**NATIONAL COMPANY LAW APPELLATE TRIBUNAL**
**PRINCIPAL BENCH, NEW DELHI**

**Company Appeal (AT) (Insolvency) No. 720 of 2024**

**IN THE MATTER OF:**

**Rahul Kumawat** **...Appellant(s)**

**Versus**

**Bank of India & Anr.** **...Respondent(s)**

**Present:**

**For Appellant : Mr. Krishnendu Datta, Sr. Adv. with Mr. Sanyat Lodha, Ms. Surbhi Arora, Ms. Niharika Sharma, Adv.**

**For Respondents : Mr. Aditya Kumar, Pallavi Saxena and Mr. Nath, Adv. for R1**
**Mr. Neeraj Kr. Gupta, Adv. for IRP**

**O R D E R**
**(Hybrid Mode)**

**Per: Justice Rakesh Kumar Jain: (Oral)**

**26.04.2024:** This appeal is directed against the order dated 04.04.2024 passed by the Adjudicating Authority (National Company Law Tribunal, Indore Bench) by which an application filed under Section 7 of the Code by the Respondent/Bank of India (Financial Creditor) has been admitted. Moratorium has been imposed and Chaya Gupta has been appointed as the Interim Resolution Professional (in short 'IRP').

2. It is pertinent to mention that this is the second round of litigation. In the first round of litigation, this Court vide its order dated 14.11.2022 set aside the order of admission dated 05.03.2020 and remanded the case back to the Adjudicating Authority to record cogent reasons in respect of admission of the application filed under Section 7 of the Code.

3. In the impugned order, the Adjudicating Authority has reproduced the order passed by this Court and thereafter it has noticed the additional affidavit dated 17.05.2023 filed by the Financial Creditor which is in para 4 of the impugned order and is reproduced as under:-

> "4. In the context, the Financial Creditor vide its additional affidavit filed on 17.05.2023 has given its submissions onto those objections raised by Corporate Debtor. The relevant part thereof are reproduced here as under: -
>
> (i) That the main objection raised by the Corporate Debtor with regard to "classification of credit facility of Respondent being not in compliance of circular issued by Reserve Bank of India dated 07.02.2018 (Annexure R/3 Page 517) and therefore classification of credit facility of Corporate Debtor as NPA is not only bad in law, but also terming default based on wrong classification is also incorrect" is baseless and deserves to be rejected. It is pertinent to mention here that, the account of Corporate Debtor was declared NPA (on 30/09/2017) i.e. prior to issuance of RBI Circular and the account of Corporate Debtor was not eligible for restructuring and not viable technically and not proper, therefore the Financial Creditor rejected the restructuring, and the Corporate Debtor had duly defaulted, in fact and in law, at the time of institution of application before Hon'ble NCLT.
>
> (ii) As demonstrated hereinafter the classification of credit facility of CD is also in compliance of Circular issued by Reserve Bank of India dated 07.02.2018. That condition (iv) of the said circular: -
>
> "The amount from the borrower overdue as on September 1, 2017 and payments from the borrower due between September 1, 2017 and January 31, 2018 are paid not later than 180 days from their respective original due dates" is not fulfilled by the Corporate Debtor is not fulfilled by the creditor. That the Term Loan Account No. 881070210000008 of Rs. 192.68 Lacs was repayable as per the following table (page38)

| Year | Particulars | Amount in Lacs |
|---|---|---|
| FY 2014-15 | First 7 monthly instalments of RS. 66500.00 starting from 30.09.2014 | 4.65 |
| FY 2015-16 | Next 12 monthly instalments of RS 66500.00 each | 7.98 |
| FY 2016-17 | Next 12 Monthly instalments of RS.66500.00 | 7.98 |
| FY 2017-18 | Next 12 Monthly instalments of RS.333000.00 | 39.96 |
| FY 2018-19 | Next 12 Monthly instalments of RS.333000.00 | 39.96 |
| FY 2019-20 | Next 12 Monthly instalments of RS.333000.00 | 39.96 |
| FY 2020-21 | Next 11 monthly instalments of Rs. 440000.00 each and Last 1 monthly instalments of Rs 379000.00 | 52.19 |
| | **Total** | **192.68** |
| **Monthly interest to be served as and when applied** | | |
| (I) Principal Amount payable from 30.09.2014 to 30.08.2017 | | |
| **Sr. No.** | **Tenure** | **Amount in Lacs** |

| | | |
|---|---|---|
| 1. | From 30.09.2014 to 30.03.2017 (31 Months) | 66500x31=2061500 |
| 2. | From 30.04.2017 to 30.08.2017 (5 Months) | 333000x5=1665000 |
| | **Total Amount Payable** | **3726500** |

Interest Amount payable from 30.09.2014 to 30.08.2017 = Rs 7333503.00 (pages 413 to 418 of the application)

Total Amount Payable from 30.09.2014 to 30.08.2017 = Rs 11060003.00.

