

**National Company Law Appellate Tribunal**

**Principal Bench, New Delhi**

**COMPANY APPEAL (AT) (INSOLVENCY) No. 512 of 2021**

Arising out of the order dated 26.03.2021 passed by National Company Law  
Tribunal, Chandigarh Bench, Chandigarh in C.P. (IB)-70/Chd/HP/2019

**IN THE MATTER OF:**

**Anita Jindal**

**...Appellant**

**Versus**

**1. M/S JINDAL BUILDTECH PVT. LTD.**

Through the Interim Resolution Professional  
Having Registered Office At:  
Village Kishanpura Baddinalarh Road,  
Baddi, District Solan, Himachal Pradesh

**...Respondent No. 1**

**2. VINAY YADAV**

Residing At:  
38A, Mianwali Colony,  
Gurgaon, Haryana

**...Respondent No. 2**

**For Appellant:**

**Mr. Abhijeet Sinha, Advocate.**

**For Respondent:**

**Ms. Priya Hingorani, Sr. Advocate with  
Mr. Himanshu Yadav, Advocate for R-2.**

**Ms. Swati Saluja, Advocate for Financial  
Creditor.**

**J U D G E M E N T**

**[Per: Ms. Shreesha Merla, Member (T)]**

1. The Appellant, the Shareholder and Ex-Director of the Corporate Debtor/M/s Jindal Buildtech Pvt. Ltd. has preferred this Appeal under Section 61 of the Insolvency and Bankruptcy Code, 2016 (herein after referred to 'the Code') against the Impugned Order dated 26.03.2021 passed by the Learned Adjudicating Authority (National Company Law Tribunal, Chandigarh Bench, Chandigarh) in C.P. (IB)-70/Chd/HP/2019, admitting the

Section 7 Application preferred by the second Respondent/Mr. Vinay Yadav. By the impugned order the Adjudicating Authority, while admitting the Section 7 Application observed as follows:-

*“10. Section 7(5)(a) of the Code is as follows:*

*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.”*

*11. In the present case, the concurrence of default is evidenced by the details furnished by the petitioner including cheque bearing No.000221 dated 01.09.2016 amounting to Rs. 57,00,000 and cheque bearing No.000222 dated 01.09.2016 amounting to Rs. 30,50,000 (Annexure-C (Colly)). It can be seen that aforesaid cheques were dishonoured due to "Insufficient Balance" as evident from cheque Return Memo dated 05.12.2016, 21.11.2016 and 30.11.2016 attached as Annexures D, E & F respectively. The financial creditor has also issued a Legal notice dated 19.10.2018 (Annexure-G) through its counsel demanding full payment of pending amount. Original postal receipts and tracking report showing the delivery of Legal notice dated 19.10.2018 are found at Annexure-H (Page Nos. 31-36). The petitioner has attached bank statements showing an amount of Rs. 57,00,000/- transferred to the corporate debtor from the account of his Sole Proprietorship Firm i.e. M/s Ultracon International and Rs. 40,00,000/- from his own account as Annexure-I. (colly). It is evident from the contents of the petition that the corporate debtor has defaulted in the repayment of amount to the financial creditor.”*

**2. Submissions of the Ld. Counsel appearing on behalf of the Appellant.**

- It is submitted by the Ld. Counsel for the Appellant that the second Respondent has falsely represented himself to be a Financial Creditor of the Corporate Debtor, as the money in question was never advanced to the Corporate Debtor as financial debt, but, in fact, the same amount was

deposited to open and operate some joint depots to sale and distribute goods manufactured by the Corporate Debtor.

- The Corporate Debtor furnished three cheques only with an intention to provide security of the subject amount.
- The Section 7 Application was filed by the second Respondent without appending any document to show that the amount in question is of loan amount; any financial agreement to establish on what terms and conditions the purported 'short term loan' was advanced to the Corporate Debtor; never furnished the detailed record of the default of the default recorded with the information utility as mandated under Section 7(3) of the Code; did not file adequate evidence to prove that the Corporate Debtor owed a 'financial debt' to the Creditor.
- Mere reliance on the bank statements to allege that some money in the nature of financial debt was given to the Corporate Debtor, does not satisfy the requirements of a 'financial debt' as defined under the Code.
- The audited Financial Statements of the Corporate Debtor for the FY 2018-19 and FY 2017-18 show the amount as 'advances from customer" this establishes that the said amount does not have consideration for the time value of money.
- Non-reply to a legal notice does not amount to any admission as to whether the amount deposited in the account was a loan. The petition has been filed only as a pressure tactic against the solvent Corporate Debtor claiming an amount of Rs. 87,50,000/- to be amount in default arising out of two cheques of Rs. 57,00,000 and Rs. 30,50,000/- issued by the Corporate

Debtor in favour of the second Respondent, which had returned on account of insufficient funds.

