We have heard the Ld. Counsels for the parties and perused the averments made in the Petition, Reply, Affidavits, and Interlocutory Application along with the documents enclosed therein.

13. Before delving into the merits of the case, we may recapitulate some of the significant events and relevant dates which are going to have a bearing on the determination of the present case. To deal with the contention raised by the parties, it is relevant to set out certain facts concerning the debts advanced by the Financial Creditor to the Corporate Debtor:-

13.1. The Corporate Debtor who is engaged in the business of automobile dealership availed various loan facilities from the Financial Creditor. The entire limit of loan i.e., Rs. 47,46,00,000/- (Rupees Forty Seven Crore and Forty Six Lakh Only) was secured by various immovable properties mortgaged by the Corporate Debtor. Thereafter, due to default in repayment of the loan facility, the Financial Creditor initiated the proceedings before the learned DRT by filing an Original Application bearing no. *10/2014* for recovering an amount of Rs. 56,44,88,716/- (Rupees Fifty-Six Crores Forty-Four Lakh Eighty-

Sd- Sd-

Eight Thousand Seven Hundred and Sixteen Only). During the pendency of the recovery proceedings, the Financial Creditor and the Corporate Debtor entered into a compromise which was sanctioned and approved by the Board of the Financial Creditor *vide* Sanction Letter and Board Meeting dated 24.12.2015. Both the parties agreed for the settlement amount of Rs. 44.83 Crores against the total dues and the said Compromise was valid upto 31.03.2018. The said compromise was filed by the parties before the Ld. DRT and consequently, a Consent Recovery Certificated dated 28.01.2016 was issued by the Ld. DRT.

13.2. Thereafter, both the parties jointly filed a Miscellaneous Application bearing *IA No. 23/2016* in *OA No. 10/2014* before the Ld. DRT for modification in the order of Consent Decree dated 28.01.2016. The parties sought substitution of condition no. 15 in the said OTS. The said Application was allowed by the Ld. DRT *vide* Order dated 30.03.2016 and an amended Consent Recovery Certificate was issued to the parties. For ease of reference, substituted condition no. 15 is reproduced hereunder:

> *"Issue provisional NOC, if required, to facilitate deal for sale of property provided the Purchaser agrees for depositing the sale amount directly with our Bank in ESCROW Account and at the specific request of the borrower company for entering into any*

Sd-

Sd-

JV for redevelopment or conversion of land, provisional NOC will be issued to facilitate the conversion/redevelopment of land"

13.3. As per the clause 11 of the Consent Recovery Certificate dated 30.03.2016, it was valid till 31.03.2018. The said period was extended by three months by the Financial Creditor i.e., till 30.06.2018. Due to the alleged non-compliance of the terms of the Compromise, the Financial Creditor frustrated the Compromise *vide* its letter dated 01.09.2018 and 06.09.2018 and the same was communicated to the Corporate Debtor.

13.4. The Corporate Debtor challenged the termination of the compromise before the Hon'ble Rajasthan High Court by filing a Writ Petition bearing no. *SBCWP 15514/2018*. The Hon'ble Rajasthan High Court disposed the said Writ Petition and observed that:

> *"As the entire dispute pertains to the issuance of the consent recovery certificate, terms thereof and the alleged violation of the terms by the Bank, the petition has to approach the Debt Recovery Tribunal only in this regard and the present writ petition seeking to question the validity of the above annexures cannot be entertained.*
> *In view of the above, the writ petition filed by the petitioners is dismissed leaving it open for the petitioners to approach the Debt Recovery Tribunal in accordance with law."*

13.5. In pursuance of the liberty given by the Hon'ble High Court, the Corporate Debtor filed a Miscellaneous Application bearing *(MA) No. 81/2018* before the Ld. DRT seeking restoration of the compromise

Sd- Sd-

and quashing of the termination letters issued by the Financial Creditor. It is pertinent to mention that during the pendency of the aforementioned Miscellaneous Application, the Bank has granted NOCs to the Corporate Debtor for selling its properties as per the directions of the Ld. DRT and the realised amount has been adjusted against the outstanding dues of the Corporate Debtor. Moreover, the Bank has issued NOC as late as 04.03.2023 in compliance of the Order of the Ld. DRT dated 28.02.2023.

