

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

Company Appeal (AT) (Insolvency) No. 2068 of 2024

[Arising out of the Impugned Order dated 23.09.2024 passed by the Adjudicating Authority, National Company Law Tribunal, Kolkata Bench-II in C.P. (IB) No. 146/KB/2023]

In the matter of:

Subham Capital Private Limited

5, C.R. Avenue, 2nd Floor, Kolkata-700072,
West Bengal, India

Email: shyamsel@ymail.com

.... Appellant

Versus

Vedic Realty Private Limited

Having its registered office at:

1/1B, Upper Wood Street,
Kolkata- 700017;

Email: info@vedicrealty.com

.... Respondent

Present:

For Appellant : Mr. Gaurav Mitra, Mr. Arjun Asthana and Ms. Prachi Sharma, Advocates.

For Respondent : Mr. Anirban Ray, Sr. Advocate with Mr. Ratul Das, Mr. Kamran Hussain, Mr. Jatin Sapra, Mr. Shivam Pathak, Mr. Anand Dwivedi, Mr. Arjun Ray and Ms. Nishika Chugh, Advocates.

J U D G M E N T
(Hybrid Mode)

Per: Barun Mitra, Member (Technical)

The present appeal filed under Section 61 of Insolvency and Bankruptcy Code 2016 ('IBC' in short) by the Appellant arises out of the Order dated 23.09.2024 (hereinafter referred to as '**Impugned Order**') passed by the Adjudicating Authority (National Company Law Tribunal, Kolkata Bench-II) in C.P. (IB) No. 146/KB/2023. By the impugned order, the Adjudicating Authority

has dismissed Section 7 petition filed by the Appellant/Financial Creditor-Subham Capital Private Limited for initiation of Corporate Insolvency Resolution Process (**'CIRP'** in short) of the Corporate Debtor-Vedic Realty Private Limited. Aggrieved by the Impugned Order, the present appeal has been preferred by the Appellant-Financial Creditor.

2. Coming to the sequence of events of the present case, it is relevant to notice that at the behest of Corporate Debtor, the Appellant, basis an oral understanding, extended financial assistance by way of disbursal of loans aggregating Rs 22.75 Cr between 2011 and 2016 in several tranches. These loan transactions which carried an interest liability were reflected in the books of accounts of both parties and relevant bank account statements and the liability in this regard had also been acknowledged by the Respondent through confirmation letters; loan renewal acknowledgments; demand promissory notes confirming receipt of loan amounts besides issue of post-dated cheques towards repayment of principal and interest. The Respondent-Corporate Debtor defaulted after the last tranche of re-payment made on 07.04.2021, following which the Appellant first issued a recall notice dated 01.03.2022 and then filed a Section 7 petition vide C.P(IB)No. 215 of 2022. Subsequently, the parties executed a Settlement Agreement dated 18.11.2022 wherein the Respondent acknowledged the outstanding liability and agreed to repay the same as per an agreed schedule which led to withdrawal of CP(IB)No. 215 of 2022 by the Appellant. However, as the Respondent failed to comply with the settlement terms, the Appellant filed CP(IB) No.146 of 2023 under Section 7 of the IBC seeking initiation of CIRP of the Corporate Debtor. Despite being given several

opportunities, the Respondent failed to file its reply. Hence, their right to file reply was closed on 08.01.2024 by the Adjudicating Authority and the matter was set ex-parte and admitted the Section 7 petition vide CP No. 146 of 2023 on 25.01.2024. The Respondent filed IA No. 286 of 2024 under Section 60(5) of IBC seeking recall of the CIRP admission order. The Adjudicating Authority disposed of IA No. 286 of 2024 on 09.02.2024 recalling the Section 7 admission order and allowing the Respondent to file their reply. The Appellant filed an appeal before this Tribunal challenging the recall order of the Adjudicating Authority dated 25.01.2024 on which this Tribunal without interfering with the recall order issued directions on 12.03.2024 to the Adjudicating Authority to consider the CP(IB) No. 146 of 2023 in accordance with law. The Section 7 petition vide No. 146 of 2023 filed by the Appellant was considered and dismissed by the Adjudicating Authority on 23.09.2024. Aggrieved by the said order, the present appeal has been preferred by the Appellant-Financial Creditor.

