

IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD
DIVISION BENCH
COURT - 1

ITEM No.301
TP/3(AHM)2023 in CP/470(HC)2016

Proceedings under Section 7 IBC

IN THE MATTER OF:

Nand Kishore Palaha & Anr
V/s
CMR Lifesciences Pvt Ltd

.....Applicant

.....Respondent

Order delivered on: 09/09/2024

Coram:

Mr. Shammi Khan, Hon'ble Member(J)
Mr. Sameer Kakar, Hon'ble Member(T)

PRESENT:

For the Applicant :
For the Respondent :

ORDER
(Hybrid Mode)

The case is fixed for pronouncement of the order. The order is pronounced in the open court, vide separate sheet.

- Sd -

SAMEER KAKAR
MEMBER (TECHNICAL)

- Sd -

SHAMMI KHAN
MEMBER (JUDICIAL)

**BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT-I, AHMEDABAD**

**TP/3/AHM/2023
In
CP No. 470 of 2016**

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

- 1. Nand Kishore Palaha**
- 2. Smt. Parveen Palaha**

Both residing at;
12, Aarohi Villa,
Nr. Sun City, Sardar Patel Ring Road,
Bopal, Ahmedabad-380058.

...APPLICANTS/FINANCIAL CREDITORS

VERSUS

CMR LIFESCIENCES PRIVATE LIMITED

U24230GJ2011PTC064445

Having its address at:
506/507, Matrix Tower,
Corporate Office Road,
Nr. Vadafone Tower, Satellite,
Ahmedabad-380015.

...RESPONDENT/CORPORATE DEBTOR

Order Pronounced On: 09.09.2024

C O R A M:

SH. SHAMMI KHAN, HON'BLE MEMBER (JUDICIAL)
SH. SAMEER KAKAR, HON'BLE MEMBER (TECHNICAL)

A P P E A R A N C E:

For the Applicant : Mr. Navin Pahwa, Sr. Advocate a/w.
: Mr. Ravi Pahwa, Advocate

For the Respondent : Mr. Saurabh Soparkar, Sr. Advocate a/w.
: Ms. Prutha Bhavsar, Advocate

ORDER
(PER: BENCH)

1. Originally, this application was filed before the Hon'ble High Court as Company Petition No. 470 of 2016. Hon'ble High Court vide order dated 26.11.2021 was pleased to transfer the same to this Tribunal.
2. This is an application filed by Applicants claiming to be Financial Creditors to initiate the Corporate Insolvency Resolution Process ("CIRP") in the matter of CMR Lifesciences Private Limited (Corporate Debtor) under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("IBC, 2016") read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiation of Corporate Insolvency Resolution Process (CIRP) against the Respondent/Corporate Debtor for having defaulted payment of its outstanding dues.
3. On perusal of Part-I of the Form-1, it is seen that the Applicants herein are individual persons having their residence at 12, Aarohi Villa, Near Sun City, Sardar Patel Ring Road, Bopal, Ahmedabad – 380058.

4. The affidavit in support of the application is affirmed by Shri Nand Kishore Palaha. The authorization letter issued by Applicant No. 2 Smt. Parveen Palaha authorizing the Applicant No. 1 i.e. Nand Kishore Palaha to file this petition is annexed as Annexure -A of the petition. Applicant No. 2 is wife of applicant No. 1.
5. On perusal of Part-II of the Form-1 reveals that the Corporate Debtor is CMR Lifesciences Private Limited. The Corporate Debtor was incorporated on 15.03.2011 with CIN: U24230GJ2011PTC064445. The registered office of the Corporate Debtor is situated at 506/507, Matrix Tower, Corporate Office Road, Nr. Vadafone Tower, Satellite, Ahmedabad-380015.
6. On perusal of Part-III of the Form-1 reveals that Financial Creditors have named IP **Mr. Sunilkumar Kabra**, having Registration No. IBBI/IPA/-001/IP-P01011/2017-18/11662 under section 13 (1)(c) of the Code to act as Interim Resolution Professional (**IRP**). Form 2 has been filed along with Authorisation for Assignment (AFA). The AFA is valid till 29.11.2024.

7. Perusal of Part-IV indicates total amount of debt granted Rs.4,65,56,970/- (Rs. 1,74,90,000/- Principal + Rs. 2,90,66,970/- towards interest @12% p.a. calculated upto 30.11.2022).
8. It is stated that the Applicant No. 1 is qualified B.Sc (Hons), MBA and the Applicant No. 2 is a qualified M.A. due to the vast experience and professional qualifications, the Corporate Debtor approached the applicant no.1 for being appointed as President of the Company and after some discussions, the applicant no.1 came to be appointed as the President of the Company w.e.f. 1.1.2013 and to that effect letter of appointment dated 1.1.2013 came to be issued to the applicant no.1. The applicants were requested by the respondent company to bring in funds as unsecured loan in the Company. The applicants accordingly advanced unsecured loan to the tune of 1,75,53,781/- jointly on various dates. (The applicant no.1 advanced Rs. 1,15,40,000, while the applicant no.2 advanced Rs. 59,50,000 as unsecured loan to respondent company). Copy of bank statement of applicant no.1 as well as applicant no.2 is annexed as Annexure D & E respectively.

9. It is stated that the applicants have received letters from the respondent company acknowledging receipts of the unsecured loans from the applicants. The letters sent by the respondent company also acknowledged the liability of the respondent company to pay interest and the rate thereof on the unsecured loans advanced by the applicants.
10. It is stated that during the meeting dated 14.2.2016 held between the applicants and the Directors of the respondent company, the respondent company gave a statement containing particulars of the unsecured loan advanced by various persons to the respondent company. The statement particulars as contains on 31.1.2016. As per this statement, the respondent company acknowledged an amount of Rs. 59,97,761/ in favour of applicant no.2 and an amount of Rs. 1,15,56,020/- in favour of applicant no.1 towards unsecured loan.
11. It is established from the letters addressed by the respondent company to the applicants, the respondent company agreed to pay interest @ 12% p.a. on the amount

of unsecured loan advanced by the applicants to the respondent company.

12. The respondent company paid interest @ 12% p.a. on the unsecured loans advanced by the applicant no.2 upto 31.3.2014 after which no interest was paid. The applicant no.2 therefore is entitled to interest @ 12% p.a. from 31.3.2014 to 30.11.2022. The respondent did not pay any interest amount on the unsecured loans advanced by the applicant no.1, the applicant no.1 therefore is entitled to interest @ 12% p.a. from 31.3.2014 to 30.11.2022. The applicants however learned that the respondent company had credited the amount of interest on the unsecured loans advanced by the applicants in its books. On receipt of a ledger account of interest unsecured on the loan maintained in the books of account of the respondent so far as the applicant no.2 is concerned. As per the ledger account as on 31.3.2016, the respondent company has acknowledged outstanding interest amount of Rs. 5,77,743/-.
13. On account of several defaults committed by the respondent company and so also on account of various

irregularities being committed by the respondent company in relation to its affairs, the applicant no.1 was left with no option but to resign from all the posts of the respondent company w.e.f. March 2015.

14. It is stated that instead of settling the legitimate dues of the applicants, respondent addressed an email dated 9.2.2016 to the applicant no.1 making frivolous allegations. The respondent however stated that the points mentioned in the email dated 9.2.2016 will be discussed in the meeting 14.2.2016 which was scheduled between applicant no.1 and the Directors of respondent company.
15. Accordingly, meeting came to be held on 14.2.2016 between the applicant no.1 and the directors of the respondent company wherein various statements including statements acknowledging the outstanding amount of unsecured loan, outstanding amount of salary, ledger account of the Company in relation to the car which was given to the applicant no.1 were given by the respondent company to the applicant no.1. The respondent company assured that the dues of the applicants will be settled shortly and the

applicants will also be furnished all other relevant statements shortly.

