IN THE NATIONAL COMPANY LAW TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

CP (IB) No.130/ (PB)/2023

ORDER UNDER SECTION 7 OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016 R/W RULE 4 OF THE INSOLVENCY AND BANKRUPTCY (APPLICATION TO ADJUDICATING AUTHORITY) RULES, 2016.

IN THE MATTER OF:

STATE BANK OF INDIA

Through Authorized Representative
Assistant General Manager.
Registered Office: SAMB-1,
12th Floor, Jawahar Vyapar Bhavan,1,
Tolstoy Marg, New Delhi-110001

Applicant/Financial Creditor

Versus

RAEBAREILLY ALLAHABAD HIGHWAY PRIVATE LIMITED

Registered Office: Property No A-618, Ground
Floor,Kh.No.618, Kanchan Kunj,
Madanpur Khadar Extn-II, Sarita Vihar,
New Delhi, Delhi, India, 110076
CIN No.: U45203DL2011PTC213560

Respondent/Corporate Debtor

Order Pronounced On: 01.02.2024

CORAM:

CHIEF JUSTICE (RETD.) RAMALINGAM SUDHAKAR
HON'BLE PRESIDENT

SHRI AVINASH K. SRIVASTAVA
HON'BLE MEMBER (TECHNICAL)

Appearances:

For the Financial Creditor: Mr. U.K. Choudhary, Sr. Advocate

For the Corporate Debtor: Mr. Abhishek Anand, Advocate

ORDER

The present application has been filed by State Bank of India (hereinafter referred to as **'Applicant'/ 'Financial Creditor'**) on 09.02.2023, u/s Section 7 of the Insolvency and Bankruptcy Code, 2016 **('The Code'),** r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 , for initiating the Corporate Insolvency Resolution Process (CIRP), declaring moratorium and for appointment of Interim Resolution Professional (IRP), against Raebareilly Allahabad Highway Private Limited (hereinafter referred to as '**Respondent'/Corporate Debtor')** for a total financial default of **Rs.105,63,32,977.24/-** (Rupees One Hundred Five Crore Sixty Three Lacs Thirty Two Thousand Nine Hundred Seventy Seven and Twenty Four Paisa Only).

PARTIES

1. The 'Financial Creditor' (FC) herein is a Public Sector Bank incorporated on 01.07.1955 under the State Bank of India Act, 1955, having its registered office at SAMB-1, 12TH Floor, Jawahar Vyapar Bhavan, 1, Tolstoy Marg, New Delhi-110001. The Financial Creditor is represented through Mr. Abhishek Kumar, Assistant General Manager.
2. The Corporate Debtor (CD) herein is Raebareilly Allahabad Highway Private Limited, CIN: U45203DL2011PTC213560, represented through Mr. Naushad Ahmad, having its registered office at A-618, Ground Floor, Kh.No.618, Kanchan Kunj, Madanpur Khadar Extn-II, Sarita Vihar, New Delhi, Delhi, India, 110076. The respondent herein was incorporated on 08.02.2011 with a Paid Up Capital of Rs. 33,51,00,000 and Authorized Capital of Rs. 35,00,00,000. Therefore, this Bench has jurisdiction to deal with this application. Copy of Company's Master Data has been annexed as **Annexure (A-10)**

BRIEF FACTS

1. The CD entered into Concession Agreement dated 31.03.2011 with the National Highway Authority of India (NHAI) pursuant to which the Corporate Debtor was granted a contract to construct, operate and maintain the existing Raebareilly to Allahabad Section of National Highway 24B from 82KM to 188

KM consisting of total 106.6 km in the State of Uttar Pradesh on the terms and condition contained in Concession Agreement.

2. It is submitted by the FC that for the financing of the project, the CD approached the SBI Consortium comprising of (State Bank of India, India Infrastructure Finance Company Limited, State Bank of Bikaner and Jaipur, Reliance Capital Limited and Punjab National Bank (hereinafter referred to as **("Consortium Banks")** in the year 2011, requesting for a loan of Rs. 225.08 Crores. The Consortium Banks agreed to disburse the amount in the following manner:

State Bank of India (SBI)	70 crore
Reliance Capital Limited (RCL)	15 crore
Punjab National Bank (PNB)	65 crore
India Infrastructure Finance Company Limited (IIFCL)	49.08 crore
State Bank of Bikaner and Jaipur (SBBJ)	16 crore
TOTAL	215.08
Sub Debt by RCL	10 crore
Total	225.08 crore

That vide notification dated 22.02.2017, the State Bank of India with the sanction of the Central Govt. and the Reserve Bank of India acquired by way of amalgamation, the business including the assets and liabilities of 5 banks including State Bank of Bikaner and Jaipur whose claim has now merged with SBI. The Financial Creditor as a part of consortium banks advanced a sum of Rs. 86.00 crore (including that of "SBBJ)."

3. The Consortium Banks entered into a Common Loan Agreement dated 04.10.2011 **("Agreement")** with the Corporate Debtor and the credit facilities were sanctioned by Consortium Banks against primary and collateral security which includes personal guarantee and corporate guarantee (corporate guarantee stands discharged on date),this further included charge creation on all assets of CD including creation of equitable mortgage of immovable properties in favour of the Security Trustee on behalf of Consortium Banks vide execution of various loan documents dated 04.10.2011. It is submitted by the FC that the Agreement dated 04.10.2011 was amended several times from

the year 2013-2016. The Agreement dated 04.10.2011 is annexed as **Annexure A-2.**

4. It is submitted by the FC that the CD could not fulfil its payment obligation as per the Agreement (as amended from time to time), therefore the Loan Account of CD was classified as Non Performing Asset **("NPA")** on 29.01.2017**.** The NESL Certificate evidencing the default has been annexed as **(Annexure A-14).**

5. Further National Highway Authority of India **("NHAI")**, in the year 2018, sanctioned a loan of Rs.119.91 crore to the Corporate Debtor under its One Time Fund Infusion and Rationalized Compensation Scheme (OTFIS), to help the Corporate Debtor complete the project. As a result of which, Consortium Banks through State Bank of India (being the **"Lenders Representative"/ "Lenders Agent"**) agreed to restructure the repayment schedule. As a result of which a Tripartite Agreement dated 05.02.2018, was executed between the NHAI, Corporate Debtor and the Financial Creditor (being the "**Lenders Representative**." The terms and condition for repayment of existing loans of Consortium Banks with that of NHAI OTFIS facility were agreed between the parties.

6. It is submitted by the FC that the, CD, could not fulfill the repayment obligation as per the terms of the Tripartite Agreement dated 05.02.2018. Pursuant to which the Financial Creditor issued a Demand Notice dated 12.01.2023. The Demand Notice has been annexed as (**Annexure A-7).** The said notice obligated the CD to pay the accrued interest aggregating to 105,63,32,977.24 as on 31.12.2022 as per the terms of Tripartite Agreement against the Loan Account No. 32918200343 & 61189496417. However it is submitted that the payments till date have not been made by the CD.

7. It is also submitted by the FC, that the said dues were acknowledged by the CD by various Revival Letter and Acknowledgment Letter dated 31.03.2019, 02.12.2020, 03.04.2020, 02.04.2021 and 05.04.2022**.** The Revival Letter/Acknowledgment Letters have been annexed as **Annexure A-6.** Thus, the CD has not disputed the position of outstanding dues, rather has

acknowledged the dues, the dues have not been paid till date, even after the lapse of time mentioned in the Demand Notice i.e. 12.01.2023. Therefore, the FC has filed the present application.

Submissions of the Ld. Counsel appearing for the Corporate Debtor are:

8. Notice was issued to the CD for filing of reply. After due service, the Corporate Debtor appeared through its counsel and filed its reply denying averments made in the Section 7 application on the following grounds:

    A. Firstly, it is submitted by the CD that the application is liable to be dismissed on the ground that the FC has not placed on record any authorization letter, board resolution, power of attorney with the petition. It is vehemently argued by the CD that Mr. Abhishek Kumar, Assistant General Manager representing State Bank of India does not have any valid authorization to file the suit/ petition in court of law. Reliance is placed on Gazette Notification dated 02.05.1987.Further, the CD relies on the decision passed by the Hon'ble NCLAT in ***M Sai Eswara Swamy v. Siti Vision Digital Media Pvt. Ltd., Company Appeal (AT) (Ins) No. 706 of 2021.***

    B. Secondly, it is submitted by the CD that the FC has *failed to mention the date of default* and working for computation of amount and days of default.

    C. Thirdly, it is submitted by the CD that *there exists no default*, which as per section 7(1) of the Code is one of the essentials for maintainability of Section 7 application. The CD further states that *neither the whole of debt or any installment thereto has become due and payable*, the FC has filed the present application only for the interest component, which has also not become due. It is submitted by the CD that in terms of the Tripartite Agreement dated 05.02.2018, the repayment schedule was bifurcated into payment of interest component and principal amount. The principal amount was to become due by 2027 and that the interest component on the Senior Debt shall only become due subject to the approval of NHAI. Thus while presenting this argument, the CD has relied upon the interpretation of Clause 5 read with Schedule III-A and Schedule IV of the Tripartite Agreement.

D. Fourthly, it is submitted by the CD that the Section 7 application filed by the FC cannot be maintained solely for the recovery of interest component. The CD places reliance on the decision passed by Hon'ble NCLAT in ***Permalli Wallace Pvt. Ltd. V. Narbada Forest Industries Pvt. Ltd Company Appeal (AT) (Ins.) No. 36 of 2023 & S.S. Polymer v. Kanodia Technoplast Limited, Company App. (AT). (Ins) No. 1227 of 2019.***

E. Further, it is submitted that the present application is not maintainable in view of the judgment passed by the Hon'ble Supreme Court in ***Vidarbha Industries Power Limited v. Axis Bank Limited, (2022 8 SCC 352).***

9. Rejoinder

A. Rival contentions were placed on behalf of the FC who placed reliance on Part IV of Form-1 while stating that the "*NPA date is the date of default*" which is also accepted by the Hon'ble Supreme Court in catena of judgments.

