IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI
BENCH-VI

IB-763/(ND)/2021

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

In the matter of:

M/s Minda Industries Ltd.
Registered office at
B -64/1 Wazirpur Industrial Area
Delhi - 110052

...Applicant/ Financial Creditor

Versus

M/s Unicast Autotech Pvt. Ltd.
Registered office at:
27-B/7, New Rohtak Road
New Delhi DL 110005

...Respondent/ Corporate Debtor

<u>Coram:</u>

SHRI. P.S.N. PRASAD, Hon'ble Member (Judicial)

SHRI. RAHUL BHATNAGAR, Hon'ble Member (Technical)

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PRESENT

Counsel for Applicant: Mr. Mahip Singh (Advocate) and Mr. Abhishek Kumar Shrivastava Advocate

Counsel for Respondent: Mr. Shashank Agarwal, Advocate

ORDER

Per: PSN PRASAD, MEMBER (JUDICIAL)

Date: 08.07.2022

1. This is an application filed by the applicant Minda Industries Limited on 06.12.2021, through Authorised Signatory of Financial Creditor, Mr. Pawan Agarwal, duly authrorised vide Board Resolution dated 27.07.2020 to initiate Corporate Insolvency Resolution Process ("CIRP") against M/s Unicast Autotech Private Limited under Section 7 of the Insolvency and Bankruptcy Code 2016 ("the Code") for the alleged default on the part of the Respondent for an amount of Rs. 1,19,00,147/- (Rupees One Crore Nineteen Lakh One Hundred and Forty Seven) to be paid to the Applicant. The details of transactions leading to the filing of this application as averred by the Applicant are as follows:

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- That, The Applicant/Financial Creditor i.e., Minda Industries Limited (MIL/Financial Creditor/Lender) is one of the leading supplier of Automotive Solutions to Original Equipment Manufactures (OEMs).
- That, the Corporate Debtor i.e., Unicast Autotech Private Limited is a private limited company. The Corporate Debtor is involved in the business of manufacturing aluminium die casts from its plant.
- That, around December 2020, the Corporate Debtor approached the Financial Creditor seeking to sell its 100 % stake in Corporate Debtor's Narsapura unit. The Financial Creditor considered the prospects and based on the business prospects promised by the Corporate Debtor, made a Non-Binding Offer dated 15.02.2021 to the Corporate Debtor.
- That, the Corporate Debtor and its Promoters have failed to honour the terms of the Non-Binding Offer dated 15.02.2021 and entered into discussions with one Sandhar Technologies Limited (Hereinafter referred to as "Sandhar").
- That, the Promoters of Corporate Debtor again approached the Financial Creditor vide e-mail dated 10.04.2021

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expressing their willingness to disengage with Sandhar and to avail the Financial Creditor's offer for acquisition.

- That, in view of the aforesaid request of the Corporate Debtor, on 15.04.2021, the Financial Creditor made a Revised Indicative Non-Binding Offer ("NBO") to the Corporate Debtor for 100 % acquisition of the Corporate Debtor's Narsapura unit. In terms of the said NBO, the Financial Creditor offered INR 3 crores for acquiring 10 % of the outstanding interest in the Corporate Debtor including but not limited to common shares of classes, preference shares, convertible instruments etc.
- That, the Corporate Debtor was in precarious situation with no working capital available with it even to fulfil the existing orders, therefore, in order to make the acquisition of the Corporate Debtor's Narsapura Unit a profitable decision for the Financial Creditor, the Financial Creditor agreed to provide the Financial Assistance to the Corporate Debtor in order to complete the outstanding customer orders and for supporting its Narsapura plant and the operations therein.
- That, the said financial assistance was provided at the rate of 18% interest compounded annually in case the Corporate

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Debtor defaults in repayment or otherwise is in breach of the terms of the agreements. The financing was provided towards supporting ongoing operations of Corporate Debtor by supplying raw materials funding and managing critical working capital in order to complete the outstanding customer orders. The Financial Creditor agreed to provide such Financial Assistance to the Corporate Debtor to enable it to honour its commitments to its customer requirement of the business and for unhindered continuation of the operations of Corporate Debtor's Narsapura Unit, which were eventually to be acquired by the Financial Creditor.