- It is submitted that in the ongoing proceedings under Section 138 of the NI Act, the Corporate Debtor had already paid an amount of Rs. 67,90,000/- vide a Demand Draft dated 09.09.2019. As per the directions of the Trial Court, the Corporate Debtor paid interest @ 6% p.a and the second Respondent did not oppose the plea of the Corporate Debtor for closure of the proceedings before the JMIC, Gurgaon. Furthermore, the second Respondent has accepted the amount and did not challenge the orders of the Trial Court. Therefore, any claim including interest thereupon arising out of the said cheque amounting to Rs. 57,00,000/- is wholly misconceived. Even assuming the claim of the second Respondent is correct, the present amount due is only Rs. 30,50,000/-.
- It is submitted that in order to put an end to the dispute, without prejudice to its contentions, the Appellant had annexed a Demand Draft of Rs. 30,50,000/-, but the Respondent, with an intention to extract more money is now demanding interest at exorbitant rate of 18% p.a.
- The Ld. Counsel for the Appellant has placed reliance on the Judgment of Hon'ble Supreme Court in Pioneer Urban Land Vs. UOI, (2019) 8 SCC 416 in support of his case that "the 'disbursal' must be money and must be against consideration for the 'time value of money', meaning thereby, the fact that such money is now no longer with the lender, but is with the borrower, who then utilises the money"

- Learned Counsel stressed that this Code should not be used for 'Recovery' of money and that it is essentially meant for 'Resolution'.
- The Ld. Counsel for the Appellant also placed reliance on the ratio of the Hon'ble Supreme Court in UoI Vs. Watkins, AIR 1966 SC 275, wherein it was held as follows:-

*"It was pointed out that the plaintiff had given notice to the defendant claiming rent at the rate of Rs. 4 per ton per month and there was no protest on behalf of the defendant and, therefore, it must be taken that there was an implied agreement between the parties that rent would be paid at that rate, i.e., at the rate of Rs. 2,400 per month. We do not think there is any warrant for this submission. Merely because the plaintiff had claimed storage charges at the rate of Rs. 4 per ton per month and there was silence on the part of the defendant, it cannot be deemed that there was acquiescence on the part of the defendant and that there was an implied undertaking on its part to pay godown rent at that rate."*

### **3. Submissions of the Ld. Counsel appearing on behalf of the second**

#### **Respondent:**

- It is submitted that the first Respondent/Corporate Debtor had admitted in the reply to the Section 7 Application under the heading preliminary objections "that the Corporate Debtor had taken a short-term loan of Rs. Ninety-Seven Lakhs and assured its return within a year and also returned a sum of Rs. Nine Lakhs Fifty Thousand to the Financial Creditor. It is submitted that this amount of Rs. 9,50,000/- was paid on 11.05.2016 prior to the filing of Section 7 Application. In September, 2016 the Respondent No. 1/Corporate Debtor issued two cheques dated 01.09.2016 to the second Respondent for a total amount of Rs. 87,50,000/-, but the same

were returned unpaid and hence proceedings under Section 138 of the NI Act were initiated against the Corporate Debtor.

- A Legal Notice dated 19.10.2018 was duly served upon the first Respondent on 25.10.2018, who reiterated the mutually agreed terms for advancement of the aforesaid loan being based on assurances of assured return along with interest @ 18 % p.a thereon. Pursuant to the order dated 07.08.2019 under the NI Act, the Corporate Debtor paid a total sum of Rs.67,90,000/- out of which Rs. 57,00,000/- towards the discharge of the principal sum Rs. 10,88,000/- towards the interest component on the said amount and Rs. 2,000/- towards cost.
- It was never the case of the Appellant before the Adjudicating Authority that the second Respondent was not a Financial Creditor and the debt due was not a financial debt. Legal Notice dated 19.10.2018 reiterating the terms of loan including interest @ 18% p.a was never replied to, disputed or objected to by the Corporate Debtor. Hence, adverse inference ought to be drawn against the Corporate Debtor. In the reply dated 06.08.2019, the Corporate Debtor had not challenged the maintainability of the Section 7 Application nor disputed the financial debt. Hence, the Adjudicating Authority has rightly held that there is a 'debt' and 'default' in payment of the financial debt and is more than Rs. 1,00,000/-, as admitted the application.
- Ld. Counsel for the second Respondent placed reliance on the Judgments of the Hon'ble Supreme Court in **'Orator Marketing Pvt. Ltd.' Vs. 'Samtex Desinz Pvt. Ltd.'** (MANU/SC/0487/2021), wherein the Apex

Court has held that 'even a person who gives a term loan to a Corporate Debtor, free of interest, falls within the ambit of Financial Creditor, is defined under the Code'.