3. Making submissions on behalf of the Appellant, Shri Gaurav Mitra, Ld. Counsel for the Appellant submitted that the present Section 7 proceeding arose out of multiple loan disbursements made between 2011 to 2016 by the Appellant which liability constituted “financial debt” in terms of Section 5(8) of the IBC. The outstanding liability, which was above the threshold limit, was clearly reflected in the bank statements of the Corporate Debtor and finds repeated acknowledgement by the Corporate Debtor in the form of Demand Promissory Notes, confirmation letters, loan-renewal acknowledgments, issuance of post-dated cheques and deduction of TDS made on interest payments. Since existence of debt and default clearly stood established, the Appellant had filed Section 7

petition vide CP(IB) No. 215 of 2022 which they subsequently withdrew following a Settlement Agreement dated 18.11.2022. Submission was pressed that withdrawal of the earlier Section 7 petition pursuant to the settlement dated 18.11.2022 was not a bar on the filing of another fresh Section 7 petition vide CP(IB) No. 146 of 2023 since the default continued even after execution of settlement agreement. It was pressed that the Section 7 applications filed vide CP Nos. 146 of 2023 and 215 of 2022 were not based on identical facts and the cause of action for instituting these petitions were clearly distinct. However, the Adjudicating Authority dismissed this petition erroneously on the misplaced ground that it was not maintainable as the previous Section 7 petition was withdrawn by the Appellant himself and the Adjudicating Authority had not given any liberty to come up afresh if the settlement failed. It was also contended by the Appellant that the breach of settlement clearly gave a new cause of action in their favour to file a Section 7 application and the Adjudicating Authority had misdirected itself by applying the principles of *res judicata* in the present case. It was also vehemently contended that the impugned order suffered from error of law as it wrongly held that an explicit written agreement of loan is a mandatory instrument required for any NBFC Financial Creditor to substantiate that the nature of transactions between them and borrower was in the nature of financial debt and that in the absence of a written financial agreement or contract as in this case, no Section 7 petition could have been filed.

4. Refuting the contentions advanced by the Appellant, Shri Anirban Ray, the Ld. Sr. Counsel for the Respondent–Corporate Debtor submitted that the Appellant, being an Non-Bank Financial Company (“**NBFC**” in short), it was

bound by the RBI Fair Practices Code and Master Circular ("**RBI Circular**" in short) dated 02.07.2012 which circular mandated the need on the part of NBFCs as in the case of the present Appellant of written loan agreement and sans such document, the alleged transaction could not have been treated as financial debt. It was further submitted that the Appellant's claim is essentially based on breach of the Settlement Agreement dated 18.11.2022 which breach did not entitle the Appellant to file a fresh petition under Section 7 of the IBC as the remedy against the breach of Settlement Agreement cannot be enforced through insolvency proceedings as the IBC is not a recovery mechanism. Further, when the Appellant had withdrawn the first Section 7 application from the Adjudicating Authority without liberty to revive or file a fresh petition, the subsequent Section 7 petition was clearly not maintainable as the Settlement Agreement did not provide for any terms which authorised the Appellant to file fresh proceedings under Section 7. It was also contended that a fresh Section 7 petition would not be maintainable on an identical cause of action as it is barred by law and the principles of *res judicata*. It was further submitted that the Respondent is a solvent company operating as a going concern and in face of lack of proof of financial debt and default, the Adjudicating Authority had rightly dismissed the Section 7 petition.

5. We have duly considered the arguments advanced by the Learned Counsel for the parties and perused the records carefully.

6. When we look at the impugned order, we find that the Adjudicating Authority had outlined three issues for its consideration as highlighted at para 36 of the impugned order which is as extracted below:

“IV. Issues that cropped up for the determination by this Adjudicating Authority are as under:

A. Whether mere breach of the terms of Settlement constitutes a 'financial debt' based on original debt.

B. Whether a petition is dismissed as withdrawn without the leave of the Court qualifies the petitioner to come afresh in respect of the same cause of action.

C. Whether an explicit written agreement of loan is a mandatory instrument for the Financial Creditor, being an NBFC, to substantiate the nature of transactions between the lender and borrower.”

