NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH (COURT-II)
IN
(IB)-131/ND/2025

IN THE MATTER OF:

Brilliant Metals Private Limited
Having registered office at :
A-7/1 Jhilmil Industrial Area
G.T Road, Shahdara
Delhi- 110095 **... Applicant/Financial Creditor**

VERSUS

Avyukta Dairy Products Ltd.
Having registered office at :
BB-17, Basement, GK Enclave,
South Delhi New Delhi - 110048 **... Respondent/Corporate Debtor**

Section: 7 of the IBC, 2016

Order Delivered on: 19.12.2025

CORAM:

SH. ASHOK KUMAR BHARDWAJ, HON'BLE MEMBER (J)

MS. REENA SINHA PURI, HON'BLE MEMBER (T)

PRESENT:

For the Applicant : Adv. Shankari Mishra, Adv. Mehak Khandelwal
For the Respondent : Adv. Aditya Madaan, Adv. Digvijay S.

ORDER

PER: MS. REENA SINHA PURI, MEMBER (T)

This Application has been filed by M/s Brilliant Metals Pvt Ltd (hereinafter referred to as the Financial Creditor or **FC/Petitioner**) against

M/s Avyukta Dairy Products Ltd. (hereinafter referred to as the Corporate Debtor/**CD/Respondent**) which is also the corporate guarantor to loans availed by the M/s Avdhesh Construction and Impex Ltd. (**Principal Debtor/PD**), seeking initiation of CIRP[1] under section 7 of IBC[2]. The Petitioner claims that the Respondent has committed a default in the repayment of financial debt, arising from an arbitral award dated 02.07.2024, amounting to Rs 2,58,57,160, as on 02.07.2024 along with interest at the rate of 8% per annum until realization.[3.]

2. The FC states that it is engaged in the business of manufacturing and supplying equipment, including milk-processing plants and allied machinery. It is submitted that Mr. Avdhesh Mittal, Chief Financial Officer of the CD ("PG") approached the FC with a proposal for establishing milk-processing plants at various locations across India. Pursuant to this proposal, the FC issued an Offer Letter dated 15.05.2017 to Mr. Avdhesh Mittal, setting out the definitive terms for the supply of machinery. Acting upon the said Offer Letter, the CD issued a Work Order dated 07.07.2017. Similar work orders were also issued by M/s Avyukta Dairy Products Pvt. Ltd., M/s Aveena Cold Storage Pvt. Ltd., and M/s B.P. Fresh Fruits Pvt. Ltd., all of which are entities associated with Mr. Avdhesh Mittal.

3. In order to secure the instalment-based payments due to the FC, Mr. Avdhesh Mittal and his associated entities, namely the CD (M/s Avukta Dairy

[1] Corporate Resolution Insolvency Process
[2] Insolvency and Bankruptcy Code, 2016
[3] Copy of arbitral award dated 02.07.2024, Pg 49-68 of the Application

Products Pvt Ltd.), M/s Aveena Cold Storage Pvt. Ltd, and M/s B.P. Fresh Fruits Pvt. Ltd executed guarantees[4] on 07.07.2017. Avdhesh Mittal and his associated entities furnished a guarantee[5] vide letter dated 07.07.2017:

> *"1. The payments due to you from any of my entities shall be duly and punctually paid as per agreed terms.*
>
> *2. I hereby guarantee that I shall be personally liable for any payments due to you against any supplies -made by you to any of my entities or any payment due under any other head whatsoever.*
>
> *3. In the event of default of any payment obligation, I shall, upon demand, forthwith within a period of 30 days pay to the Supplier without demur all the amounts payable by any of my entities, who is liable to pay any monies to you under any work order or on any account whatsoever.*
>
> *4. That I shall also indemnify and keep the Supplier indemnified against all losses, damages, costs, claims and expenses whatsoever which the Supplier, may suffer, pay or incur by reason of or in connection with any such default on the part of the Purchaser including legal proceedings taken against the Purchaser and/or the Guarantors for recovery of the defaulted amount, expense and charges.*
>
> *5. I hereby agree that my guarantee hereunder shall in no manner be affected by any variations, alterations, modifications, waiver in the terms of Work Order issued by the Supplier.*
>
> *6; This Guarantee shall be enforceable against me personally, notwithstanding that any other guarantees are issued by the Purchasers or any/ all my entities.*
>
> *7.* ***This Guarantee shall be a continuing one and shall remain in full force and effect till such time the Purchasers clear, all the dues of the Supplier including any amount, which may be due and payable by any of my entities, in which I am Director, Shareholder or principal officer.***

[4] Pg 35-38 of the Application
[5] Pg 36-37 of the Main Petition

8. Any dispute, controversy or claim arising out of or in relation to the Guarantee shall be governed by Arbitration as per letter dated 15.05.2017."

Emphasis Supplied

4. These guarantees were subsequently extended by the said entities to cover the additional financial assistance sought by the Corporate Debtor from the FC in April 2019. Insofar as the CD is concerned, its guarantee for such financial assistance was duly approved by its Board through a Resolution[6] dated 26.04.2019. The guarantee was extended vide letter dated 29.04.2019 to cover the financial assistance sought by the PG for PD, stating:

"Thank you for agreeing to grant me financial accommodation. As discussed, I am enclosing the board resolutions from the following entities: -

i. Avyukta Dairy Products Pvt. Ltd.
ii. Aveena Cold Storage Pvt. Ltd.
iii. B.P. Fresh Fruits Pvt. Ltd.

Letter/guarantee from Avdhesh Construction and Impex Ltd.

I hereby assure that since this is a short term arrangement and you are already in possession of my personal guarantee no fresh documents are being executed and the personal guarantee given to you will mutatis mutandis apply to present transactions whereby you have agreed to release funds in the account of Avdhesh Construction and Impex Ltd.

[6] Pg 42 of the Application

My guarantee dated 07.07.2017 will be read for the current transactions between Brilliant Metals Pvt. Ltd. and Avdhesh Constructions and Impex Ltd."

Emphasis Supplied

5. The CD defaulted in honouring its repayment obligations, whereupon the Financial Creditor (FC) issued a demand notice[7] dated 15.09.2023. Despite this, neither the CD nor the other guarantors discharged their commitments. A further demand notice[8] dated 10.10.2023 was issued by the FC to all guarantors, which also elicited no compliance. However, by letter dated 16.10.2023, Mr. Avdhesh Mittal, acting on behalf of the CD as well as the guarantor companies, expressly acknowledged[9] the outstanding liability of Rs. 2.45 crores.