B. Further, the FC submitted that Clause 5 of the Tripartite Agreement no way limits the payment of the interest amount to CD as agreed under the Agreement and Schedule IIIA of the Tripartite Agreement. It is submitted that Clause 5 is only limited to the payment to be made from the Sub Escrow Account under the OTFIS Scheme, further it is submitted that the embargo for recovery of interest is only from NHAI Loan facility until Provisional Commercial Operation Date/Commercial Operation Date is achieved by the CD and there is no embargo for servicing of interest by the CD, otherwise to the senior lender.

C. It is submitted by the FC that CD was supposed to service interest towards the senior debt, whereas the principal senior debt amount was payable and due from year 2027 till 2031 and that reliance placed on clause 5 of the Tripartite Agreement is wholly misconceived. To put in short, it is the submission of the FC that Tripartite Agreement does not supersede the terms and condition of the financial agreements entered

into between lenders and Corporate Debtor. Reliance is placed on Clause 8 of the Tripartite Agreement:

> 8. **COMING INTO FORCE AND DURATION OF THE AGREEMENT**
>
> This Agreement shall come into force and effect on the date hereof and shall remain in force until mutually terminated by the Parties. However, the Lenders (represented by the Lenders' Representative) shall cease to be a Party to this Agreement on the date on which all of the dues and monies owed or payable by the Concessionaire to them in terms of the Common Loan Agreement, Subordinate Debt Agreement and other Financing Agreements shall have been irrevocably and unconditionally paid and discharged in full by the Concessionaire to them, to their satisfaction.

D. The FC further submits that the averment made by the CD regarding "*no default*" on part of CD is misconceived. He states that *"interest due and payable"* either under the loan agreement or tripartite agreement is "*default*" within the meaning of Section 3(12) of the IBC, 2016. Further, it is stated that there is acknowledgment by CD and also the legal notice sent by the FC dated 12.01.2023 has not been disputed by the CD.

E. The FC further put forth its submission on the issue of interest component, stating that interest component is part of installment of the amount due and payable, within the meaning of Section 3(12) of the IBC, 2016. Ld. Sr. Counsel stated that the FC cannot be asked to wait for the principal amount to become due and payable. The counsel places reliance on a decision of Hon'ble NCLAT in ***Koncentric Investment Ltd. v. Standard Chartered Bank CA(AT) (Ins) No. 911 of 2021 order dated 27.01.2022 (Para 21) , Base Realtors Pvt. Ltd v. Grand Realcon Pvt. Ltd., CA(AT)(Ins) No. 882/2022 Order Dated 15.11.2022.***

F. Contrary to the stand taken by the CD in view of ***Vidarbha Industries (supra)***, the FC states that Vidarbha Industries was in relation to electricity generating company and not a construction company, moreover the CD has not serviced interest pending despite having sufficient time and seeking abeyance of Section 7 Application on the ground of approximate start to generation of revenue is only a device to delay the process of CIRP. He further relies on ***Innoventive Industries Ltd. v. ICICI Bank and Anr. (2018 1 SCC 407) (Para 28 and 30) and E.S. Krishnamurthy v. Bharath Hitecch BuilderPvt. Ltd (2022 3***

SCC 161) (Para 32). Further he relies on M. Suresh Kumar Reddy vs. Canara Bank & Ors. Civil Appeal No. 7121 of 2022.

10. We have heard Ld. Counsel for both the parties and perused the documents submitted. In our considered view, it would be convenient to deal the present application Issue wise.

Analysis and Findings

ISSUE-1

Whether there exist a valid Authorization in favor of Assistant General Manager of the FC?

11. The present application has been filed by Mr. Abhishek Kumar, Assistant General Manager (State Bank of India), being the Authorized Representative of the FC. The CD relying on Gazette Notification dated 02.05.1987, submitted that the said notification does not authorize Mr. Abhishek Kumar to file the present petition and sign vakalatnama in favor of any advocate. Further, the CD submitted that the FC has failed to place on record a) any document showing that Mr. Abhishek Kumar is the Assistant General Manager, and b) any authorization letter, board resolution or power of attorney for filing of present Section 7 petition. The relevant portion of the notification dated 02.05.1987 is hereby extracted:

STATE BANK OF INDIA
CENTRAL OFFICE
Bombay, the 27th March 1987
NOTICE

No. ORG/17405—In pursuance of Regulations 76(1) of the State Bank of India General Regulations 1955, framed under Section 50 of the State Bank of India Act 1955, the Executive Committee of the Central Board hereby authorises the undernoted class of officers to exercise the Signing Power to the extent specified against each of the Officer(s) below —

A.	All Officers in the Grades of SMGS — IV and above	To sign all documents, instruments, accounts, receipts, letter and advices, etc. connected with the current or authorised business of the Bank in respect of all matters coming in discharge of functions of the posts held for the time being.
B.	All Branch Managers/ Managers of Divisions in the Grades of MMGS III/MMGS-II/JMG-I	To sign all documents, instruments, accounts, receipts, letters and advices, etc., connected with the current or authorised business of the Bank in respect of all matters coming in discharge of functions of the posts held for the time being.
C.	All Managers (Accounts)/ Accountants, Heads of Cash Departments at branches [Managers (Cash), Dy. Managers (Cash) and Asst. Managers (Cash)]	Power to discharge bills of exchange, promissory notes, documents of title to goods which come to them in discharge o functions of the post held for the time being.

However, the FC submits that Mr. Abhishek Kumar is authorized to sign the documents on behalf of the FC in terms of the notification mentioned above. The FC also places reliance on Regulation 76/77 of The State Bank of India General Regulations, 1955 to strengthen his arguments. Regulation 76 and 77 are extracted below:

76. Accounts, receipts and documents of State Bank by whom to be signed.-

[The managing directors,] (the deputy managing directors), the 6 (chief general managers) and such other officers and employees of the State Bank as the Central Board or the Executive Committee may authorize in this behalf by notification in the Gazette of India, to such extent and subject to such limitation if any, as the Central Board or the Executive Committee may ***specify or impose in so authorizing, are hereby severally empowered, for and on behalf of the State Bank, to sign all documents, instruments, accounts, receipts, letters and advices connected with the current or authorised business of the State Bank and****, in particular and without prejudice to the generality of the foregoing powers, to endorse and transfer promissory notes, stock receipts, stock debentures, shares, securities and documents of title to goods, standing in the name of or held by or on behalf of the State Bank or, in the absence of any agreement to the contrary, standing in the name of or held by or on behalf of any person, firm, company or corporation for or on behalf of which person, firm, company or corporation the State Bank has been constituted as attorneys, to draw, accept and endorses bills of exchange and cheques, to issue, confirm and transfer letters of credit and to sign guarantees and indemnities.]*

(2) Without prejudice to the provisions of sub-regulation (1) all powers of attorney and other authorizations issued by the Imperial Bank in favor of any officer or other employee who becomes an officer or other employee of the State Bank by virtue of section 7 of the Act shall continue to be in full force and effect as if instead of the Imperial Bank, the State Bank had been a party to such powers of attorney or authorisations, and, accordingly, any such officer or other employee may exercise on behalf of the State Bank such powers as he was exercising before the appointed day on behalf of the Imperial Bank.

(3) The provisions of this regulation shall not deemed in any way to affect the provisions of the Imperial Bank of India Act, 1920, not the authority which any person has under that Act in relation to the Imperial Bank, and any such person if so authorized under this regulation and by, or under, the Imperial Bank of India

Act, 1920, may act on behalf of the State Bank as well as the Imperial Bank to the extent so authorized.

77. Plaints, etc., by whom to be signed.-

Plaints, written statements, petitions, and applications may be signed and verified, affidavits may be sworn or affirmed, bonds may be signed, sealed and delivered, and generally all other documents connected with legal proceedings whether contentious or non-contentious may be made and completed on **behalf of the State Bank by the chairman or by any officer or employee empowered by or under regulation 76 to sign documents for and on behalf of the State Bank.**

12. The State Bank of India in pursuance of power conferred under Regulation 76 of the State Bank of India General Regulations, 1955 passed a notification dated 02.05.1987, whereby the executive committee of Central Board authorized the Senior Management Grade Scale IV officer & above to sign all the documents, accounts, receipts on behalf of the State Bank of India.

13. Further, Regulation 77 as mentioned above, authorizes

"**the chairman or by any officer or employee empowered by or under regulation 76 to sign documents for and on behalf of the State Bank"**

to sign the plaint, written statement, petition and application etc and generally all other documents connected with legal proceedings. The notification dated 02.05.1987 read with Regulation 76 and 77 clearly authorizes Senior Management Grade Scale IV officer and above to sign the documents on behalf of the FC. The Assistant General Manager is a position above Senior Management Grade Scale IV officer, further the Assistant General Manager Mr. Abhishek Kumar has also filed an affidavit in support of the present petition. Therefore, in our considered view the Mr. Abhishek Kumar (Authorized representative of the FC) has a valid authorization in his favor. It is therefore clear that the application has been filed by an authorized person on behalf of the Financial Creditor and the objection of the Appellants on the maintainability of the application on this ground is untenable Even otherwise, if there is a defect, the same can be rectified by

giving an opportunity to FC, the application cannot be rejected on the sole ground. (***Palogix Infrastructure (P) Ltd. v. ICICI Bank Ltd., 2017 SCC OnLine NCLAT 266.***

> *42. As per Entry 5 & 6 (Part I) of Form No. 1, 'Authorized Representative' is required to write his name and address and position in relation to the 'Financial Creditor'/Bank. If there is any defect, in such case, an application under section 7 cannot be rejected and the applicant is to be granted seven days' time to produce the Board Resolution and remove the defect.*

Hence Issue No.1 is answered accordingly.

<u>ISSUE-2</u>

Whether the Date of NPA be considered as Date of Default for the purposes of Section 7 of The Code?

