

IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH

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

SHRI RAJEEV MEHROTRA,
HON'BLE TECHNICAL MEMBER

IA(IBC) No. 300/JPR/2024
& CP No. (IB)- 88/7/JPR/2022

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

IN THE MATTER OF:

UNION BANK OF INDIA

...Financial Creditor

VERSUS

M/S SWASTIK COPPER PVT. LTD.

...Corporate Debtor

MEMO OF PARTIES

CP No. (IB)- 88/7/JPR/2022

UNION BANK OF INDIA

Branch office at Asset Recovery
Management Branch, 101-110, First
Floor, Anukampa Tower, Church
Road, Jaipur- 302001

...Petitioner/ Financial Creditor

VERSUS

M/S SWASTIK COPPER PVT. LTD.

R/o at E-1/1274, Phase-III, Sitapura
Industrial Area, Jaipur- 302022

... Respondent/Corporate Debtor

Sd/-

Sd/-



CP No. (IB)- 300/JPR/2024

M/S SWASTIK COPPER PVT. LTD.

R/o at E-1/1274, Phase-III, Sitapura
Industrial Area, Jaipur- 302022

... Applicant/Corporate Debtor

VERSUS

UNION BANK OF INDIA

Branch office at Asset Recovery
Management Branch, 101-110, First
Floor, Anukampa Tower, Church
Road, Jaipur- 302001

...Respondent/ Financial Creditor

FOR THE FINANCIAL CREDITOR	:	Anubha Singh, Adv. Simran Gupta, Adv.
FOR THE CORPORATE DEBTOR	:	Sanjay Jain, Adv. Ankita Kedia, Adv.

Order Pronounced On: 23.09.2024

ORDER

Per: Shri Deep Chandra Joshi, Judicial Member

- The Application is filed by *Union Bank Of India* ('Financial Creditor'/ 'Bank') against *M/s Swastik Copper Pvt. Ltd.* ('Corporate Debtor'/ 'Applicant') claiming to be a Financial Creditor through its authorised officer and chief Manager *Shri Pramod Kumar Tardia*, who is duly authorised *vide* power of attorney to file this Application against *M/s Swastik Copper Pvt. Ltd.* ('Respondent Company'/ 'Corporate Debtor') under Section 7 of the Insolvency and Bankruptcy Code ('IBC'/'Code'), 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, seeking initiation of Corporate

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Insolvency Resolution Process ('CIRP'), pursuant to default committed by the Respondent Company in repayment of the loan amount to the Financial Creditor.

2. The Financial Creditor is a Banking Company incorporated under the Banking Companies (Acquisition and Transfer of Undertaking) Act, 1970 having its head office at *Union Bank Bhavan, 239, Vidhan Bhavan Marg, Nariman Point, Mumbai-400021, Maharashtra* and a branch office at *Union Bank of India Asset Recovery Management Branch, 101-110, First Floor, Anukampa Tower, Church Road, Jaipur.*
3. The Corporate Debtor is a Private Limited Company, incorporated under the Companies Act, 1956 on 17.02.1993 and duly registered with the Registrar of Companies, Jaipur bearing CIN: U27201RJ1993PTC007230. The registered office of the Company is at *E-1/1274, Phase-III, Sitapura Industrial Area, Jaipur.* The Authorised Share Capital of the Corporate Debtor is Rs. 1,80,00,000/- (One Crore Eighty Lakhs Only) and the Paid-up Share Capital is Rs. 1,56,80,000/- (One Crore Fifty-Six Lakhs Eighty Thousand Only).
4. The details of the transactions leading to the filing of this Application as averred by the Financial Creditors are as follows:
 - 4.1. It is submitted by the Financial Creditor that it sanctioned various credit facilities to the Corporate Debtor from the year 2000 to 2016.