6. In view of the continued non-payment, the FC initiated arbitration proceedings against the CD and the guarantors. By an Arbitral Award[10] dated 02.07.2024, the Tribunal held the CD and the guarantors jointly and severally liable to pay a sum of Rs. 2,46,48,957, together with interest @ 8% per annum and costs of Rs. 1,25,000. Thereafter, the FC issued a notice[11] dated 05.08.2024, calling upon the CD to satisfy the award; however, no payments were made.

[7] Pg 46-47 of the Application
[8] Pg 48 of the Application
[9] Pg 60 of the Application
[10] Pg 49-68 of the Application
[11] Pg 69-75 of the Application

7. Upon the failure of the CD to satisfy its obligations under the Arbitral Award, the FC instituted an application under Section 7 of the IBC bearing CP (IB) No. 613 of 2024, titled *Brilliant Metals Pvt. Ltd. v. Avyukta Dairy Products Ltd.* However, by order[12] dated 14.11.2024, the Adjudicating Authority dismissed the petition as premature, holding that the arbitral award had not yet attained finality, the statutory appeal period being still open.

8. The arbitral award dated 02.07.2024 thereafter attained finality on 02.11.2024, no appeal having been filed by the CD. In these circumstances, and the debt remaining unpaid, the FC has filed the present Application on 11.02.2025 against the CD in its capacity as corporate guarantor. FC has also preferred application under Section 95 of the IBC against the PG, Mr. Avdhesh Mittal[13]. Separate applications under Section 7 of IBC have been made against the PD as well. Both these applications are also before us.

9. In its reply, the CD contends that it has consistently acted in good faith, which, according to it, is evident from the contemporaneous record. It is alleged that the FC has withheld material facts and raised unfounded claims. The CD submits that whenever the PB was unable to make payments directly, it stepped in and effected payments on its behalf—namely, an amount of Rs. 20,75,000 in March 2021 and a further amount of Rs. 3,04,12,043 in November 2022. It is further submitted that although the COVID-19 pandemic caused severe disruption to its business operations, part-payments

[12] Pg 76-87 of the Application
[13] CP (IB) No: 575 of 2024 titled "Brilliant Metals Pvt. Ltd. v. Avdhesh Mittal"

were made on various dates in a bona fide manner. The CD asserts that, in fact, excess payments have been made to the FC. The CD also relies on the pendency of certain litigations before the Debt Recovery Tribunal, Delhi, to contend that it remains a solvent entity with substantial assets and favourable business prospects.

10. In its rejoinder, the FC has refuted the contentions of the CD. It is submitted that, upon expiry of the statutory period prescribed under Section 34 of the Arbitration and Conciliation Act, 1996 for challenging the Arbitral Award dated 02.07.2024, and in the absence of payment towards the award, the CD's continuing default of the financial debt stands conclusively established. The FC asserts that the non-payment of the awarded amount squarely attracts the definition of "default" under Section 7 of the IBC.

11. We have perused the records and heard the submissions of the parties. At the outset, it is necessary to refer to Section 36 of the Arbitration and Conciliation Act, 1996, which governs the enforceability of arbitral awards and prescribes the statutory framework for their execution as if they were decrees of the court. The relevant portion is extracted below for ready reference:

> *Section 36: Enforcement. 36. (1) Where the time for making an application to set aside the arbitral award under section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were a decree of the court.*

12. Further, reference is made to the judgment of Hon'ble NCLAT in *M/s Annapurna Infrastructure Pvt Ltd v M/s SORIL Infra Resources Ltd*[14], where it was observed:

> *Under Section 36 of the Arbitration Act, an arbitral award is executable as a decree but it can be enforced only after the time for filing the application under Section 34 has expired and no application is made, or such application having been made has been rejected. That means, the arbitral award reaches finality after expiry of enforceable time under Section 34 and/or if application under Section 34 is filed and rejected.*

13. In *Dena Bank* v. *C. Shivakumar Reddy*[15], the Hon'ble Supreme Court held that final judgment and/or decree of any court or tribunal or any arbitral award for payment of money, if not satisfied, would fall within the ambit of a financial debt. Reference may also be made *to Kotak Mahindra Bank Ltd. Vs. A. Balakrishnan & Anr.*[16], wherein Hon'ble Supreme Court held that the view taken by the two-judge bench in the case of *Dena Bank* v. *C. Shivakumar Reddy (supra) is* correct in law and affirmed the same.

14. Further in *Shankar Kashid vs. Intec Capital Limited & Ors.*[17], the Hon'ble NCLAT observed on 02.05.2025:

> *46. We note that in the present case, the Corporate Debtor has defaulted in repayment of the loan and the application under section 7 of the Code was filed by the Respondent No.1 duly accompanied by a record of default as recorded with the information utility, in compliance with the mandatory requirements under Section 7 of the Code. The Corporate Debtor*

[14] Company Appeal (AT)(Ins) No. 32 of 2017
[15] (2021) 10 SCC 330
[16] (2022) 62 SC
[17] Company Appeal (AT) (Ins) No. 62 of 2024 & I.A. No. 195, 197 of 2024

has not disputed the sanction and disbursal of the loan, execution of the loan agreement, related transactional documents, or the registration of charge with the Registrar of Companies. ***We also take into consideration that the arbitral award dated 21.02.2018 which crystallized the outstanding amount payable by the Corporate Debtor of Rs.1,42,95,144 along with interest @12% which constitutes a financial debt under Section 5(8) of the Code, and the non-payment of this award amount amounts to a default. The Adjudicating Authority has correctly applied the provisions of Section 7 of the Code as well as the settled legal position laid down in Innoventive Industries Limited vs ICICI Bank and Anr. (2018) 1 SCC 407 to admit the Corporate Debtor into the CIRP.***

…….

48. We note that the Appellant has raised several issues regarding the conduct of Respondent No.1/ Financial Creditor as well as supplier of the machine i.e., Respondent No. 4 herein and several complaints and counter complaints have been lodged by the respective parties which are which are still pending. We further note that contractual issues have also been raised. However, none of these are directly concerned with the debt and default which is a subject matter for the present appeal.

49. Thus, the issue before us in the appeal is limited that whether there has been debt of more than Rs. 1 Crore to meet the threshold as stipulated under Section 7 of the Code and whether there has been default by the Corporate Debtor. ***We will also look into whether the Arbitral Tribunal Award dated 21.02.2018 could tantamount to financial debt in terms of Code.***

50. From the facts noted from the pleading, of all parties noted by us in all discussions earlier, we observe that the money indeed was disbursed by the Financial Creditor to the Corporate Debtor as well as to supplier of the machinery i.e., Respondent No. 4 based on the instruction of the Corporate Debtor. It is also fact that the total money disbursed was more than Rs. 1 Crore. We observe that the Corporate Debtor vide

letter dated 18.01.2012 advised the Financial Creditor to disbursed an amount of Rs. 45,11,110/- to the account of the Corporate Debtor and Rs. 1,12,40,024/- in favour of Respondent No. 4. The necessary documentations have been annexed in the appeal. Thus, the money was paid as a loan by the Respondent No.1/Financial Creditor to the Corporate Debtor /Respondent No. 2 and therefore it is clearly established that the said amount meet the threshold criteria as stipulated under Section 7 of the Code.

