NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No.1058 of 2023

(Arising out of Order dated 26.07.2023 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench {Court-II} in CP No.(IB)-39(ND)/2023)

IN THE MATTER OF:

Vijay Kumar Singhania
Having Office At: 51, Panchanna
Gram, EM Bypass,
Kolkata 700039, West Bengal ... Appellant

Vs

1. Bank of Baroda,
Through Its Senior Manager,
Zonal Stressed Assets Recovery Branch
Located At:4th Floor, Rajendra Bhawan,
Rajendra Place, New Delhi-110008

2. Sunil Kumar Gupta
Interim Resolution Professional For
Cygnus Splendid Limited
B-10, Magnum House-1, Karampura Commercial Complex,
Shivaji Marg ,New Delhi,Delhi ,110015
Also, at
908, 9th Floor, D Mall, Netaji Subhash Place
Pitampura, Delhi – 110034 ... Respondents

Present:

For Appellant: **Mr. Deepak Khosla, Mr. Ajay K. Jain, Mr. Yash Karan Jain, Advocates**

For Respondent: **Mr. Kush Sharma, Miss Asiya Khan, Advocates for R-1**

K.K. Mishra, Sahil Nagpal, Nitin Mohan Mathur, Nikita Rana, Nikhil Maan and T. Jain, Advocates for R-2

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal, by a Suspended Director of the Corporate Debtor has been filed challenging the order dated 26.07.2023 passed by National

Company Law Tribunal, New Delhi Bench (Court-II) admitting Section 7 Application filed by Bank of Baroda (Respondent No.1 herein).

2. Brief facts of the case, giving rise to the Appeal are:

(i) The Corporate Debtor – Cygnus Splendid Limited prior to its incorporation under the Companies Act, 1956 was a partnership firm viz M/s Cygnus Splendid and for its business purpose obtained Term Loan and Cash Credit Facility from Bank of Baroda by sanction letter dated 11.10.2012.

(ii) After being incorporated as Registered Company, Bank of Baroda revised/ sanctioned existing credit facility in favour of Corporate Debtor on the terms and conditions as mentioned in the Sanctioned Letter dated 18.02.2014, which consisted Term Loan Facility for an amount of Rs.9,02,50,000/- payable to the Applicant on demand together with interest @ 3.75% above Base Rate of the Bank plus 0.15% tenor premium per annum with monthly rests or at such other rates as may prevail from time to time. Cash Credit (Hypothecation) facility was sanctioned for an amount of Rs.3,64,00,000/- payable on demand together with interest thereon @ 3.25% above Base Rate of the Bank per annum with monthly rests or at such rates as may prevail from time to time.

(iii) The Corporate Debtor did not operate the account in accordance with banking norms and failed to maintain financial discipline and defaulted to pay the instalments of loan amounts as also the interest due thereon. The facility extended to the Corporate Debtor were classified as Non-Performing Asset ("**NPA**") with effect from 13.03.2017.

(iv) The Bank filed OA No.615 of 2017 on 26.05.2017 against the Corporate Debtor and its guarantor for recovery of amount of Rs.7,85,62,274/- along with interest. The Bank of Baroda, before filing the above OA, has issued a Demand Notice dated 06.05.2017 under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest ("SARFAESI") Act, 2002. The loan having not been discharged, the Bank proceeded under Section 13(4) of the SARFAESI Act and took symbolic possession of the secured immovable properties of the Corporate Debtor through possession notice dated 13.09.2017.

(v) The Appellant on 03.01.2018 and 10.01.2018 gave settlement proposal for Rs.275 lacs and Rs.280 lacs respectively, which was rejected by the Bank on 11.01.2018. The Appellant again on 07.02.2018 gave settlement proposal along with two associate companies. A combined settlement proposal of Rs.6.25 crores was given, which was not accepted by the Bank.

An amount of Rs.2 crores was deposited on behalf of three companies on 03.09.2018 towards upfront amount for settlement. Another OTS proposal was submitted by the Appellant on 05.09.2019. Several OTS proposals were submitted by the Appellant, e.g., dated 05.09.2019, 07.09.2019, 23.09.2019, 16.12.2019, 21.09.2020 and 03.11.2020. In the said OTS proposals, the Corporate Debtor acknowledged its liability to pay defaulted amount.

(vi) In OA filed by the Bank before the Debt Recovery Tribunal, several IAs were filed by the Appellant, seeking various directions. Several auction notices were issued for sale of assets, which were taken possession by the Bank.

(vii) The Appellant lodged a complaint with the Bank on 05.04.2019 demanding the Bank to lodge a FIR with regard to theft committed in the factory premises, where various machinery parts and accessories went missing. The Appellant also filed Police complaint before Kotwali Police Station.

(viii) A combined settlement proposal of Rs.7.5 crores was submitted on behalf of all the three companies on 05.09.2019, which was rejected by the Bank on 09.09.2019. By email and letter dated 13.12.2019 and 16.12.2019, the Appellant and associate companies had submitted settlement proposal to settle the account for Rs.7.5 crores, after adjusting an amount

of Rs.3.61 crores already deposited. The Appellant communicated that they will not be able to increase the offer. The Bank on 18.12.2019 communicated that the said offer is not acceptable. Combined proposal by all the three companies for settlement was given on 21.09.2020 for Rs.8.00 crores. The Bank asked the Appellant to submit a revised proposal, the combined offer submitted by the Appellant and associate company was not accepted.

(ix) A Commercial Suit No.28 of 2022 was filed by the Appellant along with associate companies, jointly before Commercial Court at Alipore for an amount of Rs.162.99 crores?

(x) In OA No.615 of 2017, the Corporate Debtor has filed a counter-claim of Rs.45 crore on 24.09.2020.

(xi) On 03.01.2023, the Bank of Baroda filed Section 7 Application being CP No.(IB)-39(ND)/2023. In the Application filed under Section 7 the aggregate amount of principal and interest defaulted to be paid by the Corporate Debtor was calculated as Rs.13,49,47,775.57/- and date of default was mentioned as 13.03.2017. The details and particular of the OA No.615 of 2017 filed by the Bank was also mentioned in the Application. Several other documents were filed by the Financial Creditor in support of Section 7 Application. Reply to Section 7 Application was filed by the Corporate Debtor.

(xii) The Adjudicating Authority after hearing the Financial Creditor as well as the Corporate Debtor, by the impugned order dated 26.07.2023 admitted Section 7 Application.

(xiii) The Adjudicating Authority held that Application filed by Financial Creditor is not barred by time. The Corporate Debtor having made several OTS proposal and lastly on 03.11.2020, is an acknowledgement of the default amount, hence the Application filed within three years from the date of acknowledgement, is well within time. The Adjudicating Authority held that Financial Creditor has furnished certified copy of entries in the relevant account in Banker's Book, and has also enclosed statement of account in respect of two accounts along with interest calculation sheet, which is valid evidence in terms of provisions of Regulation 2A(a) of IBBI (CIRP) Regulations, 2016. It was held that Corporate Debtor committed default in payment of the amount of loan against the loan accounts. The Application filed by the Financial Creditor being complete, the petition under Section 7 was admitted. Moratorium was imposed and Insolvency Professional Mr. Sunil Kumar Gupta was appointed as Interim Resolution Professional ("**IRP**")

Aggrieved against which order, this Appeal has been filed by the Appellant.

