NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No.690 of 2023

Arising out of Order dated 21.03.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Cuttack Bench, in TP (IBC) No.02/CB/2022)

IN THE MATTER OF:

State Bank of India
Stressed Assets Resolution Group
Commercial-III Branch,
112-115, First Floor, Tulsiani Chambers,
Free Press Journal Marg, Nariman Point,
Mumbai-400021 ... Appellant

Versus

Abhijeet Ferrotech Limited
Registered Office - FE-83, Sector-III,
Salt Lake City, Ground Floor,
Kolkata, West Bengal-700106 ... Respondent

Present:

For Appellant	**:**	**Mr. Abhijeet Sinha, Sr. Advocate with Mr. Harshit Khare, Mr. Prafful Saini, Mr. Aditya Shukla, Advocates.**
For Respondent	**:**	**Mr. Krishnendu Datta, Sr. Advocate with Mr. Sandeep Bajaj, Mr. Devansh Jain, Ms. Vasudha Chadha, Mr. Rahul Gupta, Advocates.**

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal by the State Bank of India ("**SBI**") has been filed challenging the order dated 21.03.2023 passed by National Company Law Tribunal, Cuttack Bench, Cuttack, by which Section 7 Application filed by the SBI to initiate CIRP against the Corporate Debtor, Abhijeet Ferrotech Ltd. has been

rejected. Aggrieved by the order rejecting Section 7 Application, this Appeal has been filed by the Financial Creditor.

2. Brief facts of the case necessary to be noticed for deciding the Appeal are:

(i) The State Bank of Travancore has sanctioned loan to the tune of Rs.99 crores on 17.03.2012 to the Corporate Debtor. On 08.04.2013, the working capital limit of Rs.99 crores was renewed for a further period of 12 months.

(ii) On 31.03.2013, the accounts of the Corporate Debtor was declared as Non-Performing Assets ("**NPA**"). The SBI along with other consortium lenders entered into Master Restructuring Agreement with the Corporate Debtor on 28.09.2013. Various documents were executed by the Corporate Debtor in support of Master Restructuring Agreement on 30.09.2013. On 14.02.2014, the erstwhile State Bank of Travancore restructured the credit facilities in favour of the Corporate Debtor and an amount of Rs.89,46,00,000/- was sanctioned. On 26.03.2014, Deed of Accession and Modification on Master Restructuring Agreement was executed. On23.12.2015, the State Bank of Travancore additionally sanctioned the limit of Rs.36,74,00,000/-. Various documents thereafter were executed. On 28.12.2015, State Bank

of Travancore sanctioned the limit of Rs.1,26,20,00,000/- in favour of the Corporate Debtor.

(iii) On 30.09.2016, the loan account of the Corporate Debtor slipped into NPA category w.e.f. 31.03.2013 owing to the default in payment for more than 90 days. On 25.11.2016, the SBI recalled the entire loan and granted 07 days' time to close the accounts.

(iv) The Respondent - Corporate Debtor having failed to make the payment, proceedings under Section 13 (2) of the SARFAESI Act, 2002 were initiated by the Bank. On 11.09.2018, the SBI filed an application under Section 19 of the Recovery of Debts Due to the Banks and Financial Institutions Act, 1993 ("**1993 Act**"). On 07.07.2021, the Corporate Debtor submitted an OTS proposal, acknowledging the outstanding amount and proposing to make the payment.

(v) On 01.08.2021, the Appellant filed a petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "**IBC**") for initiation of Corporate Insolvency Resolution Process ("**CIRP**") against the Corporate Debtor for default of the amount of Rs.144,70,88,690/-.

(vi) On 17.06.2022, the DRT-II, Kolkata had dismissed the Application filed by the SBI under Section 19. Order of the DRT-II, was challenged by the Appellant before the Debts Recovery

Appellate Tribunal ("**DRAT**"). The DRAT vide its order dated 19.03.2024 allowed the Appeal of the SBI and set aside the order passed by DRT_II dated 17.06.2022. The Corporate Debtor filed C.O. No.1180 of 2024 before the Calcutta High Court, challenging the order of DRAT and Calcutta High Court vide its order dated 30.04.2024 granted an interim order, staying the order dated 19.03.2024, till September 30, 2024 or until further order, whichever is earlier.

(vii) Section 7 Application filed by the Appellant was rejected by the Adjudicating Authority vide order dated 21.03.2023. The Adjudicating Authority framed following question for consideration:

> "1. Whether the proceeding of this petition is barred in view of the order passed by DRT-II, Kolkata in T.A. No.179 of 2020 dated 17.06.2022 and liable to be rejected?"

(viii) The Adjudicating Authority answered the above question in favour of the Corporate Debtor and held that point for consideration involves in Section 7 petition as well as in Appeal, which was pending before DRAT is directly and substantially same, the Adjudicating Authority is not inclined to invoke discretion. The reasons given by the Adjudicating Authority for rejecting Section 7 Application, are contained in paragraphs 19 and 20, which are as follows:

"**19.** The petitioner even after filing of this petition for initiation of Corporate Insolvency Resolution process against the respondent, simultaneously proceeded with T.A.No.179 of 2020 before DRT II-Kolkata, for recovery of the said debt amount. Of course, pending of petition before DRT is no bar to proceed with petition under section 7 of IBC 2016. The facts alleged in this petition is almost similar to the averments made in petition T.A.No.179 of 2020. The DRT is the competent civil forum established for adjudication and recovery of debts due to banks and financial institutions. The petitioner and respondent are parties in T.A.No.179 of 2020. The order passed in T.A.No.179 of 2020 is now under appeal before the DRAT and not reached finality hence, the principal of *resjudicata* does not apply. However, the order passed in T.A.No.179 of 2020 is valid and existing order in force, hence we cannot simply ignore the said order and proceed with this petition. If this Adjudicating Authority proceed with this petition, there is a possibility of passing of inconsistent order on the same set of facts. This leads to chaos and confusion, this is against the judicial discipline. At this juncture, we feel that the principle and analogy laid down in section 10 of Code of Civil Procedure 1908 is applicable. Section 10 of Code of Civil Procedure 1908 speaks about the stay of subsequently filed suit, where issue in previously instituted suit is substantially same of the subsequently filed suit. The appeal pending before the DRAT is in continuation of the previously filed Application T.A.No.179 of 2020. The subsequently filed petition shall stand stayed. T.A.No.179 of 2020 is earlier application filed prior to filing of this petition. T.A.No.179 of 2020 was dismissed on 17.06.2020. The appeal is now pending before DRAT-Kolkata. The point for consideration involves in this petition and appeal pending , before DRAT is directly and substantially same. In the circumstances, till the finality of the order passed in T.A.No.179

of 2020 reached, it is not prudent to proceed with this petition. When the suit is decreed, the causes of action on which the suit is instituted will vanish, the party to the suit cannot fall back upon the original cause of action and institute a fresh civil proceeding. Here, also the application filed before the DRT-Kolkata culminated into decree, now the petitioner cannot fall back upon the original cause of action, which was vanished and culminated into decree. In respect of petition under section 7 of IBC, 2016 the Apex court held in Vidarbha Industries Power Limited vs Axis Bank Limited in para 79 as follows:

> *The Adjudicating Authority (NCLT) has been conferred the discretion to admit the application of the Financial Creditor. If facts and circumstances so warrant, the Adjudicating Authority can keep the admission in abeyance or even reject the application. Of course, in case of rejection of an application, the Financial Creditor is not denuded of the right to apply afresh for initiation of CIRP, if its dues continue to remain unpaid.*

20. In view of supra citation this Adjudicating Authority is inclined to invoke discretion, and in consequence this petition is liable to be rejected, with granting liberty. Thus, the point is answered.