- The Learned Sr. Counsel also relied on '*Metropolis Travels & Resorts (I) Pvt. Ltd.*' Vs. '*Sumit Kalra and Ors.*' 98 (2002) DLT 573, '*ICRI Research Pvt. Ltd.*' Vs. '*Bon Lon Securities Ltd.*', MANU/DE/4833/2018, '*Rangappa*' Vs. '*Mohan*', AIR 2010 SC 1898, '*Madhusudan Tanita*' Vs. '*Amit Chorarira*' MANU/NL/0374/2020, '*Innoventive Industries Ltd.*' Vs. '*ICICI Bank*', (2018) 1 SCC 407, and '*Swiss Ribbons Pvt. Ltd. & Ors.*' Vs. '*Union of India (UOI) & Ors.*', (2019) 4 SCC 17, in support of their case that if the Adjudicating Authority is satisfied that there is a 'debt' and a 'default', the Section 7 Application is required to be admitted.
- The Appellant has erroneously placed reliance on the Notification dated 24.03.2020 issued by the Ministry of Corporate Affairs (MCA), Government of India as default in the repayment of the outstanding loan occurred on 21.11.2016, 30.11.2016 and 05.12.2016, much prior to the date of notification and moreover the Section 7 Application was filed way back in December, 2018.
- It is submitted that the Appellant has falsely stated in the present Appeal that though the Corporate Debtor moved an Application dated 19.01.2021 to grant an opportunity for hearing but the Adjudicating Authority passed the impugned order dated 26.03.2021 without affording any such opportunity. In fact, the said application dated 19.01.2021 was allowed and the order dated 12.01.2021 was recalled. The Adjudicating Authority

heard all the submissions advanced by the Corporate Debtor and reserved the orders vide order dated 27.01.2021.

- Under the ambit of Section 7 of the Code, the Adjudicating Authority is to only determine whether a 'default' has occurred and whether the 'debt', which may still be disputed, was due and remained unpaid. The deposit of the said demand draft does not remove the existence of default as existed and as on the date of filing of the Section 7 Application. Moreover, the said Demand Draft was by M/s Jindal Buildsys Limited and not the Appellant herself. M/s Jindal Buildsys Limited is already facing insolvency proceedings before the Adjudicating Authority for several defaults and hence the Adjudicating Authority has rightly admitted the Section 7 Application.

**Assessment:**

4. After hearing the submissions of both the parties at length, we are of the considered view that the main issue which arises for consideration in this Appeal is whether the Section 7 Application admitted against a Solvent Company, in the background where the Company has issued two cheques as security for the amount lent, and one cheque amount has been paid, (pursuant to the Order of the Trial Court under Section 138 of the NI Act, 1881, to compound one of the cases), and for the balance second cheque amount, does the initiation of Insolvency Proceedings fall within the ambit of the scope, objective and spirit of the Code which is 'Resolution' and not 'Recovery'? Whether the Adjudicating Authority while admitting a Section 7 Application, as in this case, examine only if there is a 'Debt' and 'Default' but



also assess if the intent of the Applicant is primarily only 'Recovery of the dues'?

**5.** For better understanding of the case on hand, a few dates are important:

- It is the case of the second Respondent that an amount of Rs.97,00,000/- was lent to the 'Corporate Debtor' as 'Short-Term Loan' in December 2015, to be repaid within a period of one month.
- On 11.05.2016, an amount of Rs.9,50,000/- was paid towards part-payment of the loan.
- On 01.09.2016, the 'Corporate Debtor' issued two post-dated cheques for Rs.57,00,000/- and Rs.30,50,000/-, which had being presented, were returned unpaid on 21.11.2016 and 05.12.2016 respectively.
- In 2017, the second Respondent filed two separate cases under Section 138 of the NI Act, 1881 before the District Court, Gurgaon, Haryana.
- On 30.11.2018, a Section 7 Petition was filed being CP (IB) No. 70/CHD/HP/2019 before the Adjudicating Authority, Chandigarh Bench seeking initiation of Insolvency Resolution against the 'Corporate Debtor', claiming an amount of Rs.87,50,000/- as the amount of default.
- On 09/09/2019, the 'Corporate Debtor' paid an amount of Rs.57,90,000/- to the second Respondent before the Trial Court in proceedings under Section 138 of the NI Act.