3. When the Appeal was heard on 18.08.2023, learned Counsel for the Appellant Shri Abhijeet Sinha submitted that the Appellant has taken several steps to settle the account with the Bank. It was mentioned that Bank has communicated a letter dated 17.08.2023 asking M/s. Cygnus Group of Companies to submit separate proposals for each account. Learned Counsel for the Appellant submitted that Appellant shall submit a separate OTS proposal. Noticing the aforesaid submission, by order dated 18.08.2023, interim order was passed directing the IRP not to take any further steps in the Corporate Insolvency Resolution Process ("CIRP") till the next date. Following order was passed on 18.08.2023:

> *"**18.08.2023:** Learned Counsel for the Appellant submits that Appellant has taken several steps to settle the account with the Bank of Baroda. He has referred to the correspondence with the Bank and specifically Letter dated 05th April, 2023 which is filed at page 212 of the Supplementary Affidavit. Learned Counsel for the Appellant submits that in all the three accounts i.e. Account of the Corporate Debtor as well as two sister companies total amount of Rs. 3,76,60,055/- has been deposited.*
>
> ***2.** Learned Counsel for the Bank submits that Bank has communicated a Letter dated 17th August, 2023 to M/s. Cygnus Group of Companies that if the OTS Proposal is to be submitted in the future, they are requested to submit separate proposals for each account to their respective/concerned branches where the loan amount it repayable instead of submitting a combined proposal for all three accounts/companies.*

> ***3.*** *Learned Counsel for the Appellant submits that Appellant was not aware of the Letter dated 17th August, 2023 and now in view of the Letter of the Bank, the Appellant proposes to submit a separate OTS Proposal with regard to corporate debtor and other two group companies. Appellant may submit OTS proposal within 10 days from today and the Bank thereafter within 10 days may consider the OTS Proposal.*
>
> ***4.*** *Learned Counsel for the IRP is present and submits that he has constituted the Committee of Creditors on 16th August, 2023.*
>
> ***5.*** *List this Appeal on 20th September, 2023. In the meantime, IRP may not take any further steps in the CIRP till the next date."*

4. On 20.09.2023, when again the matter was taken up, learned Counsel for the Bank submitted that OTS proposal, which has been submitted by the Appellant has not been approved and a communication dated 18.09.2023 was sent to the Appellant. The learned Counsel for the Appellant submitted that they will further approach the Bank and following order was passed on 20.09.2023:

> *"**20.09.2023:*** *Learned counsel for the Bank submits that OTS proposal which has been submitted by the Appellant has not been approved and on 18.09.2023 a communication has been sent in this regard.*
>
> *Learned counsel for the Appellant submits that after communication dated 18.09.2023 Appellant received email to further approach the Bank. He seeks adjournment.*

Appeal is adjourned to 26.09.2023.

Interim orders to continue.

Appellant is permitted to file Additional Affidavit by 25.09.2023."

5. On 26.09.2023, the Appeal was taken up, when the learned Counsel for the Bank informed that OTS submitted by the Appellant is under consideration and matter be posted after 10 days. The matter thereafter adjourned to 12.10.2023. On 12.10.2023, learned Counsel for the Appellant submitted that Appellant shall make efforts to increase the offer and following order was passed:

> *"**12.10.2023:** Learned Counsel for the Appellant submitted that an e-mail has been received on 11.10.2023 by the Bank where Bank has advised the Appellant to substantially improves the offer for OTS in the account for consideration of the same by the Competent Authority. It is submitted that the Appellant has received an information for a meeting with the Bank's official within one week. He submits that he shall be meeting with the Bank and shall make efforts to increase the offer as communicated by the Bank.*
>
> ***2.*** *We are of the view that the settlement, if any, with the Bank shall take within a time period and it cannot indefinitely linger on.*
>
> ***3.*** *Both the parties are permitted to file an Affidavit bringing on record the details of all subsequent events, if any and settlement, if any.*
>
> ***4.*** *List the Appeal on 09.11.2023. Interim order to continue."*

6. On 09.11.2023, when the Appeal was taken up, a request was made by the Appellant that Appellant intends to improve the offer and he is to met the Bank Official after 14.11.2023. Recording the aforesaid submission, as a last opportunity, the matter was fixed for 04.12.2023. On 09.11.2023, following order was passed:

> *"**09.11.2023:** Learned Counsel for the Appellant submits that Appellant is intending to improve the offer and Bank has indicated to meet after 14th November, 2023.*
>
> ***2.*** *Learned Counsel for the Bank submits that they have no such instruction.*
>
> ***3.*** *We have already granted time to the Appellant on 12.10.2023 to substantially improve the offer for OTS in the account for consideration of the same by the Competent Authority. We make it clear that this is a last opportunity being allowed to the Appellant for submitting an improved offer and it is for the bank to consider the same.*
>
> ***4.*** *List this Appeal on 04th December, 2023. Interim Order to continue. This being last opportunity, no further time shall be allowed to the Appellant. In event, no settlement takes place, the matter shall finally be heard on merits.*
>
> ***5.*** *Mr. Yash Karan Jain, Learned Counsel seeks liberty to file Vakalatnama during the course of the day. Prayer is allowed."*

7. The Appeal came for hearing before the Tribunal on 04.12.2023, on which date learned Counsel for the Bank submitted that no settlement

could take place. Recording the aforesaid submission, the interim order was vacated.

8. Shri Deepak Khosla, learned Counsel appeared on behalf of the Appellant and made elaborate oral submissions in support of the Appeal. The learned Counsel for the Appellant also handed over one page note for consideration of the Court. After hearing the learned Counsel for the Appellant and the Bank of Baroda, the order was reserved. The learned Counsel for the Appellant has also made a request to submit a copy of written note, which was not acceded to, since the Appellant had already made elaborate oral submissions. On same day, i.e., 04.12.2023 at 5:51 P.M., an email was sent by learned Counsel for the Appellant addressed to learned Counsel who appeared for the Bank of Baroda, copy of which was also forwarded to the Registrar of NCLAT. Along with email a note containing 13 grounds was also forwarded. The email mentions that 13 grounds were argued on 04.12.2023 before the Court and although one page note was accepted by the Court, but 13 grounds note was not accepted, hence said note was circulated along with the email.

9. We have heard Shri Deepak Khosla, learned Counsel appearing for the Appellant and Ms. Asiya Khan, learned Counsel appearing for the Bank of Baroda.

10. learned Counsel for the Appellant has submitted that Bank of Baroda has not adhered to the Insolvency and Bankruptcy Board of India (Information Utilities) Regulation, 2017 (hereinafter referred to as

'**Information Utilities Regulation'**). It is submitted that Bank of Baroda did not submit information of default to the Information Utilities nor any authentication of default has been obtained from the Information Utilities. The learned Counsel submits that in view of the Regulation 21 of the Information Utilities, as amended on 14.06.2022, it is imperative for the Bank of Baroda to have filed the information of default with the Information Utilities and obtained the authentication as required. It is submitted that no authentication having been obtained, there is no proof of any default. It is submitted that registration of default is mandatory and there being no default, Section 7 Application could not have been admitted. A one page note under the heading 'The Legislative Scheme pertaining to Information Utilities" was also handed over to the Court by the learned Counsel for the Appellant, referring to various Regulation of Information Utilities Regulation.

