

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
ALLAHABAD BENCH, PRAYAGRAJ**

**IA NO.341/2021 & IA NO.342/2021**

**IN CP (IB) NO.40/ALD/2021**

**Along with CP(IB)No.40/ALD/2021**

**IN THE MATTER OF**

[An application 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]

**CP (IB) NO. 40/ALD/2021**

**IN THE MATTER OF:**

**Rotomac Exports Pvt. Ltd. .... Applicant/Financial Creditor  
Through Anil Goel Liquidator**  
Having its Registered Office at:  
E-10A, Kailash Colony,  
New Delhi-110048.

**Versus**

**M/S Mohan Steels Limited .....Respondent/Corporate Debtor**  
Having its Registered Office at:  
Site No.1, Gauzali Industrial Area,  
Kanpur, Lucknow Highway, Unnao, UP- 209801

**AND IA No. 341/2021 & 342/2021**

**IN THE MATTER OF:**

**Mohan Steels Limited**

**..... Applicant/Respondent**

**Versus**

**Rotomac Exports Private Limited (in Liquidation)**

**Through Anil Goel Liquidator**

**..... Respondent/Petitioner**

Order pronounced on 7<sup>th</sup> December, 2023

Coram:

Mr. Praveen Gupta. : Member (Judicial)

Mr. Ashish Verma : Member (Technical)

Appearances:

Sh. Dhananjaya Sud with Sh. : For the Financial Creditor &  
Lokesh Malik Respondent in both IAs  
& Ms. Shalya Agarwal, Advs.

Sh. Rohit Gandhi with Sh. : For the Corporate Debtor &  
Adhish Srivastava & Sh. Kartik Applicant in both IAs  
Jain, Advs.

**ORDER**

1. The Present Application has been filed on 23.3.2021 under section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred as "**I & B Code, 2016**") by the Applicant Company/Financial Creditor namely, **Rotomac Exports Private Limited** seeking initiation of the **Corporate Insolvency Resolution Process** (hereinafter referred as "**CIRP**") against the

Respondent Company/Corporate Debtor i.e. **Mohan Steels Limited** read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016 in Form 1 containing all the information as required in Part I, II, III, IV and V of the Form.

2. Mohan Steels Limited, (hereinafter referred as the "**Respondent Company/Corporate Debtor**") was incorporated on 22.07.1971 (CIN. L27107UP1971PLC003442) under the provisions of the Companies Act, 1956, with the objective of running a business in steel manufacturing. The Corporate Debtor's registered office is at Gauzali Industrial Area, Unnao, UP- 209801.
3. The Applicant Company, Rotomac Exports Private Limited (hereinafter referred as the "**Applicant Company/Financial Creditor**"), is Private Limited Company incorporated on 05.02.2002 under the Companies Act, 1956 (CIN no. U51497UP2002PTC026476) having its registered office at 201, City Centre, 63/2, The Mall, Kanpur, UP-208004. The Applicant Company is engaged in the business of wholesale trading of nonagricultural intermediate products, waste and scrap.

4. The Applicant Company submits that the Company was engaged in frequent business with the Respondent Company along with monetary exchange during the course of business. And that during such dealings, the Financial Creditor had advanced a loan of Rs. 9.90 crores with execution of a Hypothecation Deed dated 19.04.2007 by the Corporate Debtor against the creation of charge on Melt Shop assets.
5. The Applicant Company submits that the Corporate Debtor paid a sum of Rs.1.75 crores and Rs.1.50 crores vide cheques dated 14.05.2007 and 12.04.2016 respectively. It is further submitted that the Corporate Debtor vide cheque no. 000388 had also paid another sum of Rs.1 Crore in respect of the said Loan. In respect of the said payments made by the Corporate Debtor, the Financial Creditor had written a letter dated 10.03.2017 to modify the charge amount to Rs.5.65 crores. Accordingly, the Corporate Debtor vide Form No. CHG-1 dated 10.03.2017 modified the charge on the assets of melt shop to Rs.5.65 crores.
6. The Applicant states that as per the financial statements for the financial year 2015-2016 and 2016-2017 of the Financial Creditor, the Corporate Debtor owed the Financial Creditor, the following amounts:

- i. Rs 17,23,72,422/- including an amount of Rs. 5.65 crores payable in respect of the said Loan;
  - ii. Rs. 3,59,69,907/- interest due on the said Loan advanced by the Financial Creditor capitalized in the financial year 2013-14.
7. The Applicant states that the Corporate Debtor was liable to make the repayment of the said Loan to the Financial Creditor but no such repayments were received by the Financial Creditor. As stated in the Application, the amounts advanced to the Corporate Debtor are in form of the amount raised having the commercial effect of borrowing as provided for under Section 5(8) of the Insolvency & Bankruptcy Code, 2016. And the total outstanding amount due to the Financial Creditor is Rs. 20,83,42,329 along with interest and the same has also been acknowledged by the Corporate Debtor.
8. The Applicant Company further states that an application for initiation of Corporate Insolvency Resolution Process of the Corporate Debtor was filed by Frost International Limited before this Hon'ble Tribunal (CP No. 380/ALD/2018) in 2018 wherein the proceedings are ongoing. The Financial Creditor, through Liquidator had filed an Impleadment Application

(I.A. No. 91 of 2019) for appointment as Resolution Professional of the Corporate Debtor as deemed fit. The Corporate Insolvency Resolution Process has not commenced till date. Since there is recurring default on part of the Corporate Debtor and the Application for Impleadment has remained pending, this Application for initiation of Corporate Insolvency Resolution Process of the Corporate Debtor is filed by the Financial Creditor, through the Liquidator.

9. The Respondent Company /Corporate Debtor has submitted its reply on 26.10.2021 wherein it has denied all the averments and allegations made by the Applicant in the petition and disputed the fact that the debt is owed by Respondent Company to Applicant Company stating that the contents of the petition are not maintainable since it is barred firstly under Section 10 A of the I & B Code, 2016 and secondly barred under Section 5 and 8 of the Arbitration and Conciliation Act, 1996. The Respondent Company has also filed separate applications in that regard i.e. IA Nos. 341/2021 and 342/2021 impugning the maintainability of the present petition before this Tribunal.

10. The Respondent Company submits that the Applicant Company Rotomac Exports Pvt. Ltd. is guilty of *suppressio veri, suggestio falsi* as the Applicant Company Rotomac Export Pvt. Ltd. has suppressed material information, relevant facts and documents from this Tribunal that would potentially disentitle the Applicant Company Rotomac Exports Pvt. Ltd. to file and maintain the present petition seeking initiation of CIRP of the Respondent Company Mohan Steels Ltd.
11. The Respondent Company states that the Applicant Company Rotomac Exports Private Ltd. agreed to make capital investment and bring in requisite funds in the Respondent Company Mohan Steels Ltd. for its operation and rehabilitation in the capacity of a co-promoter. The Applicant Company Rotomac Exports Pvt Ltd. and Respondent Company Mohan Steels Ltd. entered into a Memorandum of Understanding dated 12.03.2005 (**MOU**). The said MOU has been concealed and suppressed by the Applicant Company and Copy of MOU dated 12.03.2005 has been annexed as **ANNEXURE R-2** with the reply.

12. The Respondent Company states that the Applicant Company Rotomac Exports Private Ltd. materially failed to fulfill its obligations under the MOU including bringing the funds as stipulated therein, however, in October 2010, and further in contrast to the ongoing business of Respondent Company Mohan Steel Ltd., the Kothari and Desai Group, i.e. Mr. Vikram Kothari, Mr. Uday Desai and Mr. Sunil Verma initiated mercantile trade and related transactions on behalf of the Respondent Company Mohan Steel Ltd. The decision to commence with the said mercantile trade was taken unilaterally by the Kothari and Desai Group and without the knowledge or any consultation with other members of the Board. A copy of the minutes of meeting and Board Resolution dated 08.11.2011 reflecting the same has been annexed as **ANNEXURE R-4** with the reply.

13. The Respondent Company contends that the present petition is not maintainable as the same is barred under Section 10A of the Code which provides for a complete suspension of initiation of CIRP. This petition was prepared for filing by the Applicant Company Rotomac Exports Pvt Ltd. on 23.02.2021 and eventually the copy was served upon the Respondent

Company Mohan Steels Ltd. on 22.03.2021 by way of an email. The copy of the email dated 22.03.2021 has been filed as **ANNEXURE R-23** with the reply. That the petition has been filed on the premise that despite having acknowledge about the debt having been shown as due in the Balance Sheet of the FY 2019-20, (i.e. 31.03.2020), payment has not been made and there has been a default. This petition has been filed for the default, which has allegedly occurred within the period between 31.03.2020 to 23.02.2021, which falls within the suspension/prohibited period under Section 10A of the Code (i.e., between 25.03.2020-25.03.2021). Therefore, the same is barred in law.