- That, in order to secure the financial assistance being provided to the Corporate Debtor, the Applicant/ Financial Creditor and the Corporate Debtor entered into a Business Support Agreement dated 17.04.2021 (Hereinafter referred to as "BSA"). In terms of the BSA, the Financial Creditor agreed to provide financial assistance of an amount not exceeding INR 3 crores and the Corporate Debtor was obligated to repay the same to the Financial Creditor as and when the Corporate Debtor receives payments from its customers.

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- It is pertinent to highlight that the aforesaid financial assistance being provided by the Financial Creditor to the Corporate Debtor was towards fulfilment of the 100% acquisition and in case of non-fulfilment / termination of the BSA, the Corporate Debtor had to return the financial assistance provided to it along with 18% interest per annum compounded annually. Moreover Clause 2.4 of the BSA specifies that the nature of the financial assistance as extracted herein under: Clause 2.4 of the BSA:

  > *"All amounts spent by Minda to provide the Support until Acquisition shall be considered as unsecured debt extended by Minda to unicast "*

- It is submitted the debt given to the Corporate Debtor was in nature of a Financial Debt i.e. consideration given for time-value of money and the Applicant / Financial Creditor expected returns on the same. the same is also reflected from the relevant clauses of BSA which define the Repayment Amount in Clause 2.5 as all the amount paid by the Applicant/Financial Creditor until such date to the Corporate Debtor, along with interest at the rate of 18% percent per annum (compounded annually). It is further pertinent to

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highlight that under Clause 3.5, the parties also agreed that any receipt into the CACC ad CA Accounts of the Corporate Debtor shall be first utilized towards refund of the Repayment Amount. Therefore, the Corporate Debtor specifically agreed to first pay the Financial Creditor from the payments it received from its customers.

- That there is an Event of Default clauses in the agreement i.e. Clause 7.2, which provides that in case of an Event of Default, the BSA shall stand terminated. The relevant clause is reproduced herein below:

  "7.2 Termination - This Agreement shall stand terminated: (i) upon occurrence of an Event of Default; or (ii) without any further act, deed or thing to be done on the part of the Parties upon Minda and the Promoters executing a share purchase agreement for Acquisition; or (iii) upon Minda giving a 2 (two) days' notice to Unicast and the Promoters stating its intention to terminate this Agreement at its sole discretion. "

- Further, the parties specifically agreed that the Event of Default would include any breach by the Promoters of the Corporate Debtor of the terms and obligations of the BSA. Relevant extract is reproduced as under: -

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- *any representation given by Unicast or the Promoters under this Agreement in incorrect, misleading, inaccurate and / or untrue; and / or*
- *Unicast or the Promoters commit a breach of any covenant, undertaking, obligation and / or any of the provisions of this Agreement which breach, if capable of being remedied, has not been remedied within 5 (five) days from the date of receiving a written notice through post or email from Minda requesting that the breach be remedied. "*

- That, it is sufficiently clear from the afore extracted clause that it was the obligation of the Corporate Debtor to comply with the covenants and terms of the agreements executed between the parties and any failure to do will result in termination of the Agreement and would make the Corporate Debtor liable to pay the Repayment Amount. The relevant clause is reproduced hereinunder as:

"2.5 Upon Termination of this Agreement (in case the parties decide not to go ahead with the Acquisition transaction), the Promoters shall forthwith upon demand and in any event within 7 (seven) days from the date of termination of this Agreement pay Minda, without any demur or protest, any and all the amounts paid by Minda until such date to Unicast, along with interest at the rate of 18% (eighteen) percent per annum (compounded annually), applicable from the date of termination until repayment, together with all costs incurred towards recovering such amount ("Repayment Amount") Minda will have the right to revoke the pledge in case of any failure by Unicast or Promoters to pay the Repayment

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Amount within 7 days of termination of this Agreement (in case the parties decide not to go ahead with Acquisition transaction) "