14. Before delving into the issue, it is noteworthy to mention the relevant provision of law mentioned under The Code:

> ***Section 6.*** *Where any corporate debtor commits a* ***default,*** *a financial creditor, an operational creditor or the corporate debtor itself may initiate corporate insolvency resolution process in respect of such corporate debtor in the manner as provided under this Chapter*
>
> ***Section7.*** *(1) A financial creditor either by itself or jointly with other financial creditors may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when* ***a default has occurred.***
>
> *Explanation.—For the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor.*
> *(2) The financial creditor shall make an application under sub-section (1) in such form and manner and accompanied with such fee as may be prescribed.*
>
> *(3) The financial creditor shall, along with the application furnish—*
> *(a) record of the default recorded with the information utility or such other record or evidence of default as may be specified;*
> *(b) the name of the resolution professional proposed to act as an interim resolution professional; and*
> *(c) any other information as may be specified by the Board.*
>
> *(4) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3)*
>
> *(5) Where the Adjudicating Authority is satisfied that—*

(a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or
(b) default has not occurred or the application under sub-section (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application:

15. An application under section 7 of The Code is initiated by a Financial Creditor either by himself or jointly with other Financial Creditors for initiation of Corporate Insolvency Resolution Process against Corporate Debtor, where there exist a 'debt' and a 'default', meaning, when a debt becomes due and is not paid, the Financial Creditor under section 7 has a right to file an application seeking initiation of Corporate Insolvency Resolution Process (***in short "CIRP"***) against the Corporate Debtor.

16. Under Section 7(2) of The Code read with The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (in short ***'AA' Rules, 2016***), a Financial Creditor is required to apply in the Form 1 (*as provided in Rule 4 of 'AA' Rules, 2016*) accompanied with documents and records as specified in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons), Regulations, 2016 (in short ***" CIRP Regulations,"***).The Form-1 comprises Part 1 to V. where Part IV and V, requires particular of '***Financial Debt***' and the '***Date of Default'***. At present we will only deal with 'Date of Default' being one of the primary issues in the present application.

17. The Particulars of the *Date of Default* mentioned under Form 1, Part IV, of the present application is extracted below:

Date of Default: The loan accounts of the Corporate Debtor were classified as NPA on *29.01.2017* (*The interest overdue is w.e.f. 01.11.2016 for SBI Term Loan and w.e.f. 01.12.2016 for e-SBBJ Term Loan*). Subsequently, the consortium of Banks as aforesaid through State Bank of India, as Lead Bank agreed to restructure the repayment schedule of their Loans to the Corporate Debtor after NHAI sanctioned the Corporate Debtor the Loan of Rs.119.91 Crores under their One Time Fund Infusion Scheme and Rationalised Compensation (OTFIS) to help the

18. In Part IV of the Form-1 as extracted above, the FC mentions the Date of NPA as the Date of Default. However, the CD on the other hand submits that the FC has not mentioned the Date of Default and thus the Section 7 application is liable to be dismissed.

19. The question which arises before us is whether the date of NPA can be considered as Date of Default. In this backdrop, it is relevant to understand that the adjudicating authority under the present legislation has a very limited role to play while admitting or rejecting an application filed under section 7 of The Code. One of the important factor to be considered in an application under section 7 is the existence of debt and thereby 'non payment of debt" i.e. default (***Babulal Vardharji Gurjar v. Veer Gurjar Aluminium Industries (P) Ltd., (2020) 15 SCC 1)***. This is also evident from the bare language mentioned under Section 6 and 7 of The Code.

20. As has been settled by the Hon'ble Supreme Court in catena of judgments that the Limitation Act, 1963 is applicable to the proceedings under the Code, 2016 ***(B.K. Educational Services (P) Ltd. v. Parag Gupta & Associates, (2019) 11 SCC 633).*** The basic idea behind the application of the Limitation Act, 1963 is not to give life to time barred debts ***(Babulal Vardharji Gurjar v. Veer Gurjar Aluminium Industries (P) Ltd., (2020) 15 SCC 1)***. The mentioning of Date of Default in the Form-1 under Part IV is only for the purposes of reckoning of the Limitation Period within which a Financial Creditor has to exercise his rights, so that a financial creditor does not sleep over his right. Section 238 A of the Code provides for the provision of the Limitation Act, 1963 to apply to proceedings before the Adjudicating Authority. Accordingly, the time period for filing the application u/s 7 of the Code is governed by Article 137 of the Schedule to the Limitation Act, 1963 which provides for exercising the right within period of 3 years, from the date when the right to apply accrues. Hence, the Financial Creditor has to file the application within 3 years from the date when the right to apply accrue i.e. the date of default ***(Dena Bank v. C. Shivakumar Reddy, (2021) 10 SCC 330).*** Relevant paragraphs are extracted below:

99. *There can be no dispute with the proposition that the period of limitation for making an application under Section 7 or 9 IBC is three years from the date of accrual of the right to sue, that is, the date of default. In Gaurav Hargovindbhai Dave v. Asset Reconstruction Co. (India) Ltd. [Gaurav Hargovindbhai Dave v. Asset Reconstruction Co. (India) Ltd., (2019) 10 SCC 572 : (2020) 1 SCC (Civ) 1] authored by Nariman, J. this Court held : (SCC p. 574, para 6)*

> *"6. … The present case being "an application" which is filed under Section 7, would fall only within the residuary Article 137."*

131. *It is not in dispute that Respondent 2 is a corporate debtor and the appellant Bank, a financial creditor. The question is, whether the petition under Section 7 IBC has been instituted within 3 years from the date of default. "Default" is defined in Section 3(12) to mean "non-payment of a debt which has become due and payable whether in whole or any part and is not paid by the corporate debtor".*

132. *It is true that, when the petition under Section 7 IBC was filed, the date of default was mentioned as 30-9-2013 and 31-12-2013 was stated to be the date of declaration of the account of the corporate debtor as NPA. However, it is not correct to say that there was no averment in the petition of any acknowledgment of debt. Such averments were duly incorporated by way of amendment, and the adjudicating authority rightly looked into the amended pleadings.*

133. *As observed above, the appellant Bank filed the petition under Section 7 IBC on 12-10-2018. Within three months, the appellant Bank filed an application in the NCLT, for permission to place additional documents on record including the final judgment and order/decree dated 27-3-2017 in OA No. 16 of 2015 and the recovery certificate dated 25-5-2017, enabling the appellant Bank to recover Rs 52 crores odd. The judgment and order/decree of the DRT and the recovery certificate gave a fresh cause of action to the appellant Bank to initiate a petition under Section 7 IBC.*

134. *On or about 5-3-2019, the appellant Bank filed another application for permission to place on record additional documents including inter alia financial statements, annual report, etc. of the period from 1-4-2016 to 31-3-2017, and again, from 1-4-2017 to 31-3-2018 and a letter dated 3-3-2017 proposing a one-time settlement. This application was also allowed on 6-3-2021. The adjudicating authority, took into consideration the new documents and admitted the petition under Section 7 IBC.*

135. *Even assuming that documents were brought on record at a later stage, as argued by Mr. Shivshankar, the adjudicating authority was not precluded from considering the same. The documents were brought on record before any final decision was taken in the petition under Section 7 IBC.*

136. *A final judgment and order/decree is binding on the judgment debtor. Once a claim fructifies into a final judgment and order/decree, upon adjudication, and a certificate of recovery is also issued authorizing the creditor to realize its decretal dues, a fresh right accrues to the creditor to recover the amount of the final judgment and/or order/decree and/or the amount specified in the recovery certificate.*

137. *The appellant Bank was thus entitled to initiate proceedings under Section 7 IBC within three years from the date of issuance of the recovery*

certificate. The petition of the appellant Bank, would not be barred by limitation at least till 24-5-2020.

138. While it is true that default in payment of a debt triggers the right to initiate the corporate resolution process, and a petition under Section 7 or 9 IBC is required to be filed within the period of limitation prescribed by law, which in this case would be three years from the date of default by virtue of Section 238-A IBC read with Article 137 of the Schedule to the Limitation Act, the delay in filing a petition in the NCLT is condonable under Section 5 of the Limitation Act unlike delay in filing a suit. Furthermore, as observed above Sections 14 and 18 of the Limitation Act are also applicable to proceedings under the IBC.

21. Further the dictum laid down in ***Dena Bank v. C. Shivakumar Reddy, (2021) 10 SCC 330)*** has also been followed by Hon'ble National Company Law Appellate Tribunal in ***Edelweiss Asset Reconstruction Co. Ltd. v. Perfect Engine Components (P) Ltd., 2022 SCC OnLine NCLAT 1622. The relevant paragraphs are extracted below:***

4. *The brief point, which falls for consideration in this Appeal is whether the Adjudicating Authority was justified in dismissing the Application filed under Section 7 of the Code as 'barred by Limitation' and also holding that there was no 'default'.*

5. *We are of the considered view that the issue of Limitation is to be tested on the touchstone of the ratio of the Hon'ble Apex Court in '**Dena Bank (now Bank of Baroda) v. C. Shivakumar Reddy'** wherein the Hon'ble Apex Court has clearly laid down that Judgment/decree for money or Certificate of Recovery or Arbitral Award in favour of the 'Financial Creditor', constitutes an 'acknowledgement of debt' and gives rise to a fresh cause of action, provided it is within three years of the default:*

The Hon'ble Apex Court in '*Laxmi Pat Surana* v. *Union Bank of India*'[7] has observed as follows:

*"**43.** Ordinarily, upon declaration of the loan account/debt as NPA that date can be reckoned as the date of default to enable the financial creditor to initiate action under Section 7 IBC. However, Section 7 comes into play when the corporate debtor commits "default". Section 7, consciously uses the expression "default" - not the date of notifying the loan account of the corporate person as NPA. Further, the expression "default" has been defined in Section 3(12) to mean 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. In cases where the corporate person had offered guarantee in respect of loan transaction, the right of the financial creditor to initiate action against such entity being a corporate debtor (corporate guarantor), would get triggered the moment the principal borrower commits default due to nonpayment of debt. Thus, when*

the principal borrower and/or the (corporate) guarantor admit and acknowledge their liability after declaration of NPA but before the expiration of three years therefrom including the fresh period of limitation due to (successive) acknowledgments, it is not possible to extricate them from the renewed limitation accruing due to the effect of Section 18 of the Limitation Act. Section 18 of the Limitation Act gets attracted the moment acknowledgment in writing signed by the party against whom such right to initiate resolution process under Section 7 IBC ensures. Section 18 of the Limitation Act would come into play every time when the principal borrower and/or the corporate guarantor (corporate debtor), as the case may be, acknowledge their liability to pay the debt. Such acknowledgment, however, must be before the expiration of the prescribed period of limitation including the fresh period of limitation due to acknowledgment of the debt, from time to time, for institution of the proceedings under Section 7 IBC. Further, the acknowledgment must be of a liability in respect of which the financial creditor can initiate action under Section 7 IBC."