14. The Respondent Company further contends that the present petition is also not maintainable as there is specific bar under Section 11 (d) of the Code. The said provision categorically provides that a Corporate Debtor, in respect of whom a liquidation order has been passed is not entitled to make an application to initiate CIRP under the Code. Admittedly, in the case of the Applicant Company Rotomac Exports Pvt. Ltd., the liquidation order was passed on 23.03.2018. An Explanation II has been inserted by way of amendment dated

13.03.2020, however, it is submitted that the said Explanation is null and void in the eyes of law as it is well settled that an Explanation to a provision is only explanatory and cannot in any manner overrides or extinguishes the substantive provision. Thus, as this Explanation is in the nature of overriding and extinguishes the substantive provisions contained in Section 11 (d), the same is null and void and cannot be read into.

15. The Respondent Company also submits that the present petition is not maintainable since the same is also barred under Section 5 and 8 of the Arbitration and Conciliation Act and the Applicant Company Rotomac Exports Pvt. Ltd. has deliberately concealed and suppressed the fact that a Memorandum of Understanding (MOU) was executed between the Applicant Company Rotomac Exports Pvt. Ltd. and Respondent Company Mohan Steels Ltd. on 12.03.2005, in terms of which, the Applicant Company Rotomac Exports Pvt. Ltd. became the co-promoter of Respondent Company Mohan Steels Ltd. and funds were brought by it for the operation and rehabilitation of the Respondent Company Mohan Steels Ltd. And that this Tribunal does not have the

jurisdiction due to the operation of Section 5 and 8 of the Arbitration and Conciliation Act, 1996.

16. The Respondent Company contends that the present petition is not maintainable since the Applicant Company Rotomac Exports Pvt. Ltd. is neither a Financial Creditor nor there is any default of Financial Debt as defined under the Code. Pursuant to the MOU, the Applicant Company Rotomac Exports Pvt. Ltd. became the co-promoter of the Respondent Company and funds were brought by it for the operation and rehabilitation of the Respondent Company. Therefore, the Applicant Company Rotomac Exports Pvt. Ltd. is co-promoter and majority shareholder of the Respondent Company Mohan Steels Ltd. It is also pointed out in the reply that the Applicant Company Rotomac Exports Pvt Ltd. accepts and admits that it is the majority shareholder of the Respondent Company Mohan Steels Ltd. holding 77,07,537 equity shares with a face value of Rs. 10/- comprising of 43.94% of the paid-up capital of the Respondent Company Mohan Steels Ltd. and the same is reflected in the shareholder list of the Respondent Company/Corporate Debtor for the FY 2017-18. **(Pg. 13 of the Petition)**. And as

a majority shareholder, co-promoter as also a related party, the Applicant Company Rotomac Exports Pvt Ltd. cannot be permitted to initiate the present proceedings under Section 7 of the Code against the Respondent Company Mohan Steels Ltd treating it as Corporate Debtor.

17. The Respondent Company further submits that the Hypothecation Agreement dated 19.04.2007 on which reliance has been placed by the Applicant Company Rotomac Exports Pvt. Ltd. was also executed in furtherance and continuation of the MOU dated 12.03.2005, which was the basis of the entire understanding between the parties and contained principle of commercial terms agreed between the parties.
18. The Respondent Company also contends in the reply that no amounts are due and payable to Applicant Company since they have already received the amounts payable to the Respondent Company by third parties. The Kothari and Desai Group had entered into numerous contracts for supply of goods with various entities and the Respondent Company did not receive any payments pursuant to the sale of contracted goods.

19. The Respondent Company contends that the matter is already sub-judice and there is pendency of investigation by the Serious Fraud Investigation Office (SFIO) wherein a detailed investigation has been carried out against the Applicant Company and its Directors and on the basis of the said investigation, the SFIO has filed a case with the court of competent jurisdiction, in which the cognizance has already been taken by the Hon'ble Court.
20. The Respondent Company further contends that the Applicant Company relies on Balance Sheets of the Respondent Company to allege that loans were advanced but fails to explain which entries in their statement forms the basis of their claim. Nor the various deposits which have been made in said period for the purposes of determining the liability of the Respondent Company were factored in.
21. The Respondent Company also contends that the directors have acted in an unauthorized and illegal manner and in breach of their fiduciary duties as Directors of the Respondent Company and they have gone to the extent of manipulating books of account to gain personal benefit at the cost of Respondent. The same is already a subject matter of

investigation by the SFIO and the proceedings before the court of competent jurisdiction.

22. The Respondent Company contends that there exists severe conflict of interest with the resolution professional of the Applicant Company. The Applicant Company has filed the present petition before this Tribunal through Mr. Anil Goel, Liquidator. The said Liquidator had filed an application before the NCLT, Allahabad in **C.P. (IB) NO. 380/ALD/2018** in the matter of *Frost International v. Mohan Steels* wherein he sought impleadment and proposed himself as the Interim Resolution Professional of the Corporate Debtor.
23. Against the above reply/counter filed by the Respondent Company, the Applicant Company has submitted its rejoinder stating as under:

(i) the first main contention of the Respondent Company for dismissal of the instant application is regarding the quantum of default. The amount/quantum of default cannot be a valid ground for rejection of an application under Section 7 of the Code, if other criteria of Section 7 application are satisfied. The ascertainment of the correct quantum of amount of default is neither required

nor envisaged under the Code and the only requirement under section 7 is to establish a default in terms of section 4 of the Code along with all other requirements as stipulated under section 7 and relevant Regulations. Once default as required is established, the Insolvency Resolution Process has to be triggered. The Applicant relied on the decision of the Hon'ble NCLT, Principal Bench, New Delhi in the matter of **IFCI Limited versus Era Housing & Developers (India) Ltd (IB)-489(PB)/2017** delivered on 08.02.2018, wherein the bench admitted the application filed by the financial creditor under section 7 and rejected the contentions regarding mismatch in quantum of default.

(ii) Another main contention of the Respondent Company is regarding the pendency of investigation against the alleged illegal/criminal acts of the erstwhile directors of the Corporate Debtor. Countering this contention, the Applicant relied on the order of the Hon'ble NCLT in the matter of **Yes Bank Itd versus M/s Namo Alloys Pvt Ltd (Company Petition No. (IB)- 867(PB)/2018** wherein the Corporate Debtor opposed the application

filed u/s 7 by the Financial Creditor on grounds of criminal charges pending against the officers of the Financial Creditor. However, the Hon'ble NCLT, rejected such contentions.

(iii) The Applicant Company has relied on the decision of the Hon'ble Supreme Court in case of **Mobilox Innovations Pvt. Ltd v. Kirusa Software Pvt. Ltd** reported in **AIR 2017 SC 4532** and referred to its para 19 wherein it has been observed that:

*"Once the adjudicating authority/Tribunal is satisfied as to the existence of the default and has ensured that the application is complete and no disciplinary proceedings are pending against the proposed resolution professional, it shall admit the application. The adjudicating authority/Tribunal is not required to look into any other criteria for admission of the application."*

(iv) The Applicant contends that the Respondent has wrongly relied on Section 10A of the Code to argue that the instant Application is not maintainable. That Explanation to Section 10A states that Section 10A shall not be applicable to any default committed before 25.03.2020. In this regard, section 10A has been referred:

*"10A. Notwithstanding anything contained in sections 7, 9 and 10, no application for initiation of corporate*

*insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020 for a period of six months or such further period, not exceeding one year from such date, as Provided that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period.*

*Explanation-For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply to any default committed under the said sections before 25th March, 2020."*

The Applicant states that the date of default is prior to March 25, 2020 and has placed reliance on the Balance Sheet for the FY 2019-20 for showing acknowledgment of outstanding debt, on which default is recurring since 2015. Therefore, the Applicant argued in the rejoinder that the contention of the Respondent raised in the reply that the default occurred between 31.03.2020 to 23.02.2021 is liable to be rejected.