13.6. Despite the Financial Creditor not agreeing to any further extension of the consent decree, frustration of which was already communicated to the Corporate Debtor, the Miscellaneous Application bearing no. *81/2018* was decided by the Ld. DRT *vide* Order dated 23.05.2023. The relevant extract of the Order dated 23.05.2023 is reproduced hereunder:-

> *"69. So, considering all the cumulative effects, the grounds and evidence, so filed on record, I am of the view that the Applicant, is entitled for a period of 12 months in order to complete the repayment of remaining amount as per OTS/Settlement and the repayment schedule shall start from the date of this Order."*

13.7. Being aggrieved by the order of the ld. DRT dated 23.05.2023 wherein the ld. DRT has extended the time period for completion of repayment provided under the OTS/ Recovery Certificate which expired on 31.03.2018, the Financial Creditor challenged the Order of the Ld.

Sd-

Sd-

DRT dated 23.05.2023 before the Hon'ble High Court by filing a Writ Petition bearing no. *SBCWP 8690/2023*. In the said Writ Petition, the Financial Creditor also filed a Stay Application. The Hon'ble High Court passed an ex-parte stay *vide* Order dated 02.06.2023. The relevant portion of the Order of the Hon'ble High Court dated 02.06.2023 is reproduced hereunder:-

> *"Meanwhile, operation of the order dated 23.05.2023 (Annexure-2) passed by the learned Debt Recovery Tribunal shall remain stayed"*

14. In the instant case, the Bank in Part IV has alleged a default of Rs. 192,92,07,828/- (Rupees One Ninety-Two Crore Ninety-Two Lakhs Seven Thousand Eight Hundred Twenty-Eight Only) as on 31.10.2022 plus future interest @ 15.75% (per Annum) as per amended consent recovery certificate dated 30.03.2016 issued by DRT, Jaipur. Further, the Bank has mentioned the date of default as 31.01.2022 and the due date as 30.03.2016.

15. It has been highlighted by the Financial Creditor that the Corporate Debtor is not carrying any business operations and therefore, there is no possibility of any repayment from any income of the Corporate Debtor. The status of the Corporate Debtor as per the website of the MCA has been verified and it is noted that the Corporate Debtor is categorized as *ACTIVE Non-Compliant* and its last Balance Sheet was made as on 31.03.2011 and the last AGM was held on 30.09.2011. Thus, as per the MCA data, the Corporate Debtor has

Sd- Sd-

not filed its annual accounts since 2011 and no AGM has taken place thereafter. Further, as per the master data, the Corporate Debtor has certain properties in its name against which a charge has been created in favour of the Financial Creditor, the same has been annexed as *Annexure-1* of the Petition.

16. Before delving into the issue at hand, we refer to Section 7 of the Code which clarifies that the Adjudicating Authority upon being satisfied that the default of financial debt has occurred, may order for initiation of CIRP of the Corporate Debtor. The key ingredients of an Application filed under Section 7 of the Code are: (i) there has to be a financial debt and; (ii) there must be a default in repayment of the financial debt. Hence, the Applicant must establish that there is a financial debt and that a default has been committed in respect of that financial debt by the Corporate Debtor. While dealing with an application under section 7, the Adjudicating Authority is not required to consider the question of the dispute between the parties as long as the 'debt' and 'default' is proved.

17. In the instant case, there is no dispute that the Corporate Debtor has availed various loan facilities from the Financial Creditor. The same is also corroborated by the Recovery Certificate and the proceedings before the learned DRT as well as the Hon'ble High Court. Thus, the existence of the first ingredient i.e. financial debt is nowhere in dispute among the parties.

Sd-

Sd-

18. In so far as the existence of default is concerned, as per the submission by the Corporate Debtor it is emphasised that they are not in default, as the consent decree stands extended vide DRT order dated 23.05.2023 and the same has been stayed by the Hon'ble High Court vide its order dated 02.06.2023. To the contrary, the Financial Creditor contended that the consent decree was already frustrated in 2018, and after 2022, no payment has been made by the Corporate Debtor despite the loan being recalled. Further, the Corporate Debtor has not made any effort to settle its loan liability and is trying to complicate the matter through multiple litigations. Therefore, the Corporate Debtor has defaulted in repaying the financial debt to the Financial Creditor.

