IN THE NATIONAL COMPANY LAW TRIBUNAL

ALLAHABAD BENCH, PRAYAGRAJ

CP (IB) NO.14/ALD/2022

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)

In the matter of:

PHOENIX ARC PRIVATE LIMITED
(TRUSTEE OF PHOENIX TRUST FY22-16)

Having its Registered Office at:
5th Floor, Dani Corporate Park,
158, C.S.T. Road, Kalina, Santacruz (E)
Mumbai, Maharashtra-4000098.

.... Applicant/Financial Creditor

Versus

DRASTEE REALCON PRIVATE LIMITED

Having its Registered Office at:
C-45, Sector-62, Noida, Gautam Budh Nagar,
Uttar Pradesh, PIN-201307, India.

......Respondent/Corporate Debtor

Order pronounced on 14.07.2023

Coram:

Mr. Praveen Gupta.	:	Member (Judicial)
Mr. Ashish Verma	:	Member (Technical)

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Appearances:

Sh. Arvind Nayar, Sr. Adv. assisted by Ms. Wamika Trehan, Sh. Kartikeya Saran, Ms. Maithili Moondra, Sh. Akshay Joshi & Sh. Ujjawal Satsangi, Advs.

: For the Financial Creditor

Sh. Aman Dwivedi along with Sh. Akshay Mohiley, Advs.

: For the Corporate Debtor

ORDER

Facts of the case

1. The present Application is filed by the L&T Finance Limited (herein after referred to as "Applicant/Financial Creditor") under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("Code") to initiate insolvency resolution process against Drastee Realcon Private Limited (herein after referred to as "Respondent/Corporate Debtor") 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.

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2. The Applicant is a company incorporated under the Companies Act, 1956 and is registered as Non-Banking Financial Institution (NBFC) with the Reserve Bank of India (hereinafter after referred to as Applicant/Financial Creditor).The Applicant has assigned Mr. Ruchir Jauhari (Zonal Head–North) as the Authorized Representative in the present case, vide Board Resolution dated 18 October 2019 r/w Section –E(2) of Post Approval Delegation of Credit Related Powers r/w Letter of Authority dated 06 December 2021, annexed as **Annexure A-3 (Colly)** of the instant petition, who has signed the instant petition. However, later via an Assignment Agreement registered on 29.03.2022, the debt for which the present application has been filed was assigned to Phoenix ARC Private Ltd. Consequently, on filing of an I.A No. 172/2022, an order dated 26.05.2023 has been passed by this Tribunal allowing for substitution, and accordingly, L&T Finance Limited was substituted by Phoenix Arc Private Limited which thus, became the Financial Creditor. The Applicant has assigned Mr. Jimit Trivedi as the authorize representative vide Board Resolution dated 25.04.2022

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which is annexed with I.A No. 172/2022 as **Annexure-A-5**.

3. The Corporate Debtor i.e Drastee Realcon Private Limited was incorporated on 13 November 2019 and is carrying on the business of Real Estate development with registered Office at Gautam Buddh Nagar, Uttar Pradesh (hereinafter, referred to as Respondent/Corporate Debtor).The Corporate Debtor submitted an applications for loan on 23 November 2019 to L & T Housing Finance Limited which sanctioned a loan amount of Rs. 100,00,00,000/- (Indian Rupees One Hundred Crores). This Company later got merged with L&T Finance Limited, the Present Applicant/Financial Creditor. Corporate Debtor is represented by Mr. Aman Dwivedi and Mr. Akshay Mohiley Advocates.
4. The Applicant/Financial Creditor sanction loan of the Respondent/Corporate Debtor of INR 100,00,000, (Indian Rupees One Hundred Crores Only) vide sanction letter dated 14.02.2020 and granted secured loan to the Corporate Debtor of INR 100,00,00,000 (Indian Rupees One Hundred Crores Only) . In pursuance of this loan,

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Loan Agreement dated 27.02.2020 (also known as "Facility Agreement") were executed between both the parties. This loan as per the Loan Agreement dated 27.02.2020 were to be utilised for payment towards development management rights of Residential group housing project "Upcountry Phase-II located in Yamuna Expressway, Uttar Pradesh consisting of total area 19,03,940 sq. ft. and also for payment towards projects costs including construction costs, creating DSR and other and other incidental costs of the Facility.

5. Out of sanctioned loan amount of Rs. 100,00,00,000/-, an amount of Rs. 86,00,00,000 has been disbursed. The period of loan repayment was 72 months from the date of disbursement with initial 36 months constituting moratorium period and next 36 months for repayment of the principal loan amount. The loan carries an interest rate of "*8.75% below the interest rate of (L&T Housing Finance Limited Prime lending Rate i.e 9% p.a (floating) plus applicable interest rate statutory levy (if any) on the principal amount of loan remaining outstanding each day. The PLR rate being 17.75% p.a.*" It is payable on 15th day

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of every month from the date of disbursement. However, the first instalment of interest shall be repayable till 14th of next month from the date of disbursement. The loan is secured by the Security stated in Schedule III of the loan Agreement dated 27 February, 2020.