7. After consideration of the above issues, the Adjudicating Authority at para 66 of the impugned order has summarised the rationale for dismissing the Section 7 petition which is as reproduced below:

“66. In terms of the enumerations supra, we would summarize the legal propositions and conclusions as under:

a. Upon withdrawal of a petition or a claim without the leave of the Court to institute a fresh one in respect of the subject matter of such petition or such claim as in the previous one, the petitioner is precluded from instituting any fresh petition in respect of the same subject matter as in the previous petition or claim; or to seek same legal remedy under the same statutory provision on the same cause of action before the same Court under same title.

b. Once a petition is withdrawn, the petitioner abandons his claim for which he has instituted the proceedings and the withdrawal becomes absolute unless the Court grants liberty to proceed afresh.

c. If, at the time of withdrawal, the Court grants the liberty to the petitioner withdrawing his petition to proceed afresh, it is a qualified withdrawal, and the petitioner shall have the right to seek same legal remedy under the same statutory provision on the same cause of action before the same Court under same title.

d. An agreement in explicit between the parties is necessary to determine the nature of transactions as well as debt.”

8. We would like to deal first with the finding returned by the Adjudicating Authority that in the present factual matrix, there was no financial debt of the Corporate Debtor qua the Appellant in view of the stipulations of the RBI Circular.

9. It is the case of the Respondent that the Appellant as Financial Creditor could not have entered into an oral agreement with the respect to disbursement of loan as it was in violation of RBI Master Circular. It was submitted that the requirement of an explicit written agreement of loan between lender and borrower in the case of a NBFC has been held by NCLT in ***Desana Impex Limited Vs. Brick and Mortar Realty Pvt. Ltd. in CP(IB) No. 342 of 2022*** for the transactions to be treated as a loan.

10. Per contra, it is the contention of the Appellant that the Adjudicating Authority has wrongly relied on the judgment of the NCLT in ***Desana Impex Ltd. in CP(IB) No. 342 of 2022*** since this judgment of the NCLT has already been overruled by this Tribunal in ***Desana Impex Limited Vs. Brick and Mortar Realty Private Limited in CA(AT)(Ins) No. 318 of 2024*** wherein it has been held that IBC does not mandate that there should be a written agreement to establish financial debt. It was contended further that this issue of whether a financial contract is a *sine qua non* for establishing a financial debt or not stood well settled in a judgement of this Tribunal in ***Agarwal Polysacks Ltd. vs K. K. Agro Foods & Storage in CA(AT)(Ins)No.1126 of 2022*** wherein after advertng to Regulation 8(2) of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and Rule 3(1)(d) and Rule 4(1) of Insolvency and Bankruptcy (Application to

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Adjudicating Authority) Rules, 2016 which regulates filing of application by the Financial Creditors, it has been held that written financial contract is not a pre-condition or an exclusive requirement for proving existence of debt. It was asserted that this judgement makes it clear that financial debt can be proven from other relevant documents and it is not mandatory for a written financial contract to be the only basis for establishing a financial debt.

11. To answer this question, we need to first notice that the RBI Master Circular clearly precedes the enactment of the IBC and in view of Section 238 of the IBC which contains an overriding provision, the IBC clearly holds supremacy and therefore overrides the RBI Circular. But more importantly, we need to abide by the judicial precedent set by this Tribunal in ***Desana Impex judgment supra*** which has comprehensively considered the question as to whether a written financial contract is necessary to prove a financial debt and the applicability of the RBI Master Circular.

12. The relevant excerpts of the ***Desana Impex judgment supra*** are as extracted below:

29. It is noted that the Adjudicating Authority has dismissed the Section 7 Petition, primarily due to the absence of formal written loan agreement as noted below in its order:

“..... 10. As per the RBI guidelines on Fair Practices Code for NBFCs, dated 18 February 2013, the NBFCs should convey in writing to the borrower in the vernacular language as understood by the borrower by means of sanction letter or otherwise, the amount of loan sanctioned along with the terms and conditions including annualized rate of interest and method of application thereof and keep the acceptance of these terms and conditions by the borrower on its record. The RBI’s circulars have statutory force, and this is well recognised in law. Hence, it is mandatory on the part of Financial Creditor,

being a NBFCs to keep the terms and conditions recorded in writing.”