19. At this juncture, it becomes relevant to take note of the proceedings before the learned DRT. It is pertinent to mention that the time period for the repayment as per the consent decree dated 30.03.2016 had expired on 31.03.2018. Further, the Corporate Debtor had failed to adhere to the terms of the consent decree and repay the loan amount as envisaged in the same. Further, till date, despite selling some of the assets of the Corporate Debtor, the debt of the Financial Creditor has not been satisfied. We have also noted that the consequence of non- compliance of the consent decree are provided in para 21 of the consent decree and the same is reproduced hereunder for reference:

Sd-

Sd-

> *"21. All the relief / concessions given under subject compromise shall be withdrawn and entire claim amount of Rs. 56,44,88,716 with pendentlite and future interest @ 15.75 % per annum with monthly rests, cost and charges claimed under the O.A. 10/2014 would become payable if borrowers default in repayment or fails to honor any of the terms & conditions of compromise, whether fully or partially. The decision of the bank in this regard shall be conclusive & binding on the borrower."*

20. Thus, a perusal of para 21 of the consent decree makes it conspicuous that on default by the Corporate Debtor in complying with the terms of the consent decree, the whole amount along with pendentlite interest will become payable.

21. In so far as the argument of the Corporate Debtor qua extension of the consent decree is concerned, it is noticed that the period of one year from the order of the DRT dated 23.05.2023 has already expired on 22.05.2024. Further, till the date of final hearing of this matter by this Adjudicating Authority on 10.06.2024, there was no submission by the Corporate Debtor concerning any payment being made by it to the Financial Creditor or any effort to sell any of the assets to liquidate the debt. We have also noted that the terms of consent decree have not laid down the condition that the payments will be made only out of sale of properties rather, the Corporate Debtor was free to settle this liability from any of its sources within the stipulated time.

Sd-

Sd-

22. Further, it is pertinent to mention that the arrangement under the OTS although provided for payment of debt by sale of the secured assets of the Corporate Debtor however, the same was never intended to be the sole mechanism for meeting the debt obligations by the Corporate Debtor. The obligation taken by the Corporate Debtor to service the obligations under consent decree were unconditional and the same is also evident from para 5 of the terms & conditions of the consent decree. For ease of reference para 5 of the terms & conditions of the consent decree is reproduced hereunder:

> "5. *Balance amount of Compromise Rs. 22.83 Cr. to be paid within 24 months from the date of conveying the sanction but in any case on or before 31.12.17.*"

23. As far as the arguments of the Corporate Debtor regarding non-occurrence of default due to OTS and its extension is concerned, it is germane to refer to the judgment of the Hon'ble NCLAT in the matter of *Mr. Jayesh Dani Vs. SREI Equipments Pvt. Ltd.*, Company Appeal (AT) (Ins.) No. 161 of 2024 (31.05.2024), wherein it was observed as under:

> "*41. While the OTS agreement shows that the Corporate Debtor's intent to settle the dues, the failure to adhere its terms, even considering external factors such as the High Court's order, cannot nullify the Financial Creditor's right to pursue insolvency proceedings. The terms of the OTS required strict compliance, and the Corporate Debtor's failure to meet these terms justified the Financial Creditor's decision to terminate the agreement.*
> *Assessment of Financial Creditor's Conduct:*
> *42. The Financial Creditor acted within its rights by accepting the initial OTS payment and subsequently seeking to recover the*

Sd-

Sd-

remaining dues through insolvency proceedings when the Corporate Debtor defaulted. There is no evidence of bad faith or unfair obstruction by the Financial Creditor. The acceptance of partial payments does not negate the default or the legitimacy of the insolvency proceedings.

43. The Adjudicating Authority correctly applied the provisions of the IBC in admitting the Company Petition and initiating CIRP. The Corporate Debtor's inability to service its debt, as per the loan agreements and the OTS, substantiates the Financial Creditor's petition under Section 7 of the IBC."

24. Further, the Hon'ble Supreme Court in *Employees Organisation vs. Jaipur Metals and Electricals Limited* (2018) ibclaw.in 34 SC clearly held that petition under Section 7 is an independent proceedings which is unaffected by pendency of proceedings in other court, which may be filed by the same company. The above judgment of the Hon'ble Supreme Court clearly lays down that the proceedings under Section 7 can neither be held to be barred by any order passed by DRT under the 1993 Act, nor pendency of any proceedings before DRT shall preclude decision on Section 7 Application on merits.