6. The Corporate Debtor had granted exclusive right on all the immovable mortgage properties in favour of the Creditor and all the receivables from the mortgage properties. The loan was secured by the Deed of Corporate Guarantee dated 27 February 2020 and Personal Guarantee from the Promoter dated 27 February 2020 along with pledge of 100% of the fully paid up Share Capital of the Borrower. Exclusive charge was also leviable on the Escrow Account and Debt Reserve Account and other reserves. In addition to this, a Hypothecation Deed dated 02 March 2020 was also executed as per the loan agreement by the Corporate Debtor.

7. It is claimed by the Applicant that the Corporate Debtor issued an unconditional Demand Promissory Note promising to pay the Applicant both the loan amounts

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advanced as per the loan agreements dated 27 February 2020.

8. The Corporate Debtor had remitted the interest on loan amount till 15 June 2021 and thereafter, defaulted in payment of interest till date. The loan disbursed by the Financial Creditor has been acknowledged by the Corporate Debtor and its liability towards repayment of the same along with interest. The Applicant/Financial Creditor by way of emails dated 10.04.2021 shared the balance statements in respect of the dues under the loan agreement with the Corporate Debtor. The said balance statements were duly accepted by the Corporate Debtor admitting its liability under the loan agreements. These emails of applicant and acceptance by the Corporate Debtor are annexed at **Annexure A-11 (Colly)** of the application. It is also pointed out by the Applicant/Financial Creditor that apart from not paying the interest after 15 June 2021, the Corporate Debtor has also failed to fulfil many conditions of loan agreements as enumerated below:-

I. The Corporate Debtor has failed to create Debt Service Reserve.

II. The Corporate Debtor is obligated to deposit entire receivables in the designated escrow account. However, this has not been complied by the Corporate Debtor which is in absolute contravention to the terms of the loan Agreement.

III. Failure to obtain NOCs for sale of units due to which sale is void ab initio.

IV. Failure to route receivables through Escrow Account.

V. Failure to maintain security and receivable cover.

VI. Failure to achieve sales of units and sales of units and sales collections in the project inventory as per Project Inventory as per agreed schedule.

VII. Non-adherence to the agreed schedule of construction of the Project.

VIII. Failure to obtain RERA Registration and launch project for sale.

9. The Above Failure of the Corporate Debtor to honour the payment terms under the loan agreements coupled with non-payment of interest led to an 'Event of Default' as enumerated in the Loan Agreement. Thus, the financial

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creditor classified the account of the Corporate Debtor as Non-Performing Assets ("NPA") on 13 October 2021.

10. The continued default in payment of interest by the corporate debtor led to issuance of Recall Notice dated 25.11.2021 by the Financial Creditor, in exercise of its rights under the Loan Agreement. The Financial Creditor vide recall notice dated 25 November 2021 called upon the Corporate Debtor to pay the total outstanding loan amount of Rs. 92,63,44,418.98/- as per the agreement within two days. The Financial Creditor gave two days notice to the Corporate Debtor to pay the above outstanding amount but the Corporate Debtor failed to pay by 27 November 2021. **Therefore, the present application under section 7 has been filed computing the total outstanding debt of Rs. 92,74,47,732.98 /- (consisting of Principal amount of Rs.86,00,00,000/-, interest Rs.3,46,22,949/-, Additional interest of Rs.2,33,64,384/-, and delayed payment charges of Rs. 24,09,265/-,and TDS Due Rs.70,51,134/-) as on 30.11.2021 for payment which the Corporate Debtor has defaulted.** This loan is also shown in a statement of

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accounts of the Financial Creditor reflecting the above said total outstanding amount of default, along with a Certificate in accordance with Bankers Book of Evidence, 1891.

11. In support of the total default amount of Rs. 92,74,47,732.98 the Applicant/Financial has also filed Report of Default with the National E-Governance Services Limited dated 22 November 2021 but the same is shown as pending authentication by the CD and the same is annexed as **Annexure-24**. Particulars of the financial debt through various documents and records evidencing the default are provided in Part-V of the Application and supporting documents are also annexed with the Application.

Reply on behalf of Corporate Debtor

12. In the counter Affidavit, it is submitted by the Corporate Debtor that the transaction between Corporate Debtor and Financial Creditor is a one-sided non-negotiable arrangement. There is no substantial evidence to prove the disbursement of loan amount by the Financial Creditor for consideration of time value of money. Hence,

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it does not come within the definition of financial debt as provided under Section 5(8) of the Code, consequently applicant is not financial creditor as per the provisions of the IBC, 2016.

13. Further, it is also submitted by the Respondent/Corporate Debtor that Applicant/Financial Creditor has only alleged based on the loan agreement dated 27.02.2020 that there is a financial debt. However, there is no evidence submitted by the applicant that there is actual disbursement of the loan amount to the applicant. It is out of the purview of the Section 5(8) of the IBC, 2016.