(v) Further, the Applicant states that the Respondent's contention regarding non-maintainability of the petition in light of bar under section 11(d) of the Code is liable to be rejected. The IBC (Amendment) Ordinance, 2019 and the IBC

(Amendment) Act 2020 incorporated Explanation II in section 11 of the Code and the same has been referred by it as below:

*11. Persons not entitled to make application. - The following persons shall not be entitled to make an application to initiate corporate insolvency resolution process under this Chapter, namely*

*(b)...*

*(c)...*

*(d) a corporate debtor in respect of whom a liquidation order has been made.*

*Explanation 1. For the purposes of this section, a corporate debtor includes a corporate applicant in respect of such corporate debtor.*

*Explanation II.- For the purposes of this section, it is hereby clarified that nothing in this section shall prevent a corporate debtor referred to in clauses (a) to (d) from initiating corporate insolvency resolution process against another corporate debtor.*

Referring to above amended provision of section 11(d) with Explanation II, the Applicant argued in the petition that there is no embargo on initiating CIRP against another Corporate Debtor by a Corporate Debtor in respect of whom a liquidation proceeding has been initiated.

(vi) The Applicant further relied upon the order of the Hon'ble NCLT, Mumbai Bench in the matter of **Jai Ambe Enterprise versus S.N. Plumbing Pvt. Ltd (CP 1268/I&BC/NCLT/MB/MAH/2017 dated 06.02.2018**

wherein , it has been held that a RP who is representing CD, is entitled to initiate CIRP under Section 9 of IBC against its debtors as the Corporate Debtor shall be considered to be taking up the role of a Creditor in this situation and shall, therefore, not be barred by section 11 of the Code. In paragraphs 3 and 4 of the Order, the Hon'ble NCLT decided that the outstanding debts of the Corporate Debtor shall be considered as "assets" and by virtue of Section 25, it is the duty of the RP to recover the assets of the Corporate Debtor.

(vii) The Applicant Company further states that due to seizure of electronic and other records of the Applicant Company/ Financial Creditor by CBI, the Liquidator is not in possession of the MOU signed between the Applicant Company and Respondent Company. That, as on the date of filing of the present application, there was no pending dispute regarding the said loan amount before any competent court or arbitral tribunal. The Respondent Company has not preferred any petition for appointment of the arbitrator for resolving any dispute arising out of or in connection with the Memorandum of Understanding. Since the outstanding debt has already

been acknowledged by the Respondent, there is no question of a pending dispute to be referred for arbitration.

(viii) the Applicant Company Rotomac Exports Pvt Ltd is a co-promoter because it holds 43.94% of the paid-up capital. There is no embargo on filing of an application under section 7 of the I & B Code, 2016 if such co-promoter or a majority shareholder is also a financial creditor under the Code. Once the requirements, as stipulated under section 7 of the Code are satisfied, the Application for initiation of the CIRP is liable to be admitted. There is no bar on initiating CIRP, either by a co-promoter or a majority shareholder under section 11 of the Code. No embargo is stipulated by the Code or related regulations and relevant case laws, on initiation of the CIRP against a corporate debtor by a related party. The Applicant relies on the order of the Hon'ble Supreme Court in the matter of **M/s Orator Marketing Pvt Ltd v M/s Samtex Desinz Pvt. Ltd (Civil Appeal 2331 of 2021, July 26, 2021)** wherein the court has categorically clarified that "interest" on principle amount is not a mandatory requirement under section 5(8) which prescribes the definition of "Financial Debt".

(ix) As further argued by the Applicant Company, it is trite law that the pendency of any dispute cannot be a valid ground for dismissing an application u/s 7 of the Code if the Application clearly stipulates a debt that has become due and payable but has been defaulted by the Corporate Debtor. The Application under section 7 cannot be rejected on the ground of pending proceedings in various forums. The Applicant relied on a decision of the Hon'ble NCLAT in the matter of **Vinayaka Exports & Anr versus M/s Colorhome Developers Pvt. Ltd (Company Appeal (AT) (Ins) No. 06 of 2019)** wherein the bench overturned the decision of dismissing the application filed by the financial creditor u/s 7 of the Code by the Hon'ble NCLT.

(x) The Applicant denied the contention of Respondent Company on the point of the Balance Sheets of the Corporate Debtor acknowledging the debt owed to the Applicant Company and states that the Balance Sheets for FY 2007-08, 2008-09, 2009-10, 2010-11, 2011-12, 2012-13, 2013-14, 2014-15 of the Corporate Debtor shows the outstanding debt owed to the Applicant Company by the Respondent Company. Copies of the relevant extracts of the Balance Sheets **have**

**been annexed as Annexure-1 (Colly)** with the rejoinder. The Applicant Company relied on the decision of the Hon'ble Supreme Court in case of **Asset Reconstruction company (India) Ltd. Vs Bishal Jaiswal (15th April 2021, Civil Appeal no. 323 of 2021)**.

(xi) The Applicant Company states that the breach of duties by the directors of the financial creditor cannot be a valid reason for non-payment of debt owed by the Corporate Debtor. The alleged illegal and fraudulent acts of the erstwhile directors of the Financial Creditor are still under investigation by the competent authorities and are pending for final adjudication before the Courts of competent Jurisdiction. Therefore, the reliance placed by the Corporate Debtor on such on-going investigation is unwarranted. The principle of separate legal entity ensures that the Company cannot be made liable for the illegal acts of the directors.

(xii) The Applicant submits that there exists no conflict of interest of the resolution professional of the Applicant Company as the Respondent's contention regarding conflict of interest is an apprehension of the Respondent and no cogent reason has been provided by the Respondent. Further,

another matter having bearing on **CP (IB) No. 380/ALD/2018** have no bearing on the said matter in light of debt advanced by the Financial Creditor to the Corporate Debtor, which has been defaulted by the Corporate Debtor.

24. During the course of the proceeding, two interlocutory applications have been filed by the Respondent Company i.e. 341/2021 and 342/2021 on 26.10.2021, challenging *inter alia* the maintainability of the present petition in terms of section 5 and 8 of the Arbitration Act, 1996, the petition being barred under the provisions of section 10A and raising a contention that there being specific bar under section 11(d) of the I & B Code 2016. A combined reply on both IAs have been filed by the Applicant Company on 21.02.2023 putting up the same arguments as it has already been made in its rejoinder discussed in previous para except a new set of the arguments have been taken to mention a date of default being 10.03.2017 (which was not mentioned in Part IV of the Application) in order to counter the plea of the Respondent Company as regards the present application being covered u/s 10A of the Code. The averments made by the Applicant Company in the reply filed on 21.02.2023 in respect of date of default in the present application being 10.03.2017 is reproduced as under: -

“7. That further, on the bare perusal of the Audited Balance Sheet of the Corporate Debtor as on 31.03.2018, it is evident that the Corporate Debtor owed a cumulative amount of Rs.17,23,72,422/- (Rupees Seventeen Crore Twenty-Three Lakh Seventy-Two Thousand Four Hundred and Twenty Two Only) including the outstanding Loan of Rs.5.65 Crore advanced by the Financial Creditor to the Corporate Debtor against the Melt Shop Assets of the Corporate Debtor. Copy of the Audited balance Sheet of the Corporate Debtor as on 31.03.2018 is annexed herewith and marked as **ANNEXURE – R2**.

8. That is significant to submit that the Hon’ble Supreme Court of India, in the matter of “**Asset Reconstruction Company (India) Limited vs. Bishal Jaiswal & Anr; Civil Appeal No. 323 of 2021**”, relying upon the judgments passed by the Hon’ble Supreme Court in the matter of “**Mahabir Cold Storage vs. CIT; 1991 Supp (1) SCC 402**’ and “**A.V. Murty vs. B.S. Nagabasavanna; (2002) 2 SCC 642**’ and others overruled the Judgment passed by the Hon’ble National Company Law Appellate Tribunal, New Delhi in the matter of “**V. Padmakumar vs. Stressed Assets Stabilisation Fund; Company Appeal (AT) (Insolvency) No. 57 of 2020**’ and further subsequent to the observations made in accordance with the various provisions of the Companies Act, 2013, held that the Balance Sheets as well as the Financial Statements filed by the Companies can amount to Acknowledgement of Debt under Section 18 of the Limitation Act, 1963.

9. That it is submitted that non-payment of due amount by the Corporate Debtor is a Financial Debt as per Section 5 (8) (f) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the “**Code**”) which provides as – “any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing:”.

10. That it is submitted that the Corporate Debtor was liable to make the repayment of the said Loan Amount to the Financial Creditor. However, no such repayments have

been received by the Financial Creditor or the Respondent. Hence, left with no other option, the Financial Creditor has approached this Hon'ble Tribunal in light of the default committed by the Corporate Debtor with respect to the Financial Debt owed to the Financial Creditor.