***7.** In the aforenoted Judgment, the Hon'ble Apex Court has clearly laid down the principle that the 'date of default' does not mean a strict interpretation that it has to be the 'date of NPA' in fact, the 'date of default' defined under Section 3(12) of the Code is to mean 'non-payment of a debt which has become 'due and payable' whether in whole or any part and is not paid by the Corporate Debtor'.*

***8.** It is also seen from the Balance Sheets that there has been an 'acknowledgement of liability' upto the years 2018-2019. The contention of the Learned Counsel for the Respondent that the Restructuring Letters were sanctioned beyond three years of the date of NPA and therefore is 'barred by Limitation' is untenable as at the cost of repetition we hold that as per the ratio of the Hon'ble Apex Court in 'Laxmi Pat Surana' (Supra) the 'date of default' cannot be strictly construed as the date of NPA. The material on record shows that the 'Corporate Debtor' has been consistently acknowledging its 'debt' from 31.03.2010 onwards by way of letters in Restructuring Packages, and also by way of communication the Appellant/'Financial Creditor' for Restructuring, apart from the liability being shown in the Balance Sheets.*

22. Taking note of the decision in ***Edelweiss Asset Reconstruction Co. Ltd. v. Perfect Engine Components (P) Ltd., 2022 SCC OnLine NCLAT 1622,*** we are of the view, that ordinarily the Date of NPA can be considered as Date of Default but the right to apply under the Code accrues once there is a default (which is three months prior to Date of NPA). Hence, in the present case, even if we consider the Date of Default to be three month prior to the Date of NPA i.e. from 29.10.2016, the right to file the application was to be exercised within 3 years. It is noteworthy to mention herein that there has been subsequent acknowledgment by the Corporate Debtor acknowledging the debt through letter dated 31.03.2019, 02.12.2020, 03.04.2020, 02.04.2021, 05.04.2022. It has been settled by the catena of judgments that Section 18 of

the Limitation Act is applicable to IBC proceeding. The Code does not exclude the application of Section 6, 14 or 18 or any other provision of Limitation Act to proceeding under IBC provided that the said acknowledgments are made before the expiry of 3 years. Once an acknowledgment is done, a fresh cause of action arises, thereby extending the limitation period.

23. Thus, the stand taken by the CD, that the applicant has not mentioned the Date of Default, is wholly misconceived as the Adjudicating authority is hardly left with any discretion to refuse the admission of the application under Section 7 once it is satisfied that the default has occurred ***(M. Suresh Kumar Reddy v. Canara Bank, (2023) 8 SCC 387):***

> ***11.*** *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 IBC 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 IBC must follow. If 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.*

24. In our considered view, even if we consider the Date of Default for the purposes of reckoning limitation period (prior to Date of NPA), there being subsequent acknowledgment by the Corporate Debtor, the Application is within the limitation period and the Financial Creditor cannot be debarred from exercising his rights. Thus Issue No.2 is answered accordingly.

ISSUE-3

Whether a Section 7 Application can be entertained solely for the recovery of Interest Component?

25. The third issue before us is whether the FC can file a Section 7 application under the Code, solely for the interest component and whether interest has become due in terms of the financial agreements between the parties.

26. The FC herein has filed an the present application for a default of 105,63,32,977.24/- against the CD which includes the Accured Interest and Penal Interest as on 31.12.2022. The Particulars of the Financial Debt are mentioned under Part IV of the application, the relevant extract of which are extracted below:

Amount claimed to be in default and the date on which the default occurred	The details regarding the amount claimed to be in default are already enclosed with the Statement of Accounts as **ANNEXURE: A-8 (Colly)**. *AMOUNT CLAIMED:* *(ACCRUED INTEREST + PENAL INTEREST):* **Rs. 105,63,32,977.24/-***(Rupees One Hundred and Five Crores Sixty-Three Lakhs Thirty-Two Thousand Nine Hundred and Seventy-Seven and Paise Twenty-Four)* as on 31.12.2022. *INTEREST AMOUNTS:* **Rs.91,11,90,840.24/-**(Rupees Ninety-One Crores Eleven Lakhs Ninety Thousand Eight Hundred Forty and Paise Twenty-Four Only), towards *accrued interest*, as on 31.12.2022.

27. It is vehemently argued by the CD, that an Application under section 7 of the Code cannot be filed solely for the interest component as the principal amount is yet to be due. In support of his argument, the CD has relied upon, ***S.S. Polymers v. Kanodia Technoplast Limited, 2019 SCC OnLine NCLAT 1310,*** the relevant paragraphs of which are extracted below:

> ***3.*** *The Adjudicating Authority has noticed that a sum of Rs. 25,00,000/- out of Rs. 32,71,800/- was paid to the Appellant by 31st December, 2018 through RTGS(s). The remaining amount of Rs. 7,71,800/- was also paid by 'Corporate Debtor' to the Applicant by 17th January, 2019 through NEFT(s). The said amounts were paid before the admission of the application under Section 9 of the I&B Code. Even after receiving the total amount due, the Appellant pursued the application under Section 9 of the I&B Code for a*

sum of Rs. 2,16,155/- towards interest. In these background, the Adjudicating Authority observed that in the absence of any Agreement, no such amount can be claimed.

4. *The Learned Counsel for the Appellant relied on 'Invoices' to suggest that in the 'Invoices', the claim was raised for payment of interest. However, we are not inclined to accept such submission as they were one side Invoices raised without any consent of the 'Corporate Debtor'.*

5. *Admittedly, before the admission of an application under Section 9 of the I&B Code, the 'Corporate Debtor' paid the total debt. The application was pursued for realization of the interest amount, which, according to us is against the principle of the I&B Code, as it should be treated to be an application pursued by the Applicant with malicious intent (to realize only Interest) for any purpose other than for the Resolution of Insolvency, or Liquidation of the 'Corporate Debtor' and which is barred in view of Section 65 of the I&B Code.*

28. Further he relies on ***Permali Wallace (P) Ltd. v. Narbada Forest Industries (P) Ltd., 2023 SCC OnLine NCLAT 1465,*** the relevant paragraphs of which are extracted below:

3. *The Appellant had filed earlier an Application under Section 9 in the year 2017 which was withdrawn on settlement entered into between the parties for payment of certain principal amount and the interest. After the settlement between the parties, the Corporate Debtor had made a payment of operational debt of Rs. 1,74,16,527/- as per settlement amount of total principal amount and out of interest for Rs. 48 Lacs, amount of Rs. 16 Lacs was paid. There being some default in payment of the interest amount, Section 9 Application was filed which has been rejected by the Adjudicating Authority. The Adjudicating Authority has made following observations in paragraphs 8, 9 and 10 of the Impugned Order:*

> *"8. At the outset, we note that this application is filed by the Operational Creditor for execution of terms of settlement agreement dated 07.11.2017. In our considered opinion, the amount arising out of some settlement agreement cannot be termed as operational debt within the meaning of Section 5(21) of the IBC, 2016.*
>
> *9. Apart from above, it is not in dispute that the Corporate Debtor paid the Operational Creditor the entire operational debt (principal). The Corporate Debtor has also paid a sum of Rs. 16 Lakhs towards the interest on principal sum. It is a case of the Operational Creditor that the Corporate Debtor has to pay additional sum of Rs. 1,28,00,000/- towards the interest which amount is disputed by the Corporate Debtor. Earlier an application was disposed of on the ground of settlement. In pursuance to the settlement arrived at, the operational debt of Rs. 1,74,16,527/- (principal amount) and the interest to the extent of Rs. 16,00,000/- has already been paid. The balance amount of Rs. 32,00,000/- remained unpaid against Rs. 48,00,000/- towards interest as per settlement agreement. However, now the Operational Creditor is before us to claim a sum of Rs. 1,28,00,000/- (Rs. 1,44,82,040/- Rs. 16,00,000/-) towards the interest. We sincerely feel that the Operational Creditor has been using the IBC proceeding for recovery of disputed*

amount and which is not object of the Insolvency and Bankruptcy Code, 2016. On this ground alone, this application is not maintainable.

10. Moreover, there appears to be a dispute about the terms of settlement agreement as far as calculation of interest amount is concerned. It cannot be resolved before this Adjudicating Authority."

4. *Learned Counsel for the Appellant challenging the order contends that liberty was granted in the consent terms/ settlement agreement that in event any breach is committed, the Application be revived. He further submits that post dated cheques were bounced and Appellant filed Application under Section 9 was for recovery of the balance interest amount which was unpaid.*

5. *Having heard Learned Counsel for the parties, we are of the view that Adjudicating Authority did not commit any error in rejecting Section 9 Application. It has been laid down by the Hon'ble Supreme Court in "Swiss Ribbon Pvt. Ltd. v. Union of India" ((2019) 4 SCC 17), IBC is not a recovery proceeding and the Application which has been filed by the appellant in the present case is only the application for recovery of balance amount of the interest and application was not filed for resolution of any insolvency of the Corporate Debtor. We are of the view that no error has been committed by the Adjudicating Authority in rejecting Section 9 Application filed by the Appellant. There is no merit in the Appeal, the Appeal is dismissed.*

29. However, the Financial Creditor relies upon the judgment passed by the Hon'ble National Company Law Appellate Tribunal in ***Base Realtors (P) Ltd. v. Grand Realcon (P) Ltd., 2022 SCC OnLine NCLAT 1603.*** The relevant paragraphs are mentioned below:

17. From the resume of the facts, narrated herein before, the question which arises for our consideration is as to whether an application under Section 7 of the Code can be filed and 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?.....