14. It is further submitted that the Hon'ble NCLAT in ***Sanjay Kewalramani vs Sunil Parmanad Kewalramani, Company Appeal (AT) (Insolvency) No. 57 of 2018*** held that

"…There is nothing on the record to suggest that 2nd and 3rd Respondents had given the loan in favour of the 'Corporate Debtor' which can be termed to be 'disbursement of an amount for consideration for the time value of money' as required under Section 5(8). Merely grant of loan and admission of taking loan will ipso facto not treat the 2nd and 3rd Respondents as 'Financial Creditors', till they show that it complies with the substantive definition or any one or other clause of Section 5(8).

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Mere fact that the company paid interest @ 12% per annum, during certain period cannot be the ground to hold that the 'debt' comes within the meaning of 'Financial Debt' to treat the 2nd and 3rd Respondents as 'Financial Creditors'. As we find that 1st Respondent who signed and filed the application under Section 7 of the 'I&B Code' was not eligible to file the application not being a 'Financial Creditor', as held by the Adjudicating Authority, we hold that the petition at the instance of 2nd and 3rd Respondents were also not maintainable.

..."

15. The applicant has also relied upon the ***Vidarbha Industries Power Ltd v. Axis Bank Ltd. (2022) 8 SCC 352*** contending that admissibility of application under section 7 by the Adjudicating Authority is discretionary in nature which depends upon the debt, default and financial health of the corporate debtor. The relevant paras are as under:-

"76. *The fact that the legislature used "may" in Section 7(5)(a) IBC but a different word, that is, "shall" in the otherwise almost identical provision of Section 9(5)(a) shows that "may" and "shall" in the two provisions are intended to convey a different meaning. It is apparent that the legislature intended Section 9(5)(a) IBC to be mandatory and Section 7(5)(a) IBC to be discretionary. An application of an operational creditor for initiation of CIRP under Section 9(2) IBC is mandatorily required to be admitted if the application is complete in all respects and in compliance of the requisites of the IBC and the rules and regulations thereunder, there is no payment of the unpaid operational debt, if notices for payment or the invoice have been delivered to the corporate debtor by the*

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operational creditor and no notice of dispute has been received by the operational creditor. The IBC does not countenance dishonesty or deliberate failure to repay the dues of an operational creditor.

77. *On the other hand, in the case of an application by a financial creditor who might even initiate proceedings in a representative capacity on behalf of all financial creditors, the adjudicating authority might examine the expedience of initiation of CIRP, taking into account all relevant facts and circumstances, including the overall financial health and viability of the corporate debtor. The adjudicating authority may in its discretion not admit the application of a financial creditor.*

78. *The legislature has consciously differentiated between financial creditors and operational creditors, as there is an innate difference between financial creditors, in the business of investment and financing, and operational creditors in the business of supply of goods and services. Financial credit is usually secured and of much longer duration. Such credits, which are often long term credits, on which the operation of the corporate debtor depends, cannot be equated to operational debts which are usually unsecured, of a shorter duration and of lesser amount. The financial strength and nature of business of a financial creditor cannot be compared with that of an Operational Creditor, engaged in supply of goods and services. The impact of the non-payment of admitted dues could be far more serious on an operational creditor than on a financial creditor.*

79. *As observed above, the financial strength and nature of business of financial creditors and operational creditors being different, as also the tenor and terms of agreements/contracts with financial creditors and operational creditors, the provisions in the IBC relating to commencement of CIRP at the behest of an operational creditor, whose dues are*

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undisputed, are rigid and inflexible. If dues are admitted as against the operational creditor, the corporate debtor must pay the same. If it does not, CIRP must be commenced. In the case of a financial debt, there is a little more flexibility. 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."

16. It is also submitted by the Corporate Debtor that the Financial Creditor was harassing them by threatening to recall the loan despite the fact that Corporate Debtor was servicing the said loan as per the loan agreement by paying all interests on time. The recall of loan vide recall notice dated 25th November 2022 by the Financial Creditor is illegal which delayed the construction of the project and hampered the revenue generation of the Corporate debtor.

17. In its written submission, the Corporate Debtor has presented an argument based on the loan agreement dated 20th March 2017, executed between the financial creditor and Supertech Ltd for the construction of the Eco Village Project. The Corporate Debtor has alleged that the

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Financial Creditor misappropriated the funds deposited in the Escrow account, which were intended for the aforementioned project. This misappropriation allegedly resulted in the inability of the Corporate Debtor to complete the project as well as the failure to repay the debt.

18. The respondent contends that the recall notice issued on 25.11.2021 is deemed to be illegal on the grounds that the moratorium period of 36 months had not concluded on the aforementioned date. Instead, the completion of the moratorium period is anticipated on 28.04.2023 and 15.03.2023, 36 months after date of disbursement of loan amount. Furthermore, the principal amount was not due on the specified date. Respondent/Corporate Debtor further contends that default in the payment of interest by the Respondent/Corporate Debtor is not supported by any evidence on record. Therefore, it does not touch any of the grounds of Section 7 and deserves not to be admitted accordingly.