11. That it is submitted that the Corporate Debtor has been avoiding making the repayments to the Financial Creditor without any substantial grounds or reason and such deceitfulness of the Corporate Debtor has caused the Financial Creditor irreparable loss and damage in their business. However, despite repeated requests, the Corporate Debtor is yet to make the repayment of the monies due to the Financial Creditor. Thus, the Corporate Debtor has committed a "Default" in repayment of its financial obligations as defined under Section 3(12) of the Code.

12. That it is of pertinence to mention herein that the last payment as received by the Financial Creditor from the Corporate Debtor was on 31.08.2016 wherein the Corporate Debtor vide RTGS paid a sum of Rs.1 Crore in respect of the said Loan to the Financial Creditor and accordingly, modified the Charge on the assets of melt shop to Rs.5.65 Crore vide Form No.CHG-1 dated 10.03.2017.

13. That it is submitted that vide the aforesaid transactions entered into between the Financial Creditor and the Corporate Debtor, the Date of Default for the repayment of debt by the Corporate Debtor to the Financial Creditor is **10.03.2017**. That subsequently, in view of the aforementioned facts and circumstances, the present Company Petition was filed by the Financial Creditor seeking initiation of the CIRP of the Corporate Debtor.

14. That it is of pertinence to mention herein that the Central Government vide the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020 dated 05.06.2020 in light of the Covid Pandemic in the country, inserted a new Section 10A in the Insolvency and Bankruptcy Code, 2016, suspending the invoking of the provisions of the Code for a period of 6 months for any default arising on or after 25.03.2020. That it is submitted that the Central

*Government vide Notification dated 24.09.2020 and 22.12.2020 extending the aforesaid suspension for a further period of 3 Months each, till 24.03.2021.*

*15. That it is relevant to submit that in the present dispute between the Financial Creditor and the Corporate Debtor, the Date of Default for the repayment of debt by the Corporate Debtor to the Financial Creditor is **10.03.2017**, i.e., well before the timelines qua the suspension of the provisions of the Code as envisaged under Section 10A of the Code. Thus, the contention of the Corporate Debtor that the present Company Petition filed by the Financial Creditor seeking initiation of the CIRP of the Corporate Debtor is not maintainable in accordance with Section 10A of the Code is completely baseless and is devoid of merits.*

### **FINDINGS AND ORDER**

25. We have considered all the submissions made before us in the main application, counter reply and rejoinder filed in respect of main application and also the contentions raised and reply filed in the two IAs as mentioned in previous para as well as the arguments put up by the Ld. Counsels of both parties in the hearing

26. This is an application filed u/s 7 by the Liquidator of M/s Rotomac Exports Private Limited as Financial Creditor after this company is already put under liquidation for recovery of certain outstanding loan amounts appearing in the Balance Sheet of its one associate company M/s Mohan Steel Ltd (Corporate Debtor) in which it is a majority share holder to the extent of 43.94% of

shareholding. CIRP was earlier initiated against the Applicant Company Rotomac Exports Private Ltd. vide order dated 20.09.2017 of this tribunal due to this company not being able to repay its financial debts and later put under liquidation vide order dated 23.03.2018 of this tribunal due to no resolution plan could be received during CIRP. As per Part IV of the Application in Form 1, the total outstanding debt is shown as Rs. 20,83,42,329/- along with interest @ 12% out of which, it is stated that Rs. 9.9 crore was paid as secured loan on security of Melting Unit Machines. It is also stated that a total amount of Rs.4.75 crore was repaid and Rs. 5.65 crore was outstanding when a fresh Hypothecation Deed was executed and filed with the ROC on 10.03.2017. It is further stated in Part IV of the Application that the audited Financial Statement for financial year 2015-16 and unaudited Financial Statement for financial year 2016-17 of the Financial Creditor shows that the Corporate Debtor owed an amount of Rs. 17,23,72,422/- (including Rs. 5.65 crore of secure loan) and Rs. 3,59,69,907/- interest due on the loan advanced by the Financial Creditor capitalized in financial year in 2013-14, total of which comes to Rs. 20,83,42,329/- as outstanding debt shown in Part-IV of the Application. It is further mentioned that the Respondent

Company/Corporate Debtor in its Balance Sheets from the financial year 2013-2020 acknowledged the debts payable to the Applicant Company/Financial Creditor. With the above details discussed in Part-IV of the Application, it has been stated by the Applicant Company that it being a Financial Creditor, has not been paid its dues pending from the end of the Respondent Company/Corporate Debtor and therefore, the current management of the Applicant Company (a Corporate Debtor itself as CIRP was started against it and now put under liquidation) is unable to run its affairs in a profitable and competitive manner. In Part-IV of the Application, nowhere date on which default has occurred, is clearly mentioned specifying a particular amount of default and date on which such default has occurred, except mentioning that a total amount of Rs. 20,83,42,329/- was shown as outstanding debt in the audited Financial Statement for financial year 2015-16 and in unaudited Statement for financial year 2016-17 of the Financial Creditor and these amounts are also reflected in the Balance Sheets of the Corporate Debtor from financial year 2013-2020 on the basis of which this application has been filed without mentioning any specific date of default.

27. In counter to the above Application, the Respondent Company/Corporate Debtor submitted its reply briefly stating the facts of the case that the Respondent/Corporate Debtor Mohan Steel Ltd. suffered substantial losses during the years 1997-98 and 1998-99 due to steep fall in steel price and because of such losses suffered by the Corporate Debtor, it made a reference to the Board for Industrial and Financial Reconstruction(BIFR) u/s 15(1) of the Sick Industrial Companies (Special Provision) Act, 1985 (SICA) vide Case No. 162/1999. Under such situation, the Applicant Company/Financial Creditor agreed at that time (before it is put under CIRP) to make capital investment and bring in requisite funds in the Respondent Company/Corporate Debtor for its operation and rehabilitation as co-promoters. Consequent to the above, an MOU dated 12.03.2005 has been signed between Applicant Company/ Financial Creditor and Respondent Company/ Corporate Debtor vide which the Applicant Company/Financial Creditor was required to arrange funds for capital investment as well as providing funds for day to day operation of the Respondent Company/Corporate Debtor and in lieu of which Applicant Company/ Financial Creditor being a promoter of the Corporate Debtor were given equity shares against

the investment provided by them towards rehabilitation in a 1:1 ratio of share holding and thus, the Applicant Company became responsible for the operation and financial management of the Respondent Company/Corporate Debtor jointly with other promoters of the Corporate Debtor. Under this process, Shri Vikram Kothari from the management of the Applicant Company at that time was appointed as Director and Chairman of the Board of the Directors of the Respondent Company/ Corporate Debtor.

28. Under the above background of the case, it has been pleaded in the reply that the Applicant Company is neither a Financial Creditor nor there is any default of Financial Debt as define under the Code because the alleged amount of debt for which application u/s 7 has been filed has not been given against consideration for time value of money but were disbursed under a MOU wherein the Applicant Company became the co-promoter and the shareholder of the Respondent Company and under took to perform several obligation for the operation and rehabilitation of the Respondent Company over a period of the time, which are detailed in the said MOU. It has also been pointed out that the Hypothecation Agreement dated 19.04.2007 for giving of secured loan of Rs. 9.9 crore on which reliance has been placed to show such amount of

secured loan being in the nature of financial debt, was also executed in furtherance and continuation of the MOU dated 12.03.2005. Citing these circumstances under which the funds were obtained by the Respondent Company from the Applicant Company shown in the Balance Sheet under the head Loans and Advances, it has been contended by the Respondent Company that such amounts of loan are not Financial Debt. It is further argued that there is no default of any Financial Debt, even if the Applicant Company is considered as Financial Creditor. In this regard, the nature of various transactions and the financial dealings between the Respondent Company Mohan Steel Ltd. and the Applicant Company M/s Rotomac Export Ltd. have been explained stating that Mr. Vikram Kothari in the erstwhile management of the Applicant Company Rotomac Exports Pvt Ltd. along with other directors i.e. Mr. Udai Desai and Mr. Suneel Verma initiated mercantile trade and related transactions on behalf of the Respondent/ Corporate Debtor. Such decision was taken by Kothari and Desai Group without any knowledge and any consultation with other members of the Board of the Respondent Company/Corporate Debtor. Such mercantile trade continued without any control of original promoters of