16. It is stated that in spite of above assurance, the respondent neither made any payment to the applicants nor provide further particulars and statements as promised by it.
17. The applicant no.1 in the meanwhile gave its response to the email dated 9.2.2016 by sending an email dated 12.2.2016 to the respondent. The applicants thereafter received a legal notice dated 28.4.2016 from the respondent, wherein once again the respondent raised frivolous claims against the applicants, to which detailed reply dated 22.6.2016 was issued by the applicant through his advocates to the legal notice dated 28.4.2016 of the respondent and applicant has issued legal notice dated 12.7.2016 to the respondent calling upon the respondent to make payment of Rs. 2,95,76,349/- towards various heads.
18. It is stated that applicants have received reply dated 28.7.2016 from Advocate on behalf of the respondent. A perusal of the reply of the respondent company would show that most of the claims made by the applicants were

admitted by the respondent company. In response to the reply dated 28.7.2016 of the respondent, the applicants sent a detailed response vide letter dated 9.8.2016 through their advocates wherein, applicants reiterated the demand of applicants as contained in the notice dated 12.7.2016 and once again called upon the respondent to pay the outstanding dues, failing which it was stated that the applicants would initiate appropriate action against the respondent to which there was no response from the respondent company nor paid any amount to the applicants.

19. The amount claimed to be in default is Rs. 4,65,56,970/- (Including interest @12% p.a.) as on 30.11.2022.
20. The applicant thereafter filed Company Petition No. 470 of 2016, which was presented on 04.10.2016 and registered on 17.10.2016 with Hon'ble High Court of Gujarat.
21. It is stated that the Corporate Debtor defaulted on 31.03.2015. Copy of computation of outstanding amount including interest due and payable to applicant no.1 and 2 is annexed at Annexure- F1 & F2 respectively.

22. The Financial Creditor is relying on the following documents:-

1. Copy of master data of Respondent Company, a copy of which is annexed as Annexure-I;
2. Copy of the statement as given by the company to the Applicant no.1 in the meeting held on 14.2.2016, a copy of which is annexed as Annexure-J;
3. Copy of the email dated 9.2.2016 addressed by the company to the Applicant no.1, a copy of which is annexed as Annexure-K;
4. Copy of the email dated 12.2.2016 sent by the Applicant no.1 to the Company, a copy of which is annexed as Annexure-L;
5. Copy of the legal notice dated 28.4.2016 received from the Company, a copy of which is annexed as Annexure-M.
6. Copy of the reply dated 22.6.2016 sent by Applicant no.1 to the Company, a copy of which is annexed as Annexure-N;
7. Copy of the notice dated 12.7.2016 issued by Financial Creditors to Company, a copy of which is annexed as Annexure-O;
8. Copy of the notice dated 28.7.2016 received from the Company through its advocate, a copy of which is annexed as Annexure-P;
9. Copy of the notice dated 9.8.2016 issued on behalf of Financial Creditors to Company, a copy of which is annexed as Annexure-Q;
10. Copy of memo of Company Petition No.470 of 2016 filed before the Hon'ble High Court of Gujarat along with the copy of reply filed by Corporate Debtor and rejoinder thereof filed by the Financial Creditors, a copy of which is annexed as Annexure-R;
11. Copy of order dated 26.11.2021 passed by the Hon'ble (High Court of Gujarat in Company Petition

No.470 of 2016, a copy of which is annexed as Annexure-S;

23. Reply was filed by the Corporate Debtor on 27.06.2023 vide inward diary No. 2320, which is affirmed by one Mr. Chimanbhai Patel, Head of Finance of the Respondent and to that effect a board resolution dated 16.04.2024 is annexed with the reply at Annexure – A.
24. It is stated that since it was Applicant No. 1 and Mr. Mandlia (one of the founder director) who were at the helm of the affairs of the respondent, all major decision including sourcing of funds and terms and conditions were undertaken by Applicant No. 1 thus, acting as de facto directors.
25. It is stated that on the basis of investments from multiple investors in the form of purchase of shares and unsecured loans, separate memorandum of understandings was entered into with such investors and the same were signed by the founder directors- namely Applicant No. 2 and Mrs. Mandlia.
26. It is stated that in and around October, 2012, Applicant No. 1 and Mr. Manish Mandlia were removed from Intas

Pharmaceuticals Ltd. In January, 2013, Applicant No. 1 and Mrs. Mandlia appointed the Applicants and Mr. Manish Mandlia as the Director and Additional Director of the Respondent respectively and also designated as President and Vice President respectively. It is further stated that Intas Pharmaceuticals Ltd. initiated criminal proceedings against Applicant No. 1 and for the purpose of defending the criminal prosecution, Applicant No. 1 engaged and consulted legal counsel and the fees towards the same was paid from the Respondent's account.

27. It is further stated that the Applicants were drawing excessive remuneration to the tune of Rs. 48,82,000/- from the Respondent even before the Respondent commenced its operations. As per the terms and conditions of the MoU, Applicant No. 1 and Mr. Manish Mandlia were entitled to a 20% hike of their salary paid by Intas Pharmaceuticals Ltd. in the Respondent. However, when they joined the Respondent and because their respective wives were in the management of the respondent, they took remuneration equivalent to 45% which was in clear breach of the terms and conditions of the MoU. Thus, an excess amount of Rs.

48,82,214/- has been paid towards remuneration to Applicant No.1 for the period from January-2013 to October-2014. It is further stated that due to excess payment of remuneration, the Respondent also had to pay excess TDS and PF in excess to the tune of Rs. 12.59 lakhs.

28. On 20.10.2013, after resignation of Applicant No. 2 and Mrs. Mandlia from the Respondent, the composition of the Board with effect from 01.11.2013 was as under:

- i. Mr. Nand Kishore Pahala
- ii. Mr. Manish Mandlia
- iii. Mr Navin Chandra Mishra
- iv. Dr. Deodatta Chafekar

It is pertinent to mention that Applicant No. 1 was in charge of all the financial decisions of the Respondent including but not limited to operation of banks accounts of the Respondent and signing of cheques on behalf of the Respondent.

29. It is pertinent to mention that during Applicant No.1's tenure of directorship, Applicant No. 1 was engaged in serious financial mismanagement and embezzlement of funds of the Respondent such as appointment of personnel

for managing the Respondent's godown without taking any security deposit, hiring known workers and employees and paying them extra ordinary salaries, splurging money on conferences and training of employees as a result of which respondent faced deficit of almost Rs. 9 Crores during the nascent stage. The relevant documents are annexed as Annexure B to this reply.

30. When such unnecessary expenses and financial mismanagement was informed by the Finance and Accounts Manager to the shareholders and other concerned persons of the Respondent, Applicant No. 1 in order to show sales growth to the investors caused the products to be indented to the stockist without actual sales to the end customers. In absence of actual retail sales, the products remained with the stockists and ultimately got expired. Consequently, the stockists returned the expired material and the Respondent had to issue credit notes amounting to approx. Rs. 64 lakhs to different stockists.

31. In view to take stock of the financial situation and in view of the several queries raised by the investors, the Board of Directors decided to hold a meeting on 16.03.2014 at 9.30

a.m. and the agenda for the said meeting was circulated. As the shareholders and investors were rightfully raising issues regarding the management of the Respondent, it was decided that all 9 major investors would be appointed as directors of the Respondent.