Amount Paid by the borrower from 30.09.2014 to 30.08.2017 = Rs 9739512.00 (Refer pages 413 to 418 of the application)

Hence the Term Loan account was overdue as on 01.09.2017 by [Rs 11060003/-Rs 9739512/-] Rs 1320491/-.

And as it would be amply clear from the statement of account of the Term Loan Account No. 881070210000008 that the aforesaid overdue amount and payments from the borrower due between September 1, 2017 and January 31, 2018 were not paid by the Corporate Debtor within 180 days from their respective original due dates as required by the RBI circular. That the last repayment in the said account was of Rs. 1000/- on 03.11.2017. Therefore, it is most humbly submitted that there is an existence of default in the sense that the debt is due. Default has been defined under Section 3 (12) in very wide terms as meaning non-payment of even part thereof or an instalment amount, as the debt is a liability and obligation on the part of Corporate Debtor towards Financial Creditor. The Code gets triggered the moment default is of Rs. One Crore or more. A copy of statement of Term Loan Account No. 881070210000008 is filed herewith and marked as Annexure A/3. (iii) That with regard to the non-disclosure of the subsequent reclassification of the account of CD

as “Operational Account”, it is submitted that the Financial Creditor never re-classified the account as “Standard” from “NPA” after classifying it NPA on 30.09.2017.

4. It also noticed that the additional submissions made by the Applicant Bank is recorded in Para 5 which read as under:-

> “5. Further in addition to the aforesaid submissions, the applicant has made following submissions:
>
> (i) The applicant bank is Banking Company duly incorporated under the provisions of the Companies Act, 1956 and is a Banking Company within the meaning of Section 2 (1) (c) and (d) of the Securitization & Reconstructions of Financial Assets and Enforcement of Security Interest Act, 2002.
>
> (ii) The Corporate Debtor has availed various credit facilities from the Applicant since 2014, which facilities have been renewed/modified/enhanced and restructured from time to time. It is submitted that various security and credit agreements/documents including but not limited to corporate guarantees, personal guarantees, third party mortgages were executed/signed by the Corporate Debtor and other obligators from time to time in order to secure the credit facilities. But in spite of all the support from the Applicant Financial Creditor at every step, the Corporate Debtor failed to comply with the applicable terms and conditions of the sanction letters and various agreements/documents thereto as executed from time to time, particularly visa-a-vis the requirement of credit facilities. It is submitted that since the Corporate Debtor was unable to perform its repayment obligations towards the Financial Creditor, the Financial Creditor was constrained to send repeated reminders in the forms of letters, demand notices and correspondences to the Corporate Debtor and the guarantors requesting them to clear the outstanding dues.

(iii) In view of the default by the Corporate Debtor, its account was classified as a Non-Performing Asset on 30.09.2017 by the Applicant Financial Creditor, as per the applicable RBI guidelines owing to persistent financial/non-financial irregularities in relation to repayment of the credit facilities, as per the terms of the various credit agreements/documents executed by the Corporate Debtor. The Applicant Bank issued Notice dated 06.11.2017 under Section 103 (2) of the SARFAESI Act, 2002 to the Corporate Debtor demanding to discharge its full liabilities to the tune of Rs. 1066.21 Lakhs, as on the date of notice, along with further interest at the contractual rate on aforesaid amount together with incidental expenses, cost charges, etc. within stipulated time under Section 13 (2) of the SARFAESI Act, 2002. The said notice is produced at Annexure I, page 475 along with the Application (relevant page 478).

(iv) The Corporate Debtor had on several occasions, during the pendency of this petition, offered various Settlement Proposal and the Applicant Financial Creditor has always showed its support to that effect. However, the last OTS proposal also failed on account of noncompliance of the terms and conditions of the Settlement Scheme. The Letter of rejection addressed by the Applicant dated 07.10.2019, is produced at Annexure R-16, page 544, by the respondent Corporate Debtor itself. (v) The total outstanding amount due and payable by the Corporate Debtor is to the tune of Rs. 11,57,89,697/- as on the date of filing the Application under Section 7 of IBC 2016 plus further interest. That the outstanding debts have not been repaid till date and the same are due and payable. That with an intent of framing of a comprehensive resolution plan post-initiation of corporate insolvency resolution process, the present application under Section 7 of the Code is being filed. (vi) A total exposure of Rs 9,92,68,000/- was sanctioned to the Corporate Debtor as per the details given below, [as per Annexure C, Page 28].