25. A similar issue came up before the Hon'ble NCLAT in the matter of *JM Financial Asset Reconstruction Vs. Howrah Mills Company Ltd.* Company Appeal (AT) (Ins.) No. 521 of 2024 wherein it was observed that once debt and default are proved, the Adjudicating Authority ought to have admitted Section 7 application and initiated CIRP against the Corporate Debtor. Moreover, the said judgement provides that the pendency of any other

Sd-

Sd-

proceedings against the Corporate Debtor will not curtail the power of this Adjudicating Authority to initiate the CIRP against the Corporate Debtor. In this regard, reference can be made to the following paras:

> *"15. Temporary injunction which was granted was that "Respondent No. 1 and or his men and agents is restrained from giving any further effect or acting on the basis of the letter March 02, 2020 till 08.10.2021". The injunction order in no manner interdicted the proceeding under Section 7 which was initiated and revived by the applicant. Only restrain on appellant was that "it shall not give any further effect or acting on the basis of the letter March 02, 2020". By prosecuting Section 7 application, appellant was not giving any further effect or acting on the basis of the letter dated 02.03.2020. Section 7 application was filed on the debt and default by the corporate debtor, which was withdrawn on Agreement to Assign between the parties dated 15.12.2020 which agreement has been breached and as per liberty granted by the Adjudicating Authority, the company petition was revived which order was also affirmed by this Tribunal. Thus, there is no impediment in proceeding under Section 7 application. As observed above, agreement dated 15.01.2020 was only agreement to assign and was not assignment agreement. Purchase consideration has not been paid. No document of assignment has yet been executed by the appellant in favour of Respondent No. 2. Thus, the debt on the part of the corporate debtor still continues and having not assigned to Respondent No. 2, the corporate debtor continues as debtor and cannot be absolved from its liabilities to pay its debt.*
>
> *17. We, thus, are of the view that the submission of the Respondent No. 2 that on payment of 25% of the consideration, JMFARC was precluded from taking any legal action even though Respondent No. 2 committed breach of the Agreement dated 15.01.2020 cannot be accepted.*
>
> *18. We may also refer to Section 231 of the IBC which contains an injunction which is couched in negative term that "no civil court shall have jurisdiction in respect of any matter in which the*

Sd/-

Sd/-

Adjudicating Authority or the Board is empowered by, or under, this Code to pass any order"

"231. Bar of jurisdiction. – No civil court shall have jurisdiction in respect of any matter in which the [Adjudicating Authority or the Board] is empowered by, or under, this Code to pass any order and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any order passed by such [Adjudicating Authority or the Board] under this Code."

19. In the present case, Section 7 application is within the jurisdiction of the Adjudicating Authority which application although initially was withdrawn but having been restored by subsequent order of the Adjudicating Company Appeal (AT) (Ins.) No. 521 of 2024 Authority has to be continued and interim injunction order dated 29.09.2021 issued by the Commercial Court can have no effect on continuance of proceeding under Section 7. We may also refer to Section 238 which gives Code an overriding effect. Section 238 is as follows:

"238. Provisions of this Code to override other laws. – The Provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."

26. The Hon'ble NCLAT in *State Bank of India vs. Abhijeet Ferrotech Ltd.* (2024) ibclaw.in 428 has observed that

"18. the determination of default in DRT proceedings which is pending in Calcutta High Court can have relevance for the purposes of Section 19 application, but cannot be said to be a reason to hold the proceedings under Section 7 barred, as has been held by the Adjudicating Authority.

.... 27. There can be no doubt to the proposition laid down in the above case. What was held in the above case was determination of issue between the parties operates in any subsequent proceedings in the same suit as well as in the subsequent suit between the said

Sd—

Sd—

parties in which the same issue arises. As noted above, the proceedings under 1993 Act for recovery of debt due to Bank and proceedings under Section 7 of the IBC, are entirely different proceedings with different purpose and object. Section 238 having given overriding effect to the proceedings under Section 7, the order passed, cannot operate as issue estoppel between the parties in reference to Section 7 proceedings and the judgment of the Hon'ble Supreme Court in Hope Plantations Ltd. does not render any assistance to the Respondent.

.... 32. We, thus, are of the considered opinion that order of DRT dated 17.06.2022 and the proceedings under Section 19, which are still inconclusive, cannot be a ground to hold Section 7 Application as barred. The Adjudicating Authority committed error in holding Section 7 Application is barred in view of the order dated 17.06.2022 passed by DRT."