32. It is stated that thereafter, with a view of reconcile the accounts of the Respondent, the investors and other directors of the Respondent decided to implement several reforms such as reduction in salary of Applicant No. 1 as well as Mr. Mandlia, revision in the terms and conditions of the MoU, change in the manager of the godown, etc.

33. It is stated that thereafter, in the board meeting dated 31.08.2014, several important decisions were taken including decision of the salary payable to Applicant No. 1 and Mr. Mandlia. It was further decided that since the respondent is not in a position to make payment of unsecured loans to the investors, it was proposed to convert such loans into equity shares and Applicant no. 1 was authorized to take necessary steps towards the same. It is stated that in the said meeting, it was resolved that the

remuneration of Applicant no. 1 would be reduced to Rs. 50,000/-.

34. It is stated that thereafter, despite existence of multiple methods to infuse funds into the Respondent, Applicant No. 1 unilaterally and purportedly decided to infuse funds into the Respondent thereby rejecting other reforms of infusing funds with the sole objective of withdrawing the said funds at a higher rate by applying interest at the rate of 12% since it was Applicant No. 1 who was authorized to sign cheques towards the same. From the ledger attached with this reply, it is also noticed that Applicant No. 1 by drawing excess remuneration was infusing funds in the form of directorial loan carrying 12% interest and the said funds were withdrawn at the behest of Applicant No. 1 according to his whims and fancies. It is further submitted that at no point in time, Applicants provided reason as to why the said loan is required and that to at such a high rate of interest.

35. Assuming while denying that the funds were bought into by the Applicant, it is stated that there was no appropriate consent of the Board of the Respondent or the investors to

undertake the liability of taking and repaying such Director's Loan at the stated rate of interest.

36. Slowly and gradually, the investors and other directors of the Respondent started resigning on witnessing that Applicant No. 1 was conducting the affairs of the Respondent on his own sweet will thereby causing grave losses as a result of poor managerial and decision-making skills.
37. It is stated that thereafter, the Applicant unilaterally and without the consent of the appointed directors of the Respondent called for a board meeting vide notice for board meeting dated 31.01.2015 for a meeting scheduled to be held on 08.02.2015 wherein the agenda pertained to discussions affecting the financial status/structure of the company including allotment of equity shares, infusion of equity by investors, cash credit limit from bank, etc. To the said notice, the Director of Respondent- Shri Navin Mishra issued legal notice dated 05.02.2015 raising objections. A copy of the notice dated 05.02.2015 is placed at Annexure-C to the reply.

38. Realizing that there were no more funds and the deteriorating position of the Respondent, Applicant No. 1 resigned from the Respondent on 01.04.2015 leaving the Respondent in deep shackles of debt.
39. It is stated that at the time of resignation of Applicant No. 1, huge liabilities statutory as well as non-statutory were standing in the books of the Respondent and salaries of several employees remained unpaid.
40. It is stated that thereafter, Applicant No. 1 had realised that it was not possible to run the Respondent Company in its current state, he conveniently resigned as director of the Respondent w.e.f. 28.04.2015. Due to the emergent situation of resignation of one of the last two directors, the remaining director who was interested in the survival of the Respondent in the interest and to the benefit of all stake holders, appointed Dr. Deodatta Chafekar as the Additional Director in the Board of Directors meeting held on 29.04.2015.
41. Thereafter, on 17.05.2015, a meeting of board of directors of the Respondent was called wherein several crucial

decisions such as settlement of immediate liabilities or statutory dues, payment to vendors, etc. It was further resolved that necessary adjustments, deduction and entries be passed in the books of accounts to give effect to the Resolutions.

42. In furtherance of the Applicant's oblique and extortionate motive the Applicant issued legal notices to the Respondent dated 12.07.2016 claiming a purported debt of Rs. 2,95,76,349/-. To the said notice, the Respondent replied vide reply dated 28.07.2016 stated that the claim of the Applicants is illegal and not called for given the fact that Applicants were the reason that the Respondent had incurred huge amount of debt. To the said reply, the Applicants issued reply dated 09.08.2016 wherein the Applicants made a futile attempt to justify their hollow claims.

43. Following preliminary objections were raised in the reply are as under:-

- (a) The Applicants are not financial creditors and there is no financial debt as defined under Section 5 (7) and 5 (8) of the IB Code, 2016.

- (b) The present petition has been filed for recovery and not for resolution of the respondent.
- (c) Respondent is profit-making company, which was loss-making company due to ill management of the Applicant.
- (d) The claim of the Applicant is time barred.
- (e) The amount claimed by the respondent is to the tune of Rs. 5,09,73,326/- due and payable by the Applicant no. 1 and the same is greater than the amount claimed by the Applicant.

44. Rejoinder was filed by the applicant under diary No. 2506 dated 10.07.2023, the certain point in rejoinder are as below.

- (i) Respondent has not denied the unsecured loan obtained through the Applicant.
- (ii) No allegation can be raised in the present petition, which is under Section 7 of the IB Code as per the settle law laid by Hon'ble Supreme Court. The Tribunal has to see only debt, default and limitation.
- (iii) None of the preliminary objections has been raised are tenable in the eyes of law.

- (iv) There is financial debt advanced by the Applicant in terms of Section 5 (7) and 8 of IB Code which is in default.
- (v) Present petition is not filed for recovery.
- (vi) The present petition is within limitation as winding up petition was filed before the Hon'ble High Court in the year 2016 whereas the default has occurred on 31.03.2015.
- (vii) It is stated that Hon'ble High Court has specifically held in order dated 26.11.2021 that the Tribunal would do the needful in accordance with law to proceed with the matter from the stage it is transferred. Thus, present petition is a transfer petition is continuation of the original proceedings which were pending before the Hon'ble High Court.

45. Written submission of the Applicant was filed under diary No. 4032 dated 13.05.2024 and convenience compilation was submitted on the same date under same diary number.

46. In the written submission, Applicant states as under:

Submissions:

- 1. It is the case of Corporate Debtor that there is no unsecured loan disbursed by the Applicants to the Corporate Debtor as***

the letter of acknowledgement of the Corporate Debtor was signed by the Applicant no.1 himself as Director.

Response

- a) The said contention of Corporate Debtor is misconceived in as much as firstly, the then Board of Directors of the Corporate Debtor had authorized the Applicant no.1 to do all acts and deeds on behalf of Corporate Debtor. In fact, the Board Resolutions of the Corporate Debtor (Pg. 457 of reply) placed by it with the Reply Affidavit would reveal that the Board of Directors authorized the Applicant no.1 to execute and enter into various agreements with various parties on behalf of the Corporate Debtor. In the Board Meeting dated 12.10.2014, the financial responsibility was also fixed on Applicant no.1 and one Mr. Manish Mandila to look after the day to day affairs of the Corporate Debtor. Therefore, the Board of Directors had always authorized the Applicant no.1 to act on behalf of the Corporate Debtor and sign agreements, etc. with various vendors. The Applicant no.1 was also entrusted to look after the day to day affairs of the Company and he was also entrusted with the duty of looking after the financial transaction of the Corporate Debtor of his zone.
- b) It is surprising to note that though the Corporate Debtor now refuses to accept that unsecured loan was advanced by the Applicants, but in the Board Meeting held on 12.10.2014 (Pg.452 of Reply), it is clearly resolved as under-

"Mr. Nand Kishore Palaha, Director of the Company, placed before the Board that in view of the fund requirements of the Company, loans from directors may be taken at the simple rate of interest of 12% per annum. The Board discussed the item in detail and passed the following resolution unanimously-

"RESOLVED UNANIMOUSLY THAT pursuant to Memorandum and Articles of Association, and according to the provisions of the Companies Act, 2013, loan from directors in the Company be and are hereby approved at a simple rate of interest of 12% per annum.