Further, in 2016, the Corporate Debtor again sought multiple facilities

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from the Financial Creditor and the same were sanctioned *vide* letter dated 22.08.2016. The details of the loan facilities extended in the year 2016 as provided in the Petition are as follows:-

Particulars	Amount in Rupees
Cash Credit	20.00 Crore
Bank Guarantee	36.00 Crore
Inland LC/Import LC (90days)	4.00 Crores
UBD-LC (90days)	36.00 Crore
UBD-LC/Import LC (90days)	2.50 Crore

4.2. The details of the Financial Debt owed by the Corporate Debtor to the Financial Creditors as reflected in Part IV of the Application are reproduced hereunder:-

1.	<i>Total amount of debt granted date of disbursement</i>	<i>The Applicant Bank Sanctioned various credit limit from the year 2000 to 2016 to the Corporate Debtor. In the year 2016 the Corporate Debtor again sought multiple facilities from the Financial Creditor in the nature of CC of Rs. 20.00 Crore, BG of Rs. 36.00 Crore, UBD-LC (90 days) of Rs. 36.00 Crore, UBD-LC/Import LC (90 days) of Rs. 2.50 Crore, Inland LC/Import LC (90 days) of Rs. 4.00 Crores through Sanction Letter dated 22.08.2016. Thereafter, the debt was acknowledged on 30.06.2019.</i>
2.	<i>Amount claimed to be in default and the date on which the default occurred (attach the workings for computation of amount and dates of default in</i>	<i>Amount claimed to be in default- Rs. 61,81,87,226.6 (Rupees Sixty One Crore Eighty One Lakh Eighty Seven thousand two hundred and twenty six and six paise only) as on 31.10.2022 plus future interest, charges and expenses a per various agreed upon Sanction Letters.</i>

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	<i>tabular form)</i> <i>Copy of working for computation of amount and dates of default in tabular form is annexed herewith and marked as Annexure-5.</i> <i>Date of NPA- 28.01.2020</i> <i>Thereafter, Recall Notice dated 01.02.2020 was issued, wherein the complete amount was recalled within 7 days. However, after the recall notice also the Corporate Debtor had not made the payment of the outstanding amount. Thus, default is committed on 08.02.2020.</i> <i>Date of Default: 08.02.2020</i>
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4.3. The details of the particulars of the Financial Debt (Documents, Records and evidence of Default) as reflected in Part V of the Petition are reproduced hereunder:-

1. Particular of security held, if any, the date of its creation, its estimated value as per the creditor. Attach a copy of a certificate of registration of charge issued by the registrar of companies (if the corporate debtor is a company)	1. Stocks and Book Debts of M/s Swastik Copper Private Limited 2. Plant and Machinery at premises of M/s Swastik Copper Private Limited at E-1/1274 RIICO industrial Area Phase-III, Sitapura, Jaipur (Rajasthan) 3. Factory Land and Building at E-1/1274 RIICO Industrial Area Phase-III, Sitapura, Jaipur (Rajasthan). 4. Factory Land and Building at F-28 (K) at Malviya Nagar, Industrial Area, Jaipur (Rajasthan) 5. Industrial Plot J-306 at Sitapura Industrial
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	<i>Area, Jaipur</i> <i>6. Residential Plot No. 8, Sagar Colony, Phaina Pali, Rajasthan</i> <i>7. Residential Plot No. 611, 6th Floor, Plot No. 6, Mahima Foundation Square, Jawahar Circle, Jaipur</i> <i>The charge on the above securities were created at ROC on 08.05.2000 and was modified on 30.08.2016 in favour of the Financial Creditor. Copy of the documents showing creation of charge and registration of charge at ROC is annexed herewith as ANNEXURE-6</i> <i>Valuation of the Factory Land and Building at F-28 (K) at Malviya Nagar, Industrial Area, Jaipur (Rajasthan) as per valuation report dated 11.07.2022</i> <i>Market Value: Rs 2,15,50,000.00</i> <i>Realizable Value: 1,83,10,000.00</i> <i>Distress Value: 1,40.00,000.00</i> <i>Valuation of the Industrial Plot J-306 at Sitapura Industrial Area, Jaipur as per valuation report dated 11.07.2022</i> <i>Market Value: Rs 72,50,000.00</i> <i>Realizable Value: 61,60,000.00</i> <i>Distress Value: Rs. 47,10,000.00</i> <i>Valuation of the Factory Land and Building at E-1/1274 RIICO industrial Area Phase- III,</i>
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		<i>Sitapura, Jaipur (Rajasthan) as per valuation report dated 11.07.2022</i> <i>Market Value: Rs 14,24,70,000.00</i> <i>Realizable Value: 12,11,00,000.00</i> <i>Distress Value: Rs. 09,26,10,000.00</i> <i>Valuation of the Residential Plot No. 611, 6th Floor, Plot No. 6, Mahima Foundation Square, Jawahar Circle, Jaipur as per valuation report dated 11.07.2022</i> <i>Market Value: Rs 1,21,00,000.00</i> <i>Realizable Value: 1,02,90,000.00</i> <i>Distress Value: Rs. 78,60,000.00</i> <i>Valuation of the Residential Plot No. 8, Sagar Colony, Phania, Pali Rajasthan as per valuation report dated 11.07.2022.</i> <i>Market Value: Rs 21,40,000.00</i> <i>Realizable Value: 18,20,000.00</i> <i>Distress Value: Rs. 13,90,000.00</i>
2.	<i>Particulars of an order of a court, tribunal or arbitral panel adjudicating on the default, if any (attach a copy of the order).</i>	<i>Original Application for recovery certificate is pending at Hon'ble Debt Recovery Tribunal, Jaipur in the matter of Union Bank of India Vs. M/s Swastik Copper Private Limited.</i>
3.	<i>Record of default with the information utility, if any (attach a copy of such record).</i>	<i>N.A.</i>