27. Hon'ble NCLAT in the matter of *Anandram Developers Pvt. Ltd. Vs. National Company Law Tribunal, Chennai* (2018) 145 SCL 375, observed that the provision of the Code override other laws and therefore, the code enables the filing of the insolvency application even when proceedings under the SARFAESI Act or DRT are pending for recovery of dues. Such conduct would not amount to forum shopping.

28. A combined reading of the aforementioned judgments makes it clear that the proceedings under the Code are independent of the proceedings before any other court under any law. Thus, the extension of time by DRT for repayment of the OTS vide its order dated 23.05.2023 will not preclude this Adjudicating Authority from entertaining an application qua initiation of the CIRP against the Corporate Debtor. Similarly, the stay order dated

Sd/-

Sd/-

02.06.2023 passed by the Hon'ble High Court in S.B.C.W.P. No. 8690/2023 against the order of ld. DRT dated 23.05.2023 will not come in the way of adjudication of the instant Petition.

29. Thus, we are of the opinion that the Corporate Debtor has defaulted in the repayment of loan facilities extended by the Financial Creditor as it has failed to repay the same within the time prescribed under the consent decree dated 30.03.2016. Further, we have also observed that in the order of Ld. DRT which extended the Consent Decree by one year and the operation of which was stayed by the Hon'ble High Court of Rajasthan, there was nowhere any stay on the Corporate Debtor to sell any of its assets or make any arrangement for discharge of its liabilities. So it is clearly established that the Corporate Debtor is in continuous default as the debt remains outstanding.

30. At this juncture, it is relevant to refer to the judgment of the Hon'ble Supreme Court in *M/s Innoventive Industries Ltd. vs. ICICI Bank, C.A. Nos. 8337-8338 of 2017,* wherein it was held that upon being satisfied that a debt is due and default has occurred, the Adjudicating Authority is bound to commit the Corporate Debtor into CIRP. The relevant excerpts from the judgment are as below:

> *"28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. ……… It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a*

Sd/-

Sd/-

*default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. ……… **The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete**, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. ………*

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

(emphasis added)

31. Further, the Apex Court in the case of *E S Krishnamurthy & Ors. vs. M/s Bharath Hi Tech Builders Pvt. Ltd., Civil Appeal No. 3325 of 2020*, dated 14.12.2021, relied upon the judgment of *Innoventive (supra)* and had held as below:

"25. In Innoventive Industries (supra), a two-judge Bench of this Court has explained the ambit of Section 7 of the IBC, and held that the Adjudicating Authority only has to determine whether a "default" has occurred, i.e., whether the "debt" (which may still be disputed) was due and remained unpaid. If the Adjudicating Authority is of the opinion that a "default" has occurred, it has to admit the application unless it is incomplete. Speaking through

………

27. The Adjudicating Authority has clearly acted outside the terms of its jurisdiction under Section 7(5) of the IBC. The Adjudicating Authority is empowered only to verify whether a default has

Sd—

Sd—

occurred or if a default has not occurred. Based upon its decision, the Adjudicating Authority must then either admit or reject an application respectively. These are the only two courses of action which are open to the Adjudicating Authority in accordance with Section 7(5). The Adjudicating Authority cannot compel a party to the proceedings before it to settle a dispute."

(emphasis added)

32. Thus, upon conclusion of the fact that the debt has become due and default has been committed in payment of the same to the Creditor, the Adjudicating Authority has no discretion to refuse the admission of the Application for CIRP of the Corporate Debtor. Similarly, when it is found that the debt has not become due and payable, the Application under Section 7 of the Code can be rejected.

33. The instant Section 7 Application has been filed by the Financial Creditor *vide* Diary No. 3284/2022 dated 07.11.2022 alleging default on the basis of the amended Recovery Certificate dated 30.03.2016 as per which the repayment was valid till 31.03.2018. As per the Form IV filed with the Application, the Date of default is mentioned as 31.01.2022 being the last date of payment received from the Corporate Debtor and the date from which debt was due is mentioned as 30.03.2016. During the intervening period, the Corporate Debtor has made certain part payments to the Financial Creditor and has written several letters for extending the OTS. Thus, the *CP No. (IB)- 75/7/JPR/2022* which has been filed on 07.11.2022 is considered within the period of limitation and being proceeded with accordingly.