Respondent/Corporate Debtor through one of their nominee one Mr. Suneel Verma and under such trading, they routinely adjusted receivable/ payments, either in part or whole, to be received from foreign trading party against the receivable from other foreign trading party, with such trading parties i.e. M/s Gulf Distribution and M/s Surya Global held out to be business associates of each other, but no sums were received by Respondent Company/ Corporate Debtor. Only false assurances were given with regards to the payments. Till date, it is contended that Respondent Company/Corporate Debtor has not received any payments pursuant to the sale of contracted goods to foreign party. All these fraudulent transactions are under investigation by the SFIO, In view of the Corporate Debtor being used in carrying out fraudulent transactions for siphoning of funds by Mr. Viram Kothari, Mr. Udai Desai and Mr. Suneel Verma through the said entities M/s Gulf Distribution and M/s Surya Global, the Corporate Debtor did not get its valid payments to be credited to its accounts for being used for the purpose of its business. Citing the above peculiar circumstances under which the Corporate Debtor was deprived of receiving of its legitimate payments on account of mercantile trading, it has been argued that the amount allegedly shown as

due and payable by the Applicant Company as Financial Creditor under Part-IV of the application u/s 7 would not have occurred, had the payment been received by the Respondent Company/Corporate Debtor from M/s Gulf Distribution and M/s Surya Global instead of the same getting transferred to the group companies of the Kothari and Desai Group including the Applicant Company Rotomac Export Pvt Ltd.. Therefore, it is argued by the Ld. Counsel of the Respondent Company/Corporate Debtor during the hearing that no payment of any outstanding debt would have been due, had these payment been received by running the business of the Respondent Company in legitimate manner by the erstwhile management led by Mr. Vikram Kothari of the Applicant Company under whose directorship the Respondent Company was carrying on the business at that time before the Applicant Company itself was put under CIRP.

29. Apart from bringing out the above facts as regards the nature of financial dealing between the Applicant Company and the Respondent Company on account of which the present application u/s 7 has been filed by the Liquidator after finding that there is outstanding loans and advances shown in the Balance Sheet of the Corporate Debtors payable to the Financial Creditor, the issue

relating to present application being barred u/s 10A of the I & B Code has been raised stating that as the petition has been filed for the default, which has allegedly occurred within the period 31.03.2020 to 23.02.2021 and this period falls within the suspension/prohibited period u/s 10A of the Code (i.e. between 25.03.2020 and 25.03.2021) therefore, it has been contended that the application is barred under law.

30. Against the above counter reply filed by the Respondent Company/ Corporate Debtor, the Liquidator on behalf of the Applicant Company/Financial Creditor has further submitted in rejoinder countering the above arguments of the Respondent Company/Corporate Debtor. With regard to Section 10A of the I&B Code 2016, it has been stated that the date of default is prior to March 25, 2020 as cause of action arose prior to this date as per the Financial Statement of FY 2015-16 & 2016-17 of the Financial Creditor in which it has been shown that the Corporate Debtor has a total outstanding debt of Rs. 20,83,42,329/- along with interest and such default on the part of the Corporate Debtor is recurring in nature as financial assistance advanced to the Corporate Debtor are yet to be returned to the Financial Creditor. As per the Liquidator, all the outstanding dues have been acknowledged by

the Corporate Debtor in its Balance Sheets which are annexed with the instant application. It is pointed out that reliance on the Balance Sheet for the FY 2019-20 was placed only for showing acknowledgment of outstanding debt on which default is continuing since 2015. Therefore, as per the Liquidator, the contention of the Respondent Company that the default occurred between 31.03.2020 to 23.02.2021 is liable to be rejected.

Apart from taking the above plea, one IA No. 342/2021 was also filed by the Corporate Debtor challenging the maintainability of the application as being barred u/s 10A. Against this IA, the Applicant Company mentioned in its reply filed through the Liquidator that the last payment received by the Financial Creditor from the Corporate Debtor was on 31.08.2016 wherein, the Corporate Debtor vide RTGS paid a sum of Rs. 1 crore in respect of the said loan to the Financial Creditor and accordingly modified the charge on the asset of Melt Shop to Rs. 5.65 Crore vide form no. CHG-1 dated 10.03.2017. Citing the aforesaid transaction entered into between the Financial Creditor and Corporate Debtor, the date of default on repayment of debt by the Corporate Debtor to the Financial Creditor has been mentioned by the Liquidator as 10.03.2017. In view of the aforementioned facts and

circumstances as contended by the Liquidator, the present company petition has been filed by the Financial Creditor seeking initiation of the CIRP of the Corporate Debtor and this date of the default is much before the date i.e. 25.03.2020 from which the Section 10A is applicable. It is also stated that outstanding debt is reflected in the Balance Sheets of the Corporate Debtor for the financial years 2016-17 & 2017-18 and the Application has been filed on 20.03.2021 and hence in view of the Liquidator, the same is within the limitation period as per Section 18 of the Limitation Act.

As regards the default committed by the Corporate Debtor in repaying the outstanding debt after it became due and payable as defined u/s 3(12) of the I&B Code, it has been submitted by the Liquidator in its reply to IA No. 342/2021 that the Corporate Debtor has been avoiding making the repayments to the Financial Creditor without any substantial grounds or reason and such deceitfulness of the Corporate Debtor has caused the Financial Creditor irreparable loss and damage in their business. However, despite repeated requests, the Corporate Debtor is yet to make the repayment of the monies due to the Financial Creditor. Thus, the

Corporate Debtor has committed a “Default” in repayment of its financial obligations as defined under Section 3 (12) of the Code.

As regards the nature of the financial dealings between the Financial Creditor and the Corporate Debtor due to the Financial Creditor having taken the responsibilities of rehabilitating the Corporate Debtor after it moved to the BIFR as per MOU dated 12.03.2005, the liquidators in its rejoinder without commenting on the terms of MOU dated 12.03.2005 under which various investments were made by the Financial Creditor and funds were provided for the operation of Corporate Debtor, has simply stated that there is no embargo on filling an application u/s 7 if such co-promoters or a majority shareholder is also a Financial Creditor under the Code. It is also stated that once the requirement as stipulated u/s 7 of the Code are satisfied, the application for initiation of the CIRP is liable to be admitted.

As regards depriving the Corporate Debtor from receiving its legitimate funds from mercantile trading fraudulently by the ex-directors and thus, not enabling the Corporate Debtor to clear its outstanding amounts, it is simply stated in the rejoinder that the alleged illegal acts of the erstwhile director of the Financial Creditors cannot be a valid ground for non-payment of dues of the

Financial Creditor and such illegal and fraudulent acts of the erstwhile directors of the Financial Creditor are still under investigation by the Competent Authority and are pending for final adjudication before the Courts of Competent Jurisdiction. It is also contended that the principal of separate legal entity ensures that the company cannot be made liable for the illegal act of the director.

31. After considering the facts and circumstances of the case as discussed above, the main question before us to decide is whether the Outstanding Loan & Advances shown in the balance sheet of the Respondent-Corporate Debtor payable to the Applicant on account of which the present application is filed would be covered by the expression “Financial Debt” and the Applicant would be a “Financial Creditor” within the term used in Section 7, particularly in respect of its sub-sections (1) and (5) for initiation of CIRP on default if any occurred in respect of such Financial Debt.

32. From a bare perusal of Section 7(1) of the I & B Code, 2016 , it can be seen that CIRP can be triggered by a “**Financial Creditor**” when there is a “**financial debt**” and that “**default**” has been committed in respect of repayment of that financial debt by the Corporate Debtor. In order to adjudicate the issue under

consideration, first these three terms as defined in the Code have to be read as reproduced below: -

“5(7) **“financial creditor”** means any person to whom a financial debt is owed and includes a person to whom such debts has been legally assigned or transferred to;

5(8) **“financial debt”** means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes-

- a) money borrowed against the payment of interest;
- b) any amount raised by acceptance under any acceptance credit facility or its de-materialized equivalent;
- c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;
- d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;
- e) receivable sold or discounted other than any receivable sold on non-recourse basis;
- f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing.
  - i. any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and
  - ii. the expression, “allottee” and “real estate project” shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 to 2016);]
- g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

- h) *any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;*
- i) *the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;*

3(12) “**default**” *means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not [paid] by the debtor or the corporate debtor, as the case may be;*

33. In order to understand the expression “Financial Creditor”, the requirements of expression “ Financial Debt” have to be looked into as defined in Section 5(8) of the I & B Code, 2016. The opening words of the definition of “Financial Debt” provide that a financial debt is a debt along with interest, if any, which is *disbursed against the consideration for the time value of money* and it may include any of the events enumerated in its sub-clause (a) to (i). Therefore, the first essential requirement of financial debt has to be met viz. that the debt is disbursed against the consideration for the time value of money and which may include the events enumerated in its various sub-clauses. Thus, the key feature of a debt to be financial debt is that it is for time value of money meaning thereby, it is a sum of money received today and to be paid over a period of time in a single or series of payments in future. Therefore, for a debt to be a financial debt, for showing consideration for time value

of money, there has to be a financial contract for repayment of money given as loan to the Corporate Debtor providing a repayment schedule for repaying the loan over a period of time with or without interest in single or series of payments in future. Default in repayment of such financial debt would occur at the time when any amount of such financial debt either in full or in part has become due and payable on a particular date as per the repayment schedule or on being finally recalled the loan , it is not paid by the Corporate Debtor on the specified date and if such default amount exceed the threshold limit as provided in section 4 of the I & B Code, 2016, CIRP against that Corporate Debtor may be initiated as per the provisions of section 7 of the I & B Code.