4.	<i>Details of succession certificate, or probate of a will, or letter administration, or court decree (as may be applicable), under the Indian Succession Act, 1925 (10 of 1925) (attach a copy).</i>	<i>N.A.</i>
5.	<i>The Latest and Complete copy of the Financial Contract Reflecting all amendments and waivers to date.</i>	<i>Copy of Sanction Letter, Loan Agreement and Loan documents is annexed herewith and marked as <u>ANNEXURE -7 Colly.</u></i>
6.	<i>A Record of Default as available with any credit information company</i>	<i>CIBIL report annexed as <u>ANNEXURE-8</u></i>
7.	<i>A Copies of Entries in a Bankers Book in Accordance with the Bankers Book Evidence Act, 1891 (18 of 1891)</i>	<i>As stated above, copy of the statement of account and certificate under Banker's Book of Evidence Act of the Corporate Debtor in the books of Union Bank of India is attached as <u>Annexure-9 Colly.</u></i>
8.	<i>List of other documents attached to this application in order to prove the existence of financial debt and the amount in default.</i>	<i>Notice dated 27.07.2020 under Section 13(2) of SARFASI Act and payment was not made within 60 days and recall notice is attached herewith as <u>Annexure -10.</u></i>

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5. The Respondent Company i.e., *M/s Swastik Copper Pvt. Ltd.*, filed its Reply to the Company Petition vide Diary No. 1170/2023 dated 09.05.2023 and raised the following contentions: -

5.1. The Respondent Company contended that the instant Petition under Section 7 has been filed after the expiry of the limitation period. It was submitted that as per the documents submitted by the Bank, the loan account of the Corporate Debtor was classified as NPA on 28.01.2020, however, the date of NPA is mentioned as 31.01.2020 in the recall notice dated 01.02.2020. Moreover, as per part IV of the Petition, the date of default is 08.02.2020. Thus, there are three different dates that have been provided for computation of the default. Thus, the Bank cannot be allowed to contend that the default occurred on 28.01.2020 or 31.01.2020 or 08.02.2020.

5.2. The Corporate Debtor contended that as per the prevailing law, the date of default and the date of NPA are different. Further, the date of NPA cannot be considered as the date of default. The limitation period for the filing of a Petition under the code has to be counted from the date of default i.e., 90 days prior to the classification of the account as NPA.