51. Now, we have to see whether there has been default or not. In this connection, we note that the Respondent No.1/Financial Creditor issued a loan recall-cum-arbitration notice dated 28.11.2012 calling upon the Corporate Debtor to pay outstanding amount of Rs. 1,78,32,055/-. It has also been brought out that the Financial Creditor has invoked arbitration notice in terms of the Clause 32 of the Loan Agreement dated 18.01.2012 executed between the Corporate Debtor and the Financial Creditor. The Arbitration Award was passed by the sole Arbitrator in favour of the Respondent No.1/Financial Creditor by the sole arbitrator on 21.02.2018 and it has attained finality vide order dated 01.04.2019 passed by the Hon'ble Delhi High Court in O.M.P. (COMM) No. 232/2018. It is significant to note that the issue has travelled up to Hon'ble Supreme Court of India as the Corporate Debtor had filed SLP No. (C) No. 24085/2018 against the order of the Hon'ble Delhi High Court dated 24.05.2018, however, the Hon'ble Supreme Court of India vide order dated 17.09.2018 dismissed the application filed by the Corporate Debtor by granting the liberty of four weeks to deposit the 50% award amount which was not complied by the Corporate Debtor.

52. We have noted that in fact the Appellant on his own changed the specifications of the machinery and has given the order to the Respondent No.4 for different machinery without consent of the Respondent No.1/Financial Creditor. It has also been brought out that the Corporate Debtor refused to take delivery of the machines from Respondent No.1 on some pretext since the ban on the guthka came into force in Maharashtra and did not make payment to Respondent No.4. We observe that the issues regarding ban of gutka in Maharashtra or not supply of machinery or not acceptance of the machinery by the Corporate

Debtor from Respondent No. 4, do not really impact the transaction between the Financial Creditor and the Corporate Debtor. It need to be appreciated that the proper and legally enforceable loan agreement was executed between the Financial Creditor and the Corporate Debtor. It is reiterated that the money was transferred by the Financial Creditor in the accounts of the Corporate Debtor and in the accounts of the machine supplier i.e. Respondent No. 4 at the instructions of the Corporate Debtor. Hence, the arguments of the Appellant that there has been connivance between the Respondent No. 1 and Respondent No. 4 and therefore, alleged financial debt cannot be legally enforced, is not tenable.

53. ***It is also important to note that even the sole arbitrator appointed in terms of Clause 32 of the Loan Agreement dated 18.01.2012 has also held clear debt and default thereafter, gave the Arbitral Award dated 21.02.2018 tenable****.*

Emphasis Supplied

15. It is noted that the FC has admitted before the Arbitral Tribunal that payments relating to the supply of machinery were made by the CD/ other CGs. Further, it is evident from the Arbitral award that both the FC and the PG (including entities of the PG) are *ad idem* on this aspect. The FC and the PG, in the Statement of Claim and Defence respectively, have expressly acknowledged having made advance payments and subsequent payments in relation to the supply of machinery and plants. The relevant portions of the Statement of Claim and Defence as noted in the Arbitral Award are extracted as under:

[extracted from the Statement of Claims: Para 4e and 4i]

"e. It is stated that the Claimant completed its obligations by supplying the machinery and plants of highest standards and there has never

been any complaint from the Respondents regarding quality of the machinery. **The Respondent no. 2 regularly made the payment against the supplies and the other entities introduced by Respondent no. 5 also made advance/ part payments** and in this way, the Respondent no. 5 built up huge trust, which has been later misused by the Respondent no. 5. It is stated that in the month of April, 2019, the Respondent no. 5 represented that he had suffered set-backs in the business and he requires certain funds on short term basis.

***

[extracted from the Statement of Defence: Para 5b]

b. The intentions of the Respondents were always bonafide which is reflected from the records itself that the Respondent no. 2 paid the full consideration against supplies made to it and even as per ledger account of Claimant, the Respondent no. 2 has made excess payment of Rs. 11,50,385/-. It is stated that the Claimant has concealed the material facts and raised false pleas. It is further stated that **when the Respondent no. 1 was unable to refund the payments to the Claimant, it is the Respondent no. 2 who made payment in March, 2021 for a sum of Rs. 1,20,75,000/- and further payment of Rs. 3,04,12,043/- in the month of November, 2022** and this itself is testimony of the bonafide on part of the Respondents. It is stated that despite compelling circumstances and actions of banks, the Respondents' intention was to clear the liability and even in its worst financial situation, paid Rs. 37,50,000/- in August, 2023."

Emphasis Supplied

16. Upon a careful perusal of the Arbitral Award dated 02.07.2024, it is evident that the genesis of the dispute emanates not from the transactions relating to supply of machinery, but from the financial accommodation sought

by the PG on behalf of the PD, (Avdhesh Construction and Impex Pvt. Ltd). As recorded in the Award, in or about April 2019, PG approached the FC seeking short-term financial assistance for revival of the business of PB, pursuant whereto funds were advanced by the FC from time to time. As specifically noted in the arbitral award, the outstanding amount on account of such financial assistance accumulated to more than Rs. 5.00 Crores at one point of time. Out of the said amount, Avyukta Dairy Products Pvt. Ltd., being one of the corporate guarantors, repaid a sum of Rs. 3,04,12,043 in November 2022. Thereafter, a further sum of Rs. 37,50,000 was repaid in August 2023 to the FC. That the arbitration matter related to the financial assistance provided in 2019 by the FC to the PB, is evident from Para 4i of the Arbitral Award, which also sheds light on the genesis of the arbitration proceedings. The relevant para is as under:

[extracted from the Statement of Claims: Para 4i]

> "**It is stated that the Claimant provided funds to the Respondent no. 1 from time to time and the Respondent no. 1 kept on refunding the same partly as and when the Respondent no. 1 was able to generate the funds. The Respondent no. 1, however, kept on asking for funds continuously and at one point of time, the outstanding accumulated for more than Rs. 5.00 Crores. The Claimant itself was in need of money and asked the Respondents to refund the money as the Claimant required the same for its own business. The Respondent no. 2 refunded about Rs. 3.00 Crores in the month of November, 2022 and the** Respondent no. 5 promised to pay the balance within a period of one month. However, despite repeated follow ups, **the Respondent no. 1 refunded only Rs.**

37,50,000/- in August, 2023. It became clear that the Respondents has turned dishonest as they started avoiding the Claimant. **The Claimant raised demand of the outstanding amount vide notice dated 15.09.2023, but there was no response. The Claimant raised second demand on I 0.10.2023 and also invoked the guarantees given by Respondent nos. 2 to 5. It is stated that the Respondent no. 5 gave a vague reply on 16.10.2023. The Claimant commenced the Arbitration by appointing its nominee Arbitrator Ms. Aditi Sharma.** The Respondents remained unperturbed and failed to clear the dues and their dishonest intentions were apparent when they appointed their nominee Arbitrator Mr. Zahid Hanief, instead of clearing the dues of the Claimant. The said two nominee Arbitrators decided to appoint Mr. Justice Rajesh Tandon (Retd.) as Presiding Arbitrator. The Claimant has sought recovery of the outstanding amount with interest."