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Rejoinder on behalf of the Financial Creditor

19. The applicant states that in the Reply, the Corporate Debtor has categorically admitted that the aforesaid transaction originated from the Sanction Letter 27.02.2020 executed between the parties and that the Loan was granted to the Corporate Debtor. The Corporate Debtor has further admitted in paras 8, 12 & 13 of the reply that it was servicing the said loan as per the agreement and was making interest payments in a timely manner.

Findings

20. We have heard the learned counsel of both the parties and have also examined the record carefully.

21. As regards to the admission of application filed under Section 7 by the Applicant/Financial Creditor for initiating CIRP, the Respondent/Corporate Debtor has at very outset challenged the Applicant being a Financial Creditor without fulfilling the requirement of the I & B Code,2016 in this respect and it has been argued in the reply filed by the Corporate Debtor that mere grant of loan by the

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Financial Creditor and its admission by the Corporate Debtor in the absence of substantial evidence to prove the disbursement of loan amount by the alleged Financial Creditor, for consideration for time value of money will not treat the Petitioner/Applicant as a Financial Creditor till it is shown that the arrangement comply with the substantive definition or anyone of the other clauses of Section 5(8) of the I & B Code, 2016.

22. In this regard, a decision by the Hon'ble NCLAT in the case of ***Sanjay Kewalramani vs. Sunil Parmanand Kewalramani***, Company Appeal (AT) (Ins.) No.57 of 2018 dated 12.07.2018 has also been cited.

23. In this regard, Ld. Counsel for the Applicant/Financial Creditor has forcefully argued that the said loan amount has been disbursed on various dates to the Corporate Debtor as per the details disclosed in Part IV of the Application under Section 7. These details are given as under.

S. No.	**Date of disbursement**	**Amount disbursed (INR)**
1.	28.4.2020	80,00,00,000
2.	30.9.2020	2,00,00,000
3.	29.12.2020	2,00,00,000

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4.	15.3.2021	2,00,00,000
Total		86,00,00,000

It has also been shown that this loan amount has also been reflected in the statement of accounts of the Financial Creditor mentioning the above said total outstanding amount of debt along with a Certificate in accordance with the Bankers Books of Evidence, 1891 annexed with the application as **Annexure A-13 (Colly)**. As the loan was disbursed, the Corporate Debtor has also started servicing the loan and the interest was paid as per the loan agreement till 15th June, 2021. Therefore, we find that the disbursement of loan has been admitted by the Corporate Debtor by starting to make the payment of interest as per the loan agreement and hence, no force has been found in the objection raised in the reply of the Corporate Debtor saying that no evidence on record has been produced by the Applicant showing the actual disbursement of the loan. The Corporate Debtor has also raised a point that mere grant of loan by Financial Creditor and its admission by the Corporate Debtor in the absence of the substantial evidence to prove the disbursement of loan would not make the Petitioner/Applicant to be a Financial Creditor as per the

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definition of Section 5(8) of the I & B Code, 2016. In this regard, we have perused the definition of financial debt provided in Section 5(8) of the I & B Code, 2016. As per this definition, financial debt means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes as per its clause (a) to be money borrowed against the payment of interest. As per the details available in the record and also reflected in the balance sheet under the head Long Term Borrowing (secured loans), the borrowings made by the Corporate Debtor from the Financial Creditor very much exists and as per the loan agreement, interest was also started being paid by the Corporate Debtor which continued till 15th June, 2021 and thereafter, default occurred and therefore, the argument of the Corporate Debtor has not been found tenable in respect of the Applicant being not a Financial Creditor and hence, we are inclined to accept that as per Section 5(8)(a), there is a financial debt and the Applicant is a Financial Creditor for which the default amount of the financial debt is more than the threshold limit of Rs. 1 crore. As regards the decision of Hon'ble NCLAT in the case

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of **Sanjay Kewalramani** ***(Supra)*** referred by the Corporate Debtor pleading that merely grant of loan and admission of taking loan will *episo facto* not amount to be a financial debt, we find that the fact of the said decision is completely different than the fact of the present case. As in the present case, the disbursement of loan has been established on which interes had been paid by the Corporate Debtor before it defaulted after 15 June 2021. Even the Corporate Debtor itself in its reply has admitted that it was servicing the said loan as per the agreement but the Applicant/Financial Creditor was harassing them by threatening to recall the loan on account of lull in real estate industry which led to higher than anticipated unsold inventories and hence, Financial Creditor was apprehensive that Corporate Debtor would not be able to repay the loan amount on time. Such averment made in the reply of the Corporate Debtor itself establishes that the loan was disbursed to them.