Basis the master circular of RBI dated 01.07.2015 which held that RBI guidelines have statutory force and that provides an explicit written agreement of loan, which is mandatory for NBFC to substantiate the nature of its transactions and due to the absence of a written loan agreement, it cannot be determined in this case whether the amount advanced was a financial debt nor could the interest and tenure of the loan be ascertained to arrive of the date of default. Adjudicating Authority has placed great reliance on RBI Master circular on Fair Practices Code, which makes written agreement mandatory. It is to be noted that this was issued on 01.07.2015. However, Corporate Debtor had approached the Financial Creditor in the year, 2013 and there was an oral agreement and furthermore three disbursements of the loan amount were made on 24.05.2013 and 28.06.2014 i.e. prior to RBI Circular, therefore making it inapplicable in the present case. Further, Insolvency and Bankruptcy Code (‘IBC’) does not prescribe/mandate that there should be a written agreement to establish financial debt. RBI Circular is dated July, 2015 whereas the IBC was enacted in the year 2016 and therefore, IBC holds supremacy over the RBI Circular. In fact, Section 238 of the IBC has an over-riding effect on anything contained in any other law in force or any instrument having effect by virtue of such law. Notwithstanding non-maintenance of written records, it cannot be concluded that the debt and default cannot be established under the IBC. In any case, as per Section 238 of the Code, provisions of the IBC override other laws.

*30. The Appellant also relies upon the judgment of this Tribunal, in **‘Narendra Kumar Aggarwal & Anr. Vs Monotrone Leasing Pvt. Ltd. (supra)’**. Even though the Adjudicating Authority has concluded that this would not come to the rescue of the Financial Creditor, yet it has been relied by the Appellant. The relevant extracts are as follows:*

“... 11. Thus, the contention of Financial Creditor is fully authenticated from the Money Receipt and bank transaction statement. The Appellant contends that the transaction may be treated as the ‘Inter-Corporate Deposit’, but it cannot be treated as the Financial Debt. In case the Inter-Corporate Deposit is made for a certain period, which was to be paid back with interest then such transaction will also fall in the definition of

‘Financial Debt’. The interest is the product of instant transaction, which is undoubtedly the time value of money. Thus, such transaction of the inter-corporate deposit is fully covered by the definition of Financial debt as provided under Section 5(8) of the I&B Code. The written contract cannot be treated as an essential element to prove the Financial Debt if the transaction's nature is proved otherwise.”

*Contrary to the conclusions of the Adjudicating Authority in the impugned order basis **Narendra Kumar Aggarwal (supra)**, we find that this judgement comes to the support of the Appellant. In fact, this Tribunal has upheld that an oral agreement for inter-corporate loans could be considered valid for the purposes of the IBC, if the nature of the transaction is otherwise evident from the party’s dealings. And in the facts of the case we notice that there is sufficient material otherwise which helps us to come to a conclusion that the Appellant had disbursed ₹1,50,00,000/- (rupees one crore and fifty lakhs only) and the interest is also paid by the Respondent and there is also acknowledgement.*

*31. The Appellant has also relied upon the judgment of this Tribunal in ‘**Agarwal Polysacks (supra)**’. The relevant extracts are:*

“..... 21. When we look into the statutory scheme as reflected in the Application to Adjudicating Authority Rules, 2016 and CIRP Regulations, 2016, it is clear that financial debt can be proved from other relevant documents and it is not mandatory that written financial contract can be only basis for proving the financial debt. We, thus, answer Issue No. 1 holding that it is not necessary that written financial contract be the only material to prove the financial debt.

.....

31. The Adjudicating Authority, however, took a view that there should be financial contract between the parties which elucidate the rate of interest and date of repayment. The Adjudicating Authority took a view that there is no written agreement to establish the nature of transaction between the parties, hence, Appellant failed to prove the debt. We have already held that requirement of written financial contract is not a pre-condition for proving debt. When Adjudicating Authority itself given finding in Para 5-6 the disbursement was

with interest and repayment was on demand, two essential conditions of financial debt were present with regard to time value of money. When the financial statement indicate amount with interest since the loan of Rs. 75,00,000 increased in the FY 2017-18 and amount due was shown as Rs. 79,70,250, which clearly was after adding the interest, disbursement has to be held for time value of money. We, thus, are satisfied that all preconditions for establishing financial debt are proved by the Financial Creditor and the order of the Adjudicating Authority rejecting Section 7 application is not sustainable.”