**6.** At this juncture, it is relevant to reproduce part IV and V of the Application filed by the second Respondent:

**PART IV**

| PARTICULARS OF FINANCIAL DEBT |                                                        |                                                                                                                         |
|-------------------------------|--------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------|
| i.                            | TOTAL AMOUNT OF DEBT GRANTED<br>DATE(S) OF DISBURSMENT | Total Debt: Rs. 97,00,000/-<br>(Rupees Ninety Seven Thousand only)<br>Date of Disbursement:<br>8.12.2015 and 14.12.2015 |
| ii.                           | AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON        | Amount Claimed:<br>Rs. 87,50,000/- (Rupees                                                                              |

|                                                                                                                                   |                                                                                            |
|-----------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------|
| WHICH DEFAULT OCCURED<br>WORKINGS OF COMPUTATION OF<br>AMOUNT AND DAY OF DEFAULT<br>ATTACHED IN A TABULAR FORM AS<br>ANNEXURE - B | Eighty Seven Lakhs Fifty<br>Thousand Only)<br>Date of Default: 5.12.2016<br>and 21.11.2016 |
|-----------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------|

**PART V**

| PARTICULARS OF FINANCIAL DEBT [DOCUMENTS, RECORDS AND EVIDENCE OF DEFAULT]                                                                |                                                                                                                                             |            |                                                               |
|-------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------|------------|---------------------------------------------------------------|
| 1.                                                                                                                                        | PARTICULARS OF SECURITY HELD, IF ANY, THE DATE OF ITS CREATION, ITS ESTIMATED VALUE AS PER THE CREDITOR.<br><u>List of Securities held:</u> |            |                                                               |
|                                                                                                                                           | CHEQUE NO.                                                                                                                                  | DATE       | NAME OF ACCOUNT                                               |
|                                                                                                                                           | 000221                                                                                                                                      | 01.09.2016 | M/s Jindal Builtech Private Limited                           |
|                                                                                                                                           |                                                                                                                                             |            | Rs. 57,00,000/-<br>(Rupees Fifty Seven Lakhs only).           |
|                                                                                                                                           | 000222                                                                                                                                      | 01.09.2016 | M/s Jindal Builtech Private Limited                           |
|                                                                                                                                           |                                                                                                                                             |            | Rs. 30,50,000/-<br>(Rupees Thirty Lakhs Fifty Thousand only). |
| The copies of cheques are annexed herewith as Annexure C (Colly).<br>The original cheques are being submitted in the Court of Ms. Neekita |                                                                                                                                             |            |                                                               |

|    |                                                                                                                                                                                                                                                                                                                                       |
|----|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|    | Bhardwaj, Judicial Magistrate First Class, Gurugram, Haryana.                                                                                                                                                                                                                                                                         |
| 2. | PARTICULARS OF AN ORDER OF A COURT, TRIBUNAL OR ARBITRAL PANEL ADJUDICATING ON THE DEFAULT, IF ANY:<br>Not applicable.                                                                                                                                                                                                                |
| 3. | RECORD OF DEFAULT WITH THE INFORMATION UTILITY, IF ANY:<br>Not applicable.                                                                                                                                                                                                                                                            |
| 4. | DETAILS OF SUCCESSION CERTIFICATE, OR PROBATE OF A WILL, OR LETTER OF ADMINISTRATION, OR COURT DECREE (AS MAY BE APPLICABLE), UNDER THE INDIAN SUCCESSION ACT, 1925 (10 OF 1925):<br>Not applicable.                                                                                                                                  |
| 5. | THE LATEST AND COMPLETE COPY OF THE FINANCIAL CONTRACT REFLECTING ALL AMENDMENTS AND WAIVERS TO DATE:<br>Not applicable.                                                                                                                                                                                                              |
| 6. | A RECORD OF DEFAULT AS AVAILABLE WITH ANY CREDIT INFORMATION COMPANY:<br>Not applicable                                                                                                                                                                                                                                               |
| 7. | COPIES OF ENTRIES IN A BANKERS BOOK IN ACCORDANCE WITH THE BANKERS BOOK EVIDENCE ACT, 1891 (18 OF 1891):<br>Not applicable                                                                                                                                                                                                            |
| 8. | LIST OF OTHER DOCUMENTS ATTACHED TO THIS APPLICATION IN ORDER TO PROVE THE EXISTENCE OF FINANCIAL DEBT, THE AMOUNT AND DATE OF DEFAULT: <ul style="list-style-type: none"> <li>i. <u>Record of Default:</u> <ul style="list-style-type: none"> <li>a) Cheque return memo of cheque no. 000221 amounting to Rs.</li> </ul> </li> </ul> |