| Sr. No. | Particulars | Amount Disbursed |
|---|---|---|

| | | |
|---|---|---|
| 1 | Working Capital Cash Credit-I | Rs. 1,00,00,000/- |
| 2 | Working Capital Cash Credit-II | Rs. 7,00,00,000/- |
| 3 | Term Loan | Rs. 1,92,00,000/- |
| | Total | 9,92,00,000/- |

(vii) A total amount of Rs. 115,789,697/- is outstanding as per Annexure E, page 209 of the application.

| Sr. No. | Particulars | Amount |
|---|---|---|
| 1 | Principal Outstanding | Rs 10,43,09,697/- |
| 2 | Interest Outstanding | Rs 1,14,80,000/- |
| | Total Outstanding | Rs 11,57,89,697/- |

(viii) The Applicant Bank has submitted copy of the following documents in supports of their claim. Loan Sanction Documents from 2014 to 2017 (Annexure D) Acknowledgment of debt (Annexure D) List of Properties mortgaged (Annexure F) Certification of Registration of Mortgage (Annexure F) Search Reports (Annexure F) CIBIL Report of Corporate Debtor (Annexure G) Bank Statement as per Bankers Book Evident Act, 2002 (Annexure H) Notices under Section 13(2) of the SARFAESI Act, 2002 (Annexure I) Notices under Section 13(4) of the SARFAESI Act, 2002 (Possession Notice) (Annexure I)

(ix) It is submitted that the law is well settled that in deciding a Section 7 application under the Code, the Adjudicating Authority has to satisfy whether there is a debt and a default has occurred; whether the application is complete; and whether any disciplinary proceeding is pending against the proposed insolvency resolution professional.

(x) The Applicant submits that the application is furnished in prescribed Form 1 of the Rules and the prescribed fee also has been paid. That the Applicant has proposed the name of the new interim resolution professional namely, Ms. Chhaya Gupta,

Address: 1, Bima Nagar, 202 Almas Dreams Apartment, Near Anand Bazaar, Indore452018, Madhya Pradesh, Email Address: guptachayacs@gmail.com having Registration No. IBBI/IPA-002/IP-N00984/2020-2021/13133 as 'Interim Resolution Professional' under Section 13(1) of the Code, to act as an Interim Resolution Professional. Form 2 along with the Certificate of Registration of the proposed Interim Resolution Professional has been annexed in IA/89(MP)2023 at Annexure A6, Pg. 40 of the Interim Application, wherein the declaration has been made that no disciplinary proceedings is pending against her with the Board or Indian Institute of Insolvency Professionals of ICSI. A copy of the order dated 24.03.2023 of this Hon'ble Tribunal allowing IA/89(MP)2023 is filed herewith and marked as Annexure A-4.

(xi) In conclusion, it is most humbly submitted that there is an existence of default in the sense that the debt is due. Default has been defined under Section 3(12) in very wide terms as meaning non-payment of even part thereof or an instalment amount, as the debt is a liability and obligation on the part the Corporate Debtor towards Financial Creditor. The Code gets triggered the moment default is of Rs. One Crore or more. It is reiterated that the Application is complete in all respect as per the Rules and in such form and manner as prescribed in the Rules "

5. The Court has also noticed that the submissions made by the CD are in Para 9 which read as under:-

"9. While arguing the case, learned counsel for the Corporate Debtor made following submissions:

(i) The applicant has failed to produce or placed any document/evidence on record which goes to show that the respondent's account was declared NPA on 30.09.2017.

(ii) Entire case setup by the Financial Creditor in the application u/s. 7 of the Insolvency and Bankruptcy Code, 2016 ("IBC") is that of default having occurred on 30.09.2017 basis the

declaration of the Term Loan Account of the Corporate Debtor as NPA with the consequent NPA declaration of the two Cash Credit Accounts without producing any document on record to show that the account was declared as NPA on the said date. [Section 7 Application Form 1 Pg. 3 read with Annexure E @ Pg. 209 (last column)]. It is settled law that the date of default or the nature of default cannot be altered or pleaded beyond what is stated in the Section 7 Application. In the pleadings and at the time of oral submissions before this Hon'ble Tribunal, the only case set up by the Applicant Bank is that of NPA declaration as the basis of claiming default. As such, it is humbly submitted that any other subsequent pleadings, affidavits or submissions qua any other purported default, being unsupported by pleadings, are wholly untenable and not liable to be considered by this Hon'ble Tribunal. [Innoventive Industries Ltd. vs. ICICI Bank & Anr. (2018) 1 SCC 407 Para 28; Babulal Vardharji Gurjar vs. Veer Gurjar Aluminium Industries Pvt. Ltd. & Anr. (2020) 5 SCC 1 Para 24.1, 34, 35; Next Education India Pvt. Ltd. vs. K2 Techno Services Private Limited (2021) SCC Online NCLAT 105 Para 23]