11. The learned Counsel for the Appellant has also in addition to above made other submissions in support of the Appeal. As noted above, learned Counsel for the Appellant has forwarded 13 points note containing 13 grounds by email dated 04.12.2023. To allay any apprehension on behalf of the Appellant, we proceed to notice the aforesaid note containing 13 grounds and proceed to consider the grounds raised in the note. It is suffice to extract the entire short note, which has been sent by the Appellant by email dated 14.12.2023 and to consider the same to allay any apprehension of the Appellant of non-consideration of its submission. The short note as sent by the learned Counsel for the Appellant is as follows:

"**SHORT NOTE**

MAIN PRAYER FOR 04-12-2023 :

1. *The Hon'ble Tribunal may be pleased to issue notice on the appeal to Bank of Baroda, the respondent herein, who be directed to file a Reply to the Appeal by way of a specific and detailed Affidavit.*
2. *The impugned order be stayed.*
   In the lesser-preferred alternative : the existing interim relief granted on 18-08-2023 be directed to continue (namely, that the IRP will not take further steps in the CIRP till disposal of the appeal).

13 MAIN GROUNDS :

1. ***NO JURISDICTION – NON-COMPLIANCE WITH A MANDATORY REQUIREMENT OF THE CODE :***
   The scheme of the IBC is not about ***'debt'****. It is about* ***'default'*** *i.e. 'admitted' default (and only in light of which 'admission' has it been provided that Section 7 proceedings are summary in nature – no adjudication).*
   Because of the pre-existing dispute (please see below), the bank has ***deliberately*** *not complied with the requirement of filing proof of debt lodged by it with an Information Utility. This is a mandatory requirement. On this count alone, the appeal deserves to succeed.*
   THE MORE DRACONIAN / ONE-SIDED A LAW – THE MORE MANDATORY IS THE STRICTEST POSSIBLE OBSERVANCE OF THE SAFEGUARDS BUILT INTO IT FOR PROTECTION OF THE OPPOSITE PARTY - OR SUCH LAW WILL BE DEEMED TO BE 'VOID', AND LIABLE TO BE STRUCK DOWN.

'Registration of default' is a safeguard built into what is a draconian law, and which is a safeguard for the protection of corporate debtors in ***summary*** *proceedings, who may be subjected to misuse (or even abuse, as in this case) in* ***summary*** *proceedings in implementation of what are otherwise well-meaning provisions of the IBC.*

2. ***NO DEBT :*** *Forget about 'default', there is no 'debt'. Rather, the bank owes the Corporate Debtor money, for which purpose a Counter-Claim of* ***Rs. 45 crores*** *has been filed with DRT (Delhi) as far back as on* ***24-09-2020*** *(i.e. 3+ years ago) in OA No. 615 of 2017, which was filed by the bank for* ***Rs. 7 crores*** *before DRT (Delhi). Despite issuance of notice on the counter-claim on* ***21-07-2023****, the bank has not filed any reply, though 4+ months have elapsed ; also, Money Suit No. 28 of 2022 is pending before the Ld. Commercial Court at Alipore (Kolkata) since* ***05-07-2022*** *for a combined amount of* ***Rs.162.99 crores*** *claimed jointly by 3 plaintiffs (detailed below), where the claim by the Corporate Debtor (Cygnus Splendid Ltd) alone is for* ***Rs.14 lakhs****, which, when read with the counter-claim pending with DRT (Kolkata) since 2020 for* ***Rs. 45 crores*** *(coming to a total of* ***Rs. 45.14 crores****), far exceeds the total claim of the Bank of* ***Rs.13.49 crores*** *reported by it in the Section 7 petition filed before NCLT.*

DETAILS OF COMMERCIAL SUIT No. 28 OF 2022 :

Sl. No.	COMPANY	CLAIM BY	
		BANK	COMPANY
(1)	(2)	(3)	(4)
1.	Cygnus Splendid Ltd	**13.49 cr** (Sec. 7 IBC – Jan 2023)	0.14 cr – MS 28 45.00 cr – DRT

			45.14 cr
2.	Sunway Infrastructure Services Ltd	**4.34 cr** (As on 13-11-2017 – OA 1206 of 2017)	**114.03 cr**
3.	Cygnus Equipments & Rentals Ltd	**8.45 cr** (As on 25-10-2018 – OA No. 171 of 2017)	**48.82 cr**
	TOTAL	**26.28 cr**	**207.99 cr i.e. ~ 8x > excess by 181.71 crs**

Note : Figure in column (3) is not any claim made by the bank in the Commercial Suit, but is what has been demanded by it from time to time.

3. ***NO COUNTER-CLAIM / SET-OFF FILED BY BANK IN COMMERCIAL SUIT :*** *The bank has not filed any counter-claim, or claimed any set-off, in the Commercial Suit. Hence, it is barred from filing the IBC petition by virtue of Order II (Rule 2) of the CPC when read with Order VIII [Rule 6a(4)]. Not asking for a set-off on account of its own OA before DRT is undoubtedly in view of no reply to the counter-claim since July 2023.*

4. ***MALICIOUS INITIATION OF IBC :*** *The bank has only filed Section 7 against Company (a) above i.e.* ***Cygnus Splendid Ltd****, and not against Company (b) and (c) i.e. Sunway Infrastructure Services Ltd nor against Cygnus Equipments and Rentals Ltd, because those companies have huge demands in the Commercial Suit. This is patently malicious, as the objective is not 'insolvency-resolution', but merely a pressurizing tactic.*

5. ***PRE-EXISTING DISPUTE :*** *The counter-claim pending at DRT Delhi since* ***24-09-2020*** *for Rs. 45.00 crores, plus the suit at Alipore Commercial Court pending since* ***05-07-2022****, all proves the victims of a 'pre-existing' dispute. The Section 7 petition was filed on* ***12-01-2023****, whereas the*

*was filed 3+ years earlier, and the commercial suit was filed 6 months earlier (i.e. on **12-07-2022**).*

6. ***FRAUD - SUPPRESSION :*** *Bank did not disclose the counter-claim over the Money Suit in the IBC petition, knowing fully well that in such event of disclosure, its Section 7 petition would fail.*

7. ***FRAUD READ WITH CPC's ORDER VI (Rules 3-5) :*** *As the Officers arrayed as Defendants in the suit have filed no Written Statement, this proves that all the assertions made in the suit against such officers stand admitted by such officers (and, therefore, by extension, stand admitted by the Bank, as it is the actions of these Officers that binds the Bank). The fact that the assertions in the suit stand admitted by its Officers was deliberately not disclosed by the Financial Creditor to NCLT in the Section 7 petition.*

8. ***FRAUD – SUPPRESSION OF BREACH OF B. R. Act :*** *The bank has not disclosed the pendency of the suit and potential liability thereupon in its audited Balance Sheet for the year ending March 31, 2023.*

   Therefore, to invoke the protection of a pre-existing dispute being a bar to the filing of such insolvency-resolution petitions even by a 'Financial Creditor', the Corporate Debtor seeks parity between the provisions of the 'letter' Section 7(3)(a) of the Code (which admittedly applies to Financial Creditors only) read with the 'spirit' of Section 8(2)(a) of the Code read with its Section 9(1) (whose 'letter', admittedly, applies to Operational Creditors, but whose 'spirit', by the principles of parity, ought to be read down to apply to 'financial creditors' in this type of scenario as well).