3. We have heard Shri Abhijeet Sinha, learned Senior Counsel and Shri Harshit Khare, learned Counsel appearing for the Appellant and Shri Krishnendu Datta, learned Senior Counsel with Shri Sandeep Bajaj, learned Counsel appearing for the Respondent.

4. Shri Abhijeet Sinha, learned Senior Counsel for the Appellant, challenging the order of the Adjudicating Authority submits that proceedings under Section 19 of the 1993 Act is no bar for entertaining an Application

under Section 7. The proceedings under Section 19 are for different purpose, i.e. for recovery of the dues of the Bank, whereas the proceedings under Section 7 of the IBC is for different purpose and object, i.e., insolvency resolution of the Corporate Debtor. The pendency of the proceedings under Section 19 (at present which is pending before the Calcutta High Court), which was dismissed by DRT vide order dated 17.06.2022, cannot be a ground to reject Section 7 Application. It is submitted that the Adjudicating Authority has also committed error in relying on Section 10 of the Code of Civil Procedure ("**CPC**") by holding that Section 7 proceedings, which is subsequent, needs to be stayed, in view of Section 10 of CPC. It is submitted that by Section 238 of the IBC overriding effects has been given to the proceedings under IBC and neither Section 10 of the CPC is available, nor pendency or decision of proceedings under Section 19 of the 1993 Act, can be a reason to reject Section 7 Application. Further, the basis of order of the Adjudicating Authority is that application is premature, since no default is committed, whereas, there is continuing default since the Bank is not able to realise amount from the Corporate Debtor. The Company Petition filed under Section 7 by the Bank is not a lis between the Corporate Debtor and the Appellant, but it is a lis in rem. For the purpose of admission of Section 7 Application, only requirement is to determine the existence of debt, which is in default of an amount of Rs.1 crores. The Corporate Debtor on 07.07.2021 has given OTS proposal, which clearly acknowledged the debt and default.

The Adjudicating Authority had not considered the effect of OTS proposal in reference to Section 7 Application filed by the SBI. Section 7 Application filed by the Appellant was well within time.

5. Learned Counsel for the Respondent refuting the submission of learned Counsel for the Appellant submits that the DRT heaving held the Corporate Debtor not in default, there is no occasion to entertain Section 7 Application. The Corporate Debtor had every right to prove before the Adjudicating Authority that there is no debt and default. The order of DRT dated 17.06.2022 was relied by the Adjudicating Authority to reject Section 7 Application. The Adjudicating Authority has rightly proceeded not to reopen findings of the DRT. The finding that there is no default by DRT is a finding of competent Court between the parties, operates as issue estoppel, precludes the parties after a final judgment to re-agitate and re-litigate the same cause of action. The arguments taken by the SBI before DRT as well as in defence taken before the DRT is same as has been pleaded before the Adjudicating Authority in Section 7 Application. Even though, proceedings under Section 19 is no bar to file Section 7 Application, but present is a case where finding of default has been returned by DRT, which cannot be reopened in Section 7 proceedings, it having become final between the parties.

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

7. From the facts as noticed above, there is no dispute between the parties that proceedings under Section 19 of the 1993 Act were initiated on 11.09.2018 and Section 7 Application has been filed on 01.08.2021. The learned Counsel for the Bank has relied on the OTS proposal dated 07.07.2021. Before we come to the respective submission of the parties, it is relevant to notice the pleadings in Section 7 Application. Particulars of financial debt have been mentioned in Part-IV of Section 7 Application. The 'date of default' has been mentioned as 30.09.2016. Part-IV of the Application is as follows:

"**Part – IV**

PARTICULARS OF FINANCIAL DEBT		
1.	TOTAL AMOUNT OF DEBT GRANTED DATE(S) OF DISBURSEMENT	28.12.2015:- Rs.l,26,20,00,000/- (Rupees One Hundred Twenty Six Crore Twenty Lakhs Only) 23.12.2015:- Rs. 36,74,00,000/- (Rupees Thirty Six Crore Seventy Four Lakhs) 14.02.2014:- Rs. 89,46,00,000/- (Rupees Eighty Nine Crore Forty Six Lakhs Only) 08.04.2013:- Rs. 70,00,00,000/- (Rupees Seventy Crore Only) 17.03.2012:-Rs. 99,00,00,000/- (Rupees Ninety Nine Crore Only) The sanction letters for the said limits is hereto annexed and collectively marked as Annexure E'.
2.	AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH	Rs.144,70,88,690/- (Rupees One Hundred Forty Four Crore Seventy Lakhs Eighty Eight Thousand Six

	DEFAULT OCCURRED (ATTACH THE WORKINGS FOR COMPUTATION OF AMOUNT AND DAYS OF DEFAULT IN TABULAR FORM)	Hundred Ninety Only)as on 19.07.2021. Date of Default: 30.09.2016 (The Original date of NPA was 31.03.2013. As stated above, the Company was restructured under CDR in September 2013 and subsequently it had failed and exited from CDR in December 2015. The accounts were accordingly classified as NPA on 30.09.2016 w.e.f. 31.03.2013 as per RBI Guidelines and Directives). The proceeding has been filed within the period of limitation. Proceeding under SARFAESI Act 2002was initiated on 17.02.2017 and OA No 742 of 2018 being an application under Sec 19 of the RDDBFI Act was filed on 11.09.2018. Thus, the present petition has been filed within limitation. In any event, in the Balance Sheets of the Corporate Debtor and the Income Tax returns for the past period, there is an acknowledgement of debt and a promise to pay and therefore limitation to file this proceeding stands extended till 3 1.03.2023, which is 3 years from the date of the last Balance Sheet and/ or the financial year for which Income Tax returns were filed. Further by a letter dated 07.07.2021, within the period of limitation, the Corporate Debtor has acknowledged the liability. The period from 15.03.2020 till date stands excluded in computing the period of limitation for initiation of the proceedings pursuant to the order of the Hon'ble Supreme Court. The said order is still subsisting. Thus, the present petition has been filed within the limitation period.