5.3. It was submitted that the Bank wrongly declared the account of the Corporate Debtor as NPA and converted the Non-Fund Base facility into the fund base facility and converted the contingent liability into

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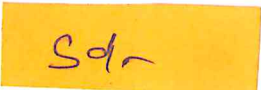
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the current liability. Further, the Bank prematurely remitted the amount to the beneficiaries of the Bank Guarantees much prior to the expiry of the validity terms of the contracts entered by the Corporate Debtor. Moreover, on multiple occasions, the Corporate Debtor along with the beneficiaries of the Bank Guarantees requested the Bank for extension of validity period of the Bank Guarantees, however, no heed was paid to the same.

5.4. The Corporate Debtor has assailed the illegal declaration of the NPA by the Bank before the Ld. DRT wherein a stay order has been passed in favour of the Corporate Debtor. Further, the issue of illegal remittance of the Bank Guarantees has also been raised before the Ld. DRT Jaipur in *SA No. 48/2021* titled as '*Swastik Copper v/s Union Bank of India*' which is yet to be adjudicated.

5.5. It was pointed out that the Bank has also approached the Ld. DRT seeking recovery of Rs. 55,69,27,003/- (Rupees Fifty-Five Crores Sixty-Nine Lakh Twenty-Seven Thousand and Three Rupees Only) along with the interest @14.80% p.a. from the Corporate Debtor by way of *Original Application No. 172/2021* titled as '*Union Bank of India v/s Swastik Copper Pvt. Ltd. & Ors*'. In the aforementioned Application, the Corporate Debtor has raised a counter claim against the Bank to the tune of Rs. 88,47,65,938/- (Rupees Eighty-Eight Crores Forty-Seven Lakh Sixty-Five Thousand Nine Hundred and

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Thirty-Eight Only) along with interest @15% p.a. Further, the aforementioned facts have been concealed by the Bank in the instant Petition.

5.6. The Corporate Debtor has challenged the illegal actions of the Bank concerning illegal remittance of the Bank Guarantees to the beneficiaries without invocation of the same before the Hon'ble Rajasthan High Court by way of *Writ Petition no. 5723/2020*.

5.7. It was contended that since the aforementioned claims of the Corporate Debtor are yet to be adjudicated upon by the Ld. DRT and the High Court, it cannot be said that the Corporate Debtor has committed any default.

5.8. The Corporate Debtor has raised objection qua the documents submitted by the Bank under Part V of the Application and has contended that the documents annexed with the Petition cannot be relied upon as they are not properly stamped as per the provisions of the Stamp Act.

5.9. In support of its contentions the Corporate Debtor has relied upon the Judgment of the Hon'ble Apex Court in the case of *Vidarbha Industries Power Limited v/s Axis Bank Limited* (2022) 8 SCC 352 and submitted that this Adjudicating Authority can use its discretionary power under Section 7 of the Code. The relevant paras



of the said Judgment as relied by the Corporate Debtor are reproduced hereunder:-

“86. Even though Section 7(5)(a) of the 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.

90. We are clearly of the view that the Adjudicating Authority (NCLT) as also the Appellant Tribunal (NCLAT) fell in error in holding that once it was found that a debt existed and a Corporate Debtor was in default in payment of the debt there would be no option to the Adjudicating Authority (NCLT) but to admit the petition under Section 7 of the IBC.”

6. The Financial Creditor/Bank has filed its Rejoinder to the Reply filed by the Corporate Debtor *vide* Diary No. 1695/2023 dated 13.07.2023 and made the following submissions:-

- 6.1. It was submitted that the instant Petition has been filed within limitation i.e., within three years from the date of default. A recall notice was issued by the Bank to the Corporate Debtor on 01.02.2020 seeking repayment of the outstanding dues within seven days. However, the Corporate Debtor failed to repay the amount within the stipulated time, hence, 08.02.2020 is the date of default. Further, the Petition has been physically filed on 01.12.2022 within the prescribed time period.