- Further, the financial assistance provided by the Applicant / Financial Creditor to the Corporate Debtor was additionally secured by way of a Share Pledge Agreement dated 14.05.2021 ("SPA"). further secure the Financial Assistance provided by the Financial Creditor to the Corporate Debtor, the Pledgors i.e. Kiran Udyog Pvt. Ltd.; Arvind Kumar Jain, Rajiv Kumar Jain and Vivek Kumar Jain (who are also the Promoters of the Corporate Debtor) agreed to pledge in favour of the Applicant / Financial Creditor.
- That in view of the aforesaid financial arrangement and agreements entered between the parties, the Corporate Debtor started availing the credit facility from April 16, 2021 onwards. That the Corporate Debtor used the credit forwarded by the Applicant / Financial Creditor to pay its raw material suppliers and vendors.
- That it is pertinent to highlight that for a brief initial period, the Corporate Debtor duly paid the amount forwarded to it as financial assistance by the Financial Creditor. However, the last payment was made by the Corporate Debtor on

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10.06.2021 and subsequently i.e. post 10.06.2021, the Corporate Debtor has stopped paying and thereby defaulted on its contractual obligations to repay the outstanding amount. The trigger for initiation of the CIRP by a Financial Creditor under Section 7 of the IBC is the occurrence of a default by the Corporate Debtor. 'Default' means non-payment of debt in whole or part when the debt has become due and payable and debt means a liability or obligation in respect of a claim which is due from any person and includes financial debt and operational debt. The Corporate Debtor has thus intentionally and deliberately failed to repay the amount received by it as financial assistance.

- That the Financial Creditor provided the Financial Assistance to the Corporate Debtor in running its business. In lieu of the Financial Assistance provided by the Financial Creditor, it raised Debit Note of a total amount of Rs.2,73,91,298/- out of which the Corporate Debtor paid back Rs.1,39,00,000/- plus material worth Rs.25,00,000/- i.e. repaid a total amount of Rs. 1,64,00,000/-, but failed to pay the balance amount of Rs. 1,09,91,298/-, thus committing an Event of Default in terms of the Financing Documents. It is submitted that after

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duly benefitting from the financial assistance received from the Financial Creditor, the Corporate Debtor is responsible for repayment of any amount under the Financing Documents executed between the parties.

- It is submitted that the Corporate Debtor has defaulted in repayment of the legitimate dues of the Financial Creditor and thereby, has defaulted in abiding by the terms and conditions of the BSA.
- That in lieu of the default on part of the Corporate Debtor in making payment of the outstanding invoices, the Financial Creditor withdrew its Non-Binding Offer in accordance with Clause 6 of the NBO vide which the Financial Creditor had reserved its irrevocable right to withdraw the offer at any point of time at its sole discretion.
- That Clause 7.2(iii) of the BSA authorizes the Applicant /Financial Creditor to terminate the BSA giving a 2 (two) days' notice to the Corporate Debtor and its Promoters. Accordingly, the Applicant / Financial Creditor vide Termination Notice dated 09.06.2021 gave a two days' notice to the Corporate Debtor. However, the Corporate Debtor

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neither cared to cure the default committed by it nor did it respond to the said notice.

- Accordingly, on 11.06.2021 i.e. after 2 (two) days of issuing the Termination Letter, the BSA was terminated. In terms of Clause 2.5 of the BSA, the amount of the financial assistance was to be repaid to the Financial Creditor upon demand and in any event within 7 (Seven) days from the date of termination of the BSA. However, the Corporate Debtor and the Promoters failed to repay the outstanding amount of Financial Assistance within 7 (seven) days from the said termination and thereby violated the applicable provisions of the finance documents and committed default in accordance with the Code.
- The Corporate Debtor is therefore in default of making the payment to the Financial Creditor of an amount of Rs. 1,09,91,298/- (Rupees One Crore Nine Lakhs Ninety-One Thousand Two Hundred and Ninety-Eight Only) which still remains unpaid along with interest of approx. Rs. 9,08,849/- (Rupees Nine Lakhs Eight Thousand Eight Hundred and Forty-Nine Only) computed annually at the rate of 18% p.a. from the due date of invoices till 03.12.2021.