FURTHER RESOLVED THAT the said loan shall be utilized for the zone of respective person i.e. Mr. Nand Kishore Palaha and Mr. Manish Mandila, who has borrowed the funds for his zone and any such act, thing and deed shall, be treated to be done for and on behalf of the Company"

Thus, it is clear that the Board of Directors had always known about the said unsecured loan disbursed by the Applicants. However, this contention is now taken as an afterthought just to mislead this Hon'ble Tribunal.

- c) On the very same day i.e. 12.10.2014, the Board of Respondent Company authorized the Applicant no.1 and Mr. Mandila to borrow money for their own Zone. Thus, it is clear that the Board had always authorized the Directors to infuse money for the working capital requirements of the Corporate Debtor.*
- d) In fact, in the Board Meeting held on 11.5.2014 [Pg. 442/449 @ 448 of Reply), the Board unanimously authorized the Applicant no.1 to operate all the bank accounts of the Corporate Debtor. Therefore, the reply of the Corporate Debtor is an afterthought in as much as a perusal of the Board Resolutions placed by the Corporate Debtor itself would reveal that the Applicant no.1 was always authorized to act on behalf of the Corporate Debtor. It is only after the Applicant no. 1 resigned from the Board is when the other directors started harassing the Applicant no.1.*
- e) it is to state that the Corporate Debtor through its advocate in the Reply to the Recall Notice (Pg.97-108) has stated as under:-*

"6 Finally you contributed the unsecured loan being amount of Rs. 1.15 Crores from account of yourself and your wife at the interest of 12% p.a. despite the fact that the Company was getting the said amount @ 10% p.a. from other sources. Thus, you have deliberately created a liability and loss of the Company for your own benefit."

- f) This statement made by the Corporate Debtor through its advocate is an acknowledgment of debt by the*

Corporate Debtor itself. It is clear that the only dispute raised in the Reply to Recall Notice is that the Applicant no.1 could have got unsecured loan @ 10% p.a. from third parties, whereas Applicant no.1 himself infused the funds @ 12% p.a. So the dispute was only with respect to rate of interest and not the disbursement of principal debt. Therefore, the contention of the Corporate Debtor that no unsecured loan was disbursed is completely misleading. Even otherwise, the Applicants have annexed their respective bank statements (Pg.19/36 of petition) with the petition to show disbursement of unsecured loan.

g) The contention of Corporate Debtor that as the Applicant no.1 has himself signed the acknowledgment letters, the same cannot be accepted is concerned, the said contention is raised for the first time before this Hon'ble Tribunal. This contention is neither raised in the Civil Suit filed by Corporate Debtor against the Applicants nor in various correspondences addressed by the Corporate Debtor to the Applicants. Therefore, it is not open for the Corporate Debtor to raise this contention at this stage as the letters are of the year 2013 and it is not open for the Corporate Debtor to raise any grievance regarding those letters in the year 2024 and that too before this Hon'ble Tribunal.

h) The Corporate Debtor has raised false issue of forged documents and siphoning of funds because if such allegations were true, the remedy would have been to initiate criminal action against the Applicants. Having not done so, it is not open for the Corporate Debtor raise any grievance of forgery. This would reveal that the grievance of forgery is raised only with a view to wriggle out from the liabilities of the Corporate Debtor. The fact that the Corporate Debtor made no efforts to list the suit before this Hon'ble Tribunal which was pending before the Registry of this Hon'ble Tribunal for almost 4 years would reveal that all these allegations of forgery, siphoning of funds, etc. only afterthought and there is actually no substance in such allegations.

2. The second objection of Corporate Debtor is that the Corporate Debtor had filed a civil suit before the City Civil Court, Ahmedabad against the Applicants.

Response

- a.** This contention of Corporate Debtor is misconceived in as much as the suit was filed in the year 2017 whereas the present petition was filed before the Hon'ble High Court of Gujarat in the year 2016 i.e. one year before filing of the civil suit. The Civil Suit is filed by Corporate Debtor just as a counter blast to the petition filed by the Applicants.
- b.** Even otherwise, the suit was transferred by City Civil Court, Ahmedabad to this Hon'ble Tribunal on 18.2.2019. The Corporate Debtor did not take any steps for a period of 4 years. It was only when the petition was transferred from the Hon'ble High Court to this Hon'ble Tribunal, is when the Corporate Debtor took steps for listing of their suit. This makes it clear that the Corporate Debtor was never interested in pursuing its suit. This fact is recorded by this Hon'ble Tribunal in its order dated 4.12.2023 passed in the present petition. This Hon'ble Tribunal has recorded that though the civil court transferred the suit on 18.2.2019, the Corporate Debtor had made an application to the Registrar of this Hon'ble Tribunal for listing the suit for the first time only on 27.5.2023 and then on 14.6.2023. It was further observed by this Hon'ble Tribunal that no steps were taken by the Corporate Debtor for listing of this suit for a period of almost 4 years. This shows that the Corporate Debtor filed the suit only for delaying the hearing of present petition. Therefore, the submission of pendency of civil suit is misconceived and may not be accepted by this Hon'ble Tribunal.
- c.** Even otherwise, the contents of the civil suit and the contents of the present petition are completely different and the Corporate Debtor is trying to mislead this Hon'ble Tribunal by mixing the issues of both these litigations.
- d.** It is settled law that no set-off can be allowed until and unless the Counter Claim is adjudicated by a competent forum. In the facts of the present case, the so-called misconceived suit is not adjudicated by any court and an amount of Rs. 4,34,38,539/- is a fictitious amount arrived at by the Corporate Debtor. Even otherwise, the Corporate Debtor kept the so-called suit pending before this Hon'ble Tribunal for a period of 4 years and therefore, the Corporate Debtor cannot rely upon the pendency of the said suit.

3. From the facts and documents on record, it is clear that there is financial debt which is disbursed by Applicants to Corporate Debtor. The financial debt is disbursed for consideration of time value of money which is in default. It is settled law that in a section 7 petition, the Hon'ble Tribunal has only to see debt and default and nothing beyond. In the present case, there is debt and default and the amount of unsecured loan was disbursed debt as that against the consideration for time value of money. The transaction has commercial effect of borrowing and therefore, the present debt is a financial debt as per Sec.5(8) of the IBC. Therefore, the present petition is required to be admitted by this Hon'ble Tribunal.

4. The Hon'ble Supreme Court in the case of Orator Marketing Pvt Ltd. vs. Samtex Desinz Pvt. Ltd., reported at 2021 SCC Online SC 513 has held as under:

"29. In JaypeeInfratech Ltd. (supra), the debts in question were in the form of third-party security, given by the Corporate Debtor to secure loans and advances obtained a third party from the Respondent Lender' and, therefore, held not to be a financial debt within the meaning of Section 5(8) of the IBC. There was no occasion for this Court to consider the status of a term loan advanced to meet the working capital requirements of the Corporate Debtor, which did not carry interest. Having regard to the Aims, Objects and Scheme of the IBC, there is no discernible reason, why a term loan to meet the financial requirements of a Corporate Debtor for its operation, which obviously has the commercial effect of borrowing, should be excluded from the purview of a financial debt."