23. *Thus, in order to maintain the application under Section 7 of the Code the financial creditor has to show the default as a condition precedent. In this regard, we may have to refer to definition of default provided in Section 3(12) "default" means non-payment of debt when whole or any part or installment of the amount of debt has become due and payable and is not paid. The debt has also been defined as a liability in respect of claim towards a financial debt or operational debt and the claim means the right to payment. There is no dispute, in so far as the facts of this case are concerned that the amount of interest became due and payable by the Corporate Debtor to the Appellant on 01.07.2021 to the tune of Rs. 71,80,274/- in view of the condition enumerated in the debenture which says that the debenture shall carry a coupon rate of 6% p.a. on the face value plus securities premium on quarterly rests and also in view of Section 71(8) of the Companies Act, 2013.*

24. *We may also refer to Para 27 and 28 of the Judgment of the Hon'ble Supreme Court, rendered in the Case of Innoventive Industries Ltd. v. ICICI Bank, (2018) 1 SCC 407, in which the scheme of the code has been deliberated and explained in respect of Section 7 of the Code:*

"27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an installment amount. For the meaning of "debt", we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a "claim" and for the meaning of "claim", we have to go back to Section 3(6) which defines "claim" to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5 (21) means a claim in respect of provision of goods or services.

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

***25.** We would also like to refer to another decision of the Hon'ble Supreme Court in the case of Orator Marketing Pvt. Ltd. (Supra). In the said case the*

original debtor advanced a term loan of Rs. 1.60 Crores to the Corporate Debtor for a period of two years to enable the Corporate Debtor to use it for its working capital requirements. The loan was later on assigned to the Appellant therein who filed the petition under Section 7 to recover principal amount (interest free loan). The question was raised by the Respondent therein that interest free loan would not come within the purview of financial debt, therefore, the application filed as a Financial Creditor would not be maintainable. The Hon'ble Supreme Court made the following observations in Para 19, 22, 31, 47, 48 and 49 which are reproduced as under:—

> "19. Corporate Insolvency Resolution Process gets triggered when a Corporate Debtor commits a default. A Financial Creditor may file an application for initiating a Corporate Insolvency Resolution Process against the Corporate Debtor, when a default has occurred.
>
> 22. The NCLT and NCLAT have overlooked the words "if any" which could not have been intended to be otiose. 'Financial debt' means outstanding principal due in respect of a loan and would also include interest thereon, if any interest were payable thereon. If there is no interest payable on the loan, only the outstanding principal would qualify as a financial debt. Both NCLAT and NCLT have failed to notice clause(f) of Section 5(8), in terms whereof 'financial debt' includes any amount raised under any other transaction, having the commercial effect of borrowing.
>
> 31. At the cost of repetition, it is reiterated that the trigger for initiation of the Corporate Insolvency Resolution Process by a Financial Creditor under Section 7 of the IBC is the occurrence of a default by the Corporate Debtor.
>
> 'Default' means non-payment of debt in whole or part when the debt has become due and payable and debt means a liability or obligation in respect of a claim which is due from any person and includes financial debt and operational debt. The definition of 'debt' is also expansive and the same includes inter alia financial debt. The definition of 'Financial Debt' in Section 5(8) of IBC does not expressly exclude an interest free loan. 'Financial Debt' would have to be construed to include interest free loans advanced to finance the business operations of a corporate body."
>
> "47. As noticed, the root requirement for a creditor to become financial creditor for the purpose of Part II of the Code, there must be a financial debt which is owed to that person. He may be the principal creditor to whom the financial debt is owed or he may be an assignee in terms of extended meaning of this definition but, and nevertheless, the requirement of existence of a debt being owed is not forsaken.
>
> 48. It is also evident that what is being dealt with and described in Section 5(7) and in Section 5(8) is the transaction vis-à-vis the corporate debtor. Therefore, for a person to be designated as a financial creditor of the corporate debtor, it has to be shown that the corporate debtor owes a financial debt to such person. Understood this way, it becomes clear that a third party to whom the corporate debtor does not owe a financial debt cannot become its financial creditor for the purpose of Part II of the Code.
>
> 49. Expounding yet further, in our view, the peculiar elements of these expressions "financial creditor" and "financial debt", as occurring in Sections 5(7) and 5(8), when visualized and compared

with the generic expressions "creditor" and "debt" respectively, as occurring in Sections 3(10) and 3(11) of the Code, the scheme of things envisaged by the Code becomes clearer. The generic term "creditor" is defined to mean any person to whom the debt is owed and then, it has also been made clear that it includes a "financial creditor", a "secured creditor", an "unsecured creditor", an "operational creditor", and a "decree-holder". Similarly, a "debt" means a liability or obligation in respect of a claim which is due from any person and this expression has also been given an extended meaning to include a "financial debt" and an "operational debt"."

26. 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 Innoventive Industries Ltd. and taking a cue from the decision of the Hon'ble Supreme Court in the case of 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. The question posed in the earlier part of this orders is duly answered in favour of the Appellant. The appeal is thus allowed and the impugned order is hereby set aside though without any order as to cost.

30. Having considered the judgments cited by parties on both sides it is noteworthy to mention relevant definition under the Code, 2016:

31. Section 3(8) *defines corporate debtor to mean any corporate person who owes a debt to any person,* **Section 3(11)** *defines "debt"* to *means a liability or obligation in respect of a claim which is due from any person and includes "Financial Debt" and "Operational Debt."* **Section 3(12)** *defines default to mean non-payment of debt* ***when whole or any part or installment of the amount*** *has become due and payable and is not paid by the debtor or the corporate debtor, as the case may. Further* ***Section 5(8)*** *of The Code defines* ***financial debt to mean debt along with interest****, if any, which is disbursed against the consideration of* ***time value of money.*** **Sub Section (a)** *money borrowed against the payment of interest;*

32. Debt means a 'liability' or an 'obligation' under a financial arrangement whereas Default refers to 'non-fulfillment' of the 'liability' or 'obligation.' In order to initiate a Section 7 application under The Code the existence of "debt" and its non-payment i.e. "default" is sine a qua non. Applying the same to the code, Debt under S. 3(11) of the code includes a

'Financial Debt' and an 'Operational Debt.' Section 5(8) defines financial debt to be '***debt along with interest,' if any,*** which is disbursed against 'time value of money.' Time value of money is a concept meaning "a sum of money is worth more now than the same sum of money in the future."It is clear from the above elaboration that once 'financial debt' is disbursed, having a commercial effect of borrowing (S. 5(8)f)) qualifies to be a financial debt, which includes the interest along with that debt. Section 5(8) of the Code explicitly includes interest. In other words, a 'debt' or 'interest' when become 'due' and is thereby 'defaulted' triggers the 'right to sue' under the Code.

33. The Corporate Debtor has placed reliance upon *S.S. Polymers (Supra) and Permali Wallace (Supra)* decided by the Hon'ble National Company Law Appellate Tribunal. It is relevant to note that both the judgments dealt with an application filed under Section 9 of The Code which stands on a different footing. In ***S.S. Polymer (supra),*** the issue before the NCLT was that the Corporate Debtor had already paid the debt before the admission of the Section 9 Application and the Operational Creditor even after receiving the said dues, filed a Section 9 application only for the 'interest amount' despite there being no agreement to the effect. It was in that background the NCLT rejected the claim, stating there being no agreement, the application is solely for the recovery of interest amount which is against the objective of the Code, the view was further affirmed by the Hon'ble NCLAT.

34. Further in ***Permali Wallace (supra),*** the issue before NCLT was that the Financial Creditor filed Application under Section 9 in the year 2017 which was withdrawn on settlement entered into between the parties for payment of certain principal amount and the interest. After the settlement between the parties, the Corporate Debtor had made a payment of operational debt of Rs. 1,74,16,527/- as per settlement amount of total principal amount and out of interest for Rs. 48 Lacs, amount of Rs. 16 Lacs was paid, the applicant filed the Section 9 application for an amount of 1,28,00,000 towards interest. NCLT dismissed the Section 9 application, on the account that the parties had a dispute regarding the calculation of interest as per the Settlement

Agreement and that the Operational Creditor was filling the petition for recovery of disputed amount, which is against the objective of the Code. In this context it must be borne in mind that what is of the essence in a decision is its ratio and not every observation found therein. It is not a profitable task to extract a sentence here and there from a judgment and to build upon it. As a case is only an authority for what it actually decides, it cannot be quoted for a proposition that may seem to follow logically from it ***Quinn v. Leathem [1901] AC 495, State of Orissa v. Sudhansu Sekhar Misra, (1968) 2 SCR 154).*** Therefore, Reliance placed on behalf of the CD on S.S. Polymer (supra) and Permali Wallace (supra) is therefore of no avail.

35. On the other hand, the FC relied upon ***Base Realtors (supra),*** which was an application under section 7 of the IBC wherein the Financial Creditor issued the debenture to Corporate Debtor carrying an interest component. The interest became due and principal was yet to become due. The Hon'ble NCLAT held as under:

> *26. 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 Innoventive Industries Ltd. and taking a cue from the decision of the Hon'ble Supreme Court in the case of 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. The question posed in the earlier part of this orders is duly answered in favour of the Appellant. The appeal is thus allowed and the impugned order is hereby set aside though without any order as to cost.*

36. Also, the Hon'ble Supreme Court in ***(M. Suresh Kumar Reddy v. Canara Bank, (2023) 8 SCC 387)*** has held that even non-payment of part of debt, will amount to default under section 7 of the Code.

> ***11.*** *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 IBC 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 installment 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 IBC must follow. If 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.

37. In our considered view, the dictum laid down in *Base Realtors (supra) by* the Hon'ble NCLAT squarely applies to the present case and we are of the view, that an application filed under Section 7 of The Code, can be filed solely for the interest component once the interest becomes 'due' and is 'defaulted' by the Corporate Debtor. Thus Issue No.3 is answered accordingly.