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- It is further pertinent to highlight that the Financial Creditor is not only entitled to the Financial Debt but also to the loss incurred to it on account of the Corporate Debtor's resultant default in executing the Share Pledge Agreement. It is submitted that at the time of entering into the aforesaid Business Support Agreement, the Corporate Debtor assured certain business profits to the Financial Creditor in taking over the Corporate Debtor's Narsapura Plant. It was only in anticipation of the said profits that the Applicant / Financial Creditor agreed to provide the financial support to the Corporate Debtor to assist it to continue running its business and fulfill the order of its customers. The Applicant / Financial Creditor will therefore seek appropriate remedies towards recovering the said losses arising out of the breach of Share Pledge Agreement before appropriate forums.
- It is therefore submitted that the outstanding amount payable to the Financial Creditor is a "financial debt" as provided in Section 5(8) of the Code since it is a debt along with interest which is disbursed against the consideration for the time value of money. There was an act of disbursement and it was to be paid within a stipulated time. Therefore, it

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qualifies as a financial debt and the Applicant qualifies as a Financial Creditor.

- It is submitted that the ambit of financial debt's definition is illustrative and expansive and cannot be construed as exhaustive under Section 5(8) of the Code. In terms of the definition of financial debt under Section 5(8) of the Code, which reads as: "a debt along with interest, if any which is disbursed against the consideration of the time value of money and includes money borrowed against the principle of interest.", the term 'if any' holds some significance. The term 'if any' does not amount to a compulsion that a financial debt would only be owed when there is interest payable. Financial debt means outstanding principal due in respect of a loan and would also include interest thereon if any interest were payable thereon. If there is no interest payable on the loan, the outstanding principal would qualify as financial debt. Therefore, a financial debt includes any amount raised under any other transaction, having the commercial effect of borrowing.
- It is further stated that the Legislature has included any financial transaction in the definition of financial debt which

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are usually for a sum of money received today to be paid over a period of time in instalments or in a single payment in future. Hence, the definition of 'financial debt' in Section 5(8) of the Code is therefore expansive and the same includes inter alia financial debt which does not expressly exclude an interest-free loan. Therefore, 'Financial Debt' would have to be construed to include interest-free loans advanced to finance the business operations of a corporate body.

- That, based on the abovementioned facts, the applicant has filed the present application.

2. Consequent to the notice issued by this Tribunal, the Respondent filed its reply in which the following contentions were made:

- That, application is not maintainable under Section 7 of the Code as no "Financial Debt" is owed by the Corporate Debtor.
- It is submitted that though the Applicant has filed the instant Application under Section 7 of the Code presenting itself as a "Financial Creditor", however, the Applicant has miserably failed to establish how the Corporate Debtor owes the "Financial Debt" (as defined under Section 5(8) of the Code) to the Applicant.

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- That, the debt arising under the BSA is merely an "operational debt" as defined under Section 5(21) of the Code, arising out of the supply of goods and services under the terms of BSA.
- In this regard, reference is drawn to clause 2 of the BSA. Clause 2.1 of the BSA clearly stipulates that the Applicant had agreed to provide 'Support' to the ongoing business operational Corporate Debtor by way of (i) "supply raw materials" and (ii) "funds to manage critical working capital requirements of the Business" on a need only basis. The said clause 2.1 of the BSA is reproduced hereunder:

  "Business support Minda agrees to supply raw materials and funds to manage critical working capital requirements of the Business ("Support") on a need only basis and at the sole discretion of Minda. Provided however that the value of outstanding Support at any time shall not exceed Rs. 3 crore."