Emphasis Supplied

17. In light of the above discussion, it is evident that the debt arising out of the Arbitral Award dated 02.07.2024 is a crystallised financial debt, legally enforceable against the CD. The award has attained finality upon expiry of the period prescribed under Section 34 of the Arbitration and Conciliation Act, 1996, and the CD has neither disputed the award nor made any payment towards its satisfaction. The CD's continued non-payment, therefore, constitutes a clear default within the meaning of Section 3(12) of the IBC. The assertion by the CD of good faith on account of past part-payments, is misconceived. The subsequent part-payments made either by the CD or on its behalf reinforce, rather than negate, the acknowledgement of liability.

18. The objections raised by the CD regarding the enforceability of the Board Resolution dated 26.04.2019, and its assertion of good faith on account

of past part-payments, are misconceived. The Board Resolution validly authorised the furnishing of a corporate guarantee to secure the financial assistance extended by the FC to the Principal Borrower (PB), and the CD cannot now resile from its contractual commitment. The subsequent part-payments made either by the CD or on behalf of the PB reinforce, rather than negate, the acknowledgement of liability.

19. The Arbitral Award, having attained finality, constitutes a binding adjudication of liability against the CD. The correspondence and conduct relied upon by the CD do not discharge or extinguish the debt. No credible material has been placed on record to demonstrate repayment of the awarded amount. The requirements for admission of a petition under Section 7 of the IBC—existence of a financial debt, default, and completeness of the Application—stand fully satisfied.

20. Accordingly, the Application is allowed with the following directions:

ORDER

21. The Application is admitted and this Adjudicating Authority orders the commencement of the Corporate Insolvency Resolution Process, which shall ordinarily be completed within the timelines stipulated in the Code, 2016 (as amended), reckoning from the date on which this order is passed.

22. The Applicant has proposed the name of Mr. Sanjay Mehra as the Interim Resolution Professional (hereinafter referred to as the 'IRP'). The declaration under Rule 9 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, by way of Form 2 indicates that no

disciplinary proceedings are pending against him and he is eligible to be appointed as IRP qua the CD[18]. Accordingly, this Adjudicating Authority appoints Mr. Sanjay Mehra, Registration Number: IBBI/IPA-001/IP P01818/2019-20/12784, whose Authorization for Assignment is valid up to 30.06.2026 as per the IBBI IPs Registered List on the website. The IRP is directed to file Authorization for Assignment within three days from the date of this order.

23. The IRP is directed to take charge of the management of the Corporate Debtor, immediately. He is also directed to cause public announcement as prescribed under Section 15 of the Code, 2016, within three days from the date of receipt of this order, and call for submissions of claims in the manner as prescribed.

24. Moratorium is, hereby, declared and shall have effect from the date of this order till the completion of the CIRP, for the purposes referred to in Section 14 of the IBC.

25. It is hereby ordered that all of the following are prohibited:

a) The institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any court or law, tribunal arbitration panel or other authority;
b) Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal rights or beneficial interest therein;
c) Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action

[18] Page 28-31A of the Application

under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

d) The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

26. Notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concessions, clearances or a similar grant or right during the moratorium period.

27. The supply of essential goods or services to the Corporate Debtor shall not be terminated, suspended or interrupted during the moratorium period. Further, if the IRP considers supply of any goods or services critical to protect and preserve the value of the Corporate Debtor and manage the operations of such Corporate Debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such Corporate Debtor has not paid dues arising from such supply during the moratorium period.

28. Furthermore, the provisions of Sub-section (1) of Section 14 of the IBC shall not apply to such transactions, agreements or other arrangement as may be notified by the Central Government in consultation with any financial

sector regulator or any other authority; and to a surety in a contract of guarantee to a corporate debtor.

29. The IRP shall comply with the provisions of Sections 13(2), 15, 17 & 18 of the IBC. The Directors, Promoters or any other person associated with the management of Corporate Debtor are directed to extend all assistance and co-operation to the IRP as stipulated under Section 19 of the IBC for discharging her functions under Section 20 of the IBC.

30. The Corporate Debtor as well as the Registry is directed to send the copy of this Order to the IRP, to enable her to take charge of the assets etc. of the Corporate Debtor, and comply with this order as per the provisions of the IBC.

31. The Registry is directed to communicate this Order to the Corporate Applicant.

32. The Registry shall also communicate this Order to the Registrar of Companies, for updating the status of the Corporate Debtor in the website of the Ministry of Corporate Affairs.

Accordingly, this Company Petition is allowed.

Sd/-
(REENA SINHA PURI)
MEMBER (T)

PER: SHRI ASHOK KUMAR BHARDWAJ, MEMBER (J)

The Petitioner issued offer letter dated 15.05.2017 to Mr. Avdhesh Mittal regarding supply of machinery. As a sequel thereof, the principal debtor/CD issued a Work Order dated 07.07.2017. Similar Work Orders were issued by the M/s Avdhesh Construction and Impex Ltd., M/s Avyukta Dairy Products Ltd, and M/s B.P. Fresh Fruits Pvt. Ltd. To secure the instalment-based payments due to the Petitioner, Mr. Avdhesh Mittal and the company referred to in para 2 of the order authored by Sister executed guarantees on 07.07.2017. The guarantees were subsequently extended by the entities to cover the additional financial assistance sought by the principal debtor from the Petitioner.

2. The Arbitral Proceedings were initiated against the PD and the Guarantors. In terms of the Award dated 02.07.2024, the Arbitral Tribunal held the PD and the Guarantors jointly and severally liable to pay some of Rs. 2,46,48,957/- together with interest @ 8% per annum and costs of Rs. 1,25,000/-.