38. This takes us for consideration of the next issue whether the interest has been defaulted by CD or not?

ISSUE 4

39. The question which arises further is that whether, the payment of interest has been defaulted by the CD or not? It is the case of the CD that there exist no default and therefore the present application filed by the FC is not maintainable. Therefore it is pertinent to mention relevant clauses of the Common Loan Agreement entered between CD and "Consortium of Banks" dated 04.10.2011. The relevant clauses are extracted below:

1.1 Definition:

*"**Default**" shall mean any event, circumstance, act, omission or condition, which is or which amounts to non-compliance of any of the obligations under any Transaction Document and which with giving of notice, lapse of time, making or determination or the fulfillment of any other requirement provided for in any Transaction Document or any combination of the foregoing would become an event of default under Transaction Document*

"***Due Date"*** *shall mean:*

- *i. for payment of Interest payable under this Agreement- the Interest Payment Dates:*
- *ii. for repayment of principal- the dates specified in the Amortization Schedule*
- *iii. any other amount: the date on which the amount falls due in terms of this agreement or any other Financing Document*

2.11Repayment

i. *The Borrower undertakes to repay, the principal amount of Loans to the Senior Lenders in 144 (one hundred and forty four) structured monthly installments as per the Amortization Schedule, commencing from the First Repayment Date (each a **"Repayment Installment")** such that the door to door tenor of the Senior Debt, commencing from the Initial Drawdown Date to the repayment of last installment Repayment Installment, which shall be no later than March 31, 2026 does not exceed 14(fourteen) years and 6 (six) months . Such Repayment Installments shall be payable by the borrower on the last day of the month in which the installments fall due. All Senior Lenders shall be paid on pro-rata basis.*

ii. *If, for any reason, the Loans after the final Drawdown is less than the amount of Senior Debt, the amount of installment(s) of repayment of the Loans shall stand reduced proportionately but shall be payable on the dates as specified in the Amortization Schedule.*

40. The CD could not adhere to the financial discipline as per the Amortization Schedule envisaged under the Agreement, thereby the account of CD was declared as NPA on 29.01.2017**.** It is relevant to note that, the NHAI in the year 2018, sanctioned a loan of Rs.119.91 crore to the CD under its One Time Fund Infusion and Rationalized Compensation Scheme (OTFIS), to help CD complete the project. NHAI therefore entered into a Tripartite Agreement dated 05.02.2018 with the CD. Relevant portion of the Tripartite Agreement dated 05.02.2019 is reproduced below:

2. REVIVAL PACKAGE UNDER OTFIS

At the request of the Concessionaire and the Lenders represented by the Lenders' Representative and subject to the terms and conditions of this Agreement, the Authority hereby agrees to grant the following revival package under the OTFIS for the Project subject to the Lenders not debiting interest during construction from the NHAI Loan Facility.

(i) The Authority shall extend the Concession Period by 135 (one hundred and thirty five) days thereby extending the time period of the Concession, additionally, in accordance with Circular no. 195/2016 dated January 19, 2016.

(ii) The State Government will make the remaining land available to the Concessionaire for completion of the Project.

(iii) The Authority shall immediately provide the funds under the NHAI Loan Facility to the Concessionaire, which funds shall be utilized, in accordance with Clause 5 below, towards completion of the balance work of constructing the Project Highway.

(iv) The NHAI Loan Facility will be released by the Authority commensurate to the progress and requirement of the Project determined on the basis of the reports of various monitoring agencies appointed by the Authority.

(v) After completion of the balance work of constructing the Project Highway, NHAI has agreed to ensure that the Independent Engineer issues the Provisional Certificate thereby declaring Commercial Operation Date in terms of the Concession Agreement.

41. It is the stand of the CD that even the interest component has not been defaulted as per the Tripartite Agreement. Reliance is placed on (Cl.5 of the Tripartite Agreement). Clause 5 is reproduced below:

5. **OPERATING PROCEDURE**

The Authority, after having consulted with the stakeholders, has agreed to the following operating procedure for disbursement of the NHAI Loan Facility and servicing thereof and the other Parties hereto acknowledge and agree to the same:-

(a) The Concessionaire shall open a new sub-account of the Escrow Account titled "Sub-Escrow Account (Construction and Operation) under OTFIS" for routing of the funds disbursed under the NHAI Loan Facility for completion of balance works of the Project Highway as stated herein under the OTFIS and the cash-flows of the Project for servicing the NHAI Loan Facility.

(b) All amounts disbursed under the NHAI Loan Facility shall be first deposited in the Escrow Account and shall then be directly transferred to the Sub-Escrow Account (Construction and Operation) under OTFIS for utilization thereof in the following order of priority until the achievement of PCOD / COD:

(i) all taxes due and payable by the Concessionaire for and in respect of the Project Highway;

(ii) all payments towards the Balance Project Cost; and

(iii) Concession Fee due and payable to the Authority.

It being clarified that until the achievement of PCOD / COD, neither the NHAI Loan Facility nor the Lenders' debt will be serviced from the proceeds of the NHAI Loan Facility.

(c) Until the achievement of PCOD / COD, no withdrawals will be made out of the Sub-Escrow Account (Construction and Operation) under OTFIS other than for the purpose mentioned in sub-clause (b) above.

(d) The payment out of the Sub-Escrow Account (Construction and Operation) under OTFIS will be done only against work done duly verified by the Independent Engineer and will be made directly to the contractor/suppliers/other beneficiaries, to the extent possible.

(e) All cash-flows from the Project shall be first deposited in the Escrow Account and shall then be directly transferred to the Sub-Escrow Account (Construction and Operation) under OTFIS.

(f) Post PCOD / COD, the detailed waterfall for payments to be made from the Sub-Escrow Account (Construction and Operation) under OTFIS during the Concession Period shall be as under:

(i) all taxes due and payable by the Concessionaire for and in respect of the Project Highway;

(ii) O&M Expenses, subject to the ceiling, if any, set forth in the Financing Agreements;

(iii) O&M Expenses and other costs and expenses incurred by the Authority in accordance with the provisions of the Concession Agreement and certified by the Authority as due and payable to it;

(iv) Concession Fee due and payable to the Authority;

(v) interest due and accrued on the outstanding principal amounts of the NHAI Loan Facility. It is clarified that any interest on the outstanding principal amounts of the NHAI Loan Facility until PCOD / COD shall get accrued and will be due only after PCOD / COD and shall be paid from the Sub-Escrow Account (Construction and Operation) under OTFIS in accordance with the agreed financial model provided under **Schedule III** hereto;

(vi) interest due and accrued on the outstanding principal amounts of the Senior Debt as more particularly provided in the financial model attached herewith as **Schedule IIIA** subject to the approval of NHAI as per the provisions of Concession Agreement.

(vii) principal outstanding under the NHAI Loan Facility in accordance with **Schedule IV** hereto and the agreed financial model stipulated under **Schedule III** hereto. It is clarified that the servicing of the principal amount of the NHAI Loan Facility shall not commence until PCOD / COD;

(viii) principal outstanding under the Senior Debt in accordance with the agreed financial model stipulated under **Schedule IIIA** hereto subject to the approval of NHAI as per the provisions of Concession Agreement;

(ix) all payments and Damages certified by the Authority as due and payable to it by the Concessionaire pursuant to the Concession Agreement including repayment of Revenue Shortfall Loan;

(x) provision of debt service payments due in respect of Subordinated Debt as stipulated under **Schedule IIIA** hereto;

(xi) any reserve requirements set forth in the Financing Agreements; and

(xii) post repayment in entirety of the NHAI Loan Facility, in the event of any cash surplus, such surplus shall be utilized towards repayment of the Lenders dues;

(xiii) balance, if any, in accordance with the instructions of the Concessionaire.

g) No withdrawal of interest or principal debt by the Lenders will be permitted by the Authority beyond what is agreed as per the financial model set forth in **Schedule III** hereto and as per the waterfall mechanism stipulated in Clause 5 (f) above.

h) In the event of Termination, the outstanding principal amounts of the NHAI Loan Facility including interest thereon, shall be recovered on priority charge basis in full (in accordance with Clause 5 hereof) along with other recoveries as prescribed in Article 31.4 of the Concession Agreement; and accordingly, the Termination Payments received under the Concession Agreement shall be so used.

i) Notwithstanding anything to the contrary contained in the Concession Agreement, the Escrow Agreement or any Financing Agreement, the mechanism provided in this Clause 5 shall override the waterfall mechanism stated in any of the aforesaid documents.

j) Except as provided herein, the Sub-Escrow Account (Construction and Operation) under OTFIS and the escrow arrangement shall be governed in terms of the Escrow Agreement and any supplemental escrow agreement thereof (as amended or supplemented from time to time).

k) Subject to due repayment and discharge of the entire outstanding amount under the NHAI Loan Facility and the interest thereon in terms hereof and discharge of all amounts outstanding to the Lenders in terms of and under the Financing Agreements, the Sub-Escrow Account (Construction and Operation) under OTFIS shall be closed as advised by the Lenders.

42. It is submitted by the CD that as per Cl. 5 of the Tripartite Agreement first the payment of interest due on outstanding principal amount of NHAI loan facility is to be paid then payment of interest due and accrued on outstanding principal amount of Senior Debt subject to approval of NHAI as per the provision of Concession Agreement. It is further submitted that the payment of said interest component has not been approved by the NHAI as per the provision of Concession Agreement and Tripartite Agreement, although sufficient money is available in Sub-Escrow Account.

43. It is further submitted by the CD that the project is completed to a large extent and the CD has already started receiving payment from collection of tolls, however it is submitted that the toll is being collected in Sub-Escrow Account titled as *“Sub-Escrow Account (Construction and Operation)* account which is maintained and monitored by NHAI. Further the CD relies on various communications between NHAI and the FC, while submitting that there exists a dispute between both the parties regarding the release of interest amount being credited in the Sub-Escrow Account. Per Contra, it is submitted by the FC that Cl. 5 is only limited to the payments to be made from Sub Escrow Account where the fund was infused by NHAI. Further, it is submitted that the there is no embargo for servicing of interest by the Corporate Debtor, to Senior Lender as per Loan Agreement and Schedule IIIA of the Tripartite Agreement from the year 2019.

44. Reliance has also been placed on Cl. 8 of the Tripartite Agreement, while submitting that Tripartite Agreement does not supersede the terms and conditions of Financial Agreements entered into between lenders and the CD.