- While it is not denied that as per clause 2.4 of the BSA, all the amounts spent by Minda to provide the Support until acquisition shall be considered as "unsecured debt" extended by Minda to the Corporate Debtor, however, it is denied that, in accordance with clause 2.5 of the BSA, the same was in

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the nature of "financial debt" owed by the Corporate Debtor for the following reasons:

I. There is no element of "disbursement against consideration for the time value of money" which is primary condition for any debt to be called as "Financial Debt" under Section 5(8) of the Code; and

II. There is no liability cast on the Corporate Debtor to make any payment under the said clause 2.5 of the BSA.

III. The said clause 2.5, when read together with clauses 2.1 and 2.4 of the BSA, entails the following key aspects of the transaction between the Corporate Debtor and the Applicant:

a. Minda was obligated to 'Support' the Corporate Debtor by way of (i) supply of raw materials; and (ii) funds to manage critical working capital requirements of the Business on a need only basis and at the sole discretion of Minda;

b. The 'Support' from Minda, which was primarily in the form of supply of raw materials, was to be used for continued operations of the business of the Corporate Debtor

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c. All amounts spent by Minda (even in the form of supply of raw materials) would be considered as 'unsecured debt' extended by Minda to the Corporate Debtor (just like any other commercial trade transaction):

d. The said 'unsecured debt' became payable only upon demand and only by the "Promoters" in case the parties decided not to go ahead with the 'Acquisition' transaction and, in any event, within 7 (seven) days of termination of the BSA. The term "Promoters" has been defined to include Mr. Arvind Kumar Jain (Promoter 1), Mr. Rajiv Kumar Jain (Promoter 2) and Mr. Vivek Kumar Jain (Promoter 3) and does not include the Corporate Debtor within its ambit.

e. The interest at the rate of 18% per annum on the said 'unsecured debt' was applicable:

(i) only upon demand; and

(ii) only by the "Promoter"; and

(iii) in case the parties decided not to go ahead with the 'Acquisition' transaction; and

(iv) was payable "from the date of termination until repayment".

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This shows that the interest was payable only as a penal measure which acts only as a deterrent factor against any possible delay or default, and not as consideration for the time value of money. There is no element of "disbursement" of debt against the "consideration for the time value of money".

- That, there is nothing in the said petition that indicates that the Applicant has granted any kind of funding or "disbursed any debt against the consideration for the time value of money" to the Corporate Debtor.
- That, even otherwise, it is reiterated that in terms of clause 2.5, it is the "Promoters" of the Corporate Debtor who have been made liable to pay the outstanding dues to the Applicant and not the Corporate Debtor.
- That, the Applicant has failed to annex the copies of all such invoices which the Applicant claims as the basis of its Application.
- That by not annexing the copies of the invoices, which apparently form the basis of Applicant's claim for 'financial debt' against the Corporate Debtor, the Applicant is clearly guilty of suppressing the material facts from this Hon'ble

Tribunal in an attempt to portray itself as a genuinely aggrieved "Financial Creditor". By suppressing such material facts, the Application is hit by the maxim of "suppressio veri and suggestio falsi" and hence the Application is liable to be dismissed. As has been observed by the Hon'ble Supreme Court of India in the matter of *"Udai Chand v. Shankar Lal and Others" [(1978) 2 SCC 209]*, that mis-statement of a material fact amounts to serious misrepresentation. Therefore, no relief can be granted on the basis of such misrepresentation of facts.

- That, the term "default" has been defined in Section 3(12) of the Code as "non-payment of debt when the whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor"
- In the present case, along with the 'Promoters' of the Corporate Debtor, the Applicant was also jointly obligated to ensure that any and all amounts that the Corporate Debtor would receive in its bank accounts (which were under the control and supervision of the Applicant), were directly and

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firstly paid towards repayment of the outstanding dues of the Applicant.

- Therefore, the default of the Corporate Debtor, if at all there is, is also the result of the failure of the Applicant itself.
- That, the Applicant does not have any interest in seeking any resolution or rehabilitation of the Corporate Debtor but is only interested in recovering its dues, which dues in the first place are not even payable by the Corporate Debtor.
- Accordingly, it is most respectfully submitted that the present application is not maintainable under Section 7 of the Code and deserves to be dismissed outrightly.