Note : If this parity - by applying the 'spirit' of the law - is not permitted, and adverse inference not drawn against a 'Financial Creditor' even from the omission (in this case, refusal) by the bank to fairly make such disclosure in its Balance Sheet, then this means that a corporate Debtor that has legitimate disputes with its Financial Creditor, to the extent of filing of a suit, will have no means of staving off a Section 7 petition at all, and all that a bank has to do to get a suit filed against it 'short-circuited' is to file a Section 7 petition, and get its own RP appointed, who will then bury the suit for the undue benefit of such Financial Creditor.

9. ***LEGAL CONUNDRUM :*** *Since the RP is an appointee of the Financial Creditor, and if the IBC process is allowed to go forward, this means that the suit on behalf of the Corporate Debtor can only be prosecuted by him, which means that since all actions of the RP are dictated by the Financial Creditor, it is clear that no steps will be taken by the Financial Creditor to ensure that the RP diligently prosecutes the suit against his own nominator i.e. the same Financial Creditor.*

   In fact, the very filing of the Section 7 petition constitutes ***'criminal contempt of court'*** *on the part of the bank, as the intent is to ensure that the Corporate Debtor cannot prosecute the suit against the bank.*

10. ***LIMITATION :*** *The Section 7 petition was barred by limitation. It was filed on* ***12-01-2023****, whereas the 'date of default' accepted by NCLT (para 10) was* ***13-03-2017****.*

    But to allow the petition, NCLT (para 11) has referred to a letter dated 03-11-2020 to adopt the view that the Sec. 7 petition is within limitation. However, it omitted to note that this letter was 'Without Prejudice'.

11. ***'WITHOUT PREJUDICE' LETTERS*** **:** *NCLT acted per incuriam, because it acted in ignoratium of binding judgements of the Hon'ble Supreme Court on letters that are written 'Without Prejudice' (whether such captioned by placed on the top of the letter or not – please see para 43* ***Peacock Plywood****).*

Contrary to Public Policy **:** *Even otherwise, even in absence of any judgement, such a view adopted by NCLT is patently contrary to 'Public Policy' (which is to encourage disputants to settle their disputes, by permitting them the leeway of exchanging letters to facilitate settlement if such letters are titled, or construed, as being 'Without Prejudice' without the contents of the letters being taken by the Courts as reflecting the 'admitted' position of the parties), took 'Without Prejudice' letters written by the Corporate Debtor out of the context of their legal / public-policy framework, and acted on the premise that in view of the letter dated 03-11-2020 (para 11) the Section 7 petition was within limitation only by virtue of such 'Without Prejudice' letters.*

This is patently contrary to settled law on communications that are made 'without prejudice'.

12. ***GROSS CONCEPTUAL ERROR IN PARA 11*** **:** *The IBC is not about* ***'debt'****. It is about* ***'default'*** *i.e. 'admitted' default (and only in light of which 'admission' has it been provided that Section 7 proceedings are summary in nature – no adjudication).*

NCLT made a huge conceptual error in para 11, in which it erroneously observed that (bold and underlining emphasis supplied) : "Regarding the plea of limitation, as can be seen from the averments made by the CD in its affidavit (Supra), as per its own admission, as late as on ***03.11.2020*** *the*

CD had made an offer to CGM, SMAV, BCC, Mumbai to settle the defaulted amount by accepting Rs.8.10 Cr. The said settlement offer is an acknowledgment of the ***defaulted*** *amount. Thus, the period of offer is an acknowledgment of the defaulted amount. Thus, the period of limitation would start from the said date.".*

The letter, at best, refers to ***'debt'****, and not to* ***'default'****. And 'default' has to refer to and be read as "net" amount in* ***'admitted'*** *default i.e. 'default' less counter-claims under adjudication before a judicial authority (and not mere bluster or illusory claims).*

In any event, this letter was titled 'Without prejudice' and could not have been relied upon by NCLT – please see ***Peacock Plywood****.*

13. ***POWER OF ATTORNEY :*** *The Financial Creditor had authorized one Nidhi Kumar through a Power of Attorney dated 01-09-2021 to act on its behalf, but Ms. Nidhi Kumar nominated Mr. Pawan Sharma to be true and lawful Attorney of the Financial Creditor. Thus, the Sec. 7 petition was not maintainable, not being filed by authorized representative of the Petitioner, for the reason that the Power of Attorney does not envisage the aforesaid Ms. Nidi Kumar delegating her own authority to her nominee, Mr. Pawa Sharma. Therefore, this is a classic case of delegatus non potest delegare. The Power of Attorney has been appended as* ***Annexure MMM****,* ***Vol. 8****, Pages 1501-1507.*

Therefore, on this ground also, the impugned order is a nullity in law, as NCLT has no jurisdiction to entertain and act on a petition filed by a person other than an authorised person."

12. The learned Counsel for the Bank opposing the submissions of learned Counsel for the Appellant submits that Appellant having throughout acknowledged the debt and had also taken several opportunities in this Appeal also to settle the default and having failed to do so, cannot be allowed to contend that there is no debt or default. Replying to the submission of the learned Counsel for the Appellant with regard to Information Utilities Regulation, it is submitted that the said submission was advanced before the Adjudicating Authority, which has been elaborately considered by the Adjudicating Authority in paragraph 11 of the impugned order. It is submitted that Adjudicating Authority has rightly relied on Regulation 2A(a) and Regulation 7(3)(a) of CIRP Regulations, 2016. The Adjudicating Authority being satisfied with the debt and default and noted that CIRP Regulations, 2016, nowhere provides that the information of default recorded by IU can be the only evidence to be relied, has rightly admitted Section 7 Application.

13. We have considered the submissions of learned Counsel for the parties and have perused the record.

14. We proceed to consider the submission of the parties in seriatim. Firstly, we shall consider the submissions raised on behalf of learned Counsel for the Appellant on the basis of Information Utilities Regulation and thereafter we shall proceed to consider the submissions as contained in short note raising 13 grounds.

15. The first submission which needs to be considered is the submission advanced by Learned Counsel for the Appellant on the basis of the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017. The submission is that after amendment of the aforesaid Regulation w.e.f. 14.06.2022, it is mandatory for Financial Creditor to file the information of default with the information utility and without obtaining an authentication of default as contemplated in Regulation 21, no application under Section 7 can be filed by the Financial Creditor. In the present case no authentication of the default having been obtained by the Financial Creditor, application under Section 7 was not liable to be admitted. The Adjudicating Authority committed error in admitting Section 7 application without there being any authentication of default as per Regulations 2017. The submission is that it is not debt but default on the basis of which an application under Section 7 can be triggered.

16. Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017 has been framed by the Board in exercise of the powers conferred under Sections 196, 209, 210, 211, 212, 213, 214, 215, 216 read with Section 240 of the Insolvency and Bankruptcy Code, 2016. Regulation 20 as amended w.e.f 14.06.2022 which is sheet anchor of the submission of the Appellant is as follows:-

> *"**20. Acceptance and receipt of information.**-*
> *(1) An information utility shall accept information submitted by a user in Form C of the Schedule.*

[(1A) Before filing an application to initiate corporate insolvency resolution process under section 7 or 9, as the case may be, the creditor shall file the information of default, with the information utility and the information utility shall process the information for the purpose of issuing record of default in accordance with regulation 21.]