24. The next objection raised by the Corporate Debtor is regarding their being no default in repayment of loan. In this regard, it has been argued that the Applicant/Financial Creditor has prematurely recalled the loan contrary to the

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terms of the loan agreement between the parties as well as the fair practices code issued by the RBI. It has been mentioned that the tenure of 72 month, 36 months moratorium and 36 months for repayment was provided in the loan agreement, therefore, the repayment of loan would have started only in 2023 for a loan taken in 2020 and in case, the Respondent/Corporate Debtor had failed to pay instalments of debt/interest, the provision for issuing of recall notice could have been invoked by the Applicant/Corporate Debtor. Therefore, it has been contended that the Applicant has failed to prove conclusively that the Respondent's failure to pay interest after 15 June 2022 enabled/entitled the Financial Creditor to invoke the terms in the agreement to issue recall notice. It has also been argued by the Corporate Debtor that it is a settled principle of law that the IBC is not for recovery by the Creditor but a resolution mechanism and it cannot be used to jeopardize the financial health of an otherwise solvent company by pushing it into insolvency for extraneous considerations. In support of his such argument, reliance has been placed on the decision of

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Hon'ble Supreme Court in the case of ***Swiss Ribbons Pvt. Ltd. V. Union of India*** and certain other decisions as mentioned in the reply filed by the Corporate Debtor.

25. The above arguments of the Corporate Debtor has been countered by the counsel for the Financial Creditor submitting that such allegations made by the Corporate Debtor against the Applicant, using the present proceeding as a recovery tool, are baseless. Here is a case in which the Corporate Debtor has defaulted in the repayment obligations and hence, the Creditor has right to resort to Section 7 of the I & B Code, 2016, as one of the objectives of the Code is to resolve insolvency of a Corporate entity to balance the interest of all stakeholders. As the Corporate Debtor in the present case has clearly defaulted in its repayment obligations in terms of the loan agreement and hence, the Applicant has rightly and legally enforced its right by filing the present application under Section 7 of the Code. It has also been contended by the Ld. Counsel for the Financial Creditor that the case laws relied upon by the Corporate Debtor are not applicable in the present case, since there is no valid dispute requiring a detailed trial by

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way of an arbitration or suit and the necessary ingredients of existence of debt and occurrence of default, are undisputedly made out in the present case.

26. We have carefully considered the above arguments of both parties. As per the loan agreement, we find that there is a moratorium of 36 months; however, interest is required to be paid on the outstanding loan. There is no dispute on default of payment of interest on 15th July, 2021 and afterwards. As the default on payment of interest continued, the Financial Creditor classified the loan account of the Corporate Debtor as NPA on 13th October, 2021. Thereafter, recall notice dated 25th November, 2021 has been issued to the Corporate Debtor declaring the entire outstanding amount of Rs. 92,63,44,418.98/- as outstanding amount as on 25th November, 2021 as due and payable and the Corporate Debtor was asked to pay this amount within two days, failing which, it has been informed to the Corporate Debtor that the Financial Creditor would be constrained to take legal action, including but not limited to initiation of Corporate Insolvency Resolution Process under the Insolvency and Bankruptcy Code 2016. However, the

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Corporate Debtor failed to comply with this notice and thus, a default has occurred. Now, the question is when there was a moratorium on repayment of the principal amount of loan, would it be justified to recall the outstanding loan and asking the Corporate Debtor to pay the entire amount in one go. We have heard the learned counsel of both the parties and have also examined the record carefully. The total outstanding amount of the interest is Rs. 5,79,87,333/- (including additional interest) which itself is more than Rs. 1 crore, the threshold limit for initiating CIRP under Section 7 of I & B Code, 2016. The Hon'ble NCLAT in case of ***Base Realtors Private Limited vs. Grand Realcon Private Limited*****in Company Appeal (AT) (Ins.) No.882 of 2022 dated 16th November, 2022** has held that the application filed under Section 7 of the Code could be maintained in respect of the component of interest, which became due and payable, without asking for the principal amount which has not yet become due and payable. The relevant part of this decision is reproduced as under:-

> *"After referring to various definition appearing in Part I and Part II of the Code and explaining the scheme with the help of the decision in the case of Innovative*

Industries Ltd. And taking a cue from the decision of the Hon'ble Supreme Court in the case of M/s Orator Marketing Pvt. Ltd. (Supra), we are of the considered opinion that in the facts and circumstances of the present case the application filed under Section 7 of the Code could be maintained in respect of the component of interest which became due and payable, without asking for the principal amount which has not yet become due and payable."

27. In view of the above decision, even if it is assumed that the Financial Creditor was not justified in pressing for the repayment of principal amount by issuing the recall notice, there is a clear cut default on part of the Corporate Debtor to pay the interest for which the outstanding amount has crossed the threshold limit of Rs.1 crore. Therefore, we are inclined to accept that there is a default in terms of the provision of I & B Code, 2016 in respect of the outstanding default amount. Thus, we find both conditions of Section 7 of I & B Code, 2016 as there being a debt that has been defaulted in payment, at least in respect of the interest amount which is more than the threshold limit, has been fulfilled, however, after issuance of the recall notice as per the loan agreement and after following RBI guidelines, the entire loan amount, including the interest amount amounting to Rs. 92,63,44,418.98/- are in default.