3. As can be seen from Part-IV of the application, the same is founded on Arbitral Award dated 02.07.2024. It is seen from the said Award that the business started with the first Work Order released by the Claimant on 17.06.2017 in favour of Respondent No. 2 for supply of milk and milk product processing plant for a total sum of Rs. 11,60,91,949/- (Rupees Eleven Crores Sixty Lakhs Ninety One Thousand Nine Hundred And Forty Nine Only). It is seen from Para 4(f) of the Award that the Respondent No.5 i.e. Mr. Avdhesh

Mittal requested the Petitioner for release of funds in the name of his company. It is not clear from the Award that the letter was written for release of how much funds. Para 4(g) of the Award indicates that the financial help agreed to be given by the Petitioner was on short term basis and against guarantee of Respondent Nos. 2 to 5 in the Award. The Para 4(g) also indicates that since the parties were already doing business in terms of the letter dated 15.05.2017, they will continue to be governed by the said undertaking and the disputes, if any will be resolved in terms of the said letter dated 15.05.2017. The clause 4(g) of the Award reads thus:-

> g. That on 01.04.2019 itself, the Respondent no. 1 issued letter of request incorporating therein the agreed terms and conditions. The funds provided by the Claimant were to be used for business revival of Respondent no. 1 and shall be refunded as soon as the Respondent no. 1 receives payment from any source whatsoever. The financial help agreed to be given by the Claimant was on short term basis and against guarantee of Respondents no. 2 to 5. It was agreed that since the parties were already doing business in terms of letter dated 15.05.2017, they will continue to be governed by said understanding and the disputes, if any will be resolved in terms of said letter dated 15.05.2017.

4. From the aforementioned, it is clear that the transaction between the Petitioner and the PD was operation in nature and was governed by the contract of supply of goods. Thus, the liability of the PD in terms of the Award (if any) could be for operational debt and not for financial debt. The position is further clear from the Award itself which provides that the liability of the PD was to pay the consideration for supply of machine. Even the corporate guarantees were also extended to payments and dues against supplies along with any other outstanding payment recoverable by the supplier in terms of letter dated 15.05.2017. The relevant excerpt of the Award reads thus:-

10. We have gone through the record i.e. the pleadings, documents and evidence led by the Parties. After carefully examining the matter, our findings are as under:-

ISSUE NOS. 1 & 6:

"Whether the Claimant is entitled to the Claim of Rs. 2,46,48,957/- and against which of the Respondents."

As both these issues are interconnected, they are taken up together.

The Claimant has submitted that vide letter dated 15.05.2017 (Ex. CW 1/2), it accepted the proposal of the Respondent no. 5 to supply machinery i.e. the milk and milk processing plant. The terms set up in letter dated 15.05.2017 are reproduced hereunder:-

"The supplies will be made to your entities as per the following terms:-

a. Work Order :

Work orders will be issued based on the requirements submitted by you. Any amendment in the work order will be intimated by you within seven days.

b. Payments:

(i) 40% amount shall be paid in advance.
(ii) 20% within one month.
(iii) 20% on inspection after completion.
(iv) 20% on delivery.
(v) Any advances paid by you to Vendors on our request will be adjusted in final payment.
(vi) For securing the payment, you shall provide us with:

a. Your personal guarantee.

b. Guarantee from Avyukta Dairy Products Pvt. Ltd., Aveena Cold Storage Pvt. Ltd., BP Fresh Fruits Pvt. Ltd.

c. Time Schedule:

(i) The delivery should be made according to the delivery schedule provided by you.

(ii) The cost of transport will have to be borne by you.

(iii) Insurance for the machinery in transit will have to be arranged by you.

(iv) The machinery shall be packed worthy of transport from our premises to your factory or the specified destination. The packing and forwarding charges are included in our prices.

d. Quality:

(i) The machinery shall meet the agreed specifications.
(ii) All supplies will be fit for purpose.
(iii) Any defective component will be replaced within seven days at our cost.

e. Taxes and duties:

The taxes are included in the price.

f. Warranty:

i. The minimum warranty period required for the components would be 36 months from the date of supply.
ii. Our obligation under this undertaking shall be limited to making good by repair, replacement or modification of any defect in the equipment supplied.

g. Limitation of Liability:

The aggregate cumulative liability of the supplier (regardless of whether the claim is based on tort, negligence or strict liability) resulting in any way from the performance or non-performance, at any and all times, for any and all indemnities, liabilities, losses, damages, expenses, claims, direct damages, risk purchase etc. shall any time not in aggregate exceed the 100% of the total value of the payment/ price actually received by the supplier under the Work Order.

h. Arbitration:

In the event of any dispute or difference in relation to the Work Orders, the same shall be referred to Arbitral Tribunal comprising of one Arbitrator of each party, who shall appoint third Arbitrator in accordance with the Arbitration and Conciliation Act, 1996. The venue of arbitration proceedings shall be New Delhi. Any arbitration award made in such arbitration proceedings shall be final and binding on the parties.

i. Jurisdiction:

All legal proceeding which either party to the contract might be entitled to take under this contract, shall be instituted in a Court of original jurisdiction of New Delhi."

Thereafter, Respondent no. 5 issued letter dated 07.07.2017 (Ex. CW 1/3) tendering guarantee for any payment that may be due to the Claimant. Para nos. 7 and 8 of the letter are relevant:-

"7. This Guarantee shall be a continuing one and shall remain in full force and effect till such time the Purchasers clear all the dues of the Supplier including any amount, which may be due and payable by any of my entities, in which, I am Director, Shareholder or principal officer.

8. Any dispute, controversy or claim arising out of or in relation to the Guarantee shall be governed by Arbitration as per letter dated 15.05.2017."

On 07.07.2017, Respondents no. 2 to 4 gave separate letters of guarantee (Ex. CW 1/4), (Ex. CW 1/5) & (Ex. CW 1/6) regarding any payment that may be due and payable to the Claimant. The Paras no. 4, 5 and 6 of letter dated 07.07.2017 of Respondent no. 2 are relevant:

"4. This Corporate Guarantee shall extend to all payments due against supplies along with any other outstanding payment recoverable by the Supplier from us or in terms of letter dated 15.05.2017.

5. This Guarantee shall be a continuing security for settlement of accounts between the Supplier, Avyukta Dairy Products Pvt. Ltd., its subsidiaries, associate companies, directors, shareholders etc.

6. Any dispute, controversy or claim arising out of or in relation to the Guarantee shall be governed by Arbitration as per letter dated 15.05.2017."

The paras nos. 4, 5 and 6 of Respondent no. 3 is reproduced hereunder:

"4. This Corporate Guarantee shall remain as a continuing security and shall extend to all payments or dues against supplies along with any other outstanding payment recoverable by the Supplier in terms of letter dated 15.05.2017.

5. This Guarantee shall be a continuing security for settlement of accounts of the Supplier in terms of letter dated 15.05.2017.