|  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
|--|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|  | <p>57,00,000/- dated 05.12.2016 issued by the Oriental Bank of Commerce, Manesar Branch, Gurgaon, stating the reason for the dishonor of cheque as "Insufficient funds". The copy of the cheque return memo is attached herewith as Annexure D.</p> <p>b) Cheque return memo of cheque no. 000222 amounting to Rs. 30,50,000/- dated 21.11.2016 issued by the Yes Bank, Manesar Branch, Gurgaon, stating the reason for the dishonor of cheque as "Insufficient funds". The copy of the cheque return memo is attached herewith as Annexure E.</p> <p>c) Cheque return memo of cheque no. 000222 amounting to Rs. 30,50,000/- dated 30.11.2016 issued by the Yes Bank, Manesar Branch, Gurgaon, stating the reason for the dishonor of cheque as "Insufficient funds". The copy of the cheque return memo is attached herewith as Annexure F.</p> <p>ii. Legal Notice dated 19.10.2018 given my M/s Sahijpal and Associates is annexed herewith as Annexure G.</p> <p>iii. Proof of delivery dated 25.10.2018 and track consignment record is annexed herewith as Annexure H (Colly).</p> <p>iv. A bank statement of the Financial Creditor showing amount of Rs. 97,00,000/- (Rs. Ninety seven lakhs only) deposited from the account of his Sole proprietorship firm i.e M/s Ultracon International via RTGS of Rs. 57,00,000/- (Rs. Fifty seven lakhs only) from Oriental Bank of Commerce, Manesar Branch, Gurgaon dated 14.12.2015 and RTGS of Rs. 40,00,000/- (Rs. Forty lakhs only) from Yes Bank dated 08.12.2015 and showing the dishonouring of the subject cheques due to insufficiency of funds to account of Corporate Debtor is annexed herewith as Annexure I (colly).</p> |
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7. From the aforementioned particulars of 'Financial Debt', it is clear that the amount claimed as 'default' is Rs.87,50,000/- which is inclusive of cheque amount of Rs.57,00,000/- issued on 01.09.2016 and against which the 'Corporate Debtor' paid an amount of Rs.67,90,000/- vide a Demand Draft dated 09.09.2019 before the Trial Court to compound one of the cases. It is an admitted fact that the said payment led to the closure of Case No. 1505 of 2017 which was filed for the dishonour of the cheque of Rs.57,00,000/-.



**8.** We note that the second Respondent had accepted an amount of Rs.67,90,000/- which was computed at 6% interest. This Order has not been challenged and has attained finality. The relevant portion of the subject Order of the Trial Court is reproduced as hereunder:

One cheque is subject matter of present case. It is matter of record that accused persons filed present application on 04.06.2019. Hence, keeping in view the facts and circumstances, tenure of interest, rate of interest and cost are calculated as per following schedule:-

| Cheque No. | Cheque amount | Tenure                         | Rate of Interest | Total amount (Principal + Interest) | Cost        | Total Payable amount |
|------------|---------------|--------------------------------|------------------|-------------------------------------|-------------|----------------------|
| 000221     | 57,00,000/-   | 01.09.2016<br>to<br>04.06.2019 | 6% per annum     | Rs.<br>67,88,000/-                  | Rs. 2,000/- | Rs.<br>67,90,000/-   |

Thus total amount which accused persons are required to pay for compounding of offence is Rs. 67,90,000/-.

Announced in open court

(Chavi Goel)  
JMIC/Gurugram/07.08.2019

**9.** In Part IV of the Application, the debt amount is claimed to be Rs.87,50,000/-. It is pertinent to mention that the said Application was filed on 30.11.2018 while there were parallel proceedings for recovery of the amount under Section 138 of the NI Act, 1881 before the District Court, Gurgaon.

**10.** The argument of the Learned Counsel for the Appellant that the Notification dated 24.03.2020 issued by the Central Government increasing the threshold to Rs.1Crore/- is retrospective in nature and is applicable to this case, is untenable as we are of the view that the amounts claimed pertain

to the period prior to the date of Notification. We also do not wish to delve into the other submissions of the Appellant regarding the nature of transactions, absence of Financial Contract, non-registration of debt with the information utility whether interest at 18% per annum was ever concluded between the parties except for reference in the legal Notice issued by the second Respondent. This Tribunal is of the earnest view that taking into consideration the facts and circumstances of the attendant case on hand, the issue with respect to Admission of Section 7 Petition is required to be decided on the touchstone of the ratio of the Hon'ble Supreme Court in **'Vidarbha Industries Power Limited' Vs. 'Axis Bank Limited', 2022 SCC OnLine SC 841**, wherein the Hon'ble Apex Court has observed as follows:

*"55. When an application is filed under Section 7(2) of the IBC, the Adjudicating Authority (NCLT) is required to ascertain the existence of a default from the records of the information utility or any other evidence furnished by the financial creditor under sub-section (3) of Section 7 of the IBC, within 14 days of the date of receipt of the application.*