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28. Finally, the Ld. Counsel for Corporate Debtor has argued in the light of the decision of Hon'ble Supreme Court in the case of ***Vidarbha Industries Power Ltd. Vs. Axis Bank Ltd. (2022) 8 SCC 352***, that the Hon'ble Adjudicating Authority has wide discretionary power, either to admit or reject the instant application on consideration of the whole factual matrix of the present case. In this regard, the Ld. Counsel has emphasised on the facts of the case about the recall notice issued by the Applicant/Financial Creditor being arbitrarily and against the spirit of the loan agreement due to the reason of their being a moratorium on repayment of principal amount of loan, the condition of real estate business being in bad shape and as alleged by him, the Financial Creditor acting illegally and malafidely misappropriating the amounts deposited in compulsory RERA Escrow account affecting the viability and cash liquidity of another company M/S Supertech Limited with whom the Corporate Debtor was under agreement for construction of the housing project for which the loans under consideration was taken and the same prevented the Supertech Limited to complete the housing project and

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therefore, the Corporate Debtor could not be able to repay the loan amount. It has been pleaded by the Ld. Counsel of the Corporate Debtor for applying the discretionary power considering the above factual matrix of the present case to reject the application under Section 7 of I & B Code, 2016 considering the decision of Hon'ble Supreme Court in the case of **Vidarbha Industries Power Ltd. (Supra).**

29. We have considered the above arguments of Ld. Counsel of the Corporate Debtor and also carefully gone through the decision of Hon'ble Supreme Court in the case of **Vidarbha Industries Power Ltd (Supra)** and further review petition filed in this case. On the review petition in case of **Vidarbha Industries Power Ltd. (Supra),** the Hon'ble Supreme Court has held in order dated 22.09.2022 that it is well settled that the judgements and observations in judgments are not to be read as provisions of statute and judicial utterances and/or pronouncements are in the setting of the facts of a particular case. Therefore, after clarification by the Hon'ble Supreme Court in the review petition of its decision in the case of **Vidarbha Industries Power Ltd. (Supra)**, it has been made clear that the decision given by the Hon'ble

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Supreme Court in the case of Vidarbha Industries Power Ltd. was on the facts of that particular case and no ratio was laid down about Section 7(5) of the I & B Code, 2016 being mandatory or discretionary. Now, in another decision of the Hon'ble Supreme Court in case of ***M. Suresh Kumar Reddy vs. Canara Bank & Ors. Civil Appeal No.7121 of 2022 dated 11th May, 2023,*** it has been held that once NCLT is satisfied that the default has occurred, there is hardly a discretion left with NCLT to refuse admission on the Application under Section 7 of I & B Code, 2016. The relevant part of this decision of the Hon'ble NCLAT is reproduced as under.

> *8. We have given careful consideration to the submissions. This Court in the case of* ***Innoventive Industries Limited v. ICICI Bank and Another*** *has explained the scope of Section 7. Paragraph nos.28 to 30 of the said decision read thus: -*
>
> *"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 subsection (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.*

29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of

the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing—i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.

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

(Emphasis added)

9. The view taken in the case of ***Innoventive Industries has been followed by this Court in the case of E.S. Krishnamurthy and others****. Paragraph nos.32 to 34 of the said decision read thus:*

32. In Innoventive industries [Innoventive Industries Ltd. v. ICICI Bank, (2018) 1 SCC 407, paras 28 and 30: (2018) 1 SCC (Civ) 356], ***a two-Judge Bench of this Court has explained the ambit of Section 7 IBC, and held that the adjudicating authority only has to determine whether a "default" has occurred i.e. whether the "debt" (which may still be disputed) was due and remained unpaid. If the adjudicating authority is of the opinion that a "default" has occurred, it has to admit the application unless it is incomplete.*** *Speaking*

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through Rohinton F. Nariman, J., the Court has observed: (SCC pp. 438-39, paras 28 & 30)

"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 [Ed.: The word between two asterisks has been emphasised in original.] any [Ed.: The word between two asterisks has been emphasised in original.] 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

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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.

* * *

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

33. In the present case, the adjudicating authority noted that it had listed the petition for admission on diverse dates and had adjourned it, inter alia, to allow the parties to explore the possibility of a settlement. Evidently, no settlement was arrived at by all the original petitioners who had instituted the proceedings. The adjudicating authority noticed that joint consent terms dated 12-2-2020 had been filed before it. But it is common ground that these consent terms did not cover all the original petitioners who were before the adjudicating authority. The adjudicating authority was apprised of the fact that the claims of 140 investors had been fully settled by the respondent. The respondent also noted that of the claims of the original petitioners who have moved the adjudicating authority, only 13 have been settled

while, according to it "40 are in the process of settlement and 39 are pending settlements". Eventually, the adjudicating authority did not entertain the petition on the ground that the procedure under IBC is summary, and it cannot manage or decide upon each and every claim of the individual homebuyers. The adjudicating authority also held that since the process of settlement was progressing "in all seriousness", instead of examining all the individual claims, it would dispose of the petition by directing the respondent to settle all the remaining claims "seriously" within a definite time-frame. The petition was accordingly disposed of by directing the respondent to settle the remaining claims no later than within three months, and that if any of the remaining original petitioners were aggrieved by the settlement process, they would be at liberty to approach the adjudicating authority again in accordance with law. The adjudicating authority's decision was also upheld by the appellate authority, who supported its conclusions.