		NPA certificate and the working for computation of Amount and days of default is hereto annexed and marked as "**Annexure-F**"

8. The copy of the OTS letter dated 07.07.2021 was also annexed as Annexure 'B" under Part-V. It is relevant to notice that in the Section 7 Application, details of OA No.742 of 2018 filed before the DRT Kolkata-III and transfer to DRT Kolkata-II was brought on record. Copy of the Application was one of the Annexures in Part-V. Letter dated 07.07.2021, by which Corporate Debtor has submitted proposal for One Time Settlement, to offer payment of Rs.21.29 crores as full and final settlement is as follows:

"Date:- 7th July 2021

The Deputy General Manager,
State Bank of India,
Stressed Asset Resolution Group Commercial (III),
112/115, Floor-1, Plot - 212,
West Wing,
Tulsiani Chambers, Free Press Journal Road,
Nariman Point, Mumbai - 400 021

Sub: Abhijeet Ferrotech Limited - Proposal for One Time Settlement (OTS) of om account with State Bank of India

Respected Sir,

Without prejudice to any of our rights available under applicable rules and laws, we are submitting herewith our OTS Proposal for consideration at your end.

a) We will settle the account of Abhijeet Ferrotech Limited maintained with State Bank of India at Rs. 21.29 Crs as full and final settlement.

b) The broad terms and condition of OTS proposal will be as per below provisions:-

I. Final OTS proposal will be submit to bank along with an upfront payment of 10% of the OTS amount i.e. Rs.2.13 Crs and the same will be deposited with State Bank of India's Non-Lien Loan Account. This upfront payment will be refundable if the proposal does not get approved by competent authority due to any of the reasons;

2. Part 25% i.e. Rs.5.32 Crs will be· deposited within 3 months from the date of approval of OTS Sanction.

3. Remaining 65% amount will be payable within 9 months time period along with a simple interest and same shall be calculated after successfully completion of first 3 month of OTS proposal.

As you are aware that Covid-19 has adversely effected the business of the company and.in the present circumstance and as per current market scenario, the offer proposed by us for settlement of dues of Abhijeet Ferrotech Limited with State Bank of India is the best which company can offer. Therefore, we would like to seek your approval/sanction to our best possible One Time Settlement proposal as per the broad terms as prescribed in above points.

We will be thankful to the bank if our above proposal for settlement of dues of M/s Abhijeet Ferrotech Limited would be accept by bank.

Furthermore, after duly consideration and completion of settlement of dues, we request your good office to assure us for providing necessary clearances, NOC's as described in below:-

a. Bank to issue necessary NO DUE CERTIFICATE in relation to AFL Account maintained with State Bank of India.

b. Bank to withdraw all legal case/suits/applications or any other steps taken in any legal forum including SARFAESI, DRT, NCLT, any Courts, if any and vice versa from our side.

c. The names of the Guarantors/Directors will be withdraw and/or deleted from Banks Willful Defaulters List, CIBIL, RBIs Defaulters list and/or submitted to any other allied data in banks system.

We once again earnestly appeal to the bank authorities to consider our request sympathetically and approve our offer, to enable us to concentrate fully on repayment of our dues, as proposed hereinabove.

Thanking you,

Yours faithfully,
For Abhijeet Ferrotech Limited

Sd/-
Authorized Signatory"

9. As noted above, the Adjudicating Authority has framed Question No.1 as to whether the proceeding under Section 7 is barred in view of the order passed by DRT-II, Kolkata in T.A. No.179 of 2020 dated 17.06.2022 and the question has been answered in affirmative, holding that Application under Section 7 is barred.

10. The IBC has been enacted to consolidate and amend the laws relating to reogranisation and insolvency resolution of corporate persons in a time bound manner for maximization of value of assets of Corporate Debtor. The object of IBC is insolvency resolution of Corporate Debtor. The Hon'ble Supreme Court in ***Swiss Ribbons Pvt. Ltd. and Anr. Vs. Union of India and Ors. – (2019) 4 SCC 17*** has laid down that Code is a beneficial legislation,

which puts the Corporate Debtor back on its feet and is not a mere recovery legislation for creditors. In paragraph-28 of the judgment, the Hon'ble Supreme Court laid down following:

> "**28.** It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors. The interests of the corporate debtor have, therefore, been bifurcated and separated from that of its promoters/those who are in management. Thus, the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests. The moratorium imposed by Section 14 is in the interest of the corporate debtor itself, thereby preserving the assets of the corporate debtor during the resolution process. The timelines within which the resolution process is to take place again protects the corporate debtor's assets from further dilution, and also protects all its creditors and workers by seeing that the resolution process goes through as fast as possible so that another management can, through its entrepreneurial skills, resuscitate the corporate debtor to achieve all these ends."

11. The proceedings, which were initiated by the Bank in the year 2018 under Section 19, were proceedings for recovery of dues of the Bank. Section 19 of the 1993 Act provides, filing of an Application by Bank or financial institutions to recover any debt from any person. Section 19(1) of the 1993 Act provides as follows:

"**19. Application to the Tribunal.** - (1)Where a bank or a financial institution has to recover any debt from any person, it may make an application to the Tribunal within the local limits of whose jurisdiction,

(a) the branch or any other office of the bank or financial institution is maintaining an account in which debt claimed is outstanding, for the time being; or

(aa) Clause (a) renumbered as Clause (aa) by Act No. 44 of 2016.] the defendant, or each of the defendants where there are more than one, at the time of making the application, actually and voluntarily resides, or carries on business, or personally works for gain; or

(b) any of the defendants, where there are more than one, at the time of making the application, actually and voluntarily resides, or carries on business, or personally works for gain; or

(c) the cause of action, wholly or in part, arises:

Provided that the bank or financial institution may, with the permission of the Debts Recovery Tribunal, on an application made by it, withdraw the application, whether made before or after the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2004 for the purpose of taking action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002), if no such action had been taken earlier under that Act:

Provided further that any application made under the first proviso for seeking permission from the Debts Recovery Tribunal to withdraw the application made under sub-section (1) shall be dealt with by it as expeditiously as possible and disposed of within thirty days from the date of such application:

Provided also that in case the Debts Recovery Tribunal refuses to grant permission for withdrawal of the application filed under this sub-section, it shall pass such orders after recording the

reasons therefor.] [Inserted by Act 30 of 2004, Section 20 (w.e.f. 11.11.2004).