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- 6.2. In relation to the pendency of the proceedings before the Ld. DRT, it was submitted that by virtue of Section 238 of the Code, the Code shall prevail over the Recovery of Debt and Bankruptcy Act, 1993 ('RDB Act') and Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ('SARFAESI Act'). Therefore, pendency of any Application before the Ld. DRT would not come in the way of the instant Section 7 Petition. Similarly, the pendency of the Writ Petition bearing no. 5723/2020 will not affect the jurisdiction of this Adjudicating Authority to entertain the instant Section 7 Petition.
- 6.3. Further, it was submitted that for initiation of the CIRP under Section 7 of the Code, this Adjudicating Authority is only required to ascertain the existence of a debt and a default. Since, in the instant case, the Amount of default is more than the threshold limit i.e., Rs. 1,00,00,000 (Rupees One Crore Only), the Petition ought to be admitted.
7. The Bank has filed an Additional Affidavit *vide* Diary No. 2375/2023 dated 03.10.2023 wherein it has filed a copy of the record of default issued by the information utility.
8. During the pendency of the Company Petition, the Corporate Debtor has filed an Application bearing no. *I.A. (IBC) 212/JPR/2024* for bringing on record a copy of the Order dated 17.08.2023 passed by the Ld. DRT in *S.A.*



No. 48/2021 wherein the Ld. DRT has set aside the Demand Notice issued by the Bank to the Corporate Debtor dated 27.07.2020 and has quashed all the consequential actions taken by the Bank against the Corporate Debtor.

9. The Corporate Debtor has also filed an Application bearing *IA (IBC) No. 300/JPR/2024* under Section 60(5) of the Code *vide* Diary No. 1344/2024 dated 28.05.2024 wherein it has prayed that the instant Company Petition under Section 7 be kept in abeyance until the adjudication of the Corporate Debtor's counter claim by the Ld. DRT. In the aforementioned Application, the said contentions were raised: -

- 9.1. It was submitted that the bank had initiated the proceedings under the provisions of the SARFAESI Act, 2002 and issued the demand notice to the Corporate Debtor on the basis of illegal classification of the loan account as NPA on 28.01.2020. Against the said action, the Corporate Debtor filed an *S.A. No. 48/2021* titled as '*Swastik Copper Pvt. Ltd. v/s Union Bank of India*'. The Ld. DRT *vide* its Order dated 17.08.2023 had quashed and set aside the entire action initiated by the bank on the basis of illegal classification of account as NPA on 28.01.2020 and quashed the demand notice dated 27.07.2020 issued under Section 13(2) of the SARFAESI Act, 2002 and all the consequential proceedings.

- 9.2. Further, the bank has also filed an O.A. bearing no. *172/2021* titled as '*Union Bank of India v/s Swastik Copper Pvt. Ltd. & Ors*' to recover



a sum of Rs. 55,69,27,003/- (Rupees Fifty-Five Crores Sixty-Nine Lakh Twenty-Seven Thousand and Three Only) from the Corporate Debtor. In the said Application, the Corporate Debtor has raised a counter claim against the bank and has demanded a sum of Rs. 88,47,65,938/- (Rupees Eighty-Eight Crore Forty-Seven Lakh Sixty-Five Thousand Nine Hundred Thirty-Eight Only).

9.3. Further, a Writ Petition bearing no. 5723/2020 is pending before the Hon'ble Rajasthan High Court wherein the Corporate Debtor has challenged the remittance of Bank Guarantees by the Financial Creditor to the beneficiaries without invocation of the same by the beneficiaries.

9.4. It was submitted that if the counter claim of the Corporate Debtor is allowed then there will remain no question of paying any sum to the Bank. Moreover, if the CIRP is initiated against the Corporate Debtor, the Counterclaim filed by the Corporate Debtor will be rendered futile. Thus, it was prayed that the instant Application may kindly be kept in abeyance until the adjudication of the counter claim by the Ld. DRT.