3. The Applicant has filed Rejoinder which stated as follows:-

- That, the Respondent has not disputed the execution of the Business Support Agreement rather has relied on the same to state that the debt is operational in nature. The Respondent submitted that the debt arising under the BSA is an operational debt, thereby admitting the Business Support Agreement and the fact that a debt arises out of the same. Hence without admitting any averment of the Respondent, it

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is stated that it becomes an admitted and undisputed position of the parties that the Respondent owes a debt to the Applicant, which despite being a Financial Debt, has been stated to be Operational Debt, by the Respondent.

- The Corporate Debtor has neither denied that fact that it received amounts from the Financial Creditor nor the fact that a default was committed in repayment of the said amount. It is therefore no more in dispute that the Corporate Debtor owed a debt to the Applicant and committed default in repaying the same.
- Further the Respondent also admits of its Reply that the entire amount spent by the Applicant as Financial Support / Assistance, in supporting the business of the Respondent was in the nature of 'unsecured debt' extended by the Applicant to the Respondent.
- That, in the facts of the present case, when the money disbursed is to be repaid with interest, there can be no doubt that such disbursement was made for time value of money and therefore would fall within the definition of Financial Debt under Section 5(8) of the IBC.

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- That, the Respondent also admits that under the BSA, the Applicant was obligated to financially support the Corporate Debtor by way of providing funds to manage the critical working capital requirements of the business of the Corporate Debtor. Moreover, the Respondent has nowhere denied that there are outstanding dues on its part, rather it seeks to shifts the liability from itself to its Promoters. In view of the aforesaid and admitted position of the Respondent, it is submitted that the parties are ad idem with respect to the financial support given by the Applicant to the Respondent and that there was default in repayment of the same thus resulting in outstanding dues to be recovered by the Applicant.
- The Applicant has sufficiently and satisfactorily contended and established that the Corporate Debtor owes a financial debt to the Applicant, which was extended to it under the Business Support Agreement as funds to manage the critical working capital requirement of the Corporate Debtor.
- It is further submitted that the law is settled that any such payment which has the commercial effect of borrowing would

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amount to financial debt and the fact that interest is applicable or not, would not have much bearing on the same. That the Applicant has relied on the Judgement of Hon'ble Supreme Court in the matter of *M/S Orator Marketing Pvt. Ltd. v/s M/S Samtex Desinz Pvt. Ltd [Civil Appeal No. 2231/2021],* in para 21, 22 and 31 considered the definition of financial debt under Section 5(8) of the IBC, which reads as: "a debt along with interest if any which is disbursed against the consideration of the time value of money and includes money borrowed against the payment of interest.", and observed that the term 'if any' could not have been intended to be otiose. Further that, the term 'if any' does not amount to a compulsion that a financial debt would only be owed when there is interest payable. Financial debt means outstanding principal due in respect of a loan and would also include interest thereon if any interest were payable thereon. If there is no interest payable on the loan, the outstanding principal would qualify as financial debt. Therefore, a financial debt includes any amount raised under any other transaction, having the commercial effect of borrowing.

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- The Hon'ble Supreme Court reiterated that the trigger for initiation of the CIRP by a Financial Creditor under Section 7 of the IBC is the occurrence of a default by the Corporate Debtor. 'Default' means non-payment of debt in whole or part when the debt has become due and payable and debt means a liability or obligation in respect of a claim which is due from any person and includes financial debt and operational debt. The definition of 'debt' is also expansive and the same includes inter alia financial debt. The definition of 'financial debt' in Section 5(8) of IBC does not expressly exclude an interest free loan. 'Financial Debt' would have to be construed to include interest-free loans advanced to finance the business operations of a corporate body.
- The Hon'ble NCLAT in judgment dated October 7, 2021 in the case of *Sach Marketing Pvt Ltd v/s RP of Mount Shivalik Industries Limited, Hon'ble NCLAT (New Delhi), Para 17, 18* observed that the Legislature has included any financial transaction in the definition of financial debt which are usually for a sum of money received today to be paid over a period of time in instalments or in a single payment in future. In order to constitute a financial debt in terms of Section 5(8)

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of IBC, the principal element is disbursal of money and has a commercial effect of borrowing.