(2) On receipt of the information submitted under sub-regulation (1) [or sub regulation (1A), as the case may be], the information utility shall-

(a) assign a unique identifier to the information, including records of debt;

(b) acknowledge its receipt, and notify the user of-

(i) the unique identifier of the information;

(ii) the terms and conditions of authentication and verification of information; and

(iii) the manner in which the information may be accessed by other parties."

17. Regulation 21 of the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017 deals with 'authentication of default', which reads as follows:-

"21. [Authentication of default].- *(1) An information utility shall expeditiously undertake the process of authentication and verification of information of default as soon as it is received.*

(2) For the purpose of sub-regulation (1), the information utility shall-

(a) deliver the information of default to the debtor seeking confirmation of the same within the time specified in the Technical Standards;

(b) remind the debtor at least three times for confirmation of information of default, in case the debtor does not respond, allow three days each time for the debtor to respond;

(c) deliver the information of default or the reminder, as the case may be, to the debtor either by hand, post or electronic means at the postal or e-mail address of the debtor-

(i) registered with the information utility by him, failing which,

(ii) [recorded with MCA 21 and the Central Registry of Securitization Asset Reconstruction and Security Interest of India (CERSAI) registry as repositories or any other statutory repository as approved by the Board, failing which,]

(iii) submitted in Form C of the Schedule.

[(3) On completion of the process under sub-regulation (2), the information utility shall record the status of authentication of information of default as indicated in the following Tables:

TABLE-1

Sl. No.	*Response of the Debtor*	*Status of Authentication*	*Colour of the Status*
(1)	*(2)*	*(3)*	*(4)*
1	*Debtor confirms the information of default*	*Authenticated*	*Green*
2	*Debtor disputes the information of default*	*Disputed*	*Red*
3	*Debtor does not respond even after three reminders*	*Deemed to be Authenticated*	*Yellow*

Provided that in case of financial creditors which are banks included in the second schedule of the Reserve Bank of India Act, 1934, the information utilities will record the status of authentication of information of default as indicated in the Table 2 below:

TABLE-2

Sl. No.	*Response of the Debtor*	*Status of Authentication*	*Colour of the Status*
(1)	*(2)*	*(3)*	*(4)*
1	*Debtor confirms the information of default,* *Or* *(b) Debtor does not respond even after three reminders*	*Authenticated*	*Green*
2	*Debtor disputes the information of default*	*Disputed*	*Red*

(4) After recording the status of information of default under sub-regulation (3), the information utility shall communicate the status of authentication in physical or electronic form of the relevant colour, as indicated in column (4) of the Tables 1 or 2, as the case may be, by issuing a record of default in Form D of the Schedule, to the registered users who are-

(a) creditors of the debtor who has defaulted in payment of a debt;

(b) parties and sureties, if any, to the debt in respect of which the information of default has been received.]"

18. When we look into the application under Section 7 which has been filed by the Financial Creditor under Section 7, Part-V deals with 'particulars of financial debt (documents, records and evidence of default)' which is following:-

"PART V

PARTICULARS OF FINANCIAL DEBT [DOCUMENTS, RECORDS AND EVIDENCE OF DEFAULT]		
1.	*PARTICULARS OF SECURITY HELD, IF ANY, THE DATE OF ITS CREATION, ITS ESTIMATED VALUE AS PER THE CREDITOR. ATTACH A COPY OF A CERTIFICATE OF REGISTRATION OF CHARGE ISSUED BY THE*	*i. Hypothecation of all current assets, stocks of raw materials, work-in-process, semi-finished goods and finished goods, packing materials, stores, etc., book debts, receivables, movable fixed assets, all plant and machineries, furniture, fixtures & fittings, office equipment etc. at various places including at Gurugram, Haryana and Haridwar, Uttar Pradesh;* *ii. Equitable mortgage of immovable property consisting of piece and parcel of land along-with super structure being:* *1) All that piece and parcel of land bearing consisting of One particular portion of Khasra No. 11 of Village Dahiyaki,*

	REGISTRAR OF COMPANIES (IF THE CORPORATE DEBTOR IS A COMPANY)	*Pragna- Manglaur, Tehsil- Roorkee, Haridwar, Uttrakhand admeasuring area 1750 Sq mtrs. Bounded as:* *North: Property of KIE of Khasra no. 11* *East: NH-58 and vendors land notified by GOI for* *acquiring the same* *South: Property of KIE of Khasra no. 11* *West: Property as khasra No. 366.* *2) All that piece and parcel of land bearing consisting of One particular portion of Khasra No. 11 of Dahiyaki, Pragna-Manglaur, Tehsil Roorkee, Haridwar, Uttrakhand admeasuring area 5003.45 Sq mtrs.* *Bounded as:* *North: Plot no. 5 of GM Pens International Pvt ltd* *East: NH-SK and vendors land notified by GOI for acquiring the same* *South: Plot no. 3 of Khasra no. 11* *West: Khasra No. 361,362,365 and 366 of Village Mundiyaki,* *Admeasuring 5003.45 sq meters in the name of Corporate Debtor; and* *3) Land consisting of One particular portion of Khasra No. 361,362,363 and 366 of Village Mundiyaki, Pargaana-Manglaure, Tehsil- Roorkee, Haridwar, Uttrakhand admeasuring area 1276.55 Sq mtrs. Bounded as:* *North: Plot no. 5 of GM Pens in KIE Industrial Estate* *East: kh.11 of village Dahiyaki* *South: kh. no 365* *West: part of Khasra No. 361,363 and 366 of plot no 4B* *Admeasuring 1276.55 sq meters, in the name of the Corporate Debtor.*

2.	*PARTICULARS OF AN ORDER OF A COURT, TRIBUNAL OR ARBITRAL PANEL ADJUDICATING ON THE DEFAULT, IF ANY (ATTACH A COPY OF THE ORDER)*	*That on 26.05.2017, the Financial Creditor filed an Original Application/recovery suit under Section 19 of The Recovery of Debts and Bankruptcy Act, 1993 before the Hon'ble Debt Recovery Tribunal-11, New Delhi bearing OA No. 615 of 2017 for an amount of Rs. 7,85,62,274/- (Rupees Seven Crores Eighty Five Lacs Sixty Two Thousand Two Hundred And Seventy Four) due and payable at the time, along with further interest at contracted rates and other charges as applicable. That the Hon'ble Debt Recovery Tribunal, New Delhi was pleased to issue notice in the said OA and the OA is currently pending adjudication.*
3.	*RECORD OF DEFAULT WITH THE INFORMATION UTILITY, IF ANY (ATTACH A COPY OF SUCH RECORD)*	
4.	*DETAILS SUCCESSION OF CERTIFICATE, OR PROBATE OF A WILL, OR LETTER OF ADMINISTRATION OR COURT DECREE (AS MAY BE APPLICABLE), UNDER INDIAN THE SUCCESSION ACT, 1925 (10 OF 1925) (ATTACH A COPY)*	*NA*
5.	*THE LATEST AND COMPLETE COPY OF FINANCIAL CONTRACT THE REFLECTING ALL AMENDMENTS AND WAIVERS TO DATE (ATTACH A COPY)*	*The loan and security documents executed by the Corporate PY Debtor in favour of the Financial Creditor are annexed herewith as per the list of annexures/documents contained in entry at point 8 below.*