(iii) As regards the alleged NPA declaration, it is a matter of fact that the said three accounts were in operation, banking and standard pre-as well as post- 30.09.2017 and both credit and debit entries were continuously permitted from the same. Memorandum dated 05.08.2017 prepared for sanction/approval of ZLCC with respect to Respondent's account clearly shows that the account was standard, operational and banking, and not NPA, in the month of August, 2017. [Ref. Pg. 7-8/Para i/Reply to Additional Affidavit and Pg. 34-57 of the Section 7 Application]

(iv) Minutes of the ZLCC meeting dated 13.09.2017 (Pg. 30-33 of Section 7 Application) as communicated vide letter dated 16.10.2017 (Annexure D Pg. 29 of Section 7 Application), after considering memorandum dated 05.08.2017 clearly point towards the account being standard, and not NPA, and being eligible for the loan and cash credit facilities. [Pg. 30-33/ Section 7 Application & @ Page 8-9/Reply to Additional Affidavit].

(v) As per the ZLCC Meeting minutes, account was standard and was contemporaneously recommended for extension of credit to the tune of Rs. 966.68 lacs (subsequently revised to Rs. 955.42 lacs). Thus, the Bank cannot now submit to the contrary to claim that the account was contemporaneously also declared NPA as on 30.09.2017.

(vi) Notably, under the same ZLCC meeting minutes, the Bank has artificially sought to reduce the credit limits of the Corporate Debtor's account and such unilateral actions on the part of the Bank cannot form the basis of default on the part of the Corporate Debtor for the purposes of the IBC.

(vii) The following aspects/admissions on the part of the Bank are clearly made out from the aforementioned communication dated 16.10.2017, ZLCC recommendation dated 13.09.2017 and the memorandum dated 05.08.2017:

(a) The Respondent had duly paid all the previous three term loans.

(b) Conduct of the Respondent's account is satisfactory.

(c) There are no contingent liabilities in the last financial year as per the audited report as on 31.03.2017 and further, there are no adverse audit remarks in the last audited report as on 31.03.2017

(d) The Respondent is enjoying FBWC CC limit of Rs. 800 lacs from the bank to meet its working capital requirement based on estimated sales of Rs. 6283.24 lacs for the F.Y. 2017-18 and projected sales of Rs. 6652.85 Lacs for F.Y. 2018-19 and we recommend for continuation of the same.

(e) There are favourable factors for the business of the Respondent to grow and several mitigatory factors such as good location, vast domestic market, easy availability of the raw material, the Malwa Crown brand of the Respondent company being a well-known brand, company's concentration in bulk

market, sales in states such as Maharashtra and Gujarat, good marketing team etc., in case the situation demands.

(f) The Respondent has complied with all the last sanctioned terms, all the security documents are valid, the exposure is within Bank's prudential norms/RBI guidelines, there is no deviation from usual norms and there is no persistent irregularity in account.

(g) After going through the memorandum, the ZLCC had approved the recommendation for extension of credit to tune of Rs. 966.68 Lakhs, which was subsequently revised to Rs. 955.42 Lakhs. The communication of the said approval on 16.10.2017 signifies that the account of the Respondent was worth extending the credit facility to the extent of Rs. 955.42 Lakhs as on 16.10.2017.

(h) The Respondent was a profit making company with projected revenue and profit growth

(i) The Respondent's account were fit for extending the loan facilities as late as September and October 2017.

(j) No contemporaneous mention of the account being NPA in any manner in the aforementioned contemporaneous detailed record of the Bank/Applicant.

(k) No indication, contrary to what was sought to be orally argued without basis in documents, that the account was under default.

viii) The entire stand of the Applicant Bank on the issue of NPA clearly appears to be a mala fide stand unsupported by the contemporaneous material on record. The said aspect is further evident from the factual events that transpired post the said date of 30.09.2017, as described hereunder.

(ix) Notably, no notice was issued to the Corporate Debtor prior to, at the time of or post the purported NPA declaration on 30.09.2017. Further, no demand of overdue was raised by the Applicant before 30.09.2017. [Page 18/Reply] Demand Notice

dated 06.11.2017 u/S. 13(2) of SARFAESI subsequently withdrawn by communication dated 06.04.2022. [@ Annexure R-8/ Page 212-215/Reply to Additional Affidavit]

(x) It is a matter of record as submitted during the course of the hearing that as a matter of practice and banking instructions, the Term Loan Account was all throughout serviced by way of payments being made from the Cash Credit Accounts and the responsibility and power of taking the money from the cash credit account for servicing the term loan account was that of the Financial Creditor / Applicant Bank itself. [All credit entries in the Term Loan Account Statement Pg. 413 – 419 of the Section 7 Application]