32. The Appellant has also relied upon another judgment of this Tribunal in **‘Satish Balan (supra)**. The relevant extracts are:

“.... 14. This ‘Appellate Tribunal’ observe that the Code nowhere prescribes that there should be a written agreement between the parties to prove the loan and its disbursement to be treated as financial debts. It is also observed that if there are acknowledgments by the ‘Corporate Debtor’ and where the statements of accounts of the ‘Corporate Debtor’ are in position to proof disbursement of loan and payment of interest, the absence of formal written agreement would not bar the ‘Financial Creditor’ (the Respondent No. 1 herein) from initiating the CIRP.”

Herein this Tribunal had clarified that a written agreement is not a condition precedent to proving the existence of a financial debt. Acknowledgments by the Corporate Debtor and supporting documents like ledger accounts can be sufficient to prove the debt. This also supports the case of the Appellant.

33. It is to be noted that the loan is also recorded in the balance sheet of the Appellant even though as “other liabilities” instead of “loan” and this does not negate the existence of a financial debt and therefore the conclusion of the Adjudicating Authority that this is not a financial debt cannot be sustained. Even if we don’t rely on this material on record, there is sufficient other material on record to establish debt and default.

34. After going through the submissions and also materials on record, we find that the debt and default is established in the matter. In fact, the Respondent has not even bothered to appear before this Tribunal to defend its case. Under these conditions when the Appellant has

been able to establish the debt and default, the finding of the Adjudicating Authority dismissing the Section 7 Petition cannot be sustained. Accordingly, the order of the Adjudicating Authority dated 21.11.2023 is set aside. The Corporate Debtor, namely Brick and Mortar Realty Private Limited, is ordered to be proceeded under Section 7 of the Code. The NCLT, Kolkata Bench, is to issue necessary order in this regard within 30 days of its presentation before the NCLT, Kolkata Bench.”

13. When we look at the above judgment, it is clear that the IBC does not stipulate or prescribe the need to have a written agreement between the parties to prove any disbursement of loan to be treated as a financial debt. It is also a clear derivative of this judgment that the RBI Circular does not prevail over IBC proceedings and therefore not mandatory for any NBFC to furnish any written financial contract or a written agreement between the parties to substantiate a financial debt in terms of the scheme of IBC.

14. It is an admitted fact that in the present facts of the case, there is no written contract or agreement between the Appellant and the Corporate Debtor governing the terms and conditions by which the sum was advanced by the Appellant and disbursed to the account of the Corporate Debtor. Be that as it may, when we look at the material which has been placed on record with the Section 7 petition, we find that bank statements of the Appellant showing disbursement to the Respondent has been shown from FY 2013-14 till July 2016. For the same period, it is also an uncontroverted fact that the Respondent had issued loan receipts besides Demand Promissory Notes as well as confirmation letters acknowledging receipt of loan. In addition, the Respondent has issued several letters of acknowledgement of loan renewal for the period

2013-2017 which also reflects accrual of interest. There are also signed confirmation of accounts issued by the Respondent from the FY 2013-14 to FY 2017-18. Besides unequivocal admission and acknowledgement of financial debt by the Respondent, the TDS deduction made on interest components as well as issue of post-dated dishonoured cheques are also a clear proof of disbursement of loan with interest. Thus, when we apply the ratio of the ***Desana Impex judgment supra*** to the present factual matrix, the Adjudicating Authority is found to have grossly erred in holding that as there was no written agreement or financial contract between the Corporate Debtor and the present Appellant-NBFC/Financial Creditor, there was no foundational basis for claiming that the Corporate Debtor owed a financial debt to the Appellant in terms of Section 5(8) of IBC.