(1A) Every bank being, multi-State co-operative bank referred to in sub-clause (vi) of clause (d) of section 2, may, at its option, opt to initiate proceedings under the Multi-State Co-operative Societies Act, 2002 to recover debts, whether due before or after the date of commencement of the Enforcement of the Security Interest and Recovery of Debts Laws (Amendment) Act, 2012 from any person instead of making an application under this Chapter.

(1B) In case, a bank being, multi-State co-operative bank referred to in sub-clause (vi) of clause (d) of section 2 has filed an application under this Chapter and subsequently opts to withdraw the application for the purpose of initiating proceeding under the Multi-State Co-operative Societies Act, 2002 to recover debts, it may do so with the permission of the Tribunal and every such application seeking permission from the Tribunal to withdraw the application made under sub-section (1A) shall be dealt with by it as expeditiously as possible and disposed of within thirty days from the date of such application :-

Provided that in case the Tribunal refuses to grant permission for withdrawal of the application filed under this sub-section, it shall pass such orders after recording the reasons therefor.] [Inserted by Act No. 1 OF 2013]"

12. Section 7 of the IBC is a provision for initiation of CIRP by a Financial Creditor. Section 7 (1) of the IBC is as follows:

"**7. Initiation of corporate insolvency resolution process by financial creditor.**

(1) A financial creditor either by itself or jointly with 2 [other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government] may file an application for

initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred."

13. IBC is subsequent legislation, which has been given overriding effect by the statute itself. Section 238 of the IBC provides:

> "**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."

14. In paragraph 19 of the judgment as extracted above, the Adjudicating Authority has referred to Section 10 of the CPC and has taken the view that in event the proceeding under Section 7 is proceeded with, it will lead to inconsistent result, hence, by virtue of Section 10 of CPC, subsequently executed suit has to be stayed. Following were the relevant observations made in paragraph 19:

> "**19.** ..... If this Adjudicating Authority proceed with this petition, there is a possibility of passing of inconsistent order on the same set of facts. This leads to chaos and confusion, this is against the judicial discipline. At this juncture, we feel that the principle and analogy laid down in section 10 of Code of Civil Procedure 1908 is applicable. Section 10 of Code of Civil Procedure 1908 speaks about the stay of subsequently filed suit, where issue in previously instituted suit is substantially same of the subsequently filed suit. The appeal pending before the DRAT is in continuation of the previously filed Application T.A.No.179 of 2020. The subsequently filed petition shall stand stayed. ...."

15. The first question to be answered is as to whether reliance by the Adjudicating Authority to Section 10 of CPC for taking the view that Section 7 Application, which is subsequent proceeding need to be stayed is correct view in law. Section 10 of the CPC provides as follows:

> "**10. Stay of suit --** No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in 1[India] have jurisdiction to grant the relief claimed, or in any Court beyond the limits of India established or continued by the Central Government and having like jurisdiction, or before the Supreme Court].
>
> Explanation.--The pendency of a suit in a foreign Court does not preclude the Courts in India from trying a suit founded on the same cause of action."

16. Section 238 of the IBC as extracted above, gives overriding effect to the proceedings under Section 7. Thus, despite the provision of Section 10 of CPC, the proceedings under Section 7 has to be proceeded with. The clear intendment of the statute is that the provisions of the Code shall have effect, notwithstanding anything inconsistent therewith in any other law for the time being in force. Even if for argument sake, it is accepted the provisions of Section 10 CPC will be attracted, the clear intendment of the statute is that proceedings under the IBC shall have effect. Insolvency resolution of the Corporate Debtor has to be detected at the earliest and remedial measures are to be taken to bring back the Corporate Debtor on its feet. The statute under

the IBC never contemplated that proceedings under IBC to await outcome of any previously instituted proceeding under any other statute. The Adjudicating Authority thus, fell into the error in taking the view that Section 10 of CPC is attracted in the facts of present case. Section 7 Application ought to have proceeded with despite pendency of proceedings under Section 19, which at present are pending at the stage of Calcutta High Court as the order of DRT dated 17.06.2022 was set aside by the DRAT vide its order dated 19.03.2024. The question framed by the Adjudicating Authority as extracted above was that whether the proceeding of this petition under Section 7 is barred in view of the order passed by DRT-II dated 17.06.2022. As noted above, in view of the overriding provision of Section 238, the proceedings under Section 7 shall not be barred by any proceeding initiated under Section 19. As noted above, Section 19 proceedings are for the purpose of recovery of dues by the Bank and Section 7 proceedings are for insolvency resolution of the Corporate Debtor. Both proceedings covers entirely different field and rejection of proceedings under Section 19 by DRT on 17.06.2022 cannot operate as any bar for Application under Section 7.

17. The learned Counsel for the Appellant has relied on judgment of this Tribunal ***State Bank of India vs. N.S. Engineering Projects Pvt. Ltd. – Company Appeal (AT) (Insolvency) No.978 of 2022*** decided on 03.02.2023. In the above case, Application filed under Section 7 by the State Bank of India was rejected by the Adjudicating Authority on the ground that due to non-

disbursement of part of financial assistance sanctioned by the Financial Creditors, there is contributory negligence, hence, Section 7 Application cannot be admitted. The said findings were question before this Tribunal. This Tribunal in paragraph 17 and 19 of the judgment, held as follows:

> "**17.** From the judgment of the Adjudicating Authority as noticed above in State Bank of India's case, it is clear that Adjudicating Authority has based its decision of rejecting Section 7 Application on the ground that the default committed by the Corporate Debtor in restructuring its debt, there is contributory negligence by the State Bank of India as well as Punjab National Bank. The fact that certain portion of sanction amount of financial facilities could not be disbursed by the Financial Creditors can be ground for rejecting Section 7 Application has already been answered by the Hon'ble Supreme Court in its judgment in ***Innoventive Industries Limited*** (supra). We need to notice some submissions, which were raised before the Hon'ble Supreme Court in Innoventive Industries Limited and the views, which were expressed by the Hon'ble Supreme Court in the above case. In ***Innoventive Industries Limited***, a Section 7 Application was filed by the Financial Creditors. Nineteen Banking entities had extended credit to the Innoventive Industries Ltd. In the above case also restructuring proposal given by the Corporate Debtor was approved in the meeting of Joint Lenders Forum. A Restructuring Agreement was entered into on 09.09.2014, under which funds were to be infused by the creditors and certain obligations were to be met by the debtors. Insolvency resolution process was set in motion by filing a Section 7 Application. In reply to Section 7 Application, Corporate Debtor took plea that under the Maharashtra Relief Undertakings (Special Provisions) Act, 1958, all liabilities of the Corporate Debtor except certain liabilities and remedies for enforcement thereof were temporarily suspended, hence the Application under Section 7 could not have been filed. The Corporate Debtor also filed a second application taking another plea that owing to

non-release of funds under Master Restructuring Agreement, the Corporate Debtor was unable to pay back its debts as envisaged. It was pleaded that no default has been committed by the Corporate Debtor. The above plea raised by the Corporate Debtor has been noted by the Hon'ble Supreme Court in paragraph 5 of the judgment, which is as follows:

> *"5. On this date, a second application was filed by the appellant in which a different plea was taken. This time, the appellant pleaded that owing to non-release of funds under MRA, the appellant was unable to pay back its debts as envisaged. Further, it repaid only some amounts to five lenders, who, according to the appellant, complied with their obligations under MRA. In the aforesaid circumstances, it was pleaded that no default was committed by it."*

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

> *"**63.** Even otherwise, Shri Salve took us through MRA in great detail. Dr Singhvi did likewise to buttress his point of view that having promised to infuse funds into the appellant, not a single naya paisa was ever disbursed. According to us, one particular clause in MRA is determinative on the merits of this case, even if*

we were to go into the same. Under Article V entitled "Representations and Warranties", Clause 20(t) states as follows:

> *"(t) Nature of Obligations*
>
> *The obligations under this Agreement and the other restructuring documents constitute direct, unconditional and general obligations of the borrower and the reconstituted facilities, rank at least pari passu as to priority of payment to all other unsubordinated indebtedness of the borrower other than any priority established under applicable law."*

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

Further, in paragraph 24, following was held

"**24.** Under the Scheme of IBC, when a Corporate Debtor is unable to pay its debt, which becomes payable, it is a warning signal for Corporate Debtor and when an Application is filed by a Financial Creditor to initiate CIRP under Section 7 and there are ample material that Corporate Debtor is unable to pay its debt and has committed default, the Adjudicating Authority is not required to go into the reasons of default and ignore the real status of the Corporate Debtor and close its eyes to the fact that the Corporate Debtor needs insolvency resolution. Red signal having been flagged by the Applicant, ignoring the precarious financial situation and status of the Corporate Debtor

> and not taking remedial action to bring back the Corporate Debtor on its track by adopting resolution process as per IBC and reject the Application on the reasons of default, is clearly contrary to the whole Scheme of the IBC. There being sufficient material before the Adjudicating Authority that consistent defaults have been committed by the Corporate Debtor and it is unable to pay its debt, rejection of Section 7 Application on the ground that for default committed by the Corporate

It is also relevant to notice that one of the submissions before the Adjudicating Authority that a suit has been filed by the Corporate Debtor before the High Court, where default shall be determined. The said argument was also rejected and in paragraph 29, following was held:

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

18. Thus, 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.

19. The learned Counsel for the Appellant has also relied on judgment of Hon'ble Supreme Court in ***A. Navinchandra Steels Pvt. Ltd. vs. SREI Equipment Finance Ltd. – (2021) 4 SCC 435***. In the above case, the Hon'ble Supreme Court had occasion to notice few fundamentals with regard to IBC legislation. The observation was also made that Companies Act, 2013 is the general statute as compared to IBC. In paragraph 16, 17 and 18, following was held:

> "**16.** Having heard the learned counsel for all the parties, it is important to restate a few fundamentals. Given the object of the IBC as delineated in paras 25 to 28 of *Swiss Ribbons (P) Ltd.* v. *Union of India* [*Swiss Ribbons (P) Ltd.* v. *Union of India*, (2019) 4 SCC 17] ["*Swiss Ribbons*"], it is clear that the IBC is a special statute dealing with revival of companies that are in the red, winding up only being resorted to in case all attempts of revival fail. Vis-à-vis the Companies Act, which is a general statute dealing with companies, including companies that are in the red, the IBC is not only a special statute which must prevail in the event of conflict, but has a non obstante clause contained in Section 238, which makes it even clearer that in case of conflict, the provisions of the IBC will prevail.
>
> **17.** In Allahabad Bank v. Canara Bank [Allahabad Bank v. Canara Bank, (2000) 4 SCC 406] , this Court had to deal with whether the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ("the RDB Act") was a special statute qua the Companies Act, 1956. This Court held that the Companies Act is a general Act and does not prevail against the RDB Act, which was a later Act and which has a non obstante clause that clearly excludes the provisions of the Companies Act in case of conflict. This was stated by the Court as follows: (SCC pp. 426-27, paras 38-40)

"Special law v. general law

38. At the same time, some High Courts have rightly held that the Companies Act is a general Act and does not prevail under the RDB Act. They have relied upon Union of India v. India Fisheries (P) Ltd. [Union of India v. India Fisheries (P) Ltd., AIR 1966 SC 35 : (1965) 3 SCR 679 : (1965) 57 ITR 331]

39. There can be a situation in law where the same statute is treated as a special statute vis-à-vis one legislation and again as a general statute vis-à-vis yet another legislation. Such situations do arise as held in LIC v. D.J. Bahadur [LIC v. D.J. Bahadur, (1981) 1 SCC 315 : 1981 SCC (L&S) 111] . It was there observed: (SCC pp. 350-51, para 52)

> *'52. … For certain cases, an Act may be general and for certain other purposes, it may be special and the court cannot blur a distinction when dealing with the finer points of law'.*

For example, a Rent Control Act may be a special statute as compared to the Code of Civil Procedure. But vis-à-vis an Act permitting eviction from public premises or some special class of buildings, the Rent Control Act may be a general statute. In fact in Damji Valji Shah v. LIC [Damji Valji Shah v. LIC, AIR 1966 SC 135 : (1965) 3 SCR 665] (already referred to), this Court has observed that vis-à-vis the LIC Act, 1956, the Companies Act, 1956 can be treated as a general statute. This is clear from para 19 of that judgment. It was observed:

> *'19. Further, the provisions of the special Act i.e. the LIC Act, will override the provisions of the general Act viz. the Companies Act which is an Act relating to companies in general.'*

(emphasis in original)

Thus, some High Courts rightly treated the Companies Act as a general statute, and the RDB Act as a special statute overriding the general statute.

Special law v. special law

> 40. Alternatively, the Companies Act, 1956 and the RDB Act can both be treated as special laws, and the principle that when there are two special laws, the latter will normally prevail over the former if there is a provision in the latter special Act giving it overriding effect, can also be applied. Such a provision is there in the RDB Act, namely, Section 34. A similar situation arose in Maharashtra Tubes Ltd. v. State Industrial & Investment Corpn. of Maharashtra Ltd. [Maharashtra Tubes Ltd. v. State Industrial & Investment Corpn. of Maharashtra Ltd., (1993) 2 SCC 144] where there was inconsistency between two special laws, the Finance Corporation Act, 1951 and the Sick Industries Companies (Special Provisions) Act, 1985. The latter contained Section 32 which gave overriding effect to its provisions and was held to prevail over the former. It was pointed out by Ahmadi, J. that both special statutes contained non obstante clauses but that the '1985 Act being a subsequent enactment, the non obstante clause therein would ordinarily prevail over the non obstante clause in Section 46-B of the 1951 Act unless it is found that the 1985 Act is a general statute and the 1951 Act is a special one'. (SCC p. 157, para 9)
>
> Therefore, in view of Section 34 of the RDB Act, the said Act overrides the Companies Act, to the extent there is anything inconsistent between the Acts.""