45. It is noteworthy to mention herein that a Tripartite Agreement dated 05.02.2018 was primarily executed on account of infusion of money by NHAI under its (OTFIS) to enable CD to complete the project. Wherein the “Consortium of Banks” including the FC was made a party to the agreement, so that the loan provided by the Banks under the Common Loan Agreement dated 04.10.2011 is restructured. Schedule IIIA of the Tripartite Agreement segregated the payment of loan amount (to the “Consortium of Banks” including FC) into two parts i.e. payment of principal amount and payment of interest amount. Schedule IIIA categorically provides for payment of interest from the year 2019 and payment of principal from the year 2027.

46. A new Sub-Escrow Account was to be opened and maintained wherein the funds infused by NHAI under OTFIS was to be deposited. The funds infused by the NHAI were to be used in the manner provided under Cl. 5(b) of the Tripartite Agreement. Cl. 5(b) is extracted below:

(b) All amounts disbursed under the NHAI Loan Facility shall be first deposited in the Escrow Account and shall then be directly transferred to the Sub-Escrow Account (Construction and Operation) under OTFIS for utilization thereof in the following order of priority until the achievement of PCOD / COD:

(i) all taxes due and payable by the Concessionaire for and in respect of the Project Highway;

(ii) all payments towards the Balance Project Cost; and

(iii) Concession Fee due and payable to the Authority.

47. It was made clear that the funds infused by NHAI in the Sub-Escrow Account could not be withdrawn other than for the purpose as mentioned above. Further, until achievement of PCOD/COD, neither the NHAI loan facility nor the Lenders Debt will be serviced from the proceeds of NHAI Loan Facility. Also, all the cash flows from the project were to be deposited in the Main Escrow Account and then to be transferred to Sub- Escrow Account. Funds in the Sub-Escrow Account could be withdrawn (apart for the purposes of Cl. 5(b)) once PCOD/COD is achieved by the CD.

48. The Provisional Commercial Operation Date for the portion of 80 KM was issued by NHAI on 14.12.2019 and for remaining 25 KM was issued on 18.12.2021, much later than what was envisaged under the Tripartite Agreement.

49. It is relevant to note that, Tripartite Agreement restructured the debt of the CD and CD was to service the debt as per the Schedule III-A of the Tripartite Agreement. Further the service of debt was to be in conformity with Clause 5(f) of the agreement which provides for a "Waterfall Mechanism." The clause clearly provides that interest to Senior Lenders (including FC herein) be serviced, after the interest of NHAI is serviced, and not before that. Also, payment of interest to Senior Lender is subject to approval of NHAI. Further, it is clear that incase of termination of the agreement, the outstanding principal amounts of the NHAI Loan Facility including interest shall be recovered on priority charge basis. Stand taken by FC that the embargo for recovery of interest is only from the NHAI loan facility until PCOD/COD is achieved by the CD, and there is no embargo for servicing of interest by the CD, otherwise to the Senior Lender as per the Loan Agreement, appears to be misconceived. In our view, the funds infused by the NHAI were to be used in the manner as

provided under Clause 5(b) of the tripartite agreement until achievement of PCOD/COD and all the cash flows from the project were to be deposited into the Sub-Escrow Account.

50. Once PCOD/COD is achieved the amount in the Sub-Escrow Account was to be distributed as per the Waterfall Mechanism (as provided under Clause 5(f)). Further, in our view the tripartite agreement is binding upon FC and FC consciously entered into the tripartite agreement which clearly kept NHAI dues above FC dues

51. Reliance has been placed by FC on Cl. 8 of the Tripartite Agreement which provides for termination of tripartite agreement, either mutually or incase of FC, once all its dues as per the Common Loan Agreement, Debt Agreement and other Financial Agreement shall have been paid in full by the Concessionaire In our view, Tripartite Agreement, restructured the debt of the FC, which was to be paid as per the Schedule IIIA of the agreement and FC would have ceased to be a party to the Tripartite Agreement, once its debt (as per the Common Loan Agreement) are paid.

52. Reliance has been placed by CD on several letters indicating that the NHAI and the FC have an existing dispute regarding release of Principal and Interest Amount. It is noteworthy to mention that the Escrow Account was being held in SBI, Tolstoy Marg, Branch and this was being controlled by SBI, so to say. It is relevant to quote the Minutes of Meetings/Communication between the FC and CD.

Minutes of Meeting dated 03.12.2021 convened by NHAI are reproduced below:

2. Following was discussed and decided in the meeting:-

(i) **Non-payment of NHAI 'Dues' as per Tripartite Agreement by the Lead Banker.**

It was discussed and agreed that Clause 5(F)(v) should be complied by the Bank immediately and NHAI would make a fresh request for payment of interest from the Toll Collection deposited in Escrow Account and interest 'due' to NHAI would be released by the Banks. Subsequent to that, SBI will submit a proposal to claim bank's interest as per Clause 5(F) (vi) for approval of NHAI.

53. That further, after the said Meeting, NHAI issued a letter dated 07.12.2021 and reminder dated 28.12.2021 to FC requesting for release/transfer of accrued interest amount: The relevant portion of letter dated 28.12.2021 is extracted below:

"In accordance with the decisions taken during the meeting held on 03.12.2021 at NHAI, UP-East, Varanasi, this office submitted a fresh demand for payment of interest accrued during FY 2018-19, 2019-20, 2020-21 & 2021-22 (upto 31.10.2021) on the funds infused by NHAI, as per the provisions of Tripartite Agreement dated 05.12.2018 Clause 5(f)(v). The total interest accrured till 31.10.2021 is Rs. 23,04,88,950/- which has not been credited till date.

Accordingly, you are hereby requested to transfer and deposit the said accrued interest amount of Rs. 23,04,88,950/- from toll escrow account/ sub-escrow account construction and operation, to NHAI account, as per the following details:

Sl.no	Financial Year	Interest Amount (in Rs)	Details of NHAI Account for deposition
1	2018-19	5,04,05,680.00	Bank Name- CANARA Bank
2.	2019-20	6,70,67,120.00 Annexure-2	Beneficiary Name- NHAI Regional Office
3.	2020-21	6,31,61,918.00 Annexure-3	A/c No.8481010000272
4	2021-22 (upto 31.10.2021)	4,98,54,232.00 Anneure-4	IFSC- CNRB0019856
	Total	23,04,88,950.00	

54. In view of the same, SBI, issued a letter dated 17.03.2022. Relevant portion of the letter is extracted below:

SAMB-I/CL-III/2021-22/ 3266 **DT: 17/03/2022**

To,
The General Manager (T)/ Project Director,
National Highways Authority of India,
Project Implementation Unit,
House No. 257, Ward No. 22, Vishnu Nagar,
Raebareilly 229001, Uttar Pradesh.

Dear Sir,

RAEBAREILLY ALLAHABAD HIGHWAY PRIVATE LIMITED (RAHPL)
REQUEST FOR APPROVING RELEASE OF RS.27 CRORES FROM ESCROW ACCOUNT OF BORROWER
TOWARDS REPAYMENT OF ACCRUED INTEREST ON SENIOR DEBT TILL 31.10.2021

We refer to you Letter No. NHAI/PIU-RBLY/NH-24B/2021-22/22928 dated 07.12.2021 received by us on 17.12.2021. In this regard, we would like to advise as under:

- Your request to release Rs.23,04,88,950/- being the interest accrued on the funds infused by NHAI by way of OTF as per the provisions of Tripartite Agreement dated 05.02.2018 in Clause 5 (f) (v) as on 31.10.2021 has been discussed by the Consortium of Banks in their meeting dated 01.02.2022.
- The proposal has been agreed upon by Lenders. However it has been amply emphasized by all Banks during the aforesaid meeting that a request to NHAI by SBI be made requesting release of appropriate amount from Escrow Account of Borrower towards the accrued interest on Senior Debt as on 31.10.2021 as per Clause 5 (f) (vi) of Tripartite Agreement dated 05.02.2018.
- Also, it has been agreed upon by Banks for simultaneous release of funds from the Escrow Account of Borrower towards repayment of 1. Interest on NHAI OTFIS as on 31.10.2021 as per your demand dated 07.12.2021 and 2. Accrued interest on Senior Debt as financed by Banks as on 31.10.2021 as per our present demand.

2. In light of the above, we forward herewith the consolidated dues position against Senior Debt financed by Banks to RAHPL as on 31.10.2021 (keeping the date of dues in sync with as in your demand letter dated 07.12.2021), the summary of which are as under:

BANK NAME	TYPE OF DEBT	FACILITY DESCRIPTION WITH ACCOUNT NO.	PRINCIPAL O/S AS ON 31.10.2021	ACCRUED INTEREST (INCLUDING PENAL) AMOUNT (BANK WISE) AS ON 31.10.2021
STATE BANK OF INDIA	SENIOR	TERM LOAN_SBI A/C-32918200343	698702774.51	801259807.11
		TERM LOAN_SBBJ A/C-61189496417	163262447.62	
PUNJAB NATIONAL BANK	SENIOR	216400IC00004504	692285468.00	433618812.13
IIFCL	SENIOR	TERM LOAN	437793600.00	440840312.69
RCFL	SENIOR	RLNFMUM000252910	147405174.00	159296652.00
			213,94,49,464.13	**183,50,15,583.93**

3. We accordingly request you to kindly approve/permit release of **Rs.27 Crores** (keeping in view that minimum Rs.4-5 Crores of funds need to be available with Company to sustain expenses in the Project towards maintenance operations etc.) from the Escrow Account of RAHPL towards payment of accrued interest on Senior Debts as above to enable us to process both the releases (which will include payment of demanded amount to you, i.e. NHAI) simultaneously.

4. We hope that we will get a favourable response from your side at the earliest, facilitating timely recovery for Banks, more so in view of impending annual closing.

55. It would be seen that vide this letter dated 17.03.2022 as extracted above, SBI on behalf of Consortium of Banks agreed to NHAI request for release of Rs. 23.05 crore as interest on NHAI Loan, however it imposed the condition of simultaneous approval/release of Rs. 27 crore as payment towards accrued interest on the senior debt of banks, which was not agreed to by NHAI.