- It is incorrect on part of the Corporate Debtor to state that the debt arising under the BSA is an operational debt, particularly when there is no mention of any good or service being rendered by the Corporate Debtor in lieu of such alleged operational debt. The terms of the BSA categorically records that the Applicant will provide financial support to the Corporate Debtor in the form of funds to manage critical working capital requirement of the Corporate Debtor.
- It is pertinent to note that the Corporate Debtor has failed to show any good or service being provided by the Applicant to the Corporate Debtor and has vaguely raised a baseless objection of the debt not being financial debt. The Corporate Debtor has also failed to show that there is no default on its part in repaying the financial debt.
- It is submitted that the financial debt was provided to the Corporate Debtor and the liability to repay the same is also on the Corporate Debtor, as is reflected from multiple clauses in the BSA and other agreements. Moreover, the Corporate Debtor has not once disputed that the amount as stated in

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the Application, was provided to it or the fact that it has failed to repay the same and thus committed default in terms of the code. These two facts are therefore admitted and undisputed.

- Therefore, in view of the aforesaid, it is submitted that Corporate Debtor and the Promoters are both jointly and severally liable and the same is also reflected from the mutually and willingly agreed upon provisions of the Finance Documents executed between the Applicant and the Corporate Debtor and its Promoters.
- It is submitted that the Corporate Debtor is trying to mislead the Hon'ble Tribunal by stating that the Applicant supplied any kind of raw material to the Corporate Debtor. The Applicant provided financial assistance to the Corporate Debtor which as per the BSA was to be used for procuring the raw material and completing the orders placed by customers.
- The very fact that the Applicant raised a debit note to the Corporate Debtor is evidence in itself that the Corporate Debtor owed a debt to the Applicant, which was being repaid by it in accordance with the terms of the BSA until it defaulted in its repayments.

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- The Applicant has placed on record of complete list of debit notes raised by the Applicant to the Corporate Debtor, which shows the payments received by the Applicant from the Corporate Debtor and the cost of material received by the Applicant from the Corporate Debtor. It is highlighted that the Applicant has only approached this Tribunal with respect to the amounts paid by the Applicant as financial support and does not seek any relief with respect to the disputes pertaining to material and other arrangements between the parties.
- The Applicant has provided a complete list of the invoices which form the basis of its claims. Moreover, the Corporate Debtor has no where denied the financial arrangement and the fact that it committed a default in making repayment of the financial assistance provided to it by the Applicant.
- It is therefore extremely inappropriate on part of the Respondent to make such blatantly false submissions before this Hon'ble Tribunal in utter disregard of the judicial propriety and practices. It is thus denied that the Applicant had any kind of supervisory or managerial role or any financial control over the bank accounts of CD, which it could

have utilised to ensure that no default is repayment is committed by the Corporate Debtor.

4. We have gone through written submission, documents on record filed by both the parties and arguments advanced by counsels of both the parties

5. Mere plain reading of the provision under section 7 of IBC and decision (supra) shows that in order to initiate CIRP under Section 7 the applicant is required to establish that there is a financial debt and that a default has been committed in respect of that financial debt. That while dealing with an application under section 7 the Adjudicating Authority is not required to consider the question of dispute between the parties as long as the 'debt' and 'default' is proved.

6. The Corporate Debtor has not disputed on the BSA entered into by the parties, the CD is alleging that the debt is not a "Financial Debt" and the liability is of the Promoters and not of the Corporate Debtor.

7. We have gone through the Business Support Agreement (BSA. The terms of the said BSA reflects that the nature of debt is financial in nature and has commercial effect of

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borrowing. The Corporate Debtor had failed repay the amount resultantly, committed default and in the case of *Innoventive Industries Ltd. v. ICICI Bank, (2018) 1 SCC 407,* the Hon'ble Supreme Court in para 28 has held that, "The moment the adjudicating authority is satisfied that a default has occurred, the Application must be admitted unless it is incomplete". The Financial Assistance has been provided to support the Corporate Debtor towards funding of Working capital requirement Whereas the funds provided to the Corporate Debtor were to be used by the CD inter alia for Working capital requirements including procuring of raw materials etc, the Applicant/ Financial Creditor himself has not provided goods or services to the CD. The Applicant has also annexed the relevant bank account statement with the application showing the payment disbursed to the Corporate Debtor.