18. Likewise, in Bakemans Industries (P) Ltd. v. New Cawnpore Flour Mills [Bakemans Industries (P) Ltd. v. New Cawnpore Flour Mills, (2008) 15 SCC 1] , this Court, in the context of the State Financial Corporations Act, 1951 ("the SFC Act") and the Companies Act, 1956, held that though the SFC Act was an earlier Act of 1951, yet, it would

prevail over the winding-up proceedings before a Company Judge, given that the SFC Act is a special statute qua the general powers of the Company Judge under the Companies Act. This was stated as follows: (SCC pp. 20-21, paras 37-38)

> "37. The 1951 Act indisputably is a special statute. If a financial corporation intends to exercise a statutory power under Section 29 of the 1951 Act, the same will prevail over the general powers of the Company Judge under the Companies Act.
>
> 38. There cannot be any doubt whatsoever that the proceedings under Section 29 of the 1951 Act would prevail over a winding-up proceeding before a Company Judge in view of the decision of this Court in International Coach Builders Ltd. v. Karnataka State Financial Corpn. [International Coach Builders Ltd. v. Karnataka State Financial Corpn., (2003) 10 SCC 482] wherein it has been held: (SCC p. 496, para 26)
>
> > '26. We do not really see a conflict between Section 29 of the SFC Act and the Companies Act at all, since the rights under Section 29 were not intended to operate in the situation of winding up of a company. Even assuming to the contrary, if a conflict arises, then we respectfully reiterate the view taken by the Division Bench of this Court in A.P. State Financial Corpn. case [A.P. State Financial Corpn. v. Official Liquidator, (2000) 7 SCC 291] . This Court pointed out therein that Section 29 of the SFC Act cannot override the provisions of Sections 529(1) and 529-A of the Companies Act, 1956, inasmuch as SFCs cannot exercise the right under Section 29 ignoring a pari passu charge of the workmen.'
>
> The view taken therein was reiterated by a three-Judge Bench of this Court in Rajasthan State Financial Corpn. v. Official Liquidator [Rajasthan State Financial Corpn. v. Official

Liquidator, (2005) 8 SCC 190] wherein it was stated: (SCC pp. 201-202, para 18)

'18. In the light of the discussion as above, we think it proper to sum up the legal position thus:

(i) A Debts Recovery Tribunal acting under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 would be entitled to order the sale and to sell the properties of the debtor, even if a company-in-liquidation, through its Recovery Officer but only after notice to the Official Liquidator or the Liquidator appointed by the Company Court and after hearing him.

(ii) A District Court entertaining an application under Section 31 of the SFC Act will have the power to order sale of the assets of a borrower company-in-liquidation, but only after notice to the Official Liquidator or the Liquidator appointed by the Company Court and after hearing him.

(iii) If a financial corporation acting under Section 29 of the SFC Act seeks to sell or otherwise transfer the assets of a debtor company-in-liquidation, the said power could be exercised by it only after obtaining the appropriate permission from the Company Court and acting in terms of the directions issued by that court as regards associating the Official Liquidator with the sale, the fixing of the upset price or the reserve price, confirmation of the sale, holding of the sale proceeds and the distribution thereof among the creditors in terms of Section 529-A and Section 529 of the Companies Act.

(iv) In a case where proceedings under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 or the SFC Act are not set in motion, the creditor concerned is to approach the Company Court for appropriate directions regarding the realisation of its securities consistent with the relevant provisions of the Companies Act regarding distribution of the assets of the company-in-liquidation.'"

20. In the above paragraph, it was held that by virtue of Section 34 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, overriding the Companies Act, 1956, which is earlier law, applying the same analysis that IBC is contrasted with 1993 Act, IBC being latter enactment, shall have override the RDBBFI Act. Same principles were again reiterated by the Hon'ble Supreme Court in paragraph 19 of the judgment. Section 238 was noticed in paragraph 20, where earlier judgment of this Tribunal in ***Employees Organisation vs. Jaipur Metals & Electricals Ltd.*** was noticed and extracted. In paragraphs 20 and 21, following was held:

> "**20.** Indeed, this position has been echoed in several judgments of this Court. In *Employees Organization v. Jaipur Metals & Electricals Ltd. [Employees Organization v. Jaipur Metals & Electricals Ltd., (2019) 4 SCC 227] ["Jaipur Metals"]*, this Court, in dealing with whether proceedings under the Sick Industrial Companies (Special Provisions) Act, 1985 were to be transferred to NCLT under the IBC, held: (SCC pp. 235-36, paras 19-20)
>
> > "19. However, this does not end the matter. It is clear that Respondent 3 has filed a Section 7 application under the Code on 11-1-2018, on which an order has been passed admitting such application by NCLT on 13-4-2018 *[Alchemist Asset & Reconstruction Co. Ltd. v. Jaipur Metals & Electricals Ltd., 2018 SCC OnLine NCLT 32209]*. This proceeding is an independent proceeding which has nothing to do with the transfer of pending winding-up proceedings before the High Court. It was open for Respondent 3 at any time before a winding-up order is passed to apply under Section 7 of the Code. This is clear from a reading

of Section 7 together with Section 238 of the Code which reads 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.'

20. Shri Dave's ingenious argument that since Section 434 of the Companies Act, 2013 is amended by the Eleventh Schedule to the Code, the amended Section 434 must be read as being part of the Code and not the Companies Act, 2013, must be rejected for the reason that though Section 434 of the Companies Act, 2013 is substituted by the Eleventh Schedule to the Code, yet Section 434, as substituted, appears only in the Companies Act, 2013 and is part and parcel of that Act. This being so, if there is any inconsistency between Section 434 as substituted and the provisions of the Code, the latter must prevail. We are of the view that NCLT was absolutely correct in applying Section 238 of the Code to an independent proceeding instituted by a secured financial creditor, namely, the Alchemist Asset Reconstruction Company Ltd. This being the case, it is difficult to comprehend how the High Court could have held [Jaipur Metals & Electricals Ltd., In re, 2018 SCC OnLine Raj 1472] that the proceedings before NCLT were without jurisdiction. On this score, therefore, the High Court judgment has to be set aside. NCLT proceedings will now continue from the stage at which they have been left off. Obviously, the company petition pending before the High Court cannot be proceeded with further in view of Section 238 of the Code. The writ petitions that are pending before the High Court have also to be disposed of in light of the fact that proceedings under the Code must run their entire course. We, therefore,

allow the appeal and set aside the High Court's judgment [Jaipur Metals & Electricals Ltd., In re, 2018 SCC OnLine Raj 1472] ."