15. This now brings us to the other contention raised by the Appellant that the Adjudicating Authority had wrongly non-suited the Section 7 petition vide CP No. 146 of 2023 on the ground that the Appellant had withdrawn the earlier Section 7 petition vide CP No. 215 of 2022. It was contended that it was wrong on the part of the Adjudicating Authority to hold the present Section 7 petition as not maintainable merely on the ground that the Adjudicating Authority had never allowed the Appellant the liberty to come up afresh with a Section 7 petition on the failure of the Settlement Agreement of 18.11.2022 and that the Appellant had not obtained the leave of the Court to file it. Submission was pressed that it is well settled by judicial precedents laid down by this Tribunal in ***Shraddha Enterprises Vs Simplex Infrastructures Ltd. in CA(AT)(Ins)No. 1661 of 2023*** and ***Desh Bhushan Jain, Erstwhile Director of Angel***

Promoters Pvt. Ltd. Vs. Abhay Kumar in CA(AT)(Ins)No. 124 of 2024 that breach of settlement gives rise to a new cause of action which breach in the present facts of the case entitled the Appellant to file a new Section 7 petition. Once there occurs a breach of settlement terms by the Corporate Debtor, the legal right of the Appellant-Financial Creditor in seeking appropriate legal remedy under relevant provisions of the IBC cannot be denied on the hyper-technical ground that the Adjudicating Authority had never given liberty to revive the Section 7 petition. In the present case, it was pressed that when there was a clear incidence of breach of settlement, the Appellant was well within its rights to institute a fresh Section 7 petition under the IBC. It was also asserted that it was misplaced on the part of the Adjudicating Authority to apply the principles of *res judicata* in the present case without appreciating the fact that the earlier Section 7 petition had not been finally adjudicated by it on merits. It was strongly canvassed that not allowing the Appellant to file a new Section 7 petition on grounds of *res judicata* would lead to a situation where unscrupulous Corporate Debtors like the present Respondent would deflect the initiation of a Section 7 petition and easily cheat gullible creditors by entering into sham Settlement Agreements bereft of any bonafide intent to fulfil the terms of Settlement Agreement.

16. It is the counter case of the Respondent that the Appellant had not exercised their right under Clause 10 of the Settlement Agreement which gave them the right to revive the original company petition. To invoke this clause, the Appellant should have filed the Settlement Agreement before the Adjudicating Authority while seeking withdrawal of the original company petition but the

same was not done. When the settlement between them was neither filed nor brought on record before the Adjudicating Authority, the right and liberty to revive the Section 7 company petition was not established. The Respondent in support of their contention has relied on the judgment of the Hon'ble Supreme Court in **Sarguja Transport Service Vs State Transport Appellate Tribunal, M.P, Gwalior 1986 SCC Online SC 233**. Reliance was also placed on the judgment of the Hon'ble Supreme Court in **HPCL Bio-Fuels Ltd. Vs Shahaji Bhanudas Bhad 2024 SCC Online SC 3190** and in **Satheesh V.K. Vs Federal Bank Ltd. 2025 SCC Online SC 2046** which held that unconditional withdrawal of the first petition under the same article would not be maintainable at the instance of a party who withdraws the petition without leave to challenge the original order again. It was also contended that present is not a case of restoration of the original petition but amounts to a fresh application. It was further pointed out that filing of CP No. 146 of 2023 by the Appellant on account of default of the original debt amounted to filing of two applications on the same cause of action which cannot be done under law. The Appellant having withdrawn the first Section 7 petition could not have filed a second Section 7 petition for the same cause of action since there was complete *res judicata* in respect of cause of action in the first petition.

17. To come to our analysis and findings, we may first advert our attention to the various judgements relied upon by both the parties. The Respondent has relied upon the **Sarguja Transport Service judgement supra** to contend that the Appellant cannot file a fresh petition for the same cause once it has withdrawn the same petition without the permission of the court to file fresh

suit. We do not feel the need of reproducing the excerpts of the **Sarguja Transport Service judgement supra** as the same has been copiously extracted in the impugned order. Instead, we choose to extract the judgment of the Hon'ble Apex Court of **HPCL Bio-Fuels Ltd. supra** which has also been relied upon by the Respondent as reproduced below:

“46. Undoubtedly, an application under Section 11(6) of the Act, 1996 is not a suit and hence will not be governed stricto-sensu by Order 23 Rule 1 of the CPC. However, in a number of decisions, this Court has extended the principle underlying Order 23 Rule 1 to proceedings other than suits on the ground of public policy underlying the said rule. The appellant has submitted that in view of the aforesaid decisions, there is no reason why the principles of Order 23 Rule 1 should not be extended to an application for appointment of arbitrator under Section 11(6) of the Act, 1996.”