34. In the present case under consideration, we find that M/s Rotomac Exports Pvt Ltd. on behalf of which the Liquidator has filed the application u/s 7 treating it as Financial Creditor, disbursed funds to the Respondent M/s Mohan Steels Ltd. (shown as Corporate Debtor in the present application) under the terms of an MOU dated 12.03.2005 after it agreed to make investment and bring in requisite funds in the Respondent Company for its operation and rehabilitation as a co-promoter when the Respondent Company was under BIFR in terms of section 15(1) of

the SICA as discussed in preceding para no. 27. The funds were mostly disbursed in the form of unsecured loan without any terms of repayment specified, except one secured loan of Rs. 9.9 crore for the purpose of making settlement of dues of Allahabad Bank by the Respondent Company with the condition that the Respondent Company shall repay the said loan to the lender Applicant Company within 90 days of paying the settled loan of Allahabad Bank. In the terms of payment of the said loan, it is also further stated that the borrower Respondent Company has agreed that in the event of borrower being unable to repay the said loan to the lender within 90 days of paying the settled loan of Allahabad Bank, the borrower shall create 1<sup>st</sup> charge on the sale proceeds of the Fixed Assets of the company to the extent of Rs. 9.9 crores to secure repayment of the said loan of Rs. 9.9 crores or the amount of the said loan remaining unpaid at the time of sale of those fixed assets. As the borrower Respondent Company could not repay the said loan amount within 90 days of paying the settled loan of Allahabad Bank, the borrower hypothecated to the lender/Applicant Company its Fixed Asset of Melting Unit vide Hypothecation Agreement dated 19.04.2007 and also created charge in favour of the Financial Creditor by filing Form VIII on

19.04.2007. However, no definite period of repayment of the loan has been specified after creation of first charge apart from specifying that the loan will be recovered from the sale proceed of the fixed assets to the extent of Rs. 9,9 crore or the amount of the said loan remaining unpaid at the time of sale of those fixed assets.

35. After the default of not paying the loan of Rs. 9.9 crore by the Respondent Corporate Debtor and creation of 1<sup>st</sup> Charge on its fixed assets to secure the said loan by the Applicant Company on 19.04.2007, specifying in the Hypothecation Agreement that payment of the said loan is secured on the sale proceeds of the Fixed Assets of the company to the extent of Rs. 9.9 crores or the amount of the said loan remaining unpaid, the present application has been initiated only after the Applicant itself went into CIRP and later under liquidation, by the Liquidator, though before initiation of the proceeding u/s 7, Liquidator never demanded for repayment of outstanding loan by issuing any recall notice specifying any time line to repay the outstanding loan. It has also been noted from the record that repayment of the said loan either in part or full amount was never demanded by the Applicant Company till it was under the control of the erstwhile management before it was put under CIRP on 20.09.2017 and later under liquidation on 23.03.2018.

Because of this reason of the said loan amount given by the Applicant Company during the normal course of business for rehabilitation of the Respondent Company, no schedule of repayment of principal as well as interest amount has been specified. This fact has also been stated by the auditor in the balance sheet of the Respondent/Corporate Debtor and the same is reproduce as under: -

*“(iii) According to information and explanation given to us the Company has taken long term loans from its associate company and the amount outstanding as on 31 March, 2020 is interest bearing. The terms and condition of the loans are not prejudicial to interest of the company, **No schedule of repayment of principal and interest has been stipulated.**”*

36. It may also be noted here that u/s 7(3)(c) of the Code, 2016, at the time of filling of an application by the Financial Creditor before the tribunal along with such application, the Applicant is required to furnish any other information as may be specified by the IBBI. Under the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, in respect of application to be filed by a Financial Creditor in Form-1, it has been specified in clause (5) of Part- V of Form- 1 that the Financial Creditor has to attach along with the Application, a latest and complete copy of the Financial Contract reflecting all amendments and waivers up

to date. **“Financial Contract”** has been defined under clause (d) of sub-rule (1) of Rule 3 as follows:

*“Financial Contractor means a contract between a Corporate Debtor and Financial Creditor setting out the terms of the Financial Debt, including the tenure of debt, interest payable and the date of the repayment.”*

37. Considering the above statutory provisions available in the I & B Code, 2016 and Rules and Regulations made thereunder as discussed above, we find that for a debt to be a Financial Debt, it has to be governed by a Financial Contract in which tenure of debt, interest payable, if any, and date of repayment has to be specified against the consideration for time value of money and if such debt outstanding with a Corporate Debtor is owed to a person, such person would be covered under the definition of Financial Creditor and any default committed by the Corporate Debtor in repayment of such Financial Debt to the Financial Creditor, a proceedings u/s 7 of the I & B Code can be started for initiation of CIRP proceedings.

38. In view of these facts as discussed above as regards the nature of the outstanding loan and advances appearing in the Balance Sheets of the Corporate Debtor paid to it by the Applicant Company under the control of erstwhile management before it was

put under CIRP and later under liquidation, we find that these loans were disbursed during the normal course of business for its rehabilitation under a MOU to revive it after it moved to BIFR in 1997 due to heavy losses. Such loans were found to be disbursed without specifying any repayment schedule for repaying the loan over a period of time with or without interest in single or series of payments in future and also there being no financial contract either attached with the application or produced during the course of hearing in compliance of the provisions of the Code or of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Therefore, such loan and advances as appearing in the Balance Sheets of the Corporate Debtor on account of which the present application has been filed, **cannot be said to be disbursed against a consideration for ‘Time Value of Money’** hence, such outstanding debt **would not fall within the ambit of a Financial Debt** and the applicant in the present application **would not qualify to be a Financial Creditor.**

39. Similar issue has also been dealt in a decision delivered by the Principal Bench of NCLT, New Delhi in an order dated 04.01.2020 in case of ***Utsav Securities Private Limited vs. Timeline Buildcon Private Limited in CP No. IB 1559***

**(PB)/2019.** The relevant part of this decision is reproduced as under: -

*“13. In order to find out as to whether the petitioner would be covered by the expression ‘Financial Creditor’ and the expression ‘Financial Debt’ within the meaning of the term used in Section 7 and Section 5 (7) & (8) of the Insolvency & Bankruptcy Code, it would be profitable to read the provisions of Sections 5 (7) & (8) and Section 7 of IBC which are set out below:*

*5. Definitions: In this part, unless the context otherwise requires-*

*7. “financial creditor” means any person to whom a financial debt is owed and includes a person to whom such debts has been legally assigned or transferred to;*

*(8) “financial debt” means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes-*

*(a) money borrowed against the payment of interest;*

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

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

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

*(e) receivables sold or discounted other than any receivable sold on nonrecourse basis;*

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

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

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

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

.....

*7. Initiation of Corporate Insolvency Resolution Process by financial creditor- (1) A financial creditor either by itself or jointly with 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.*

*Explanation- For the purpose of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor.*

*(2) The financial creditor shall make an application under sub-section (1) in such form and manner and accompanied with such fee as may be prescribed.*

*(3) The financial creditor shall, along with the application furnish-*

*(a) record of the default recorded with the information utility or such other record or evidence of default as may be specified;*

*(b) the name of the resolution professional proposed to act as an interim resolution professional; and*

*(c) any other information as may be specified by the Board*

From a bare perusal of Section 7 of the IBC, it is patent that the insolvency process can be triggered at the instance of a “Financial Creditor” individually or jointly against a corporate debtor when default has occurred. The first question that arises for consideration is as to who is a ‘Financial Creditor’. The meaning of that expression has to be ascertained from the definition as provided by Section 5(7) & 5(8) (supra). Section 5 (7) of IBC defines the expression “Financial Creditor” and Section 5 (8) of IBC defines the expression “Financial Debt” which has been used in Section 5(7) of IBC.