(xi) Specifically, an amount of Rs. 33,72,643.04/- was credited in Cash Credit Account No. 881030110000033 and Rs. 3,33,18,262.12/- in Cash Credit Account No. 890130110000135 between 01.09.2017 to 30.11.2018 [Ref. Bank Statement Account statements at Pg. 294- 412 and Pg. 420- 474 of the Section 7 Application & Page 9- 14/Reply to Additional Affidavit]. As such, while there were sufficient credit entries and deposits into the Cash Credit Accounts, the Applicant Bank of its own volition chose not to debit the said accounts for servicing of the Term Loan facility. The said deposits were more than sufficient to service any pending instalments that may have been due at any point in time. (xii) Applicant Bank had complete knowledge that the accounts of Respondent are operational as Respondent itself had vide letter dated 21.03.2018 informed the Applicant about the credit and debit of Rs. 1,50,53,273.50/- and Rs. 1,49,53,232.72/- respectively till 21.03.2018. [Para vi @ Pg. 14 of the Reply to Additional Affidavit & Annexure 9/Page 527/Reply to the Section 7 Application] (xiii) As such, it was up to the Bank to appropriate the same towards pending loan instalments and interest if any and no default can be said to have occurred on the part of the Corporate Debtor for the failure of the Bank in this regard. (xiv) Further, Corporate Debtor was permitted to withdraw money from the cash credit accounts all the way up to November,

2018 which could not have been the case had the accounts actually been declared NPA on 30.09.2017 as per the case sought to be projected by the Bank in the Section 7 Application. [Para v @ Pg. 14 of the Reply to Additional Affidavit & Account statements at Pg. 294-412 and Pg. 420-474 of the Section 7 Application] (xv) To this effect, the Bank had itself also given a certificate dated 17.04.2018 bearing no. VIJ/ADV/2018- 19/1 clearly stating the factum of continuing banking operations in the account maintained by the Corporate Debtor with the Bank. By way of the certificate dated 17.04.2018 the Bank had certified that Account No.890130110000135 in the name of the M/s MP Agro BRK Energy Foods Limited is operational and banking with our branch. The certificate further states that "the account can transact (receive and withdraw) maximum INR of Rs.99999999999999.99 on a single transaction as per RBI guidelines and adhering to KYC norms through clearing/transfer/RTGS/NEFT." Therefore, it is clear from the said certificate the account of the Respondent was standard and operational as on 17.04.2018 and no default had arisen in fact or in law [Pg. 529 of Reply to Section 7 Application / Also at Annexure 7 Page 211 - Reply to Additional Affidavit]. (xvi) It is a matter of record as aforementioned that the accounts of the Respondent were permitted to credit and debit entries all throughout, till as late as November, 2018 and as such, the question of the account being NPA does not arise, in view of the contemporaneous documents, stand and conduct of the Bank itself. (xvii) The Corporate Debtor is admittedly an MSME engaged in manufacture of essential commodities and has remained a going concern with ongoing business all throughout the period since the original order admitting the Corporate Debtor to insolvency to this date. (xviii) There was no default in fact or in law and the alleged classification of the Corporate Debtor's account was contrary to the circulars issued by the Reserve Bank of India. Among the various circulars and guidelines issued from time to time on classification of MSME accounts the RBI circular dated 07.02.2018 directed schedule banks and NBFCs to provide

relief for MSME borrowers registered under the GST. As per the said circular the account of the registered MSMEs were to continue to be classified as a standard asset and were not to be classified as an NPA on the basis of a 90 and 120 days' delinquency period and the respondent herein was covered by the same. Thus alleged classification of respondents account as NPA on 30.09.2017 was contrary to the circular of RBI and, therefore, it is correct to say that the respondent was not in default as on 30.09.2017. (xix) RBI's circular being beneficial in nature inasmuch as it prevents the accounts of the MSMEs from becoming stressed/non-performing assets, has to be given retrospective effect. [Securities & Exchange Board of India v. Alliance Finstock Limited and Others, (2015) 16 SCC 731 Para 15; Commissioner of Central Excise, Bangalore v. Mysore Electricals Industries Ltd., (2006) 12 SCC 448 Para 15; Commissioner of Central Excise, Thane-II v. D.C. Polyester Pvt. Ltd. 2009 SCC OnLine Bom 2259 Para 12] (xx) Without prejudice, it is for the first time that the Applicant Bank is seeking to purportedly rely upon the Circular to state that the classification of the Respondent's account is in compliance with condition (iv) of the circular. In view of the limited remand order by the NCLAT as quoted above, it is not open to the Bank to factually argue and plead afresh at this stage that one of the conditions was not met under the said circular, when the same was not the case of the Applicant Bank in the first round before the Hon'ble NCLT or in the Appeal before the Hon'ble NCLAT. (xxi) The Applicant herein has neither previously claimed before this Hon'ble Tribunal or the Hon'ble NCLAT nor informed the Respondent that the account of the Respondent is not standard as on 31.08.2017 and the account of the Respondent was overdue as on 01.09.2017. This is the first time that the Applicant Bank has pleaded the same and therefore, the same ought to not to be allowed to be relied upon placed on record. As a matter of fact, the Applicant herein had never claimed or raised any demand on the Respondent with respect to overdue amount prior to the alleged classification of Respondent's account as NPA, which itself militates against the