The same principle of extending the application of Order 23 Rule 1 of the Code of Civil Procedure has been further reiterated by the Hon'ble Supreme Court in the matter of **Satheesh V.K. judgement supra**. However, it is noteworthy that this rule is applicable as a rule in the realm of suits. Moreover, in the above judgements, the Hon'ble Supreme Court have taken the view that the principle adumbrated in Order 23 Rule 1 should apply to SLPs, Writ petitions and Arbitration proceedings not on the ground of *res judicata* but as a public policy to avoid multiplicity of litigation and to discourage the litigants from indulging in bench-hunting tactics. The applicability of the ratio of these judgements is therefore not contextually relevant in the present factual matrix arising out of IBC proceedings.

18. We next come to a set of judgments of this Tribunal which have been relied upon by the Appellant to buttress their standpoint. The first judgement banked

upon by the Appellant is that of this Tribunal in ***Shraddha Enterprises supra*** which is as reproduced below:

“12. Thus, in our considered opinion, the Ld. Tribunal has committed a patent error in dismissing the application of the appellant because if this procedure is allowed to be adopted then the unscrupulous Corporate Debtor like the respondent may keep on cheating the gullible operational creditors who would believe them that they would make their payment in installments and thus entered into the settlement. We strongly condemn the act and conduct of the respondent in this case because such type of cases are increasing day by day specially in the matter of operational creditors, where the corporate debtor like the respondent first enters into a settlement and then after paying one or two installments stop making the payment and when the application is filed for revival then the same is dismissed by the Tribunal on the hyper technical grounds. The judgment relied upon by the appellant is not applicable. Therefore, in the aforesaid discussion we allow this appeal and set aside the impugned order and restore the application filed under Section 9 by the appellant.”

We find that the facts in the above case are squarely applicable in the present matter at hand as in that case too there was a similar factual position wherein after a Settlement Agreement had been entered into between the Corporate Debtor and Financial Creditor, the Section 7 petition had been withdrawn by the Financial Creditor but when the post-dated cheques which had been issued as part of the settlement was dishonoured, the Financial Creditor filed a fresh Section 7 petition. The fresh Section 7 petition had been opposed by the Corporate Debtor on the ground that at the time of withdrawal of the first Section 7 petition, no permission had been sought from the Adjudicating Authority to revive the petition in case of breach but the Adjudicating Authority rejected the contention of the Financial Creditor and admitted the Section 7 petition. This decision of the Adjudicating Authority was upheld by this Tribunal by opining

that if any such Section 7 petition is held to be non-maintainable, it would lend premium to unscrupulous Corporate Debtors to enter into Settlement Agreements and secure immunity from fresh Section 7 petitions without abiding by the settlement terms.

19. Another judgment which has been relied upon by the Appellant is in the case ***Desh Bhushan Jain supra*** wherein this Tribunal was not impressed with the argument that an application under Section 7 cannot be filed on the basis of a settlement. The relevant excerpts of the judgment is as reproduced below:

“19.The debt and default was admitted by the Corporate Debtor and hence, approached the Financial Creditors for entering into a settlement to make the payment in instalments through post-dated cheques both in regard to the principal as well as interest component. The Financial Creditors believed the Corporate Debtor and entered into the agreement and further on the asking of the CD filed a joint application in the first petition not only to bring on record the settlement but also to withdraw the first petition being sanguine of the fact that CD would keep its words and shall honour all the post-dated cheques in time but they were not aware of the intention of the CD as it had not made payment beyond Rs. 1,10,00,000 and were still in the arrears of more than Rs. 3 Cr. The Financial Creditor then filed the second petition of the reduced debt about which the default is not in question, therefore, the Adjudicating Authority has rightly admitted the application.

20. At this stage, we would like to observe that if this kind of tricks, played by the CD with the FC are allowed and the plea raised by the Appellant is accepted that the second petition on the ground of settlement agreement is not maintainable then it would give a premium to the unscrupulous CD to get the petition filed under Section 7 withdrawn on the basis of the settlement which was not to be ultimately followed. Definitely, this kind of attitude and act on the part of the CD is not appreciated.”

When we look at the above two judgements relied upon by the Appellant, we find force in the contention of the Appellant that when the Respondent had caused a

breach of the settlement terms of 18.11.2022 and a fresh Section 7 petition had been filed, the same could not have been dismissed by the Adjudicating Authority on hyper-technical grounds that a Section 7 petition cannot be restored or revived on the breach of the settlement terms.