21. Likewise, in Forech [Forech (India) Ltd. v. Edelweiss Assets Reconstruction Co. Ltd., (2019) 18 SCC 549 : (2020) 4 SCC (Civ) 286] , in a situation in which notice had been issued in a winding-up petition and the said petition was ordered to be transferred to NCLT, to be treated as a proceeding under the IBC, this Court clearly held: (SCC p. 560, para 22)

"22. This section is of limited application and only bars a corporate debtor from initiating a petition under Section 10 of the Code in respect of whom a liquidation order has been made. From a reading of this section, it does not follow that until a liquidation order has been made against the corporate debtor, an insolvency petition may be filed under Section 7 or Section 9 as the case may be, as has been held by the Appellate Tribunal. Hence, any reference to Section 11 in the context of the problem before us is wholly irrelevant. However, we decline to interfere with the ultimate order passed by the Appellate Tribunal because it is clear that the financial creditor's application which has been admitted by the Tribunal is clearly an independent proceeding which must be decided in accordance with the provisions of the Code.""

21. The Hon'ble Supreme Court clearly held in the above case that petition under Section 7 is an independent proceeding, which is unaffected by pendency of proceedings in other Court, which may be filed by the same Company. In paragraph 25 of the judgment following was held:

"**25.** A conspectus of the aforesaid authorities would show that a petition either under Section 7 or Section 9 IBC is an independent proceeding which is unaffected by winding-up proceedings that may be

filed qua the same company. Given the object sought to be achieved by the IBC, it is clear that only where a company in winding up is near corporate death that no transfer of the winding-up proceeding would then take place to NCLT to be tried as a proceeding under the IBC. Short of an irresistible conclusion that corporate death is inevitable, every effort should be made to resuscitate the corporate debtor in the larger public interest, which includes not only the workmen of the corporate debtor, but also its creditors and the goods it produces in the larger interest of the economy of the country. It is, thus, not possible to accede to the argument on behalf of the appellant that given Section 446 of the Companies Act, 1956/Section 279 of the Companies Act, 2013, once a winding-up petition is admitted, the winding-up petition should trump any subsequent attempt at revival of the company through a Section 7 or Section 9 petition filed under the IBC. While it is true that Sections 391 to 393 of the Companies Act, 1956 may, in a given factual circumstance, be availed of to pull the company out of the red, Section 230(1) of the Companies Act, 2013 is instructive and provides as follows:

> "**230. Power to compromise or make arrangements with creditors and members.—** (1) Where a compromise or arrangement is proposed—
>
> (a) between a company and its creditors or any class of them; or
>
> (b) between a company and its members or any class of them,
>
> the Tribunal may, on the application of the company or of any creditor or member of the company, or in the case of a company which is being wound up, of the liquidator, appointed under this Act or under the Insolvency and Bankruptcy Code, 2016, as the case may be, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to

be called, held and conducted in such manner as the Tribunal directs.

Explanation.—For the purposes of this sub-section, arrangement includes a reorganisation of the company's share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes, or by both of those methods."

What is clear by this Section is that a compromise or arrangement can also be entered into in an IBC proceeding if liquidation is ordered. However, what is of importance is that under the Companies Act, it is only winding up that can be ordered, whereas under the IBC, the primary emphasis is on revival of the corporate debtor through infusion of a new management."

22. One more submission was raised before the Hon'ble Supreme Court in ***A. Navinchandra Steels Pvt. Ltd.*** (supra) that pendency of winding up proceedings was not brought into the notice of Adjudicating Authority. In the above reference, the Hon'ble Supreme Court held that Section 7 is an independent proceedings and winding up proceeding would have no effect in deciding Section 7 Application on the basis of provisions contained in IBC. In paragraph 29, following was held:

"**29.** Dr Singhvi and Shri Ranjit Kumar have vehemently argued that SREI has suppressed the winding-up proceeding in its application under Section 7 IBC before NCLT and has resorted to Section 7 only as a subterfuge to avoid moving a transfer application before the High Court in the pending winding-up proceeding. These arguments do not avail the appellant for the simple reason that Section 7 is an independent proceeding, as has been held in a catena of judgments of this Court, which has to be tried on its own merits. Any "suppression" of the winding-up proceeding would, therefore, not be of any effect in

> deciding a Section 7 petition on the basis of the provisions contained in the IBC. Equally, it cannot be said that any subterfuge has been availed of for the same reason that Section 7 is an independent proceeding that stands by itself. As has been correctly pointed out by Shri Sinha, a discretionary jurisdiction under the fifth proviso to Section 434(1)(c) of the Companies Act, 2013 cannot prevail over the undoubted jurisdiction of NCLT under the IBC once the parameters of Section 7 and other provisions of the IBC have been met. For all these reasons, therefore, the appeal is dismissed and the interim order that has been passed by this Court on 18-12-2020 [A. Navinchandra Steels (P) Ltd. v. Srei Equipment Finance Ltd., 2020 SCC OnLine SC 1141] shall stand immediately vacated."

23. The above judgment of the Hon'ble Supreme Court clearly lays down that proceedings under Section 7 can neither be held to be barred by any order passed by DRT under the 1993 Act, nor pendency of proceedings at DRT (which is now pending at the stage of Calcutta High Court) shall preclude decision on Section 7 Application on merits.

24. Learned Counsel for the Respondent to support his submission has placed reliance on various judgment of Hon'ble Supreme Court, which need to be noticed. The learned Counsel for the Respondent has relied on judgment of Hon'ble Supreme Court in ***Innoventive Industries vs. ICICI Bank – (2018) 1 SCC 407*** to support his submission that the Corporate Debtor is entitled to defend Section 7 Application by pointing out that debt is not due. He has referred to paragraph 28 of the judgment of the Hon'ble Supreme Court, which is as follows:

"**28.** When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the Explanation to Section 7(1), a default is in respect of a financial debt owed to *any* financial creditor of the corporate debtor — it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in Part III, particulars of the financial debt in Part IV and documents, records and evidence of default in Part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be."

25. There can be no doubt to the proposition laid down by the Hon'ble Supreme Court in **Innoventive Industries Ltd.** as above, but the question, which have been framed in the present case was as to whether the proceeding under Section 7 is barred in view of the order passed by DRT on 17.06.2022. the judgment of the **Innoventive Industries Ltd.** does not support the view taken by the Adjudicating Authority in the impugned order.