*56. Section 7(5)(a) of the IBC, on which much emphasis has been placed both by Mr. Gupta and Mr. Mehta, provides that where the Adjudicating Authority (NCLT) is satisfied that a default has occurred and the application under sub-Section (2) of the IBC is complete and there is no disciplinary proceeding against the proposed Resolution Professional, it may by order, admit such application. If default has not occurred, or the application is incomplete, or any disciplinary proceeding is pending against the proposed Resolution Professional, the Adjudicating Authority (NCLT) may reject such application in terms of Section 7(5)(a) of the IBC, but after giving the applicant opportunity to rectify the defect.*

*57. Both, the Adjudicating Authority (NCLT) and the Appellate Tribunal (NCLAT) proceeded on the premises that an application must necessarily be entertained*

under Section 7(5)(a) of the IBC, if a debt existed and the Corporate Debtor was in default of payment of debt. In other words, the Adjudicating Authority (NCLT) found Section 7(5)(a) of the IBC to be mandatory. The Adjudicating Authority (NCLT) was of the view that Section 7(5)(a) did not admit any other interpretation, with which the Appellate Tribunal (NCLAT) agreed.

58. The Appellate Tribunal (NCLAT) affirmed the finding of the Adjudicating Authority (NCLT) that the Adjudicating Authority was only required to see whether there had been a debt, and the Corporate Debtor had defaulted in making the repayments. These two aspects, when satisfied, would trigger Corporate Insolvency. Since the Adjudicating Authority (NCLT) did not consider the merits of the contention of the Respondent Corporate Debtor, the only question in this appeal is, whether Section 7(5)(a) is a mandatory or a discretionary provision. In other words, is the expression 'may' to be construed as 'shall', having regard to the facts and circumstances of the case.

59. Referring to the judgment of this Court in *Swiss Ribbons (supra)*, the Adjudicating Authority (NCLT) held that the imperativeness of timely resolution of a Corporate Debtor, who was in the red, indicated that no other extraneous matter should come in the way of expeditiously deciding a petition under Section 7 or under Section 9 of the IBC.

60. There can be no doubt that a Corporate Debtor who is in the **red** should be resolved expeditiously, following the timelines in the IBC. No extraneous matter should come in the way. However, the viability and overall financial health of the Corporate Debtor are not extraneous matters.

61. The Adjudicating Authority (NCLT) found the dispute of the Corporate Debtor with the Electricity Regulator or the recipient of electricity would be extraneous to the matters involved in the petition. Disputes with the Electricity Regulator or the Recipient of Electricity may not be of much relevance. The question is whether an award of the APTEL in favour of the Corporate Debtor, can completely be disregarded by the Adjudicating Authority (NCLT), when it is claimed that, in terms of the Award, a sum of Rs. 1,730 crores, that is, an amount far exceeding the claim of the

Financial Creditor, is realisable by the Corporate Debtor. The answer, in our view, is necessarily in the negative.

62. In our view, the Appellate Authority (NCLAT) erred in holding that the Adjudicating Authority (NCLT) was only required to see whether there had been a debt and the Corporate Debtor had defaulted in making repayment of the debt, and that these two aspects, if satisfied, would trigger the CIRP. The existence of a financial debt and default in payment thereof only gave the financial creditor the right to apply for initiation of CIRP. The Adjudicating Authority (NCLT) was required to apply its mind to relevant factors including the feasibility of initiation of CIRP, against an electricity generating company operated under statutory control, the impact of MERC's appeal, pending in this Court, order of APTEL referred to above and the over all financial health and viability of the Corporate Debtor under its existing management.

63. As pointed out by Mr. Gupta, Legislature has, in its wisdom, chosen to use the expression “may” in Section 7(5)(a) of the IBC. When an Adjudicating Authority (NCLT) is satisfied that a default has occurred and the application of a Financial Creditor is complete and there are no disciplinary proceedings against proposed resolution professional, it may by order admit the application. Legislative intent is construed in accordance with the language used in the statute.

64. The meaning and intention of Section 7(5)(a) of the IBC is to be ascertained from the phraseology of the provision in the context of the nature and design of the IBC. This Court would have to consider the effect of the provision being construed as directory or discretionary.

65. Ordinarily the word “may” is directory. The expression ‘may admit’ confers discretion to admit. In contrast, the use of the word “shall” postulates a mandatory requirement. The use of the word “shall” raises a presumption that a provision is imperative. However, it is well settled that the prima facie presumption about the provision being imperative may be rebutted by other considerations such as the scope of the enactment and the consequences flowing from the construction.