Thus, it is clear that a financial debt also includes a debt which is disbursed to meet the financial requirements of a Corporate Debtor which has the commercial effect of borrowings. In the facts of the present case, the Applicants advanced unsecured loan to the Corporate Debtor to enable the Corporate Debtor to meet with its working capital requirements and therefore, the unsecured loan advanced by the Applicants is covered within the

Thus, it is clear that once the Applicant is able to demonstrate that there is a debt which is due and payable, which amounts to default, then the petition deserves admission.

6. The above judgment of the Hon'ble Supreme Court was followed by the Hon'ble National Company Law Appellate Tribunal in the case of Shweta Sharma v. SREI Equipment Finance Limited and others, in Company Appeal (AT) (Ins) No.370 of 2024, wherein it is held as under:-

"16. From the above facts, it is clear that debt and default is fully established and even if the arbitral award dated 04.02.2020 is not taken into consideration the debt and default is proved on the part of the Corporate Debtor. We may refer to the judgment of the Hon'ble Supreme Court in "M. Suresh Kumar Reddy vs. Canara Bank and Ors. (2023) 8 SCC 387" where the Hon'ble Supreme Court after noticing the earlier judgments had held that when debt and default is proved, the Adjudicating Authority has to admit the application unless it is incomplete....."

Thus, it is clear that when there is a debt and default, the petition has to be admitted.

Judgments

1. 2021 SCC Online SC 513

Orator Marketing Pvt. Ltd. vs. SamtexDesinz Pvt. Ltd.

2. (2023) 8 SCC 387

M. Suresh Kumar Reddy Vs. Canara Bank &Ors.

3. 2018 SCC Online NCLAT 412

Rajesh Gupta vs. Dinesh Chand Jain

4. 2019 SCC Online NCLAT 52

ShaileshSangani vs. Joel Cardoso and Anr.

5. Company Appeal (AT) (Ins) No.370 of 2024

Shweta Sharma vs. SREI Equipment Finance Limited and others.

7. In view of what is stated hereinabove, the Applicants pray this Hon'ble Tribunal to allow this petition, as prayed for.

47. Respondent has filed written synopsis under diary No. 4009 dated 10.05.2024. In its submissions, the respondent states as under:

A. Legal submissions

I. Claim of Applicant No. 2- pre mature

- i. **Ref MoU signed on 06.10.2012- Pg 1 to 14 of convenience compilation-** Clause J(1)(iii)- unsecured loans for a period of 5 years and payable by R company in the 6th year in two instalments.
- ii. Petition before the High Court filed on 01.10.2016
- iii. Thus, the claim of Applicant is pre-mature and no debt had arisen in respect of Applicant No. 2 as on the date of filing of the petition before the Hon'ble High Court.

II. No debt payable to Applicant No. 1

- i. P has placed on record acknowledgement letters at **Ann H Pg 46-63.**
- ii. Letter dated 08.12.2023 (**Pg 46**), no board resolution for obtaining loans.
- iii. Interest at the rate of 12% not agreed upon as on 08.12.2013.
- iv. Unsigned letters- **Pg 56-59**
- v. Forged documents – Official address of the company changed by way of Board Resolution dated 11.05.2014 however the acknowledgement is on the letterhead based on new address at page 46- **Pg 46 rw Pg 249**
- vi. Applicant were in charge of management and affairs of the respondent at the time when purported debt was granted by respondent to Applicant.
- vii. Applicant in behalf of respondent signed consent for obtaining loan from Applicant no.1 himself along with unlawful interest.
- viii. Conditions of a valid contract. Refer to Sections 10 and 11 of the Indian Contract Act.

- ix. **Application of the principle of piercing of corporate veil.**
- x. Applicant were withdrawing money from respondent under guise of repayment of loan. Therefore, no existence of financial debt as u/s 5(8) of IBC 2016.
- xi. **Concept of corporate entity was evolved to encourage & promote trade & commerce but not to commit illegalities or to default.**
- xii. Lifting of corporate veil required in the present case (Pg 150 Pr iv, v Reply)
- xiii. **When corporate character is employed for purpose for purpose of committing illegality or for defrauding others, the court would ignore corporate character & would look at reality so as to enable it to pass appropriate orders to impart justice.**
- xiv. As per the established principal of law Applicant cannot be deemed to be financial creditor as defined u/s 5(7) of IBC 2016.
- xv. **Pr 26,29,30,32,34 - Shree Sulphurics Private Limited vs. C M Smith and Sons Ltd. NCLT- Ahmedabad**
- xvi. **Pr 48,51 Phoenix Arc Private Limited vs. Spade Financial Services (2021) 3 SCC 475**
- xvii. **Paragraph 4,5,14,23,24 and 27 of Earth Gracia Buildcon Pvt. Ltd. vs. Earth Infrastructure Ltd. (08.06.2021 - NCLAT)**
- xviii. **Paragraph 24-26- Gp. Capt Atul Jain vs. Hospital Pvt Ltd. and Ors. NCLAT- 27.07.2023**
- xix. Financial mismanagement and embezzlement of funds by P1 (Pg 142 Pr h - Reply)
- a. P1 in order to show sales growth to investors caused the products to be indented to the stockists without actual sales to the end customers. Absence of actual retail sales, products remained with the stockists and got expired. Products returns to the R. R had to issue credit notes of Rs. 64 lakhs (143 Pr I - Reply) (Pg 131-132 Pr 8.51 HC)

- b. *Financial transaction- siphoning off of funds from the R and misappropriating the same towards personal expenses/consideration. P abused his position by creating layers of transaction being on both sides of the contract for sole personal benefit. (Pg 156 Pr 11- Reply)*
- c. *Funds of the company including unsecured loans and share capital entirely used up by P1 (Pg 126-127 Pr 8.41 High Court records)*
- iv. *Excess remuneration to the tune of Rs. 48,82,000/- from Respondent before Respondent commenced its operation. (Pg 141 Pr f- Reply)*
- a. *P1 entitled to 20% hike however took remuneration equivalent to 45%- clear breach of the terms and conditions of MoU. (Pg 141-142 Pr f - Reply)*
- b. *Board meeting- 31.08.2014- resolved that remuneration of P1 would be reduced to Rs. 50,000/- (Pg 144 Pr 1 Reply NCLT)*
- c. *Salary taken by P1: Rs. 1,52,60,004/- p.a. (Ref: Pg 45)*
- v. *P1 unilaterally decided to infuse the funds rejecting other forms of infusing funds with the sole objective of withdrawing the said funds at a higher rate by applying interest at the rate of 12%. No reason as to why loan is required. Funds withdrawn at his own whims and fancies (Pg 144 Pr m Reply)*
- a. *P on behalf of Respondent would sign consent for obtaining the loan from himself. (Pg 150 Pr ii Reply) Acknowledgement letters- Pg 46-63 Ann H*
- b. *P withdrawing money from R under the guise of repayment of loan. (Pg 150 Pr iii Reply) (Ledger: Pg 619-621 Ann K Reply)*
- c. *Entries made in the books of the accounts of the*

company as per instructions of P1 when he was in charge of management. **(Pg 155 Pr 9 Reply) (Pg 156 Pr 12 Reply)**

vi. No consent of board of respondent/investors to undertake liability of taking and repaying director's loan at the stated rate of interest **(Pg 144-145 Pr n Reply)**

vii. At the time of resignation of P1, huge liabilities- statutory and non-statutory were standing in the books of the Respondent. P1 resigned w.e.f. 28.04.2015 **(Pg 145-146 Pr s Reply)**