6. Any dispute, controversy or claim arising out of or in relation to the Guarantee shall be governed by Arbitration as per letter dated 15.05.2017."

Thereafter, the Respondent no. 5 approached the Claimant on 01.04.2019 seeking financial help to revive the business. The Claimant has submitted that it agreed to the request of the Respondent no. 5. On the same day i.e. 01.04.2019, a letter was issued to Claimant by Respondent no. 1 (Ex. CW 1/7) with following terms:-

"A. You will be providing us funds as per requirement of our business for using the same to revive the business.

B. The repayment will be done as soon as the company receive payment from any source whatsoever.

C. We hereby guarantee that there will be no default and all payments will be cleared within seven days of demand raised by you and failure to comply the demand will attract penalty. We will be liable for interest @ 15% p.a. for your failure to pay as per demand raised.

D. The failure on your part to avail any remedy upon any breach of our obligation will not constitute a waiver of your rights. No waiver is effective unless specifically signed by you.

E. Till the time, the entire payment is made, the constitution of Company will not be changed without your written consent.

F. *We will provide you with guarantees of the sister concerns namely Avyukta Dairy Products Pvt. Ltd., Aveena Cold Storage Pvt. Ltd. and B.P Fresh Fruits Pvt. Ltd.*

G. *We also hereby unconditionally and irrevocably guarantee you the repayment of all your outstanding at any point of time as per your demand, without any demur or protest and this will be a continuing guarantee till entire payment is made to you.*

H. *The disputes and differences arising in terms of this understanding will be settled in terms of your letter dated 15.05.2017 by way of arbitration and Courts at Delhi will have exclusive jurisdiction in all matters arising between the parties."*

The Claimant has submitted that in furtherance of the letter dated 01.04.2019, para no. 'F', the Respondents no. 2, 3 and 4 submitted board resolutions (Ex. CW 1/8 to Ex. CW 1/10) and Respondent no. 5 submitted letter dated 29.04.2019 (Ex. CW 1/11). The extract of the board resolution of Respondent no. 2 dated 26.04.2019, is as under:-

The extract of the board resolution of Respondent no. 3 dated 25.04.2019, is as under:-

*"**RESOLVED** that the Company has given a Corporate Guarantee in favour of Brilliant Metals Pvt. Ltd., which is continuing and the Company has agreed that the said guarantee will equally apply for the financial accommodation being granted by Brilliant Metals Pvt. Ltd. to Avdhesh Construction and Impex Ltd.*

***RESOLVED FURTHER** that the Corporate Guarantee dated 07.07.2017 and letter dated 15.05.2017 will apply with respect to the arrangement between Brilliant Metals Pvt. Ltd. and Avdhesh Construction and Impex Ltd."*

The extract of the board resolution of Respondent no. 4 dated 27.04.2019, is as under:-

*"**RESOLVED** that the Company has given a Corporate Guarantee in favour of Brilliant Metals Pvt. Ltd., which is continuing and the Company has agreed that the said guarantee will equally apply for the financial accommodation being granted by Brilliant Metals Pvt. Ltd. to Avdhesh Construction and Impex Ltd.*

***RESOLVED FURTHER** that the Corporate Guarantee dated 07.07.2017 and letter dated 15.05.2017 will apply with respect to the arrangement between Brilliant Metals Pvt. Ltd. and Avdhesh Construction and Impex Ltd."*

The relevant contents of letter dated 29.04.2019 of Respondent no. 5 are as under:-

"Thank you for agreeing to grant me financial accommodation. As discussed, I am enclosing the board resolutions from the following entities :-

i. Avyukta Dairy Products Pvt. Ltd.
ii. Aveena Cold Storage Pvt. Ltd.
iii. B.P. Fresh Fruits Pvt. Ltd.

Letter/ guarantee from Avdhesh Construction and Impex Ltd.

I hereby assure that since this is a short term arrangement and you are already in possession of my personal guarantee no fresh documents are being executed and the personal guarantee given to you will mutates mutandi apply to present transactions whereby you have agreed to release funds in the account of Avdhesh Construction and Impex Ltd.

My guarantee dated 07.07.2017 will be read for the current transactions between Brilliant Metals Pvt. Ltd. and Avdhesh Constructions and Impex Ltd."

The Claimant has filed the ledger account of Respondent no. 1 (Ex. CW 1/12), which has been admitted by Respondent no. 5 on behalf of the Respondents. Thus, the liability of Respondent no. 1 as reflected in Exhibit – CW 1/12 for a sum of Rs. 2,46,48,957/- is undisputed.

The only defence raised by the Respondents that the money could not be paid by Respondent no. 1 on account of force majeure conditions. The said contention is totally untenable. The Respondents have taken a plea that the guarantees given by Respondents no. 2 to 5 were for the payments of machines only and not for the payments made by Claimant to Respondent no. 1.

The Respondent no. 5 in his cross examination has admitted that Ex. CW -1/7 to Ex. CW 1/11 were handed over by him to the Claimant. The Respondent no. 5 has also admitted that the Respondents no. 2 to 5 have given guarantee to the Claimant on 07.07.2017.

If the document Ex. CW 1/ 7 to Ex. CW 1/11 are read in conjunction with Ex. CW - 1/3 to Ex. CW – 1/6, the conclusion is clear and unambiguous that the Respondents no. 2 to 5 extended the guarantee for payments made by Claimant to Respondent no. 1. The Respondents cannot take any contrary plea as it is clearly stated that there guarantees will equally apply for financial accommodation granted by Claimant to Respondent no. 1.

The Respondent no. 1 neglected to discharge this liability despite service of notice of demand dated 15.09.2023, Ex. CW – 1/13. The Claimant consequently issued second demand notice and invoked the guarantees given by Respondents no. 2 to 5 vide letter dated 10.10.2023, Ex. CW – 1/14. The Respondents no. 2 to 5 did not make the payment. The Respondent no. 5 issued reply dated 16.10.2023, Ex. CW – 1/15. It is noteworthy to mention that in the reply Ex. CW - 1/15, the Respondent no. 5 has not taken any plea that the Respondents no. 2 to 5 did not issue guarantee for amounts availed by Respondent no. 1 from Claimant. The Respondent no.5 merely sought time to repay the amount stating that on account of actions by the bankers of the Respondents, the payments have been delayed. The challenge to the guarantee has been taken for the first time in the Statement of Defense.

It was contended on behalf of Respondents that the board resolutions cannot be construed as enforceable guarantees. The contents of board resolutions (Ex. CW 1/8 to Ex. CW – 1/10) depicts that the companies agreed that the guarantee given earlier by them on 07.07.2017 vide Ex. CW 1/4 to Ex. CW 1/6 will apply for payments made by Claimant to Respondent no. 1. We have to see the documents in totality and we cannot lose sight of the fact that the Respondents no. 1 to 4 are closely held companies with common directors/ family members and Respondent no. 5 is the common thread. The Respondents through Respondent no. 5 have promised that the guarantees given for payment due to the Claimant will be enforceable and thus, the contention of the Respondents denying execution of guarantees for payments advanced by Claimant to Respondent no. 1 is totally misplaced.