66. It is well settled that the first and foremost principle of interpretation of a statute is the rule of literal interpretation, as held by this Court in *Lalita Kumari v. Government of Uttar Pradesh*. If Section 7(5)(a) of the IBC is construed literally the provision must be held to confer a discretion on the Adjudicating Authority (NCLT)“.....

“83. The Adjudicating Authority (NCLT) failed to appreciate that the question of time bound initiation and completion of CIRP could only arise if the companies were bankrupt or insolvent and not otherwise. Moreover the timeline starts ticking only from the date of admission of the application for initiation of CIRP and not from the date of filing the same.

84. In *Swiss Ribbons (supra)* this Court considering the vires of the IBC observed as follows:—

“43. A financial creditor may trigger the Code either by itself or jointly with other financial creditors or such persons as may be notified by the Central Government when a “default” occurs. The Explanation to Section 7(1) also makes it clear that the Code may be triggered by such persons in respect of a default made to any other financial creditor of the corporate debtor, making it clear that once triggered, the resolution process under the Code is a collective proceeding in rem which seeks, in the first instance, to rehabilitate the corporate debtor. Under Section 7(4), the adjudicating authority shall, within the prescribed period, ascertain the existence of a default on the basis of evidence furnished by the financial creditor; and under Section 7(5), the adjudicating authority has to be satisfied that a default has occurred, when it may, by order, admit the application, or dismiss the application if such default has not occurred. On the other hand, under Sections 8 and 9, an operational creditor may, on the occurrence of a default, deliver a demand notice which must then be replied to within the specified period. What is important is that at this stage, if an application is filed before the adjudicating authority for initiating the corporate insolvency resolution process, the corporate debtor can prove that the debt is

*disputed. When the debt is so disputed, such application would be rejected.”*

85. The judgment of this Court Swiss Ribbons (supra), which was rendered in the context of a challenge to the vires of the IBC, does not consider the question of whether Section 7(5)(a) of the IBC is mandatory or discretionary. It is well settled that a judgment is a precedent for the question of law that is raised and decided. The language used in a judgment cannot be read like a statute. In any case, words and phrases in the judgment cannot be construed in a truncated manner out of context”....

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

*(Emphasis Supplied)*

**11.** In the instant case, proceedings under NI Act, 1881 commenced in the Year 2017; Section 7 Application was filed, on 10.11.2018, the ‘Corporate Debtor’ paid an amount of Rs.67,90,000/- before the Trial Court to compound one of the cases on 09.09.2019 and which led to the closure of Case No. 1505/2017; the second Respondent accepted an interest at 6% per annum before the Trial Court. This Tribunal vide Order dated 30.11.2021 recorded the submission of the Appellant that *they are ready and willing to pay the second cheque amount of Rs.30,50,000/-* and to show their *bona fide* have annexed the Demand Draft at Page 101 of the Appeal Book.

**12.** Learned Sr. Counsel appearing for the second Respondent submitted that the total debt including interest due @18% p.a. is Rs.87,76,100/- till 26.03.2021, which is the date of initiation of the CIRP. Learned Sr. Counsel

for second Respondent strenuously argued that the amount lent is a 'Financial Debt' and that the second Respondent is a 'Financial Creditor' and the debt is acknowledged in the books of accounts and hence the Adjudicating Authority was right in admitting the Section 7 Application, keeping in view the admitted 'debt' & 'default'. Reliance was placed on the Judgements of the Hon'ble Supreme Court in **'Innoventive Industries Ltd.'** (*Supra*) and **'Orator Marketing Pvt. Ltd.'** (*Supra*). While, we find force in the submissions of the Ld. Sr. Counsel that there is 'debt' and a 'default' what should also be examined is whether the intent for initiation of CIRP is 'Recovery' or 'Resolution.'

**13.** It is pertinent to mention that the second Respondent in para 14 of their Reply and in para 40 of their objections have never refuted the submission of the Appellant that 'the 'Corporate Debtor' 'is a going concern' and a viable unit and has great commercial prospects... and that the 'Corporate Debtor' in their Reply dated 07.08.2019 have clearly stated that they had the bona fide intention of returning the pending amount'. The case of the Second Respondent is that despite being a viable unit, the Appellant has defaulted in paying these amounts. Having accepted interest at 6% per annum, it is the case of the Appellant that the second Respondent is now claiming an interest at 18% per annum. Be that as it may, the Adjudicating Authority, is not a 'debt collection forum'. The Hon'ble Supreme Court in a catena of Judgements has held that IBC tackles 'Insolvency and Bankruptcy' and that it is not the objective of the IBC that CIRP should be initiated to penalise a Solvent Company for non-

payment of dues. The scope and objective of IBC is to bring about ‘Resolution’ of an Insolvent Debtor and is definitely not a ‘Recovery Proceeding’.