III. **Applicant are not financial creditors & no financial debt as defined u/s 5(7) & 5(8) of IBC 2016. (Pg 149-150)**

i. Applicant filed petition and has raised claim only to pre-empt legal action against him for financial mismanagement and breach of fiduciary duties and as counter blast. **(Pg 154-155 Pr 8 Reply)**

ii. Financials of R- **Pg 774-** Liability towards P as Contingent liability

Contingent Liability- AS 79- 10.4 A contingent liability is: (a) a possible obligation that arises from past events and the existence of which will be confirmed only by the occurrence or non- occurrence of one or more uncertain future events not wholly within the control of the enterprise; or (b) a present obligation that arises from past events but is not recognised because: (i) it is not probable that an outflow of resources embodying economic benefits will be required to settle the obligation; or (ii) a reliable estimate of the amount of the obligation cannot be made.

iii. **Paragraph VI- Priyaraj Electronics Limited vs.**

Motorola India (Private) Limited CP No. 17 of 2006. (P&H High Court)

iv. **R company is Profit making (Pg 778)**

IV. Petition has been filed for recovery & not for resolution of respondent. (Pg 150-151)

- i. *Petition preferred by Applicant is for sole purpose of recovery & not for resolution of respondent & same is evident from legal notice dt. 12.07.2016 & 09.08.2016.*
- ii. *Evident from notice dt. 12.07.2016- Claim is majorly towards outstanding salary, interest & determination of WDV of fortuner Car bearing registration no. GJ-01-RB-8343.*
- iii. *Object of IBC 2016 is resolution of companies, petition is filed for recovery & extortion is not maintainable & this authority u/s 65 of IBC 2016 be pleased to impose penalty on Applicant for preferring present petition.*

V. Respondent is profit making company. Pg 151

- i. *Present management has turned respondent into profit making company which was loss- making due to ill management of Applicant. (Ann I 610-611)*
- ii. *It is held by Hon'ble Apex Court as well as various other tribunals & court in India that Adjudicating Authority has consider matters of financial health & viability of CD before initiating CIRP of CD.*
- iii. *Respondent is profit-making entity & claim is malafide & filed for sole purpose of harassing respondent.*
- iv. **Pr 59 Vidharbha Industries vs Axis Bank Limited 2022 SCC OnLine SC 841**

VI. Civil Suit filed by R against Applicants ought to be determined together.

- i. **SPCS no. 193 of 2017** before Hon'ble Principal Civil Judge Ahmedabad at Mirzapur for claim of Rs.5,09,73,326/- inclusive of interest at 12% till date because Applicant as directors caused misappropriation of funds leading to loss to the tune of Rs. 4,34,38,539/- to respondent.
 - ii. **Set off/counter claim permitted: Vidharbha Industries vs Axis Bank Limited 2022 SCC OnLine SC 841**
 - iii. **Pr 17.8, 17.11- IDBI bank Limited and Ors. vs. Jaypee Infratech Limited and Ors. NCLT New Delhi 07.03.2023**
48. Additional affidavit was filed by the respondent under diary No. 5301 dated 5.07.2024 in compliance of order dated 21.06.2024 to place on record the complete assessment order of Income Tax Department dated 22.07.2017 for the assessment year 2014-15.
49. Page – 152 records the observation of the learned assessing officer and the observation of the assessing officer were as below:

10. UNSECURED LOANS:

On perusal of the books of accounts of the assessee, it is noted that assessee has received money as unsecured loans amounting to Rs. 2,86,81,140/- from various parties.

10.2 Qualification/ Observation made by the auditor in the Special Audit Report:

"Ledger Account of all parties (i.e. Secured as well as unsecured loans) from whom Loans have been

taken as well as repaid by the Company including the accounts which have been squared off during the year. For the unsecured loans taken during the year, you are requested to justify the conditions of genuineness, identity and creditworthiness of the lender from whom loan has been borrowed."

Till 15th May, 2017, the Assessee Company has provided complete details (i.e. PAN, bank statements and contra confirmation) of Mr. Suresh Puri, Miss/Mrs. Abha Verma, Mr Rajesh Arora and Diabetes Thyroid Hormone Research Institute Private Ltd, out of 17 parties from whom loan accepted during the year under consideration. For the rest of the parties, the Assessee Company has failed to justify genuineness and creditworthiness both conditions specified u/s 68 of the Income Tax Act, 1961.

The summary of all those 13 parties are as under:

Sr. No	Name of Person	Additions	PAN	Income Tax Return	Bank Statement	Contra Confirmation
1	Bhavna Mandalia Loan A/C	21,16,020	√	×	×	×
2	D. Chafekar Loan A/C	5,00,000	√	×	×	√
3	Jyoti Sahu Loan A/C	15,00,000	×	×	×	×
4	Lalit Agarwal Loan A/C	10,00,000	√	×	×	×
5	Megha B. Shukla Loan A/C	5,00,040	√	×	×	×
6	Narendra Prajapati Loan A/C	40	√	×	×	×

7	Naveen Mishra Loan A/C	28,00,000	√	x	x	√
8	Neeraj Kumar Loan A/C	50,000	√	√	x	x
9	Neha Chokshi Loan A/C	9,90,000	√	x	x	x
10	N. K. Pahala Loan A/C	27,00,000	√	x	x	x
11	Parveen Palaha Loan A/C	61,50,000	√	x	x	x
12	Rakesh Gupta Loan A/C	20,00,020	√	x	x	x
13	Ramesh Babu Loan A/C	10,25,000	√	x	x	x
	Grand Total	2,13,31,140				

10.3 Opportunity provided to the assessee:

10.3.1 In this regard, subsequent to the receipt of the special audit report, the Assessee was issued show caused dated 09/06/2017, the relevant para is reproduced as hereunder,

"Your reference is invited to the observations made by the Special Auditor contained in Page 450 of the Special Audit Report with reference to expenses incurred on Doctors, share application money received and unsecured loan taken. You are requested to show cause why, in view of the detailed findings of the Special Auditor, the entire expenses whose genuineness was not substantiated by producing correct PANS should not be disallowed."

10.4 Discussion on replies furnished by the assessee:

10.4.1 In response, the assessee, vide its reply furnished on 07.07.2017 (erroneously mentioned as 07.06.2017), submitted the following:

"There is no error in ITPAN of the relevant party and we too are unaware of the methodology adopted and assumptions made by the Auditors during Special Audit. The TDS has been deducted in the relevant cases and TDS certificate has also been issued. We shall made available TDS certificate as and when desire."

10.4.2 Since, the assessee was unable to furnish any details and sought even more time, in the interest of natural justice, yet another opportunity was provided to the assessee vide order sheet noting dated 07.07.2016 and the assessee was requested to furnish the requisite details on or before 12.07.2017. It was also clearly intimated to the assessee vide an order sheet noting to this effect that no further opportunities could be granted since the assessee had already been accorded repeated and sufficient opportunities in this regard (copy of order sheet annexed with assessment order).

10.4.3 However, on the appointed date the assessee again failed to furnish any details. In view of the repeated failure of the assessee, a detailed noting in this regard was made in the order sheet and the assessee was specifically requested to explain why its inability should not be construed as absence of any substantiating evidence, document or record which is now being created and therefore should not be rejected outright. However, on the request of the A/R of the assessee yet another opportunity was granted to the assessee and the assessee was requested to furnish all remaining details on 13.07.2017. (copy of order sheet annexed with assessment order).

10.4.4 On the appointed date, the assessee furnished certain information for which a detailed order sheet entry was made.