34. The adjudicating authority has clearly acted outside the terms of its jurisdiction under Section 7(5) IBC. ***The adjudicating authority is empowered only to verify whether a default has occurred or if a default has not occurred. Based upon its decision, the adjudicating authority must then either admit or reject an application, respectively.*** *These are the only two courses of action which are open to the adjudicating authority in accordance with Section 7(5). The adjudicating authority cannot compel a party to the proceedings before it to settle a dispute."*

(Emphasis added)

10. Thus, once NCLT is satisfied that the default has occurred, there is hardly a discretion left with NCLT to refuse admission of the application under Section 7. Default is defined under sub-section 12 of Section 3 of the IB Code which reads thus:

*“**3. Definitions: -** In this Code, unless the context otherwise requires, -.. .. ..*

***(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;” Thus, even the non-payment of a part of debt when it becomes due and payable will amount to default on the part of a Corporate Debtor. In such a case, an order of admission under Section 7 of the IB Code must follow. If the NCLT finds that there is a debt, but it has not become due and payable, the application under Section 7 can be rejected. Otherwise, there is no ground available to reject the application.*

***11.** Reliance is placed on the decision of this Court in the case of **Vidarbha Industries** and in particular, what is held therein in paragraph nos. 86 to 89 which reads thus:-*

*“**86.** Even though Section 7(5) (a) IBC may confer discretionary power on the adjudicating authority, such discretionary power cannot be exercised arbitrarily or capriciously. If the facts and circumstances warrant exercise of discretion in a particular manner, discretion would have to be exercised in that manner.*

87. Ordinarily, the adjudicating authority (NCLT) would have to exercise its discretion to admit an application under Section 7 IBC and initiate CIRP on satisfaction of the existence of a financial debt and default on the part of the corporate debtor in payment of the debt,unless there are good reasons not to admit the petition.

***88.** The adjudicating authority (NCLT) has to consider the grounds made out by the corporate debtor against admission, on its own merits. For example, when admission is opposed on the ground of existence of an award or a decree in favour of the*

corporate debtor, and the awarded/decretal amount exceeds the amount of the debt, the adjudicating authority would have to exercise its discretion under Section 7(5)(a) IBC to keep the admission of the application of the financial creditor in abeyance, unless there is good reason not to do so. The adjudicating authority may, for example, admit the application of the financial creditor, notwithstanding any award or decree, if the award/decretal amount is incapable of realisation. The example is only illustrative.

89. *In this case, the adjudicating authority (NCLT) has simply brushed aside the case of the appellant that an amount of Rs 1730 crores was realisable by the appellant in terms of the order passed by APTEL in favour of the appellant, with the cursory observation that disputes if any between the appellant and the recipient of electricity or between the appellant and the Electricity Regulatory Commission were inconsequential."*

(Emphasis added)

12. *A Review Petition was filed by the Axis Bank Limited seeking a review of the decision of* ***Vidarbha Industries*** *on the ground that the attention of the Court was not invited to the case of* ***E.S. Krishnamurthy****. While disposing of Review Petition by Order dated 22nd September 2022, this Court held thus:*

"The elucidation in paragraph 90 and other paragraphs were made in the context of the case at hand. It is well settled that judgments and observations in judgments are not to be read as provisions of statute. Judicial utterances and/or pronouncements are in the setting of the facts of a particular case.

To interpret words and provisions of a statute, it may become necessary for the Judges to embark upon lengthy discussions. The words of Judges

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interpreting statutes are not to be interpreted as statutes."

> ***13.*** *Thus, it was clarified by the order in review that the decision in the case of* ***Vidarbha Industries*** *was in the setting of facts of the case before this Court. Hence, the decision in the case of* ***Vidarbha Industries*** *cannot be read and understood as taking a view which is contrary to the view taken in the cases of* ***Innoventive Industries*** *and* ***E.S. Krishnamurthy****. The view taken in the case of Innoventive Industries still holds good.*

30. As now, it has been clarified by the Hon'ble Supreme Court itself that the decision in the case of **Vidarbha Industries Power Ltd**. was in the setting of facts of that case before the Hon'ble Supreme Court and the decision of Hon'ble Supreme Court in the case of **Innovative Industries Limited versus ICICI Bank, (2018) 1 SCC 407** still holds good. In case of **Innovative Industries Limited**, it has been clearly held by Hon'ble Supreme Court that if there is a debt and default in repayment of debt and application filed by the Applicant/Financial Creditor is complete in all respect, the application under Section 7 of I & B Code, 2016 is to be admitted. In the present case, we have clearly found that there is a debt and also there is a clear default in payment of interest which is more than the threshold limit as well as the default in payment of entire loan amount after recall