6.	*A RECORD OF DEFAULT AS AVAILABLE WITH ANY CREDIT INFORMATION COMPANY (ATTACH A COPY)*	
7.	*COPIES ENTRIES OF A IN BANKERS BOOK IN ACCORDANCE WITH THE BANKERS BOOKS EVIDENCE ACT, 1891 (18 OF 1891) (ATTACH A COPY)*	

S. No.	*Loan Account No.*	*Loan Type*	*Sanctioned Amount (Rs.)*	*Outstanding balance as on 08.10.2022 (Rs.)*
1.	*05860600004851*	*TL*	*9,02,50,000.00*	*Principal 3,72,20,990.77 + Interest 3,11,86,029.59*
2.	*05860500000127*	*CC (H)*	*3,64,00,000.00*	*Principal 3,70,47,954.50 + Interest 2,94,92,800.71*
5.	***TOTAL***		***12,66,50,000.00***	***13,49,47,775.57***

A copy of the Statements of Account in respect of account nos. 05860600004851 and 05860500000127 along with interest calculation sheets, and a Certificate under Section 2A of Banker's Book Evidence Act, 1891 are collectively annexed herewith as ***Annexure 7(Colly)***

8. *LIST OF OTHER DOCUMENTS ATTACHED TO THIS APPLICATION IN ORDER TO PROVE THE EXISTENCE OF FINANCIAL DEBT, THE AMOUNT AND DATE OF DEFAULT.*

S. No.	*Particulars*	*Annexure No.*
1.	*A copy of sanction letter dated 18.02.2014, bearing ref. No. PARLIA/ADV/2013-14/*	*A-8*
2.	*A copy of board resolution dated 13.03.2014 passed by the board of directors of the Corporate Debtor*	*A-9*
3.	*A copy of the Reconstitution Letter dated 30.04.2014*	*A-10*
4.	*A copy of the Term Loan Agreement dated 30.04.2014*	*A-11*
5.	*A copy of Demand Promissory Note (Term Loan) dated 30.04.2014*	*A-12*
6.	*A copy of Demand Promissory Note (Cash Credit) dated 30.04.2014*	*A-13*
7.	*A copy Letter of Instalments dated 30.04.2014*	*A-14*
8.	*A copy of Letter of Continuing Security dated 30.04.2014*	*A-15*

9.	*A copy of Composite Hypothecation Agreement dated 30.04.2014*	*A-16*
10.	*A copy of Undertaking of book debts dated 30.04.2014*	*A-17*
11.	*A copy of Power of Attorney dated 30.04.2014*	*A-18*
12.	*A copy of General Undertakings dated 30.04.2014*	*A-19*
13.	*A copy of Declaration cum undertakings dated 30.04.2014*	*A-20*
14.	*A copy of Undertaking not to withdraw etc. dated 30.04.2014*	*A-21*
15.	*A copy of Undertaking for share holdings dated 30.04.2014;*	*A-22*
16.	*A copy of Declaration dated 30.04.2014*	*A-23*
17.	*A copy of Supplemental Memorandum of Entry dated 30.04.2014*	*A-24*
18.	*A copy of Declaration of Mortgage dated 30.04.2014*	*A-25*
19.	*A copy of Letter of Confirmation of mortgage dated 01.05.2014*	*A-26*

19. The above particulars as mentioned in Part-V does indicate that record of default with information utility has not been attached along with the Section 7 Application. Whether application filed by the Financial Creditor deserves to be rejected on account of non-filing of record of default with information utility is the question to be answered.

20. We need to look into the statutory scheme of the IBC, Rules and Regulations framed thereunder for answering the aforesaid question. Section 7 of the IBC deals with 'initiation of corporate insolvency resolution process by financial creditor'. Section 7(2) provides that Financial Creditor shall make an application under sub-section (1) ***in such form and manner*** and accompanied with such fee as may be prescribed. Sub-section (3) of Section 7 provides that the financial creditor shall, along with the application furnish record of the default recorded with the information

utility ***or such other record or evidence of default as may be specified***.

Sub-sections (2) and (3) are as follows:-

> *"**7. Initiation of corporate insolvency resolution process by financial creditor.** - ……(2) The financial creditor shall make an application under sub-section (1) in such form and manner and accompanied with such fee as may be prescribed.*
>
> *(3) The financial creditor shall, along with the application furnish –*
>
> *(a) record of the default recorded with the information utility or such other record or evidence of default as may be specified;*
>
> *(b)the name of the resolution professional proposed to act as an interim resolution professional; and (c) any other information as may be specified by the Board."*

21. Section 239 empowers the Central Government to make rules for carrying out the provisions of the Code. Under sub-section (2) of Section 239, the form, the manner and the fee for making application before the Adjudicating Authority for initiating corporate insolvency resolution process by financial creditor under sub-section (2) of Section 7, in one of the matters in which rules can be framed. Section 239 (2) (c) is as follows:-

> *"**239. Power to make rules.** -.....(2) Without prejudice to the generality of the provisions of sub-section (1), the Central Government may make rules for any of the following matters, namely: —*

xxx *xxx* *xxx*

(c) the form, the manner and the fee for making application before the Adjudicating Authority for initiating corporate insolvency resolution process by financial creditor under sub-section (2) of section 7"

22. Section 240 of the Code provides 'power to make regulations' where the Board may, by notification, make regulations ***consistent with the Code and the rules made thereunder***. Section 240(1) is as follows:-

*"**240. Power to make regulations. –** (1) The Board may, by notification, make regulations consistent with this Code and the rules made thereunder, to carry out the provisions of this Code."*

23. Now we come to the Rules framed under Section 239 read with Sections 7, 8, 9 and 10 of the IBC Code by the Central Government which are rules known as 'The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016'. Rule 4 of the 'The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016' deals with 'application by financial creditor', which is as follows:-

*"**4. Application by financial creditor.—(**1) A financial creditor, either by itself or jointly, shall make an application for initiating the corporate insolvency resolution process against a corporate debtor under section 7 of the Code in Form 1, accompanied with documents and records required therein and as specified in the Insolvency and*

Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

(2) Where the applicant under sub-rule (1) is an assignee or transferee of a financial contract, the application shall be accompanied with a copy of the assignment or transfer agreement and other relevant documentation to demonstrate the assignment or transfer.

(3) [The applicant shall serve a copy of the application to the registered office of the corporate debtor and to the Board, by registered post or speed post or by hand or by electronic means, before filing with the Adjudicating Authority.]

(4) In case the application is made jointly by financial creditors, they may nominate one amongst them to act on their behalf."

24. Sub-Rule (1) of Rule 4 requires that the application under Section 7 in Form 1 is to be accompanied with documents and records required therein and as specified in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. We have already noticed Part-V of Form-1 'particulars of financial debt (documents, records and evidence of default)' in which application has to be filed by the Financial Creditor.