aforesaid submission on the part of the Applicant Bank qua non-compliance with condition (iv). Even otherwise, any default in terms of condition (iv) could only be after the 6-month window envisaged therein and not a prior, as pleaded in the present Section 7 Application i.e. from 30.09.2017. (xxii) Without prejudice to the aforesaid, it is submitted as per RBI's Master Circular on NPA dated 01.04.2023 clear guidelines have been provided with regard to procedure to be followed for recognizing any default as defined in IBC. As per the said circular, it is the duty of the bank to recognise incipient stress in loan account on default and classy the same as Special Mention Accounts ("SMA"). Further as per circular dated 11.09.2013, it is obligatory upon the banks to report credit information including classification of account as SMA to Central Repository of Information on large Credit (CRILC). However, in the present case no such reporting had been done by the bank hence the contention of bank that the account was having overdue on 01.09.2017 is false and is an afterthought. It is further submitted that once a borrower is reported to be in default, the banks are required to undertake a prima facie review of the borrower's account within 30 days from such default ('Review Period') and the same has not been undertaken by the Applicant in the present case. (xxiii) Without prejudice to the above, even otherwise, the amounts as alleged were not "overdue". Further, without prejudice, the Corporate Debtor fulfilled all the conditions under the said circular including condition (iv) of the said circular which provides for a 6-month window to make payments. As aforementioned, sufficient credit entries came into the cash credit account during 01.09.2017 up to 31.03.2018 for servicing any amounts due as instalments under the term loan account. (xxiv) As such, but for the failure of the Bank itself, there was no amount due or in default in terms of the RBI Circular and the Corporate Debtor was fully entitled to the benefit of the circular (xxv) Even otherwise, it is trite that beneficial provisions such as under the RBI circular are to be given a liberal, purposive and expansive interpretation favouring the beneficiary so as to give full effect to the purpose of

such provisions and complete benefit to the beneficiary. [Commissioner of Customs (Import), Mumbai v. Konkan Synthetic Fibres, (2012) 6 SCC 339 Para 15] (xxvi) The document placed on record by applicant itself shows that the account of the respondent was operational and payments in an out of the account were made before and after 30.09.2017 and the account of the respondent were also not frozen after alleged declaration of respondents account as NPA. (xxvii) The accounts of the respondents were standard and operational before and after 30.09.2017. (xxviii) Record clearly shows that the Bank also withdrew its notices and proceedings under SARFAESI as many as 4 times. Further proceedings sought to be re-initiated by the Bank under SARFAESI have been stayed by the High Court. (xxix) Without prejudice, the amounts due under the loan and cash credit facilities cannot be said to be overdue and in default for the purposes of IBC as the term loan account was to be serviced only in terms of the instalments due from time to time and entries towards the same were to be taken by the Bank from the cash credit account, without any intervention from the Corporate Debtor. (xxx) Without prejudice, even otherwise, the entire term loan account and cash credit account does not become due in case of a minor amount remaining due under the said accounts. (xxxi) Furthermore, it has been placed on record that the Bank had in the past as well charged exorbitant/excessive interest and thereafter reverted entries to the credit of the account towards such interest to the amount of Rs. 5,16,372.78/- on 05.05.2015 [@ Page 441/Application] and Rs. 8,67,936/- on 30.03.2016 [@ Page 455/Application] totalling Rs. 13,84,308.78/-. (xxxii) Bank Statements from Chartered Accountants clearly reflect an overcharging of interest to the tune of Rs. 51,97,373/- which further needs to be adjusted and cannot be claimed to have been due as on 30.09.2017. [@ Annexure R-10/Page 216-222/Reply] (xxxiii) Similarly, the amounts paid by third parties/corporate debtors during the process of restructuring of the accounts during the contemporaneous period from November, 2017 to March, 2018 to the tune of Rs. 42 lakhs approx., which has not