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notice has been issued, therefore, we are convinced that the present application under Section 7 of I & B Code, 2016 is to be admitted. The argument of the Ld. Counsel of the Corporate Debtor about the factual matrix of this case being the Applicant/Financial Creditor acting arbitrarily and unreasonably by issuing the recall notice and also because of his action, the construction of project could not be completed by Supertech Limited resulting into non-payment of loan, has nothing to do with servicing of the loan taken by them from the Financial Creditor. The reason cited by the Ld. Counsel of Corporate Debtor is only a business risk, which is always present when a business is carried out and that cannot have any bearing on initiation of proceeding under Section 7 of I & B Code, 2016 when there is a debt and default in repayment of such debt as provided under Section 7 of I & B Code, 2016 and also as held by the Hon'ble Supreme Court in the case of **Innovative Industries Limited *(Supra)***.

31. In view of our above findings, we are satisfied that the Applicant/Financial Creditor has proved the debt and the default, which is more than the threshold limit of one crore.

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The application is also filed within limitation period and complete in all respect and a resolution professional is also proposed as per section 7(3) (b). Accordingly, the present application under Section 7, has been found fit to be admitted as per Section 7(5) of the I & B Code, 2016.

32. In Part III of Form 1, the Financial Creditor has proposed the name of Mr. Ajit Gyanchand Jain as Interim Resolution Professional. His Registration Number is IBBI/IPA-0001/IPP00368/2017-2018//10625, R/o 204, Wall Street-1, near Gujarat College, Ellisbridge, Ahmedabad, Gujarat-380006, Email: ajit@vcanca.com . He has duly given the consent in Form No. 2 annexed as **Annexure A-5 (Colly**). The Law Research Associate of this Tribunal, Ms. Ankita Sharma, has checked the credentials of Mr. Ajit Gyanchand Jain, and found that there are no disciplinary proceedings pending against the proposed Resolution Professional and also there is nothing adverse against him. Upon verification from the website of IBBI, it is found that IRP holds valid authorization till 17 October 2023. After considering these details, we appoint Mr. Ajit Gyanchand Jain, Registration

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No. IBBI/IPA-001/IP-P00368/2017-2018/10625, as Interim Resolution Professional (IRP).

33. In the given facts and circumstances of the case as per our above findings , the present application u/s 7 being complete in all respect and having established the default in payment of the Financial Debt for the default amount being above the threshold limit and an IRP also having been appointed as per above para 32, the application is admitted in terms of Section 7(5) of the I&B Code, 2016 against the Corporate Debtor and accordingly, moratorium is declared in terms of Section 14 of the Code.

34. The IRP is directed to take steps as mandated under section 13 and 15 of the IBC for making public announcement about the commencement of CIRP against the Corporate Debtor and moratorium against it u/s 14, and also take necessary actions as per sections 17, 18, 20 and 21 of IBC, 2016.

35. The IRP shall after collation of all the claims received against the Corporate Debtor and the determination of the financial position of the Corporate Debtor constitute a

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Committee of Creditors and shall file a report certifying the constitution of the Committee to this Tribunal on or before the expiry of thirty days from the date of his appointment, and shall convene the first meeting of the Committee within seven days of filing the report of Constitution of the Committee. The Interim Resolution Professional is further directed to send regular progress reports to this Tribunal every month.

36. As a necessary consequence of the moratorium in terms of Section 14, the following prohibitions are imposed, which must be followed by all and sundry:

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

(b) Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its

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property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(d) The recovery of any property by an owner or lessor, where such property is occupied by or in the possession of the corporate debtor.

(e) It is further directed that the supply of essential goods or services to the corporate debtor as may be specified, shall not be terminated or suspended or interrupted during the moratorium period.

(f) The provisions of Section 14(3) shall, however, not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator and to a surety in a contract of guarantee to a corporate debtor.

(g) The order of moratorium shall have effect from the date of this order till completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of Section 31 or

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passes an order for liquidation of the corporate debtor under Section 33 as the case may be.”

36. We direct the Financial Creditor a sum of Rs. 1,00,000 with the Interim Resolution Professional, to meet out the expenses to perform the functions assigned to him in accordance with Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The amount, however, is subject to adjustment by the Committee of Creditors as accounted for by the Interim Resolution Professional on the conclusion of CIRP.

37. A certified copy of the order shall be communicated to both the parties. The learned counsel for the petitioner shall deliver a certified copy of this order to the Interim Resolution Professional forthwith. The Registry is also directed to send a certified copy of this order to the Interim Resolution Professional at his e-mail address forthwith.

38. List the matter on 21 August 2023 for filing of the progress report/further proceeding.

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(Ashish Verma)
Member (Technical)

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(Praveen Gupta)
Member (Judicial)

Priya Agarwal
(Stenographer)