56. Thereafter, NHAI while considering the letter dated 17.03.2022, convened a meeting dated 27.04.2022. NHAI through this meeting raised a demand for recovery of Rs.78.26 crore (as on 31.01.2022) to the FC. Minutes of the meeting dated 27.04.2022 is extracted below:

Minutes of Meeting

Project Name : Two laning with paved shoulders of Raebareilly-Allahabad Section of NH 24B from Km 82.700 to Km. 188.600, in the state of Uttar Pradesh on Design, Build, Finance, Operate and Transfer (DBFOT) on Toll Basis under- Phase IV A".

A meeting was held on 25.03.2022 at 6:30 p.m. at NHAI, HQ, New Delhi through VC in regard to project review/status & complication of work with stakeholders under the chairmanship of Member(P), NHAI. The list of participants for the meeting is enclosed at Annex-1.

Name of Concessionaire : M/s Raebareilly Allahabad Highway Pvt. Ltd.

Concession period ending on – November, 2021

The following issues were discussed and decided during the meeting.

1. The Concessionaire raised the issue of nonpayment of all the claimed/deployed manpower at the toll plazas and other expenses incurred by them for proper running and maintenance of the 02 toll plazas at this stretch. PD clarified that, the IE was processing the invoices of the Concessionaire based on the provisions made in Tripartite Agreement dated 05.02.2018. The IE, citing duplicate provisions, like Plaza Managers by all the 3 agencies, deployed by the Concessionaire at the Toll Plazas, was restricting to only 01 Plaza Manager at each toll plaza and accordingly, was withholding payments of other 02 plaza Manager. Member (P) instructed PD to finalize a just required configuration for the manpower and other expenses for both the toll plazas to operate & maintain them efficiently.

2. The Concessionaire raised the issue of COS for steel girders used in Railway Span in the ROB at Unchahar. The Member (P) directed PD to review the same and inniate action as per contract provisions at the earliest.

3. The Contractor raised the issue of inadequate and delayed allocation towards O&M expenses in the provisions made in the Tripartite Agreement. The Member (P) expressed that, the O&M expenses are to be governed by, as per actual requirement of the road and based on field tests and NSV surveys etc.

4. The Concessionaire raised issue of nonpayment of the maintenance works done by them. The Member (P) asked the PD to reconcile the works done by the Concessionaire and to release due payments, if any.

5. The Project Director, NHAI informed that, a demand for recovery of Rs. 78.26 Cr. (amount recoverable till 31.01.2022) had been submitted to lead banker, SBI, Branch-PANKAJ GALAXY-1, 2nd FLOOR, PLOT NO. 8, SECTOR - 12, DWARKA, South West. However, no recovery could be made till date. The lead banker had not entertained our request, citing that, they are ready to pay only the interest part till date (Rs. 25.25 Cr.), followed by recovery of Bankers Interest. Member (P) asked the Bankers to clear NHAI dues on priority, failing which, suitable action would be initiated by NHAI to recover its dues.

57. That further, NHAI issued a letter dated 03.06.2022, in response to letter dated 17.03.2022 issued by FC. Relevant portion of letter dated 03.06.2022 is extracted below:

Ref:-
1. This office letter no. NHAI/PIU-RBLY/NH-24B/2021-22/22928 dated 07.12.2021
2. Your office letter no. SAMB-I/CL-III/2021-22/3266 dated 17.03.2022
3. Minutes of meeting held by Member (P), NHAI on 25.03.2022 which was attended by your Representative, as well, issued vide this office letter no. 24159 dated 27.04.2022.

Sir,

As you are aware, vide this office letter referred at 1 above, this office requested you to release Rs. 23,04,88,950/- to NHAI Account towards the interest accrued on the OTFIS by NHAI to the Concessionaire, as per provisions of Tripartite Agreement dated 05.02.2018. Vide your letter referred at 2 above, you have informed us, about the banks, having agreed for simultaneously releasing of funds from escrow account towards repayment of interest on NHAI, OTFIS and accrued interest on Sr. Debt, as on 31.10.2021. The said proposition was discussed during the review meeting held with Member (P) on NHAI HQ on 25.03.2022, wherein, Member (P) very categorically directed your Representative to release the sums demanded by NHAI (Rs. 76.28 Cr.) towards expenses/funds infused by NHAI in the project including the interest on OTFIS by NHAI. The said worksheet is again enclosed herewith for your ready reference.

It is regretted that, in spite of directions of Member (P) and after having agreed for the same by your Representative, the said sum has not been released to NHAI till date. This has been viewed very seriously by the Authority. As such, through this

-2-

letter, we serve upon you, notice to release the NHAI recoverable 'dues', as on date, which is Rs. 76.28 Cr. (Statement enclosed) within one week of receipt of this letter, failing which NHAI would be at its liberty to take further needful action to recover its dues.

Encl.: As above.

(S.B. Singh)
GM (T)/ Project Director

58. Considering the letter dated 03.06.2022 issued by NHAI, FC sought clarification from CD regarding the break-up of Rs. 76.28 crore as claimed by NHAI. CD vide letter dated 08.06.2022 responded to the FC whereby denying some of the claims raised by the NHAI. In view of the response from CD, the FC through email dated 13.06.2022 denied to process the payment as demanded by the NHAI, and further requested NHAI to consider the request for release of INR 27 crore towards interest due to Consortium of Banks. Relevant portion of email dated 13.06.2022 is extracted below:

RAEBAREILLY ALLAHABAD HIGHWAY PVT LTD: YOUR DEMAND OF RS.76.28 CRS VIDE LETTER NO. 24435 DT 03.06.2022

Nityanand Mishra@4578856 <nn.mishra@sbi.co.in> Mon, Jun 13, 2022 at 12:27 PM
To: "pdpiuraebareilly@nhai.org" <pdpiuraebareilly@nhai.org>
Cc: "Abhishek Kumar @ 4519779" <Abhishek.Kumar18@sbi.co.in>, "SBI SAMB NEW DELHI(04109)" <sbi.04109@sbi.co.in>, Agm2infra2 Sarg <agm2infra2.sarg@sbi.co.in>, "RAHPL (rahpl.2011@gmail.com)" <rahpl.2011@gmail.com>

Dear Sir,

With reference to above and your **letter no. 24435 dated 03.06.2022** (enclosed herewith for reference) received as enclosure in your trail email, we advise as under:

1. As communicated by **Concessionaire vide their Letter dated 08.06.2022** in response to **our email dated 06.06.2022** (PDF Print of the email correspondence enclosed for your information and necessary cognizance) and owing to the contentions raised by them therein, we are unable to process the payment as demanded by you in respect of items at **S. No. 2 to S. No. 6 of your Letter**.

You are requested to take note of the same and proceed accordingly.

Further, we again would like to request you to accord your permission for release of payment towards the Claim raised by Consortium of Banks against the accrued interest on Senior Debts to RAHPL as demanded by us vide our Letter dated 17.03.2022 (also enclosed for reference) at the earliest to enable us to process payment at **S. No. 1 of your Letter** and intimate us accordingly.

Thanking you.

Yours faithfully,

59. For Section 7 petition to be maintainable, there has to be a debt and a default in repayment of debt by the Corporate Debtor. The debt in the present case has been restructured as per the Tripartite Agreement and it is the stand of FC that CD has defaulted in the payment of interest as per the restructured debt. Hence, Section 7 petition has been filed against the CD. We find that as per the terms of the Tripartite Agreement, more particularly clause 5(f), SBI has agreed to the repayment of the interest amount due to it after the payment of interest to NHAI. Further, the interest due and accrued on the senior debt (Consortium of Banks) is to be paid subject to approval of NHAI as per the Tripartite Agreement. From the above string of the communications between the NHAI and the consortium of banks headed by the SBI, it is seen that the SBI has not released the interest and other dues claimed by NHAI as per the waterfall mechanism from the sub-escrow account being maintained with SBI. Rather it has made it conditional upon the simultaneous release of interest due on the senior debt (the banks).

60. SBI is holding the sub-escrow account which is to be operated as per the Tripartite Agreement. In the absence of release of payment to NHAI followed by a demand to NHAI for release of interest on the senior debt, it would be difficult to agree to the stand of SBI that the Corporate Debtor has defaulted in payment of interest on the senior debt, more so when there is more than Rupees Eighty Crore in the sub-escrow account.

61. It is clear from the above exchange of communication between FC and NHAI that there exist a dispute between both the parties regarding the release/recovery of amount due. It is again reiterated that the waterfall mechanism as provided under Clause 5 (f) of the tripartite agreement, clearly provides for the service of interest to NHAI prior to the service of interest to Senior Lenders (including FC), and service of interest to Senior Lenders was only subject to approval of NHAI. For gain said, FC consciously entered into the tripartite agreement which clearly kept NHAI dues above FC dues.

62. In our view, as on date there is no approval from NHAI for payment of interest to the FC as there exists a dispute between the parties. As observed from the Statement of Accounts attached, there lies an amount of INR 80 crore as on March 2023, which is under dispute between the NHAI and the FC. Further, Since the FC restructured its debt which was to be paid as per the Tripartite Agreement. The terms of the tripartite agreement were binding on all the parties.

63. It is relevant to mention that as per the jurisdiction envisaged under the Code, the existence of 'debt' and 'default' is a sine qua non for the admission of an application under Section 7 of The Code. In our considered view, given the facts and circumstances of the present matter, there exist no default as per the Tripartite Agreement which has restructured the debt due to the Consortium of Banks.

Thus, Issue No.4 is answered accordingly.

64. For the aforesaid reasons, we are inclined to dismiss the Section 7 petition filed by State Bank of India.

ORDER

1. Accordingly, Company Petition bearing No. CP (IB)-130(PB)/2023 filed by the SBI against the Raibareilly Allahabad Highway Project Ltd. under Section 7 of IBC, 2016 for initiation of Corporate Insolvency Resolution Process is **DISMISSED**.
2. No order as to cost.
3. All the pending IA(s) / CA(s) are also disposed off.
4. A copy of this order may be given to the parties free of cost.
5. The file may be consigned to the record storage (current).

Sd/-
RAMALINGAM SUDHAKAR
(PRESIDENT)

Sd/-
AVINASH K. SRIVASTAVA
(MEMBER TECHNICAL)