We accordingly decide the issue no. 6 in favour of the Claimant and against the Respondents and hold that the guarantees given by Respondents no. 2 to 5 for the payments due to Claimant are enforceable.

We have already held that the liability of Respondent no. 1 towards Claimant no. 1 for Rs. 2,46,48,957/- is undisputed. Thus, we hold that the Claimant is entitled to recover Rs. 2,46,48,957/- from the Respondents, jointly and severally.

5. Apparently, the Award is based on the contract for supply of goods and liability of the debtor to make the payment of consideration in terms thereof. Thus, indubitably, there was no financial contract between the parties.

6. The moot question arises to be determined in the process is as to whether an Arbitral Award based on the contract for supply of goods can be treated as basis for the Petitioner to file an application under Section 7. In other words, "whether an Arbitral Award could convert an operational liability into financial liability"

7. The issue is no longer res-integra, as in ***Hpcl-Mittal Pipelines Limited vs. Coastal Marine Construction And Engineering Limited*** in C.P.(IB)-323/MB/2023, it could be viewed that the Arbitral Award would not convert the operational debt into financial debt. Paras 9, 19, 24 and 25 of the order reads thus:-

> *"9. It is submitted that the existence of such a default is not in dispute and the decision of the Hon'ble Supreme Court of India in* ***Dena Bank v. C. Shivakumar Reddy, (2021) 10 SCC 330*** *has laid down that any arbitral award for payment of money, if not satisfied, would constitute a financial debt, thereby enabling the Financial Creditor to initiate proceedings under Section 7 of the Code.*
>
> ***X X X***
>
> *19. It has been argued on behalf of the Counsel for the Petitioner that the financial claim of the Petitioner has crystalized into the award dated 14.01.2020. According to the Counsel for the Petitioner, the award in question is equivalent to a decree which can be enforced and implemented as per law. Therefore, the nature of the debt as*

per Section 5(8) is of financial debt. In support of his arguments, the Counsel for the Petitioner has relied upon in the matter of ***Dena Bank (Now Bank of Baroda) vs. C. Shivakumar Reddy and others (2021) 10 Supreme Court Cases 330*** *whereby it has been held by the Hon'ble Supreme Court that final judgement and/or decree of any court or tribunal or any arbitral award for payment of money, if not satisfied, would fall within the ambit of a financial debt. It has further been held that a judgement and/or decree for money in favour of a financial creditor, passed by the DRT or any other tribunal or court or the issuance of a certificate of recovery in favour of the Financial Creditor would give rise to a fresh cause of action for the financial creditor, to initiate proceedings under Section 7 within three years from the date of judgement and/or decree or the date of issuance of certificate of recovery. Counsel for the Petitioner has further contended that since the award in question was passed on 14.01.2020 the period of limitation would start from the date of the award as has been held by the Hon'ble Supreme Court in the cited judgement. Therefore, according to the Counsel for the Petitioner the existence of debt and default stands proved on record in this case and further that the Petition is well within the period of limitation and, therefore, the Petition be admitted and CIRP be ordered against the Corporate Debtor/Respondent.*

X X X

24. *However, the aforesaid proposition of law, put forward by the Counsel for the Petitioner, does not appear to be a correct one. In this connection a reference can be made to the law laid down in* ***Sushil Ansal Vs. Ashok Tripathi and others****,* ***2020 Ibclaw.in 43 NCLAT*** *whereby it was held that mere holding of a decree/award per se by an individual will not make it debt fall within the ambit of financial debt.* ***In Cholamandalam Investment and Finance Company Limited Vs. Navrang***

Roadlines Private Limited, 2022 ibclaw.in 331, *the Hon'ble High Court of Madras held that a decree/award of the court or tribunal is a measure of debt and mere holding of a decree per se by an individual will not make its debt fall within the ambit of financial debt. It was further held that it is the underlying claim under a decree that will decide the nature of the debt whether it is financial or operational. Undisputedly, the claim on the basis of which arbitral proceedings were initiated by the Petitioner emanated from a work contract which originally was at best an operational debt and as per the law laid down in the afore cited cases, the nature of debt would not change with the passing of a decree or an award and, therefore, simply because an award was passed in respect of an operational claim, it will not by itself metamorphose into a financial debt.*

25. *So far as the law laid down in* ***Dena Bank (Now Bank of Baroda) Vs. C. Shivakumar Reddy and others (Supra)*** *is concerned, in this case also the proceedings were initially pending before DRT for recovery of financial debt in respect of which a certificate for recovery was issued. Thus, the nature of the debt from the very beginning involved in the said case was a financial debt.*

8. As can be seen from the judgment of the Hon'ble Supreme Court in ***Sub-Inspector Rooplal and Another vs. Lt. Governor Through Chief Secretary, Delhi and Others*** (2000) 1 Supreme Court Cases 644, a coordinate bench of a Court cannot pronounce judgment contrary to declaration of law made by another bench. Para 12 of the judgment reads thus:-

*"**12.** At the outset, we must express our serious dissatisfaction in regard to the manner in which a Coordinate Bench of the Tribunal has overruled, in effect, an earlier judgment of another Coordinate Bench*

of the same Tribunal. This is opposed to all principles of judicial discipline. If at all, the subsequent Bench of the Tribunal was of the opinion that the earlier view taken by the Coordinate Bench of the same Tribunal was incorrect, it ought to have referred the matter to a larger Bench so that the difference of opinion between the two Coordinate Benches on the same point could have been avoided. It is not as if the latter Bench was unaware of the judgment of the earlier Bench but knowingly it proceeded to disagree with the said judgment against all known rules of precedents. Precedents which enunciate rules of law form the foundation of administration of justice under our system. This is a fundamental principle which every presiding officer of a judicial forum ought to know, for consistency in interpretation of law alone can lead to public confidence in our judicial system. This Court has laid down time and again that precedent law must be followed by all concerned; deviation from the same should be only on a procedure known to law."