25. When we look into Part-V, it is clear that Item No.3 records of default with the information utility, if any, is mentioned and Item No.5, the latest and complete copy of the financial contract, Item No.6, record of default as

available with any credit information company and Item No.7, copies of entries in a bankers' book in accordance with the Bankers Books Evidence Act, 1891 has been mentioned. Rule 4 sub-rule (2) refers to Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. Regulation 2A provides for 'record or evidence of default by financial creditor' for the purposes of clause (a) of sub-section (3) of Section 7 of the Code which have to be filed by the Financial Creditor. Regulation 2A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 is as follows:-

> *"**2A.** Record or evidence of default by financial creditor. For the purposes of clause (a) of sub-section (3) of section 7 of the Code, the financial creditor may furnish any of the following record or evidence of default, namely:-*
>
> > *(a) certified copy of entries in the relevant account in the bankers' book as defined in clause (3) of section 2 of the Bankers' Books Evidence Act, 1891 (18 of 1891);*
> >
> > *(b)an order of a court or tribunal that has adjudicated upon the non-payment of a debt, where the period of appeal against such order has expired."*

26. Clause (a) of sub-section (3) of Section 7 of the Code deals with record of the default recorded with the information utility or such other record or evidence of default as may be specified. When we read Section 7(3)(a) of the

Code, Regulation 2A of the 'Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016' and Rule 4 of 'The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016', it is clear that for purposes of proving a default, financial creditor is entitled to furnish certified copies of entries to the relevant account in the bankers' book as defined in clause (a) of Section 2 of the Bankers' Book Evidence Act, 1891 which is one of the evidences mentioned for proving the default. The provision of Section 7 and the 'Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016' with regard to requirement which financial creditor has to fulfil before filing Section 7 application has also come for consideration before the Hon'ble Supreme Court. The Hon'ble Supreme Court in ***"Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17"*** while referring to information available with information utility has observed that there are other sources which evidences a financial debt. Paragraphs 54 and 55 of the judgment are as follows:-

> *"54. It is clear from these sections that information in respect of debts incurred by financial debtors is easily available through information utilities which, under the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017 (Information Utilities Regulations), are to satisfy themselves that information provided as to the debt is accurate. This is done by giving notice to the corporate debtor who then has an opportunity to correct such information.*

55. Apart from the record maintained by such utility, Form I appended to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, makes it clear that the following are other sources which evidence a financial debt:

(a) Particulars of security held, if any, the date of its creation, its estimated value as per the creditor;
(b) Certificate of registration of charge issued by the Registrar of Companies (if the corporate debtor is a company);
(c) Order of a court, tribunal or arbitral panel adjudicating on the default;
(d) Record of default with the information utility;
(e) Details of succession certificate, or probate of a will, or letter of administration, or court decree (as may be applicable), under the Indian Succession Act, 1925;
(f) The latest and complete copy of the financial contract reflecting all amendments and waivers to date:
(g) A record of default as available with any credit information company;
(h) Copies of entries in a bankers book in accordance with the Bankers Books Evidence Act, 1891."

27. In ***"Innoventive Industries Limited vs. ICICI Bank and Anr-(2018) 1 SCC 407"***, the Hon'ble Supreme Court in the above case has

examined the scheme under Sections 7, 8 and 9. The scheme has been noticed by the Hon'ble Supreme Court in paragraphs 28, 29 and 30.

28. Regulation 20 of the IBBI (Information Utilities) Regulations, 2017 as amended w.e.f 14.06.2022 i.e. Regulation 20(1A) requires Financial Creditor before filing an application to initiate corporate insolvency resolution process under section 7 or 9, as the case may be, the creditor shall file the information of default, with the information utility and the information utility shall process the information for the purpose of issuing record of default in accordance with regulation 21. The submission is that after insertion of the above sub-regulation (1A) in Regulation 20, now no application can be filed under Sections 7 and 9 if it is not accompanied by record of default issued by Information utility as contemplated by Regulations 20 and 21. Regulation 20 although has been amended w.e.f 14.06.2022 but there is no amendment either in Section 7 of the IBC which empowers Financial Creditor to file record of the default recorded in the information utility ***or such other record and default as may be specified*** or in Rules 2016 or CIRP Regulations 2016. The statutory scheme, thus, contemplates furnishing record of default by the financial creditor as recorded with the information utility or such other record or evidence of default as may be specified. We have already noticed that the record of default for purposes of Section 7(3)(a) has been specified by Regulation 2A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. Thus, record of default recorded with the information utility is not the only document which has

to be furnished by financial creditor. Financial creditor is at liberty to submit such other record of default as may be specified which is a statutory provision contained in Section 7. Further Regulation 2A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 clearly refers to provide for record or evidence of default by financial creditor. We have also noticed that the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 which are Rules framed by the Central Government provides for filing of the application under Section 7 in Form-1 and under Form-1, Part-V under 'particulars of financial debt (documents, records and evidence of default)', it is not only the record of default with information utility but other record of default has also been contemplated. We have noticed that Regulations framed by the Board as per Section 240(1) has to be consistent with provisions of the Code and the Rules. If Regulation 20(1A) is to be read as Regulation now mandating the Financial Creditor to file only the record of default in the information utility, the said Regulation will not be consistent with provision of Section 7(3) of the Code and Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 which provides that what documents have to be filed by the Financial Creditor. Sub-rule (1) of Rule 4 provides for documents and records required therein and as specified in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. Thus, CIRP Regulations 2016 are referred to in Rule 4 sub-rule (1), hence, the interpretation of Regulation 20(1A) as put by the Counsel for the

Appellant shall also not be consistent with Rule 4. When Section 240 itself provides that regulations have to be consistent with provision of Code and Rules, no regulation can be implemented or enforced which is not in consonance with the Code and the Rules.

29. From the above examination of statutory scheme, Rules and Regulations, it is clear that Regulation 20(1A) cannot be read to mean that after the said amendment brought in regulation w.e.f 14.06.2022 an application filed under Section 7 which is not supported by information of default from an information utility is to be rejected and if the Financial Creditor has filed other evidence to prove default which is contemplated by the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 and the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the said application has not to be considered. We, thus, are of the considered view that even after amendment of Regulation 20 by insertion of Regulation 20(1A) w.e.f 14.06.2022, Financial Creditor is entitled to file evidence of record of default as contemplated by Regulation 2A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. We, thus, do not find any substance in the submission of the Appellant that since Financial Creditor has not filed the record of default from an information utility, Section 7 deserves to be rejected.