14. A perusal of definition of expression ‘Financial Creditor’ would show that it refers to a person to whom a financial debt is owed and includes even a person to whom such debt has been legally assigned or transferred to. In order to understand the expression ‘Financial Creditor’, the requirements of expression ‘financial debt’ have to be satisfied which is defined in Section 5(8) of the IBC. The opening words of the definition clause would indicate that a financial debt is a debt along with interest which is **disbursed against the consideration for the time value of money** and it may include any of the events enumerated in sub-clauses (a) to (i). Therefore, the first essential requirement of financial debt has to be met viz. that the debt is disbursed against the consideration for the time value of money and which may include the events enumerated in various sub-clauses. A Financial Creditor is a person who has right to a financial debt. The key feature of financial transaction as postulated by section 5(8) is its consideration for time value of money. In other words, the legislature has included such financial transactions in the definition of ‘Financial debt’ which are usually for a sum of money received today to be paid over a period of time in a single or series of payments in future. It may also be a sum of money invested today to be repaid over a period of time in a single or series of instalments to be paid in future. In **Black’s Law Dictionary** (9<sup>th</sup> edition) the expression “Time Value’ has been defined to mean “the price associated with the length of time that an investor must wait until an investment matures or the related income is earned”. In both the cases, the inflows and outflows are distance by time and there is a compensation for time value of money. It is significant to notice that in order to satisfy the requirement of this provision, the financial transaction should be in the nature of debt and no equity is to be implied by the opening words of Section 5(8)

of the IBC. It is true that there are complex financial instruments which may not provide a happy situation to decipher the true nature and meaning of a transaction. It is pertinent to point out that the concept 'Financial Debt' as envisaged under Section 5(8) of the IBC is distinctly different than the one prevalent in England as provided in its Insolvency Act, 1986 and the 'Rules' framed thereunder. It appears that in England there is no exclusive element of disbursement of debt laced with the consideration for the time value of money. However, forward sale or purchase agreement as contemplated by Section – 5(8) (f) may or may not be regarded as a financial transaction. A forward contract to sell product at the end of a specified period is not a financial contract. It is essentially a contract for sale of specified goods. It is true that some time financial transactions seemingly restructured as sale and repurchase. Any repurchase and reverse repo transaction are sometimes used as devices for raising money. In a transaction of this nature an entity may require liquidity against an asset and the financier in return sell it back by way of a forward contract. The difference between the two prices would imply the rate of return to the financier. (See Taxman's Law Relating to IBC, 2016 by Vinod Kothari & Sikha Bansla) When we examine the nature of transactions in the present case, it is not possible to conclude that any loan was advanced with interest. Certainly, there was no element of time value for money.

15. In paras 4, 5 & 7 of the reply as quoted verbatim in preceding para No. 8, the respondent has made categorical assertion which goes un rebutted establishing that no element of time value for money is attracted and it is a simple friendly loan. There is no document on record to prove the element of interest.

Therefore, such a transaction would not acquire the status of a 'financial debt' as the transaction does not have consideration for the time value of money, which is a substantive ingredient to be satisfied for fulfilling requirements of the expression 'Financial Debt'.

16. It is also relevant to note that under Section 7(3)(C) of the Code, 2016 at the time of filing an application by the Financial Creditor before this Tribunal, along with such application the applicant is required to furnish any other information as may be specified by the IBBI. The Ministry of Corporate Affairs has framed Insolvency and Bankruptcy (Application to Adjudication

Authority) Rules, 2016 where under the form to be adopted by different categories of creditors have been specified and in relation to a Financial Creditor the form prescribed is form 1. A perusal of clause 5 of part V of form 1 shows that the Financial Creditor is required to place a latest and complete copy of the financial contract reflecting all amendments and waivers up to date and a copy is required to be attached. 'Financial Contract' has been defined under clause (d) of sub rule (1) of Rule 3 as follows:-

*'Financial Contract' means a contract between a Corporate Debtor and a Financial Creditor setting out the terms of the financial debt, including the tenure of debt, interest payable and the date of repayment.*

17. In the instant case no such financial contract has also been produced in compliance with the provisions of the Code or of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 either in the petition or additional affidavits.

18. As a sequel to the above discussions, we are unable to persuade ourselves to accept that the petitioner is covered by the expression "Financial Creditor" in terms. Therefore, the petitioner does not answer the description of Section 7 read with Section 5(7) & 5(8) of IBC. The petition is accordingly dismissed."

40. Deriving strength from the above decision of the Principal Bench of the NCLT, New Delhi, under the similar facts of circumstances of the case that there is no Financial Contract specifying any terms of repayment and schedule of such repayment of the loan outstanding, we in the present case also hold that there is no Financial Debt and the Applicant Company is not a Financial Creditor

41. We have also dealt with the issue that even if the outstanding debt in the present case is considered as financial debt, whether within the meaning of the provision of section 3(12) of the I & B Code, any default has occurred. As per the records produced and details provided to us, the Respondent Corporate Debtor pursuant to the Hypothecation Agreement on 19.04.2007, made voluntary payments from time to time. A sum of Rs. 1.75 crore is paid on 14.05.2007 and Rs. 1.5 crore was paid on 12.04.2016. Thereafter, Rs. 1 crore was paid on 31.08.2016. After the above payments, charge on Fixed Assets has been modified to the extent of unpaid amount of Rs. 5.65 crore by filing Form No. CHG-1 dated 10.3.2017. It is also worth to note that there is no definite time period specified under which the funds provided by the Applicant Company to the Respondent Company in the form of unsecured as well as secured loan for its rehabilitation, is to be repaid hence, it appears that it was because of this reason that the Applicant Company initially could not indicate any specific date of default in Part IV of the application except stating that the Corporate Debtor in its Balance Sheets from 2013-2020 acknowledged the debt payable to the Financial Creditor. However, it may be noted that acknowledgement of debt at the best be taken u/s 18 of the

Limitation Act, 1963 as per the judgement of the Hon'ble Supreme Court in case of Dena Bank vs. C. Shiva Kumar Reddy and Another in Civil Appeal No.1650 of 2020 dated 04.08.2021 but it would not per se create the default. Thus, there will not be any cause of action justifying initiation of proceeding u/s 7 of the Code.

Such averments made in the present application regarding date of default as discussed above has also been countered by the Respondent/Corporate Debtor stating that the present petition/application has been filed on the premise that despite having acknowledged the debt due in the balance sheet of the FY 2019-20, (i.e. 31.03.2020), payment has not been made resulting into default and hence, the date of default has been inferred as being between 31.03.2020 (*the date on which balance sheet of FY 2019-20 is prepared*) to 23.02.2021 (*the date of filing of the present application*). When such date of default has been pointed out to be falling within the suspension/prohibited period of 25.03.2020 to 24.03.2021 as provided under section 10A of the I & B Code, 2016 during which period, filing of any application for CIRP was barred, the Applicant Company in its rejoinder dated 20.12.2021 stated that date of default has occurred prior to 25.03.2020 because such debt was mentioned in the financial statements for the financial

year 2015-16 and 2016-17 of the Financial Creditor but still no specific date of default has been provided. Later, when an IA 342/2021 has been filed by the Corporate Debtor on 26.10.2021 specifically challenging the maintainability of the application on the ground of the application being covered by the provisions of section 10A, a reply to this IA has been filed after about one and half year on 21.02.2023 in which date of default is first time mentioned as being 10.03.2017 which is the date on which the value of charge of the secured loan is modified on the melt shop of the Corporate Debtor to the extent of Rs. 5.65 crore of unpaid amount by filing of the Form CHG-1. This date cannot be a date of default based upon unilateral determination of default both in the absence of repayment schedule and any demand having been raised prior thereto. It is on record that no repayment of outstanding amount of Rs. 5.65 crore has been demanded by the Financial Creditor from the Corporate Debtor to be repaid within any specified time period while modifying the charge on the assets of the Corporate Debtor. It appears that the Applicant Company has chosen a date as 10.03.2017 to be date of default taking it to be date on which the Charge has been modified just to escape the provisions of section 10A for which objection was raised based on

his averments made in part IV of the application without considering the fact that on this date no default has occurred.