9. As far as the judgment of Hon'ble Supreme Court in ***Dena Bank vs. C. Shivkumar Reddy*** is concerned, as could be noted by the coordinate bench in the aforementioned case, the question before Hon'ble Supreme Court in the said case was that "*as to whether a final judgment and decree of the DRT in favour of the financial creditor or the issuance of a certificate of recovery in favour of the FC would give rise to fresh cause of action to a financial creditor to initiate proceedings under Section 7 of the IBC within three years from the date of the final judgment and decree and/or within three years from the date of issuance of certificate of recovery."* Para 25 of the judgment reads thus:-

"25. Another question which arises for the consideration of this Court is, whether a final judgment and decree of the DRT in favour of the Financial Creditor, or the issuance of a Certificate of Recovery in

favour of the Financial Creditor, would give rise to a fresh cause of action to the Financial Creditor to initiate proceedings under Section 7 of the IBC within three years from the date of the final judgment and decree, and/or within three years from the date of issuance of the Certificate of Recovery."

10. Thus, apparently, in ***Dena Bank vs. C. Shivkumar Reddy***, there was no such proposition before the Hon'ble Supreme Court, as to *"whether the Arbitral Award regarding the claim of the supplier would convert the operational debt into financial debt".* Such proposition was specifically answered by a Division Bench of this Tribunal and I do not find any reason to take a view different from the one taken by the Division Bench.

11. As could be viewed by the Hon'ble Supreme Court **Collector of Central Excise Calcutta vs. M/s Alnoori Tobacco Products and Anr.,** [Civil Appeal-4502-4503 of 1998] passed on 21.07.2004, a judicial precedent needs to be followed, after duly appreciating the facts of the case in which the judicial precedent has been laid down and the facts of the case in which the same is applied. Paras 11-14 of the judgment reads thus:-

"11. *Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of courts are neither to be read as Euclid's theorems nor as provisions of a statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark on lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do*

not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. In London Graving Dock Co. Ltd. v. Horton [1951 AC 737 : (1951) 2 All ER 1 (HL)] (AC at p. 761), Lord MacDermott observed : (All ER p. 14 C-D)

"The matter cannot, of course, be settled merely by treating the ipsissima verba of Willes, J., as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished Judge...."

12. *In Home Office v. Dorset Yacht Co. [(1970) 2 All ER 294 : 1970 AC 1004 : (1970) 2 WLR 1140 (HL)] Lord Reid said (All ER p. 297g-h), "Lord Atkin's speech ... is not to be treated as if it were a statutory definition. It will require qualification in new circumstances". Megarry, J. in Shepherd Homes Ltd. v. Sandham (No. 2) [(1971) 1 WLR 1062 : (1971) 2 All ER 1267] observed:"One must not, of course, construe even a reserved judgment of Russell, L.J. as if it were an Act of Parliament." And, in British Railways Board v. Herrington [(1972) 1 AC 877 : (1972) 2 WLR 537 : (1972) 1 All ER 749 (HL)] Lord Morris said : (All ER p. 761c)*

"There is always peril in treating the words of a speech or a judgment as though they were words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case."

13. *Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.*

14. *The following words of Hidayatullah, J. in the matter of applying precedents have become locus classicus : (Abdul Kayoom v. CIT [AIR 1962 SC 680] , AIR p. 688, para 19)*

"19. … Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive."

* * *

"Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it."

12. Once, the Award is in respect of the contract for supplying machinery etc. and consideration for the same, the claim decreed in terms thereof cannot be described as financial debt. The Corporate Guarantor in respect of an operational debt can also be not treated as defaulter in respect of a financial debt. For convenient reference we also produced the letter dated 15.05.2017 which reads thus:-

Dated: 15.05.2017

Mr. Avdhesh Mittal
E 94 Greater Kailash – 1
New Delhi 110048

SUB: SUPPLY OF MACHINERY

Dear Sir,

Apropos our discussion, we are pleased to offer you supplies for Milk and Milk Processing Plant, along with ancillary machinery spare parts and tools.

The supplies will be made to your entities as per the following terms:-

a. **Work Order :**

Work orders will be issued based on the requirements submitted by you. Any amendment in the work order will be intimated by you within seven days.

b. **Payments:**

(i) 40% amount shall be paid in advance.

(ii) 20% within one month.

(iii) 20% on inspection after completion.

(iv) 20% on delivery.

(v) Any advances paid by you to Vendors on our request will be adjusted in final payment.

(vi) For securing the payment, you shall provide us with:
a. Your personal guarantee.

b. Guarantee from Avyukta Dairy Products Pvt. Ltd., Aveena Cold Storage Pvt. Ltd., BP Fresh Fruits Pvt. Ltd.

13. In view of the aforementioned, I am of the view that the application preferred under Section 7 of IBC, 2016, is not maintainable and the same is accordingly rejected.

Sd/-

(ASHOK KUMAR BHARDWAJ)
MEMBER (J)

There is difference of opinion between the Members of the Bench, thus the following points are referred to the Hon'ble President under Section 419 (5) of the Companies Act, 2013:-

Point as drawn by Member (T)

1. Whether or not on the facts and circumstances of the case, section 7 petition deserves to be admitted in the case of the principal debtor and the corporate guarantors, when:

a. It is evident from the arbitral award that all the parties to the dispute are ad idem that the payments for the machinery were made to the FC, but those pertaining to the financial assistance remained to be paid;

b. The arbitral award, comprising of the principal amount and interest, resulted in creation of a fresh claim of debt, and having remained unpaid, was a financial debt in terms of section 5(8) of the IBC as laid down by the Hon'ble Supreme Court in ***Dena Bank v. C. Shivakumar Reddy (Civil Appeal No. 1650 of 2020) and Kotak Mahindra Bank Ltd. Vs. A. Balakrishnan & Anr. (Civil Appeal No. 689 of 2021).***

Sd/-
(REENA SINHA PURI)
MEMBER (T)

Point as drawn by Member (J)

i. Whether in terms of the view taken by the Coordinate Bench in ***Hpcl-Mittal Pipelines Limited vs. Coastal Marine Construction And Engineering Limited in C.P. (IB)- 323/MB/2023***, it would not be proper to take a view that the Arbitral Award in respect of a contract for supply would not convert operational debt into financial debt.

ii. Whether in the wake of the view taken in para 12 of the judgment of the Hon'ble Supreme Court in ***Sub-Inspector Rooplal and Another vs. Ltd. Governor Through Chief Secretary, Delhi and Others*** **(2000) 1 Supreme Court Cases 644**, it is not proper for a Bench of a Tribunal to follow the view taken by Coordinate Bench, on exactly identical issue.

iii. Whether in the facts of the case, particularly when the Arbitral Award talk of supply of machines and consideration for the same. One can take a view that the CD defaulted to pay any financial debt [(covered under Section 5(8) of IBC, 2016)], exceeding Rs. 1 Crore.

iv. Even when, a creditor claim default in payment of financial debt / operational debt, whether a combined application filed in respect of both operational debt and financial debt can be found maintainable.

Sd/-
(ASHOK KUMAR BHARDWAJ)
MEMBER (J)