10. The Corporate Debtor has filed its Written Submissions *vide* Diary No. 2325/2024 dated 20.09.2024 wherein it reiterated its submissions made in the Reply and have relied upon the following case laws:-

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- I. *V.R. Kamath v/s Divisional Controller, Karnataka State Road Transport Corporation and Ors. MANU/KA/0047/1997*
- II. *KBC Pictures v/s A.R. Murgadoss and Ors. MANU/MH/1270/2008*
- III. *H.K. Taneja and Ors. v/s Bipin Ganatra MANU/MH/476/2008*
- IV. *KBT Plastics Pvt. Ltd. & Anr. v/s Rajender Singh W.P. (C) 12072/2019*
- V. *M.S. Roma Enterprises v/s Mr. Martin S.K. Golla, Resolution Profession C.A.(AT)(Ins.) No. 232/2018*
- VI. *Bachhaj Nahar v/s Nilima Mandal and Ors. MANU/SC/8199/2008*
- VII. *M.A. SATHAR, & Ors v/s Thiruvananthapuram Citizens protection forum & Ors R.S.A No. 1406/2024*

11. We have heard the Ld. Counsels for the parties and perused the averments made in the Application, Reply, and Rejoinder along with the documents enclosed therein.
12. Before delving into the issue at hand, we refer to Section 7 of the Code which clarifies that the Adjudicating Authority upon being satisfied that the default of financial debt has occurred, may order for initiation of CIRP of the Corporate Debtor. The key ingredients of an Application filed under Section 7 of the Code are: (i) there has to be a financial debt and; (ii) there must be a default in repayment of the financial debt. Hence, the Financial Creditor must establish that there is a financial debt and that a default has been committed in respect of that financial debt by the Corporate Debtor.

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While dealing with an application under section 7, the Adjudicating Authority is not required to consider the question of the dispute between the parties as long as the ‘debt’ and ‘default’ is proved.

13. It has been well settled by the Hon’ble Supreme Court in *M/s Innoventive Industries Ltd. vs. ICICI Bank*, C.A. Nos. 8337-8338 of 2017, that upon being satisfied that a debt is due and a default has occurred, the Adjudicating Authority is bound to commit the Corporate Debtor into CIRP. The relevant excerpts from the judgment are as below:

*“28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the “debt”, which may also include a disputed claim, is not due. **The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete**, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority.*

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

(emphasis added)

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

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

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

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

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16. In the instant case, it is an undisputed fact that the Corporate Debtor i.e., *M/s Swastik Copper Pvt. Ltd.*, availed various financial facilities from the financial Creditor i.e., *Union Bank of India*. Thus, there was a jural relationship of debtor and creditor between the Corporate Debtor and the Financial Creditor. The same is corroborated by the various Sanction Letters and the Loan Agreements filed by the Bank in support of its Petition.
17. In so far as the issue of default is concerned, the Corporate Debtor has raised the objection that the Ld. DRT *vide* its Order dated 17.08.2023 in S.A. No. 48/2021 titled as '*Swastik Copper Pvt. Ltd. v/s Union Bank of India*' has set aside the entire action initiated by the bank on the basis of illegal classification of account as NPA on 28.01.2020 and has quashed all the consequential proceedings.
18. In its Petition, the Corporate Debtor has mentioned the date of NPA as 28.01.2020 and the date of default is mentioned as 08.02.2020 on the basis of the recall notice dated 01.02.2020. At this juncture, it is relevant to mention that as per the record of '*National e-Governance Service Limited Report*' the date of default of the debt is 08.02.2020.
19. In order to deal with the aforementioned contention of the Corporate Debtor, it is germane to refer to the Judgment of the Hon'ble NCLAT in the case of *Shri M.K. Dhir and Ors. v/s Punjab National Bank and Anr.* (2022) ibclaw.in 54 NCLAT wherein while dealing with a similar

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objection qua setting aside of NPA by Ld. DRT, the Hon'ble NCLAT observed that:-

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d. The DRT has not confirmed in the above stated order that the default has not been committed and no amount is due and payable. What it has done, it has set aside the classification of the NPA only for the purpose of the SARFAESI Act and the said order is under challenge in an appeal before the DRAT.”