42. As has been discussed earlier, in fact, as per the documents available on record, there is no repayment schedule of the amount given as loan by the Financial Creditor to the Corporate Debtor exists. The Financial Creditor has been found to be providing funds from the time to time to the Corporate Debtor for making capital investments as well as for running the business of the Corporate Debtor. On the date of filing of the present application, Rs. 20,83,42,329/- is outstanding in the balance sheet of both Financial Creditor as well as Corporate Debtor on the basis of which the Liquidator of the Applicant Company Rotomac Exports Pvt. Ltd. treating it as Financial Creditor, has filed the present petition stating the reason that the Corporate Debtor is not making payment of such outstanding debt. However, before filling of this petition, no recall notice has been issued by the Liquidator on behalf of the Financial Creditor for making the repayment of the outstanding amount. The date of default now being mentioned as 10.03.2017 by the Applicant Company in its reply filed on 21.02.2023 is the date on which revised charge is created and relevant Form to this effect is filed. Such date in our opinion cannot

be said to be a date on which the debt has become due for the repayment. As per the definition of default given in Section 3(12), default occurs on non-payment of debt when whole or any part or installment of amount of debt **has become due and payable and is not paid**. In absence of any recall notice of the outstanding amount by the present management of the Financial Creditor being the Liquidator and there being no specific repayment schedule of the loan as also confirmed by the auditor in the balance sheet of the Corporate Debtor, it cannot be said that the outstanding amount of loan as shown in the Balance Sheet has become due and payable, hence, we are of the opinion that no default of outstanding debt has occurred even if it is considered as a “ **Financial Debt**”, when the present petition U/s 7 was filed.

43. The issue of a debt being a Financial Debt or not and when a default in terms of the definition given u/s 3(12) has occurred in repayment of such Financial Debt, has been dealt with in details in a decision by the Hon’ble National Company Law Appellate Tribunal (NCLAT) in a ***Company Appeal (AT) (Ins) No. 251 of 2020 dated 3<sup>rd</sup> August, 2021 in Pawan Kumar vs. Utasav Securities Pvt. Ltd.*** The relevant part of this decision is reproduced as under: -

*“13. Certain essential conditions are required to be satisfied by a Financial Creditor seeking to invoke the provisions of CIRP as against the Corporate Section 7 of IBC. Following essential conditions are required to be satisfied by a Financial Creditor.*

*(i) There must be disbursal of loan amount.*

*(ii) Such disbursal should be made for a consideration for time value of money, and*

*(iii) When the debt (Whole or any part or instalment) become due and payable and is not paid by the Corporate Debtor means committed default.*

*14. The above all conditions are to be satisfied by the Financial Creditor then Adjudicating Authority may admit the Application under Section 7 of the IBC and initiate the CIRP against the Corporate Debtor. In the present case, it is an admitted fact that financial Creditor transferred Rs. 6.10 Crs. through RTGS between 16.02.2017 to 22.02.2017 to the Corporate Debtor’s bank account. This fact is corroborated by the bank entries filed by the Financial Creditor and the Corporate Debtor has not denied that the Corporate Debtor has not received such amount. Thus, we hold that aforesaid amount has been disbursed by the Financial Creditor to the Corporate Debtor. However, there is no written agreement between the parties to show that the disbursement of such amount is a loan transaction.*

*15. Now, we have considered whether such amount is disbursed for a consideration for time value of money?*

*16. According to the Financial Creditor the Corporate Debtor has paid interest Rs. 6,05,718 on 14.02.2018 after deduction of TDS and this fact is undisputed. Therefore, it is proved that such disbursal has been made for a consideration for time value of money. However, as per the Corporate Debtor, on the basis of deduction of TDS such inference cannot be drawn.*

*17. We have considered the submissions in the identical facts Coordinate Bench of this Appellate Tribunal in the Case of Prayag Polytech Pvt. Ltd. Vs. Gem Batteries Pvt. Ltd. CA (AT) (Ins) No. 713 of 2019 held that:*

*“Merely pointing out that TDS was deducted would not be sufficient to conclude that there was a*

*Financial Debt. TDS can be deducted for various reasons.”*

*18. Thus, we are of the view that on 14.02.2018 aforesaid amount after deduction of TDS has been paid to the Financial Creditor on this basis it cannot be concluded that the transaction in question is a Financial Debt.*

*19. According to the Financial Creditor an oral loan agreement can be enforceable in law in view of the Section 10 of the Indian Contract Act and Section 186(11) of the Act.*

*20. On the other hand, as per the Corporate Debtor in absence of a Financial Contract defined in Rule 3 (1) (d) the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 between the Corporate Debtor and Financial Creditor, the transaction cannot be termed as Financial Debt. RBI on 18.02.2013 issued guidelines to Non-Banking Finances Companies for fair practices which states that the Non-Banking Finances Company should convey in writing to the borrower in vernacular language as understood by the borrower by means sanctioned letter or otherwise, the amount of loan sanctioned alongwith the terms and conditions including annualised rate of interest. Thus, it is obligatory on the part of the Financial Creditor that there should be a loan agreement in writing only.*

*21. We have considered the submissions, the Financial Creditor has not furnished any document to show that the transaction in question is a loan transaction. So far as the section 10 of Indian Contract Act and Rule 3 (1) (d) of the Rules is concerned we again refer the Prayag Polytech (Supra) in which this Tribunal held that:*

*“7. As regard relying on Section 10 of the Contract Act, 1872, in our view IBC is a complete code in itself. Section 238 of IBC has overriding effect on provisions inconsistent with IBC. The ‘Financial contract’ is defined in “Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016” Rule 3(1)(d) requires setting out the terms of the financial debt including tenure etc. We find that Appellant has failed to show any record showing*

*financial debt to be there. As such, we are unable to find any fault in the impugned order while rejecting Section 7 application.”*

22. *With the aforesaid, we are of the view that the Financial Contract as per the Rule 3(1) (d) is must between the corporate Debtor and the Financial Creditor for setting out the terms of a Financial Debt including the tenure of the Debt, interest payable and the date of repayment. In the absence of such Financial Contract, the Financial Creditor has failed to satisfy that when the debt and interest become due and payable.*

23. *Now, we have considered, whether the Corporate Debtor failed to pay (Whole or any part or instalment of the debt) when the debt become due and payable?*

**24. As we have already discussed that the Financial Creditor has not filed any writing to show that when the debt become due and payable. As per the Financial Creditor the debt in question is payable on demand. From the notice and the Application, it is not clear that on which date the demand was made and the loan and interest become due and payable. In Para 7 of the notice there is vague allegation that:**

**“Despite repeated request and reminders, no payments either towards the loan or outstanding/overdue interest has been paid by the borrower. Thus, coercing our client to issue the present demand notice recalling the loan and the overdue interest accruing till 31.03.2019.”**

25. *The Section 7 (3) (a) of the IBC, provides that the Financial Creditor shall along with the Application is a required to furnish, a record of default recorded with the information utility or such other record or evidence of default as may be specified. The Financial Creditor has not filed any evidence of default along with the application under section 7 of IBC.*

26. *With the aforesaid, we are of the view that the Respondent No. 1 (Financial Creditor) failed to establish*

*when the debt become due and payable and the Corporate Debtor has committed default.*

44. In the above case, the notice of demand was issued by the Financial Creditor but it has been observed by the Hon'ble NCLAT that from the notice and the application, it was not clear that on which date the demand was made and loan and interest became due and payable and therefore, the Financial Creditor has been found to have failed to establish when the debt became due and payable and when the Corporate Debtor has committed default, hence, the petition u/s 7 in the case of ***Utasav Securities (supra)*** was dismissed. In the present case, even the demand notice has not been issued by the Financial Creditor leave aside there not being any financial contract specifying the terms and period of repayment of the funds disbursed by the Financial Creditor to the Corporate Debtor in form of unsecured and secure loan. Therefore, in the present case under consideration, the date of default is more clearly not established.

45. In view of our findings as discussed in aforesaid paras, we find that the outstanding amount of loan and advances shown in the Balance Sheet of the Corporate Debtor on account of which the present application has been filed is not sufficient to term it as a

Financial Debt, and therefore the Applicant filing the present application cannot be a Financial Creditor eligible to file application and even if such loan is considered as financial debt, no default in terms of section 3(12) has occurred. Therefore, on both counts, the present petition does not survive and hence, we **dismiss** the present petition filed under Section 7 due to the debt mentioned in Part-IV not being a financial debt and no default has occurred.

Ordered accordingly.

In view of our foregoing order, the pending IA NO.341/2021 & IA NO.342/2021 also no longer survive and therefore are disposed of accordingly.

*-Sd-*

**(Ashish Verma)**  
**Member (Technical)**

*-Sd-*

**(Praveen Gupta)**  
**Member (Judicial)**

07<sup>th</sup> December, 2023