been returned by the Bank, and has been appropriated as such, also needs to be adjusted against the claimed dues by the Bank. (xxxiv) Seen thus, there was even otherwise no default on the part of the Corporate Debtor of the amounts due as on 30.09.2017 and any amounts/instalments alleged to be due (Rs. 13,20,491/- as claimed by the Applicant Bank in its subsequent Affidavits before this Hon'ble Tribunal along with the amount due under the ad-hoc facility) could have been easily satisfied with the aforementioned credit amounts, reversal of interest entries, third party payments retained by the Bank etc. all of which were obligations of the Applicant Bank without anything further being required to be done by the Respondent. It is settled law that "due" is not equivalent to "default" under the IBC. As such, there was no default on the part of the Respondent such as would require the invocation of the provisions of the IBC for declaration of the Respondent as insolvent. (xxxv) The "entire loan and cash credit facility" as on 30.09.2017 could not have been said to be overdue or under default as what is due under the said facilities is merely the installments as clearly reflected from the ZLCC meetings minutes (as aforementioned, Pg. 38 of Section 7 Application). The same is also the admitted position of the Bank and no submissions to the contrary were made during the course of hearing before the Hon'ble Tribunal. In fact, no response to the contrary was so much as offered on behalf of the Bank to a specific query to this effect by the Hon'ble Tribunal. As such, even otherwise, the amount in "default" as claimed in Form 1 of the Section 7 Application (Pg. 3 of Section 7 Application) is wholly without basis in pleadings, fact or law. As such, the present Section 7 Application is liable to be rejected on that ground as well. In the context the learned counsel had also drawn our attention to the two cash Credit Accounts (A/c Nos. 881030110000033 and 890130110000135) and the Term Loan Account No. (881070210000008) and submitted that the various receivables of the respondent company was being deposited/credited into those Cash Credit accounts and the instalment due as regards term loans were being paid of through

transfer/withdrawal entries from those Cash Credit accounts. In the context he stated that as per the normal practice the bank officials on their own would give effect to such transfer/withdrawal entries from Cash Credit accounts to the term loan account and that the same was being done but then in the year of 2017 at some point of time they had not transferred/withdrawal the amount from Cash Credit to the term loan account and created an artificial situation of default in respect of its term loan accounts. On this the learned counsel for the applicant/Financial Creditor submitted that the due instalments in respect of term loan was recovered through the Cash Credit accounts till the closing negative balance (overdraft amount) was within the limits granted against those cash credit accounts. Both the learned counsels had referred to the relevant entries in all these accounts."

6. After noticing the circular issued by the RBI, it recorded its finding in Para 10.1 to 11 which is also reproduced as under:-

"10.1 Thus, it is noted that said circular was issued by the RBI keeping in view the adverse impact on the cash flow when GST regime had started, to give relief to the MSMEs whereby their accounts were to be classified as standard assets if the conditions (i to iv) as given therein were satisfied. In the context of the present respondent, the learned counsel for the applicant submitted that the condition No. (iv) which states that "The amount from the borrower overdue as on September 1, 2017 and payments from the borrower due between September 1, 2017 and January 31, 2018 are paid not later than 180 days from their respective original due dates" was not satisfied and, therefore, the benefit as per the circular dated 07.02.2018 was not available to the respondent Corporate Debtor. The learned counsel submitted that the accounts of the Corporate Debtor were correctly declared as NPA as on 30.09.2017 as per the existing norms of when the accounts became irregular over 90 days that too much prior to issuance of the said RBI circular dated 07.02.2018. In the context

the learned counsel had also drawn our attention to the payment schedules through monthly instalments and stated that the term loan account was overdue as on 01.09.2017 by Rs. 13,20,491/-. She also submitted that even otherwise the benefit of the said RBI circular could have been available to the Corporate Debtor if as per the ivth condition as stated therein the overdue amount as on 01.09.2017 together with the instalments that became due between September 1, 2017 to January 31, 2018 could have been paid within the period of 180 days from their respective original due dates; But that also is not complied.

10.2 After considering the replies on the issue from both the sides, we are of the considered view that benefit of the said circular would not be available to the Corporate Debtor in classification of its accounts as all the conditions stated in the said circular are not complied with and furthermore the said circular was issued after the account of the CD had already been declared as NPA as per the existing norms of 90 days. Without regards to that we are also of the view that, the classification of the account as NPA is no longer a prerequisite condition for filing an application under Section 7 of the IBC if Corporate Debtor has defaulted on payment of instalment as per the agreed schedule. From the details of payment, as submitted in para 5 (II) (iv) in its reply dated 07.06.2023, it is noted that though it has continued to pay some amount even after 30.09.2017 (date of NPA) and its account remained operational for the purpose of paying in and but by that itself it does not prove that it has not defaulted the payment as per the agreed schedule. If the Corporate Debtor has failed to fulfil the terms of repayment as per the agreed schedule and had paid after date of default some amount in parts and not in accordance with agreed instalments, then also it will have to be inferred that it has defaulted the payment of due debt. The plea taken by the Corporate Debtor that it has not defaulted payment of due debt is completely misplaced and the same is rejected.