20. Further, the Hon'ble Apex Court in the matter of '*Laxmi Pat Surana v/s Union Bank of India & Anr*' 2021 ibclaw.in 53 SC has held that the plea with regard to the declaration of NPA is irrelevant because Section 7 comes into play when the Corporate Debtor commits 'default'. Section 7 of the Code uses the expression default and not the date of classification of the loan account of the Corporate Debtor as NPA. Moreover, it is a settled position of law that by virtue of Section 238 of the Code, the provisions of the Code override the RDB Act, 1993 and the SARFAESI Act, 2002.
21. In the instant case, the date of default is mentioned as 08.02.2020 in the Part IV of the Petition on the basis of the Recall Notice dated 01.02.2020 and the date of NPA is mentioned as 28.01.2020. Since, the Ld. DRT *vide* its Order dated 17.08.2023 has set aside the classification of account as NPA on 28.01.2020 and has quashed all the consequential proceedings, in view of the observation of the Hon'ble NCLAT and the Hon'ble Apex Court in the aforementioned Judgments, the date of default will now be

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taken as the date mentioned in the records of the information utility services i.e., 08.02.2020 (The same date as provided under Part IV).

22. Further, the Corporate Debtor has raised the issue of limitation and has contended that the instant Petition is barred by law. It was submitted that as per the RBI guidelines, an account is declared as NPA after the interest or the principal amount remains due for a period of more than 90 days. Since, the Account was declared as NPA on 28.01.2020, the date of default should be considered as 30.10.2019. To the contrary, the Counsel for the Bank contended that the default took place on account of failure of the Corporate Debtor to make the payment in terms of the Recall Notice dated 01.02.2020 and thus, the date of default is 08.02.2020. Further, the instant Application has been filed within the prescribed period.
23. In order to adjudicate upon the issue of limitation, it is pertinent to refer to the Judgment of the Hon'ble Apex Court in the case of *Re: Cognizance for Extension of Limitation [Suo Moto Writ Petition (C) No. 3 of 2020]* wherein it was observed that:-

"I. The order dated 23.03.2020 is restored and in continuation of the subsequent orders dated 08.03.2021, 27.04.2021 and 23.09.2021, it is directed that the period from 15.03.2020 till 28.02.2022 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings.

II. Consequently, the balance period of limitation remaining as on 03.10.2021, if any, shall become available with effect from 01.03.2022.

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III. In cases where the limitation would have expired during the period between 15.03.2020 till 28.02.2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 01.03.2022. In the event the actual balance period of limitation remaining, with effect from 01.03.2022 is greater than 90 days, that longer period shall apply.

IV. It is further clarified that the period from 15.03.2020 till 28.02.2022 shall also stand excluded in computing the periods prescribed under Section 23(4) and 29A of the Arbitration and Conciliation Act, 1996, Section 12A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings.”

24. The effect of the above-referred Order of the Hon'ble Apex Court is that the balance limitation left on 15.03.2020 would become available w.e.f. 01.03.2022. The instant Petition has been filed by the Bank vide Diary No. 3512/2022 dated 01.12.2022 and if we exclude the time period from 15.03.2022 till 28.02.2022, it transpires that the instant Application has been filed well within the prescribed period of limitation.
25. At this juncture, it is incumbent to mention that during the course of hearing the Corporate Debtor has submitted OTS proposal to the Bank and the same has also been recorded by this Adjudicating Authority in its Orders dated 31.08.2023, 18.01.2024, 06.02.2024, 27.03.2024, 17.04.2024, 29.05.2024 and 09.07.2024.
26. In view of the aforementioned observations and facts, it becomes conspicuous that the Corporate Debtor i.e., *M/s Swastik Copper Pvt. Ltd.*

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has failed to discharge its liabilities towards the Financial Creditor i.e., *Union Bank of India*.