8. In the light of the aforesaid facts, we find that the agreements executed between the Financial Creditor and the Corporate Debtor clearly substantiate the Financial Creditor's claim that the debt advanced is a Financial Debt and not an Operational Debt and subsequent development

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show that the Corporate Debtor has defaulted on repayment.

9. In light of the above discussion, after giving careful consideration to the entire matter, hearing the arguments of the parties and upon appreciation of the documents placed on record to substantiate the claim, this Tribunal **admits** this petition filed under section 7 of the Insolvency and Bankruptcy Code, 2016 and **initiates** CIRP on the Corporate Debtor with immediate effect.

10. Sub-section (3) (b) of Section 7 mandates the Financial Creditor to furnish the name of an Interim Resolution Professional. In compliance thereof the applicant has proposed the name of Mr. Kanti Mohan Rustogi, for appointment as Interim Resolution Professional having registration number IBBI/IPA-002/IPN00097/2017-18/10240 having an email id kanti.rustagi@patanjaliassociates.com.

11. Mr. Kanti Mohan Rustogi has agreed to accept the appointment as the Interim Resolution Professional and has signed a communication in Form 2 in terms of Rule 9(1) of

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the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 dated 25.10.2021. There is a declaration made by him that no disciplinary proceedings are pending against him in Insolvency and Bankruptcy Board of India or elsewhere. In addition, further necessary disclosures have been made by Mr. Kanti Mohan Rustogi as per the requirement of the IBBI Regulations. The Applicant has also placed on record the Certificate of Registration of the Insolvency Professional dated 25.05.2017. The Insolvency Professional has a valid Authorisation for Assignment which is valid till 27.02.2023. Accordingly, it is seen that the requirement of Section 7 (3) (b) of the Code has been satisfied.

12. It is thus seen that the *requirement of sub-section 5 (a) of Section 7 of the code* stands satisfied as default has occurred, the present application filed under Section 7 is complete, and as no disciplinary proceeding against the proposed IRP is pending.

13. We are satisfied that the present application is complete in all respect and the applicant financial creditor is entitled to claim its outstanding financial debt from the corporate

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debtor and that there has been default in payment of the financial debt.

14. As a sequel to the above discussion and in terms of Section 7 (5) (a) of the Code, the present application is admitted.

15. Mr. Kanti Mohan Rustogi, having registration number IBBI / IPA-002 / IPN00097/ 2017-18 /10240, with email - id kanti.rustagi@patanjaliassociates.com is appointed as the Interim Resolution Professional.

16. In pursuance of Section 13 (2) of the Code, we direct that public announcement shall be made by the Interim Resolution Professional immediately (3 days as prescribed by Explanation to Regulation 6(1) of the IBBI Regulations, 2016) with regard to admission of this application under Section 7 of the Insolvency & Bankruptcy Code, 2016.

17. We also declare moratorium in terms of Section 14 of the Code. The necessary consequences of imposing the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d) of the Code. Thus, the following prohibitions are imposed:

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"(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 of 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 right 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 under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 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."

18. It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government or the supply of the essential goods or services to the Corporate Debtor as may be specified, are not to be terminated or suspended or interrupted during the moratorium period. In addition, as per the Insolvency and Bankruptcy Code (Amendment) Act, 2018 which has come into force w.e.f. 06.06.2018, the provisions of moratorium

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shall not apply to the surety in a contract of guarantee to the corporate debtor in terms of Section 14 (3) (b) of the Code.

19. The Interim Resolution Professional shall perform all his functions contemplated, inter-alia, by Sections 15, 17, 18, 19, 20 & 21 of the Code and transact proceedings with utmost dedication, honesty and strictly in accordance with the provisions of the Code, Rules and Regulations. He shall file his report within 30 days before this bench.

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(RAHUL BHATNAGAR)
MEMBER (TECHNICAL)

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(P.S.N. PRASAD)
MEMBER (JUDICIAL)