11. We have taken note of the various documents in support of the claim of the applicant bank such as loan sanction documents,

acknowledgment, debt, list of mortgage properties, civil report of the Corporate Debtor, Bank statement as per The Bankers' Books Evidence Act, 1891, notice under Section 13 (2) & 13 (4) of SARFAESI demanding to discharge its full liabilities to the tune of Rs. 10.66 crore. We have also taken note that Corporate Debtor had on several occasions, during the pendency of this petition, offered various OTS proposals which were rejected by the applicant. We have also considered the objections raised by the Corporate Debtor as regards to the classification of its account in view of the RBI circular dated 07.02.2018. We have also taken note of the entries in the cash credit accounts & terms loan accounts for the relevant period. Having considered the facts of the case, we are of the view that the Corporate Debtor has defaulted payment of due debt which is above threshold amount of Rs 1 lakh and as such the application under Section 7 deserves to be admitted"

7. Counsel for the Appellant has submitted that the Adjudicating Authority has still not dealt with the objections/contentions raised by it before it on the issue that there is no default on the part of the Appellant for which the application under Section 7 could have been admitted. He has also submitted that in Para 11 of the impugned order, the Court has only referred to various documents which are on record but there is no discussion on the said documents to hold as to how the application under Section 7 is required to be admitted in respect of the debt due and default committed by the Appellant. In support of his submission, he has referred to a recent decision of the Hon'ble Supreme Court in the case of Ramkrishna Forgings Ltd. Vs. Ravindra Loonkar, RP of ACIL Ltd. & Anr., (2024) 248 Comp. Cas. 15 in which the Hon'ble Supreme Court has held that :-

"32. From the assistance rendered and the judicial precedents brought to notice, it is clear that the order dated 01.09.2021 by the NCLT cannot withstand judicial scrutiny, either on facts or in law. There may have been a situation where due to glaring facts,

> an order of the nature impugned herein could be left untouched and this Court would have refrained from interference, but only if detailed reasoning, disclosing the facts for being persuaded to embark on such path, were discernible in the order dated 01.09.2021, which unfortunately is cryptic and bereft of detail. Recording of reasons, and not justreasons but cogent reasons, for orders is a duty on Courts and Tribunals. In the recent past, from Kranti Associates Private Limited v Masood Ahmed Khan, (2010) 9 SCC 496 to Manoj Kumar Khokhar v State of Rajasthan, (2022) 3 SCC 501, the clear position in law is that a Court or even a quasi-judicial authority has a duty to record reasons for its decision. Needless to add, 'Reason is the heartbeat of every conclusion. Without the same, it becomes lifeless.' 15 That apart, the order of the NCLT dated 01.09.2021 suffers from a jurisdictional error, as in the facts that prevailed, it was not entitled to pass the direction that it did."

8. On the other hand, Counsel for Respondent (Financial Creditor) has submitted that there is no error in the impugned order which requires any interference by this Court. He has tried to explain the documents on record to support the findings recorded in para 10 and 11 of the impugned order.

9. We have heard Counsel for the parties and after perusal of the record, are of the considered opinion that, once the Adjudicating Authority has taken into consideration the pleadings and evidence and the contentions raised by both the parties recording the finding only that it has looked into the documents, therefore, it has come to the conclusion that the default has been committed is not sufficient.

10. Consequently, we are of the considered opinion that this case requires a relook by the Adjudicating Authority on the evidence which has been brought on record to judge about two basic issues i.e. debt and default having been committed by the Appellant for the purpose of attracting Section 7 of the Code.

11. As a result thereof, the appeal succeeds and the impugned order is set aside. The matter is remanded back to the Adjudicating Authority to redecide the issue after taking into consideration the contentions of both the parties by recording categoric finding on the issue which has been raised so that it may facilitate a judicial review by the Appellate Tribunal if any.

12. The parties are directed to appear before the Adjudicating Authority on **06th May, 2024.**

13. It is made clear that we have not touched any part of the merits of the case which are left open for the Adjudicating Authority to decide in accordance with law.

14. At this stage, Counsel for the Respondent has submitted that a direction may also be issued to the Adjudicating Authority to decide this application in a stipulated time. Since, the application was filed in the year 2018, therefore, we request the Adjudicating Authority to make all endeavour to decide the application as early as possible but preferably within a period of two months from the date of appearance of the parties before it.

**[Justice Rakesh Kumar Jain]**
**Member (Judicial)**

**[Barun Mitra]**
**Member (Technical)**

**[Naresh Salecha]**
**Member (Technical)**

*Sheetal/R.R.*