10.4.5 The date of hearing and submission of details was fixed for 17.07.2017. In this regard, it is pertinent to mention that the assessee was fully aware that the scrutiny assessment proceedings were of time barring nature with the assessment getting time bared on 23.07.2017 and the same had time and again been specifically mentioned in all notices and order sheet entries. On the appointed day, the assessee failed to appear as also furnished any details whatsoever in compliance to the specific query raised in this regard.

10.5 Concluding remarks and decision:

10.5.1 Before a discussion on the details furnished by the assessee is made, it is relevant to revisit the provisions u/s 68 of the Act. Section 68 of the Act reads as hereunder,

"Where any sum is found credited in the books of an Assessee maintained for any previous year, and the Assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to Income tax as the income of the Assessee of that previous year."

10.5.2 As such, while analyzing loan transactions through the sieve of the provisions of the aforementioned section, any transaction has to pass the following tests:

1. Identity of the Unsecured Loan Parties
2. Capacity or Creditworthiness of Unsecured Loan Parties and
3. Genuineness of the transactions.

10.5.3 Needless to say, that all three parameters listed hereinabove have to be satisfied so as to prevent the application u/s 68 of the Act. Furthermore, the tests cannot be construed as mere production of dumb documents which can serve the purpose of proving the identity, creditworthiness and genuineness. The evidence furnished should be credible and coherent and

beyond reasonable doubt. If that is not so then any set of dumb documents having reference to a certain loan transaction can be manufactured and the purpose of the section defeated. This is definitely not the legislative intention behind the section.

10.5.4 When the above laid conditions are not satisfied beyond reasonable doubt, then Tax on such income is levied at the rate of 30% as per provision of Section 115BBE of the Act without allowance of any deduction or expenditure under any other provision of the Act.

10.5.5 In this regard, on perusal of the details available on record, it is evident that the assessee furnished only partial documents to the special auditor during the course of the special audit. Subsequently, in the interest of natural justice the assessee was provided with yet another opportunity during the course of the scrutiny assessment proceedings after the receipt of the special audit. In response, the assessee furnished certain details which were analysed and the irregularities found therein are discussed as under:

50. The conclusion of the assessment order which is recorded at page – 159 and 160 was as under:

10.5.8 As such the aforementioned loan transactions clearly fail the test mandated u/s 68 of the Act and are therefore deemed to be unexplained credits within the scope u/s 68 of the Act. As such an amount of Rs. 2,47,81,140/- is added to the income of the assessee and taxed u/s 115BBE of the Act. The assessee shall also not be allowed any deduction whatsoever against such income as per the mandate of the section. Since the assessee is found to have furnished inaccurate particulars of income, penalty proceedings are separately initiated u/s. 271 (1) (c) of the Act.

51. The respondent thereafter stated to have filed an appeal against order of the Income Tax assessing officer dated 22.07.2017.

52. In compliance of the order dated 10.07.2024, an additional affidavit has been filed by the respondent on 18.07.2024 vide inward diary No. 5686, wherein, it is stated as under:

"It is stated that the respondent is filing the present affidavit in furtherance of the hearing dated 10.07.2024 to place on record a consolidated chart demonstrating the page numbers of invoices and vouchers that have been analysed by the assessing officer of income tax as having been approved and / or signed by Mr. N. K. Palaha, Applicant No. 1 herein. It is pertinent to mention that the date incorporated in the table has been extracted from the Assessment Order of the Income Tax dated 22.07.2017 for the Assessment Year 2014-2015 which forms a part of the affidavit preferred by the Respondent on 04.07.2024 at Annexure-A. The Respondent submits that on calculation, the total of such fraudulent expenses which Applicant No. 1 had approved comes to Rs. 2,04,01,369/-. The respondent begs to annex the consolidated table as Annexure - I Colly to the present affidavit."

53. Reply to the affidavit dated 4.07.2024 and 16.07.2024 of the respondent was filed by the Applicant on 29.07.2024 vide inward diary No. 5947, wherein, it is stated as under:

"Response to the Affidavit dated 04.07.2024

I say that along with this affidavit, the Corporate Debtor has placed on record the Assessment Order dated 22.7.2017 for the Assessment Year 2014-15. Though no averments are made in the affidavit in relation to this Order, it was argued on behalf of

Corporate Debtor during the course of hearing held on 10.7.2024 that as the Assessing Officer vide order dated 22.07.2017 has added an amount of Rs. 2,47,81,140/- to the income of the Corporate Debtor and has not allowed any deduction of amount against such income, the present petition is liable to be rejected.

I say that in this regard, it is relevant to state and reiterate that Section 7 petition is required to be admitted the moment it is shown that there is disbursement of amount from the creditor to the debtor.

I say that the stand taken by the Corporate Debtor on the basis of the assessment order dated 22.07.2017 is completely misconceived and extraneous to the scope of consideration of a Section 7 application. By virtue of Section 238 of IBC, any such defence purportedly based on the provisions of Section 68 of the Income Tax Act is liable to be rejected.

Without prejudice to the above, it is also relevant to note that the order made by the Assessing Officer records that the Corporate Debtor did not submit documents evidencing the factum of loan advanced by the Applicants. The Corporate Debtor deliberately did not produce any documents in so far as the loan amounts disbursed by the Applicants. This aspect is also clearly recorded in the order. I say that had the Corporate Debtor produced the documents pertaining to the Applicants before the Assessing officer, the observations made by the Assessing officer could have been avoided. Be that as it may, it is the humble submission of the Applicants that the order made by the Assessing Officer or the purported violation of Section 68 of the Income Tax Act would not disentitle the Applicants to maintain the present petition u/s. 7 of IBC.

Reply to Additional affidavit dated 16.07.2024

I say that by this affidavit, the Corporate Debtor has placed on record a chart which shows that because of the Applicants, certain expense were made which were fraudulent. I strongly deny all the allegations made in

this additional affidavit. I state that the Corporate Debtor has made false allegations against the Applicants for malafide reasons.

I say that for the very same purpose, the Corporate Debtor has already filed a civil suit before the Ld. Civil Court which was transferred to this Hon'ble Adjudicating Authority in the year 2019. I say that no steps were taken for a period of almost 3 years for listing of the said suit before this Hon'ble Adjudicating Authority.

54. In absence of any evidence available to the company to justify the bogus expenditure debited by the Applicant in the books of the company, the company had no option but to withdraw the appeals under the Vivas se Vishwas scheme.
55. We have heard the learned Counsels appearing in the matter for the Applicant as well as for the Respondent and also have perused the documents. Applicant No. 1 is an Ex-Director of the Corporate Debtor and Applicant No. 2 was one of the Promoters of the Corporate Debtor.
56. Till the date of his resignation, Applicant No. 1 was in control of the Company.
57. Applicant No. 1 and 2 have advanced certain loans to the Corporate Debtor aggregating to principle amount of Rs.

1,74,90,000/- . Applicant No. 1 resigned from the Company w.e.f. March-2015.

58. Post his resignation certain allegations were raised by the Respondent on Applicant No. 1, Applicant No. 1 and 2 have filed the present transfer petition being Company Petition No. 470 of 2016 with Hon'ble High Court of Gujarat which was transferred to this Tribunal on 11.01.2022.
59. Before institution the Company Petition being No. 470 of 2016, notice was given by the Applicants to the Respondent which is dated 12.07.2016 calling upon the Respondent to make payment of Rs. 2,95,76,349/-. The reply to the said notice was addressed by the Respondent which is dated 28.07.2016 and the Respondent have admitted majority of the claims of the Applicants. However, Respondent have levelled certain allegations of misappropriation, etc. against the Applicant No. 1.
60. The Respondent have given to the Applicant a ledger account dated 31.12.2016 acknowledging thereunder that interest to the tune of Rs. 5,77,743/- which was due and payable to the Applicants.