20. It is also clear from the facts placed on record that while withdrawing the first company petition, it was clearly pointed out to the Adjudicating Authority that the first company petition was being withdrawn in view of a Settlement Agreement. It is therefore indisputable that the broad factum of settlement between the parties had been brought to the knowledge of Adjudicating Authority even though admittedly the exact terms of the Settlement Agreement had not been placed before the Adjudicating Authority. Thus, the fact that there was a Settlement Agreement was clearly in the knowhow of the Adjudicating Authority at the time of filing the Section 7 withdrawal petition even though the terms of settlement were not brought on record. Be that as it may, the Corporate Debtor had not discharged the obligations cast upon them in accordance with the Settlement Agreement following the institution of the first company petition. Once there is breach of settlement terms by the Corporate Debtor, the legal right of the Appellant in seeking the legal remedy under relevant provisions of the IBC cannot be dismissed on the hyper-technical ground that the Adjudicating Authority had never given liberty to revive the Section 7 petition. Allowing any such interpretation would give undue benefit to the Corporate Debtor inspite of having breached the settlement terms. This Tribunal in its earlier judgements extracted above have strongly deprecated dismissal of Section 7 petitions on such technical grounds by observing that permitting any such procedure would

enable unscrupulous Corporate Debtors to exploit Creditors by entering into sham settlements.

21. We also notice that while the Adjudicating Authority has rightly held that breach of terms of Settlement Agreement would not annihilate the nature and character of financial debt on account of breach. However, where the Adjudicating Authority has erred is on holding the applicability of *res judicata* in the present case. Once the Adjudicating Authority had permitted the Appellant to withdraw the first Section 7 petition, all the proceedings taken therein stood wiped out. When there was no adjudication by the Adjudicating Authority in CP(IB) No. 215 of 2022 as the same was withdrawn, the reliance on principles of *res judicata* by the Adjudicating Authority in respect of CP(IB) No. 146 of 2023 lacked legal foundation. The parties were thus left in the same position which they had occupied as if no such Section 7 petition had been instituted in the first instance. The fresh petition under Section 7 of IBC was not barred as the principles of *res judicata* were inapplicable. The breach of settlement clearly gave rise to a new cause of action in favour of the Appellant to file a Section 7 application and the Adjudicating Authority had misdirected itself by applying the principles of *res judicata* in the present case.

22. We are guided by the well settled legal precepts laid down by the landmark judgement of the Hon'ble Supreme Court in ***Innoventive Industries Ltd. Vs ICICI Bank (2018) 1 SCC 407*** wherein the incidence of financial debt and default has been lucidly explained by observing as below:

“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 instalment 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 (Section 4). 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.

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

23. When we peruse the above judgment of the Hon’ble Apex Court, it is clear that under the ambit of Section 7 of the IBC, the Adjudicating Authority is only required to determine whether there was a debt and if a default thereto has occurred and whether the debt, which may still be disputed, was due and remained unpaid. It is a well settled proposition of law that only two alternative courses of action are available to the Adjudicating Authority under Section 7(5) of the IBC which is to either admit the application under Section 7(5)(a) or reject the petition under Section 7(5)(b). The moment the Adjudicating Authority is satisfied that a default has occurred, the Application is to be admitted unless it is incomplete.

24. In our considered view, when debt and default was adequately demonstrated basis records made available before the Adjudicating Authority by

the Appellant, the Adjudicating Authority failed to appreciate the evidence and material produced before it proved that a debt had arisen; that a default has occurred and the default is above the prescribed threshold. This is a case where all the pre-requisites for filing a Section 7 petition stood fulfilled and the Adjudicating Authority committed an error in not admitting the Corporate Debtor into CIRP for having defaulted in repaying a financial debt which was above the threshold limit.

25. In result, we are of the view that grounds stated by the Adjudicating Authority for rejection of the Section 7 application was erroneous. The Appeal is hereby allowed. We set aside the impugned order and direct the Adjudicating Authority to pass an order of admission of Section 7 application under IBC within a period of one month from the date when the copy of this order is produced and to take further steps in accordance with the law. No order as to costs.

**[Justice Ashok Bhushan]
Chairperson**

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

Place: New Delhi

Date: 19.03.2026

Abdul