27. It is no more *res-integra* that Section 7 of the Code requires that a Financial Creditor by filing an application in the requisite format can initiate CIRP against the CD when a Debt is due and payable in law and has not been paid and a default has occurred and the Adjudicating Authority is to initiate CIRP if, it finds default recorded in the Information Utility or evidence of default. Thus, the criteria for initiation of the CIRP under the Code is limited to three things, (i) there is a debt due and payable in law and has not been paid (ii) Default has occurred (iii) Default is recorded with the information utility. In the instant case, all three criteria are satisfied. Further, the instant Petition has been filed within the prescribed period of limitation as observed above.
28. In so far as the Application filed by the Corporate Debtor bearing *IA (IBC) No. 300/JPR/2024* is concerned wherein the Corporate Debtor has prayed for keeping the Petition under Section 7 in abeyance till adjudication of its Counter-claim against the Financial Creditor by the Ld. DRT, it is relevant to refer to the Judgment of the Hon'ble NCLAT in the matter of *Anandram Developers Pvt. Ltd. Vs. National Company Law Tribunal, Chennai* (2018) 145 SCL 375, wherein it was observed that the provision of the Code override other laws and therefore, the code enables the filing of the insolvency application even when proceedings under the SARFAESI Act

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or DRT are pending for recovery of dues. Thus, the proceedings under the Code are independent of the proceedings before the Ld. DRT and the same cannot be kept in abeyance due the pendency of the proceedings before the Ld. DRT.

29. In view of the discussion on the proposition of law entailed in the preceding paragraphs and considering the circumstances of the case; we find that the Petition filed under Section 7 of the Code ought to be accepted. In our considered view, the debt and default were adequately demonstrated by the Financial Creditor in the instant case and the same is supported by the records. Further, the default is above the threshold limit of Rs. 1 crore. This is a case where all the pre-requisites for filing a Section 7 stood fulfilled thus the Adjudicating Authority is inclined to admit the Corporate Debtor into CIRP for having defaulted in repaying a financial debt which was above the threshold limit.
30. Thus, this Petition bearing no. *CP No. (IB) 88/7/JPR/2022* stands admitted and the Corporate Insolvency Resolution Process against the Corporate Debtor is hereby ordered to be initiated. Since the Applicant Bank has proposed the name of the IRP, therefore, we appoint *Mr. Satyendra Prasad Khorania* having Registration Number *IBBI/IPA/-002/IP-N00002/2016-2017/10002*, duly registered with ICSI Insolvency Professional Agency, to be appointed as the Interim Resolution Professional. The Applicant Bank has filed Consent in Form 2 under Insolvency and Bankruptcy Board of



India (Application to Adjudicating Authority) Rules, 2016, stating that no disciplinary proceedings are pending against the named IRP.

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

- I. The Resolution Professional proposed by the Applicant is *Mr. Satyendra Prasad Khorania*, who is an IP registered with ICSI Insolvency Professional Agency having Registration No. IBBI/PA/-002/IP-N00002/2016-2017/10002. He is hereby appointed as the Insolvency Resolution Professional (IRP) to take over the affairs of the Corporate Debtor and duties as required to be performed by him under the provisions of IBC, 2016, including the issue of the publication in widely circulated Newspaper as contemplated under the provisions of IBC, 2016 and calling for the claims from the creditors of Corporate Debtor and collation of the same shall be done.
- II. Further, as a sequel of admission, moratorium as envisaged under Section 14 of IBC, 2016 is invoked concerning the Corporate Debtor, which will be in vogue during the Corporate Insolvency Resolution Process of the Corporate Debtor. The IRP shall carry out CIRP strictly as per the timelines specified and as envisaged under the provisions of IBC, 2016 in relation to the Corporate Debtor.
- III. The said IRP shall act strictly in compliance with the provisions of IBC, 2016 and defray his expenses to be incurred and fees on the

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

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

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



33. In the circumstances, IA No. 300/JPR/2024 is disposed of and CP No. (IB)- 88/7/JPR/2022 is admitted.


DEEP CHANDRA JOSHI,
JUDICIAL MEMBER


RAJEEV MEHROTRA,
TECHNICAL MEMBER