61. Respondent have placed before us an Income Tax Assessment order stating that certain expenditure was added to the income of the Corporate Debtor for the assessment year 2014-2015. Perusal of the said assessment order reveals that loan of the Applicant No. 1 and 2 aggregating to Rs. 88,50,000/- was added to the income of the Corporate Debtor. Against which the Corporate Debtor filed an appeal which was later on withdrawn and submitted to the Tax under Vivad se Vishwas Scheme.

62. It is noted that the Respondent filed Special Suit No. 193 of 2017 as a counter claim which was transferred from the Civil Court vide order dated 18.02.2019 to this Tribunal. However, it cannot be converted under the present relevant provisions of the IB Code, 2016 for adjudication before this Tribunal. Neither the Respondent took any steps for almost four years for converting this Civil Suit in a proper form as per the provisions of the IBC for adjudication nor shown any provisions of the IBC or Rules which states that transferred Special Civil Suit can be heard by this Tribunal under the IBC. Learned counsel for the Respondent further

submitted that the pleas taken in that Civil Suit has already been taken care in the reply. Hence, IA/37(AHM)2023 was dismissed by this Tribunal vide order dated 16.01.2024 with a liberty to the Respondent of seven days to take all pleas in additional reply, if any is left in terms of the Civil Suit.

63. Thereafter, no any additional reply was filed by the Respondent and rather the Respondent assailed the order of this Tribunal dated 16.01.2024 as well as order of the Civil Court dated 18.02.2019 passed in Civil Suit No.193 of 2017 before the Hon'ble High Court in which only notice was issued without any stay to the proceedings of this Tribunal in the matter which was confirmed by the counsel for the Respondent on record.

64. On the other hand, Learned Counsel for the Applicants vehemently argued that in view of the decision of the **Hon'ble Supreme Court** in the matter of **Orator Marketing Pvt. Ltd. vs. Samtex Designz Pvt. Ltd.** reported at 2021 SCC Online SC 513 and in the case of **M. Suresh Kumar Reddy vs. Canara Bank & Ors.** reported at (2023) 8 SCC 387, this Tribunal need not to look into the

counter claim of the Respondent. He further argued that decision in the matter of Vidarbha Industries vs. Axis Bank Ltd. is based on the facts and circumstances of that matter and the decision in the case of Innovative Industries under Section 7 was held as good law as per decision in the matter of Suresh Kumar Reddy vs. Canara Bank & Ors.

65. It is seen that present Petition is continuation of the Company Petition No. 470 of 2016 which was instituted when the pecuniary limit under Section 4 was Rs.1,00,000/-.
66. Without going into controversy of crystalizing the amounts payable to the Applicant No. 1 and 2, which in our view is the job of the IRP, we hold that the Corporate Debtor has committed default exceeding Rs.1,00,000/-, the present petition is complete and deserves admission.
67. Accordingly, in light of the above facts and circumstances, it is, **hereby ordered** as under:-
- (i) The Respondent/Corporate Debtor **CMR Lifesciences Private Limited** is **admitted** in Corporate Insolvency Resolution Process under section 7 of the Code.

- (ii) As a consequence thereof, moratorium under Section 14 of Insolvency and Bankruptcy Code, 2016 is declared for prohibiting all of the following in terms of Section 14(1) of the Code.
- 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 Securitisation 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.*
 - e. *The provisions of sub-Section (1) shall however, not apply to such transactions, agreements as may be notified by the Central Government in consultation with any financial sector regulator and to a surety in a contract of guarantee to a Corporate Debtor.*

- (iii) The order of moratorium under section 14 of the Code shall come to effect from the date of this order till the completion of the Corporate Insolvency Resolution Process or until this Adjudicating Authority approves the Resolution Plan under sub-section (1) of section 31 or passes an order for liquidation of the corporate debtor under Section 33 of the IBC 2016, as the case may be.
- (iv) However, in terms of Section 14(2) to 14(3) of the Code, the supply of essential goods or services to the corporate debtor as may be specified, if continuing, shall not be terminated or suspended, or interrupted during the moratorium period. The corporate debtor to provide effective assistance to the IRP as and when he takes charge of the assets and management of the corporate debtor.
- (v) As proposed by the Financial Creditor, we appoint Mr. **Sunil Kumar Kabra** as IRP having Registration No. IBBI/IPA/-001/IP-P01011/2017-18/11662 under section 13 (1)(c) of the Code to act as Interim Resolution Professional (**IRP**). He shall conduct the Corporate Insolvency Process as per the Insolvency and Bankruptcy Code, 2016 r.w. Regulations made thereunder.
- (vi) The IRP so appointed shall make a public announcement of the initiation of Corporate Insolvency

Resolution Process and call for submissions of claims under section 15, as required by Section 13(1)(b) of the Code.

- (vii) The IRP shall perform all his functions as contemplated, *inter-alia*, by sections 17, 18, 20 and 21 of the Code. It is further made clear that all personnel connected with the corporate debtor, its promoters, or any other person associated with the management of the corporate debtor are under legal obligation as per section 19 of the Code to extend every assistance and cooperation to the IRP. Where any personnel of the corporate debtor, its promoters, or any other person required to assist or co-operate with IRP, do not assist or cooperate, the IRP is at liberty to make appropriate application to this Adjudicating Authority with a prayer for passing an appropriate order.
- (viii) The IRP is expected to take full charge of the corporate debtor's assets, and documents without any delay whatsoever. He is also free to take police assistance in this regard, and this Court hereby directs the Police Authorities to render all assistance as may be required by the IRP in this regard.
- (ix) The IRP shall be under a duty to protect and preserve the value of the property of the 'corporate debtor company' and manage the operations of the corporate debtor company as a going concern as a part of obligation imposed by section 20 of the Code.

- (x) The IRP or the RP, as the case may be shall submit to this Adjudicating Authority periodical report with regard to the progress of the CIRP in respect of the Corporate Debtor.
- (xi) We direct the financial creditor to pay IRP a sum of **Rs.2,00,000/- (Rupees Two Lakh Only)** in advance within a period of 7 days from the date of this order to meet the cost of CIRP arising out of issuing public notice and inviting claims etc. till the CoC decides about his fees/expenses.
- (xii) The Registry is directed to communicate this order to the financial creditor, corporate debtor, and to the Interim Resolution Professional, the concerned Registrar of Companies and the Insolvency and Bankruptcy Board of India after completion of necessary formalities, within seven working days and upload the same on the website immediately after pronouncement of the order. The Registrar of Companies shall update its website by updating the Master Data of the Corporate Debtor in MCA portal specific mention regarding admission of this Application and shall forward the compliance report to the Registrar, NCLT.

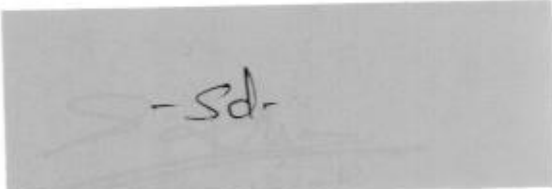
(xiii) The commencement of the Corporate Insolvency Resolution Process shall be effective from the date of this order.

68. Accordingly, this Application **TP/3/AHM/2022 in CP No. 470 of 2016** is admitted. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.



- Sd-

SAMEER KAKAR
MEMBER (TECHNICAL)



- Sd-

SHAMMI KHAN
MEMBER (JUDICIAL)

MD