26. The learned Counsel for the Respondent has also placed reliance on judgment of the Hon'ble Supreme Court in ***Hope Plantations v Taluk Land Board – (1999) 5 SCC 590*** stating that any finding of court of competent jurisdiction as binding between parties, even in subsequent proceedings in reference to *issue estoppel* or *issue preclusion***.** Paragraph 26, on which reliance has been placed by learned Counsel for the Respondent, lays down following:

> "**26.** It is settled law that the principles of estoppel and res judicata are based on public policy and justice. Doctrine of res judicata is often treated as a branch of the law of estoppel though these two doctrines differ in some essential particulars. Rule of res judicata prevents the parties to a judicial determination from litigating the same question over again even though the determination may even be demonstratedly wrong. When the proceedings have attained finality, parties are bound by the judgment and are estopped from questioning it. They cannot litigate again on the same cause of action nor can they litigate any issue which was necessary for decision in the earlier litigation. These two aspects are "cause of action estoppel" and "issue estoppel". These two terms are of common law origin. Again, once an issue has been finally determined, parties cannot subsequently in the same suit advance arguments or adduce further evidence directed to showing that the

> issue was wrongly determined. Their only remedy is to approach the higher forum if available. The determination of the issue between the parties gives rise to, as noted above, an issue estoppel. It operates in any subsequent proceedings in the same suit in which the issue had been determined. It also operates in subsequent suits between the same parties in which the same issue arises. Section 11 of the Code of Civil Procedure contains provisions of res judicata but these are not exhaustive of the general doctrine of res judicata. Legal principles of estoppel and res judicata are equally applicable in proceedings before administrative authorities as they are based on public policy and justice."

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 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.

28. The learned Counsel for the Respondent has also relied on another judgment of the Hon'ble Supreme Court in ***(2016) 14 SCC 49 – Satyendra***

Kumar v. Raj Nath Dubey, where reliance has been placed on paragraph 15, which is as follows:

> "**15.** The distinction drawn by the High Court in the impugned judgment [*Raj Nath Dubey* v. *Director of Consolidation*, 2013 SCC OnLine All 10523] that an erroneous determination of a pure question of law in a previous judgment will not operate as res judicata in the subsequent proceeding for different property, though between the same parties, is clearly in accord with Section 11 CPC. Strictly speaking, when the cause of action as well as the subject-matter i.e. the property in issue in the subsequent suit are entirely different, res judicata is not attracted and the competent court is therefore not debarred from trying the subsequent suit which may arise between the same parties in respect of other properties and upon a different cause of action. In such a situation, since the Court is not debarred, all issues including those of facts remain open for adjudication by the competent court and the principle which is attracted against the party which has lost on an important issue of fact in the earlier suit is the principle of estoppel, more particularly "issue estoppel" which flows from principles of evidence such as from Sections 115, 116 and 117 of the Evidence Act, 1872 and from principles of equity. As a principle of evidence, estoppel is treated to be an admission or in the eye of the law something equivalent to an admission of such quality and nature that the maker is not allowed to contradict it. In other words, it works as an impediment or bar to a right of action due to affected person's conduct or action. "Estoppel by judgment" finds reference in *Ahsan Hussain Abdul Ali Bohari* v. *Maina* [*Ahsan Hussain Abdul Ali Bohari* v. *Maina*, 1937 SCC OnLine MP 114 : AIR 1938 Nag 129] . It is taken as a bar which precludes the parties after final judgment to reagitate and relitigate the same cause of action or ground of defence or any fact determined by the judgment. If the determination was by a court of competent jurisdiction, the bar will remain operative even if the judgment is perceived to be erroneous. If the parties fail to get rid of an

erroneous judgment, they as well as persons claiming through them must remain bound by it."

29. The Hon'ble Supreme Court in **Satyendra Kumar's** case had occasion to consider the determination of title with regard to land under the provisions of U.P. Consolidation of Holdings Act, 1953. In the above case, with regard to determination of title in respect of land of different Village, there was a determination regarding entitlement of rights of objector. When the objector, whose claim was denied, with respect to the land of different village, the judgment rendered earlier was stated as *res judicata*. The Hon'ble Supreme Court held that the *res judicata* would not operate in subsequent proceedings in respect to other properties. In paragraph 9 of the judgment, the findings of the High Court were noticed, which held that findings or issue of law would not operate as *res judicata* in the subsequent proceedings in respect of other properties. The view of the High Court as quoted in paragraph 9 of the order, ultimately upheld by the Hon'ble Supreme Court and in paragraph 16, following was held:

"**16.** However, as explained and held by this Court in *Mathura Prasad Bajoo Jaiswal* [*Mathura Prasad Bajoo Jaiswal* v. *Dossibai N.B. Jeejeebhoy*, (1970) 1 SCC 613 : AIR 1971 SC 2355] , where the decision is on a pure question of law then a court cannot be precluded from deciding such question of law differently. Such bar cannot be invoked either on principle of equity or estoppel. No equitable principle or estoppel can impede powers of the court to determine an issue of law correctly in a subsequent suit which relates to another property founded upon a different cause of action though parties may be same.

> As explained earlier, in such a situation the principle of res judicata is, strictly speaking, not applicable at all. So far as principle of estoppel is concerned, it operates against the party and not the court and hence nothing comes in the way of a competent court in such a situation to decide a pure question of law differently if it is so warranted. The issues of facts once finally determined will however, stare at the parties and bind them on account of earlier judgments or for any other good reason where equitable principles of estoppel are attracted."

30. The above judgment, in no manner support the submissions of the Respondents in the present case.

31. Learned Counsel for the Respondent has also referred to judgment of the Hon'ble Supreme Court in ***Dena Bank vs. C Shivakumar Reddy – (2021) 10 SCC 330*** to support his submission that as per the judgment of the Hon'ble Supreme Court, after a decree/ recovery certificate, a fresh cause of action arises for filing a petition under Section 7, hence, when a decree can be passed for Section 7 petition, the reverse must also be true. Observations made by the Hon'ble Supreme Court in **Dena Bank** was in the context of limitation for filing Section 7 Application. It was held that fresh cause of action will give fresh limitation of three years for filing Section 7 Application. The said judgment of the Hon'ble Supreme Court is not on the issue, which has arisen before us for consideration in this Appeal. The judgment of **Dena Bank** also does not render any help to the Appellant.

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 as barred in view of the order dated 17.06.2022 passed by DRT.

33. In view of the aforesaid discussions and conclusions, we are of the view that order of Adjudicating Authority dated 21.03.2023 is unsustainable. In result, the Appeal is allowed. The order dated 21.03.2023 is set-aside. The Company Petition - TP (IBC) No.02/CB/2022 is revived before the Adjudicating Authority, to be considered afresh in accordance with law.

Parties shall bear their own costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical

NEW DELHI

2nd July, 2024

Ashwani