**14.** The Preamble of IBC is carefully worded to describe the spirit and objective of the Code to be ‘Reorganisation’ and ‘Insolvency Resolution’, specifically omitting the word ‘Recovery’. The Parliament has made a conscious effort to ensure that there is a significant difference between ‘Resolution’ and ‘Recovery’. The Hon’ble Supreme Court has time and again observed that the fundamental intent of IBC is ‘maximising the value of assets’ in the process of ‘Resolution’. In **‘Mobilox Innovations Private Limited’ Vs. ‘Kirusa Software Private Limited’, (2018) 1 SCC 353**, the Hon’ble Apex Court has examined in detail the United Nations Legislative Guide on Insolvency, in which the IBC finds its roots. Any Application to commence CIRP can be denied when the Creditor is using Insolvency as an inappropriate substitute for Debt Recovery Procedures. If IBC is purely used for the purpose of Debt Recovery, particularly when the amounts due are small, and the Company is a solvent entity and is a going concern, the question of ‘Reorganising’ or ‘Resolution of the Company’ does not arise. This Tribunal in **‘Binani Industries Limited’ Vs. ‘Bank of Baroda & Anr.’, Company Appeal (AT) (Ins.) No. 82 of 2018**, has differentiated between ‘Recovery’ and ‘Resolution’ and has observed that IBC is not a Recovery Proceeding. ‘Recovery’ dispossesses the ‘Corporate Debtor’ of its assets while a Resolution is an effort to keep it afloat. Further, this Tribunal in **‘Asset Advisory Services’ Vs. ‘VSS Projects’, CP (IB) No. 96/7/HDB (2017)**, and also in **‘Praveen Kumar Mundra’ Vs. ‘CIL Securities Ltd.’, 2019 SCC OnLine**

**NCLAT 334**, has noted that CIRP cannot be initiated with fraudulent and malicious intent ‘for any purpose other than the Resolution of Insolvency or Liquidation’ and therefore it is clearly covered under Section 65 of the Code.

**15.** Section 65(1) of the Code reads as hereunder:

**“65. Fraudulent or malicious initiation of proceedings.—(1) If, any person initiates the insolvency resolution process or liquidation proceedings fraudulently or with malicious intent for any purpose other than for the resolution of insolvency, or liquidation, as the case may be, the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees, but may extend to one crore rupees.”**

*(Emphasis Supplied)*

**16.** Though the aforesaid Section does not expressly mention ‘Debt Recovery Action’ under ‘for any purpose other than resolution of insolvency..’, keeping in view the factual occurrence of the events of this particular matter, we hold that the ‘intent’ may not be a ‘malafide intent’, but is nevertheless a fundamental attempt to obtain an edge/ advantage / an upper hand in ‘recovering their dues’. At this juncture we place reliance on the judgment of The Hon’ble Madras High Court in **‘S.T. Sahib’ Vs. ‘Hasan Ghani Sahib’, 1956 SCC OnLine Mad 344’**, wherein the Hon’ble High Court has examined the word ‘malice’ and observed that ‘malice’ would mean ‘inappropriate’ and wrongful motive to use the law in a manner other than its ‘legally appointed and appropriate purpose’. The Hon’ble Madras High Court has further observed that a wrongful motive need not be a *mala fide* intent, it could simply be *an attempt* to attain an advantage.

**17.** This Tribunal is of the earnest view that seeking to initiate CIRP, in the factual matrix of the attendant case, is only with an intention for 'Recovery' of their dues and opposes the very spirit, point and purpose of the Code. We hold that 'A Recovery Proceeding' of this nature does fall within the scope and ambit of the words 'for any purpose other than Resolution', as defined under Section 65 (1) of the Code. Having regard to the facts and circumstances of the case on hand, this Appeal is allowed and the Order of the Adjudicating Authority is set aside. In effect, Order(s) passed by Ld. Adjudicating Authority appointing 'Interim Resolution Professional', declaring moratorium, freezing of account and all other Order(s) passed by Adjudicating Authority pursuant to the Impugned Order, are set aside. We are conscious of the fact that pursuant to an interim direction of this Tribunal, the constitution of the CoC has remained stayed. The Adjudicating Authority will now close the proceedings. The first Respondent Company is released from all the rigours of law and is allowed to function independently through its Board of Directors with immediate effect.

**18.** Needless to add, the second Respondent may avail other remedies in accordance with law, to 'recover' its dues.

**[Justice Anant Bijay Singh]**  
**Member (Judicial)**

**[Ms. Shreesha Merla]**  
**Member (Technical)**

**NEW DELHI**  
**4<sup>th</sup> August, 2022**  
*himanshu/sheetal*