Sd— Sd—

34. The registered office of the Corporate Debtor is located in the State of Rajasthan and therefore the same falls within the jurisdiction of this Adjudicating Authority. Further, the date of default has been reckoned as 31.01.2022 being the date of last payment at the time of filing of the Petition after the entire loan has been recalled by the Financial Creditor due to frustration of the consent decree and recovery certificate. Thus, the *CP No. (IB)- 75/7/JPR/2022* which has been filed on 07.11.2022 is considered within the period of limitation and being proceeded with accordingly.

35. In view of the discussion on the proposition of law entailed in the preceding paragraphs and considering the circumstances of the case; we find that the Petition filed under Section 7 of the Code ought to be accepted. In our considered view, the debt and default were adequately demonstrated by the Applicant in the instant case and the same is supported by the records. Further, the default is above the threshold limit of Rs. 1 crore. This is a case where all the pre-requisites for filing a Section 7 stood fulfilled thus the Adjudicating Authority is inclined to admit the Corporate Debtor into CIRP for having defaulted in repaying a financial debt which was above the threshold limit.

36. Under such circumstances, The Corporate Insolvency Resolution Process can be initiated against the Corporate Debtor, as it has committed a default. Thus, this Application stands admitted and the Corporate Insolvency

Sd/- Sd/-

Resolution Process against the Corporate Debtor is hereby ordered to be initiated. Since the Applicant has proposed the name of the IRP, therefore, we appoint *Mr. Satyendra Prasad Khorania* having Registration Number IBBI/IPA/-002/IP-N00002/2016-2017/10002, duly registered with ICSI Insolvency Professional Agency, to be appointed as the Interim Resolution Professional. The Applicant has filed Consent in Form 2 under Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rules, 2016, stating that no disciplinary proceedings are pending against the named IRP.

37. Consequences of initiation of CIRP shall be inter-alia as follows:

   i) The Resolution Professional proposed by the Applicant is *Mr. Satyendra Prasad Khorania*, who is an IP registered with ICSI Insolvency Professional Agency having Registration No. IBBI/IPA/-002/IP-N00002/2016-2017/10002. He is hereby appointed as the Insolvency Resolution Professional (IRP) to take over the affairs of the Corporate Debtor and duties as required to be performed by him under the provisions of IBC, 2016, including the issue of the publication in widely circulated Newspaper as contemplated under the provisions of IBC, 2016 and calling for the claims from the creditors of Corporate Debtor and collation of the same shall be done.

Sd—

Sd—

ii) Further, as a sequel of admission, moratorium as envisaged under Section 14 of IBC, 2016 is invoked concerning the Corporate Debtor, which will be in vogue during the Corporate Insolvency Resolution Process of the Corporate Debtor. The IRP shall carry out CIRP strictly as per the timelines specified and as envisaged under the provisions of IBC, 2016 in relation to the Corporate Debtor.

iii) The said IRP shall act strictly in compliance with the provisions of IBC, 2016 and defray his expenses to be incurred and fees on the account. The Applicant is directed to act in accordance with Regulation 33(1) of the Insolvency and Bankruptcy (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. The Applicant shall deposit a sum of Rs. 2,00,000/- (Rupees Two Lakhs Only) as the fees in the account of IRP within three working days from the date of this order. The IRP shall duly file a status report from time to time appraising this Adjudicating Authority about the progress of CIRP unfolded in relation to the Corporate Debtor. In terms of Section 17 & 19 of IBC, 2016, all personnel of the Corporate Debtor including promotors and Board of Directors, whose powers shall stand suspended, shall extend all cooperation to the IRP during his tenure as such and the management of the affairs of the Corporate Debtor shall vest with the IRP.

Sd-

Sd-

iv) In terms of Section 7 of IBC, 2016, this order shall be communicated to the Applicant, Corporate Debtor, and the Interim Resolution Professional (IRP) appointed by this Adjudicating Authority to carry out the CIRP at the earliest, not exceeding one week from today.

38. Copy of this order shall also be communicated to IBBI for its record, and to any other body/entity to whom the Corporate Debtor is under legal/ contractual obligation to inform/update.

39. In the circumstances, *IA No. 381/JPR/2023* is disposed of and CP No. (IB)-75/7/JPR/2022 is admitted.

Sd—

DEEP CHANDRA JOSHI,
JUDICIAL MEMBER

Sd—

RAJEEV MEHROTRA,
TECHNICAL MEMBER