30. Before the Adjudicating Authority, submission on the basis of the argument which has been advanced by the Appellant before us that no information of default from the information utility have been filed, application deserves to be rejected was raised and dealt with by the Adjudicating Authority. It is useful to extract the following observations in paragraph 11 of the judgment of the Adjudicating Authority:-

> *".....As far as the plea of default being not recorded with the information utility is concerned, as can be seen from Section 7 (3)(a) of the IBC, 2016, along with the application, the Financial Creditor may furnish the record of default recorded with the information utility or such other or record or evidence of default as may be specified. Besides, as can be seen from Regulation 2A of IBBI (Insolvency Resolution Process for Corporate Persons Regulations), 2016, for the purpose of Clause (a) of sub-section 3 of Section 7 of the Code (ibid), the Financial Creditor may furnish a certified copy of entries in the relevant account in Banker's Book as evidence of default. In the present case, the Petitioner has enclosed the copies of the statement of account in respect of Account Nos. 05860600004851 and 05860500000127 along with the interest calculation sheet and Certificate under Section 2(A) of Banker's Book Evidence Act, 1891, as Annexure-7 to the Petition, which is valid evidence in terms of the provisions of Regulation 2A(a) of IBBI (CIRP) Regulations, 2016. As far as the plea of Regulation 20(1A) of IBBI (Information Utilities) Regulations, 2017 is concerned, in terms of the said provision,*

before filing an application to initiate CIRP the creditor should file the information of default with the Information Utility and the IU shall process the information for the purpose of issuing record of default in accordance with Regulation 21 of the Regulations. The Regulation nowhere provides that the information of default recorded by IU can be the only evidence to be relied on while taking a decision regarding the admission of a Petition under Section 7 of IBC, 2016. Even otherwise also, neither the IBBI (IU) Regulations, 2017 nor the order issued by the Registrar, NCLT can have overriding effect qua the provisions of Regulation 7(3)(a) of the IBC, 2016. In the wake, we are unable to countenance the plea raised by the Respondent i.e., in the absence of a record of default recorded by IU, an application filed under Section 7 of IBC, 2016 may not be admitted."

31. Thus, we are of the view that the Adjudicating Authority has correctly repelled the contention of the Appellant that in absence of a record of default recorded by information utility, the application filed under Section 7 may not be admitted.

32. Now we proceed to examine other grounds raised by the Appellant in support of the Appeal as contained in 'short notes' referred above.

33. Ground No.1 is covered by our discussion and conclusion as noted above while dealing with the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017. The ground further mentions that because of the pre-existing dispute, the bank has deliberately not complied

with the requirement of filing proof of debt lodged by it with an Information Utility, which according to the Appellant is mandatory requirement. The concept of pre-existing dispute is relevant with regard to operational debt. The financial debt even if disputed does not preclude the Adjudicating Authority to decide debt and default. The said issue has already been answered by the Hon'ble Supreme Court in ***"Innoventive Industries Ltd."*** (supra). In paragraph 30 of the judgment while contrasting the statutory scheme of Sections 7 and 8, Hon'ble Supreme Court has observed that it is of no matter that the financial debt is disputed so long as the debt is 'due'. In paragraphs 29 and 30 of the judgment, following has been held:-

> *"29. The scheme of Section 7 stands in contrast with the scheme under 9 Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing-i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.*
>
> *30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a*

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

34. Under Ground Nos.2 and 3, Appellant's case is that there is no debt. Rather, the bank owes the Corporate Debtor money, for which purpose a Counter-Claim of Rs.45 Crores has been filed with DRT, Delhi. It is the case of the Appellant that DRT case of Rs.5 or Rs.7 Crore and odd before DRT counter claim of Rs.45 crores have been filed by the Corporate Debtor. Appellant has also referred to Money Suit No.28 of 2022 in which a combined amount of Rs.162.99 crores have been claimed where the claim of the Corporate Debtor alone is for Rs.14 lakhs. We are of the view that filing of counter claim in the DRT in OA No.615 of 2017 or filing of money suit by Corporate Debtor being Money Suit No.28 of 2022 cannot be negation of debt which is due on the Corporate Debtor. The Hon'ble Supreme Court with regard to counter claim and set off as claimed by the Corporate Debtor in ***"Swiss Ribbons (P) Ltd. v. Union of India"*** (supra) has held that question of consideration is set off and counter claim arises

only at the time of consideration of claim after initiation of CIRP. In paragraphs 61 and 63, following has been laid down:-

> *"61. Insofar as set-off and counterclaim is concerned, a set-off of amounts due from financial creditors is a rarity. Usually, financial debts point only in one way- amounts lent have to be repaid. However, it is not as if a legitimate set-off is not to be considered at all. Such set-off may be considered at the stage of filing of proof of claims during the resolution process by the resolution professional, his decision being subject to challenge before the adjudicating authority under Section 60.*
>
> *xxx xxx xxx*
>
> *63. Equally, counterclaims, by their very definition, are independent rights which are not taken away by the Code but are preserved for the stage of admission of claims during the resolution plan. Also, there is nothing in the Code which interdicts the corporate debtor from pursuing such counterclaims in other judicial fora. Form C dealing with submission of claims by financial creditors in the CIRP Regulations states thus……"*

35. The mere fact that the Corporate Debtor has filed a counter claim and has also filed money suit cannot negate the existence of debt and default which was proved by the Financial Creditor by filing relevant materials before the Adjudicating Authority which included copies of entries in a bankers' book pertaining to both the loan accounts of the

Corporate Debtor as well as the statement of account filed along with the Section 7 application. We, thus, do not find any substance in the submission of the Appellant that since the counter claim or money suit has been filed there is no debt.

36. Under Ground No.4, Appellant's claim that the bank has filed Section 7 application only against the Corporate Debtor and not against two other sisters' companies because those companies have huge demands in the Commercial Suit, which according to the Appellant is patently malicious. We have already noticed that before filing Section 7 application, the bank has already initiated proceedings under Section 13(2) and (4) of the SARFAESI Act, 2002 against the Corporate Debtor. Mere not filing Section 7 application against other two sister companies of the Corporate Debtor cannot lead to any conclusion that application under Section 7 has been maliciously filed by the Financial Creditor. The Financial Creditor is well within its jurisdiction to take proceeding when default is committed by the Corporate Debtor. Section 7 empowers the Financial Creditor to file application under Section 7 which filing cannot be said in any manner malicious and there is no substance in the submission.

37. Coming to Ground No.5 i.e. pre-existing dispute. We have already noticed the scheme of Section 7 that mere disputing the debt by the Corporate Debtor is not relevant and when debt and default is proved, Section 7 application has to be admitted. The concept of pre-existing

dispute is relevant with regard to operational debt as per statutory scheme contained in Sections 8 and 9.

38. Coming to Ground No.6 i.e. 'fraud-suppression'. Submission of the Appellant is that the Bank did not disclose the counter-claim over the Money Suit in the IBC petition, knowing fully well that in such event of disclosure, its Section 7 petition would fail. The submission of the Appellant is without any substance, as discussed above, filing of counter claim or money suit shall not absolve the Appellant from its liability to discharge its debt and if there is a financial debt which is due and default is committed by the Corporate Debtor proceedings under Section 7 can be initiated. Mere filing of the counter claim or money suit cannot lead to dismissal of Section 7. If any such interpretation as suggested by the Appellant is accepted, all proceedings under Section 7 can be frustrated by initiating litigation by Corporate Debtor.

39. Coming to Ground No.7 that as the officers arrayed as Defendants in the suit have filed no written statement, this proves that all the assertions made in the suit against such officers stand admitted by such officers. We are of the view that in Section 7 proceedings Adjudicating Authority has not to examine the money suit filed by the Corporate Debtor against the bank and its officers. Those are separate proceedings. No allegation of fraud can be imputed on such basis.

40. Under Ground No.8, the Appellant submits that the bank has not disclosed the pendency of the suit and potential liability thereupon in its

audited Balance Sheet for the year ending March 31, 2023. Mere filing of the suit when there is no adjudication in favour of the Corporate Debtor, it cannot be said that any liability has arisen which has to be reflected in the financial balance sheet of the year ending 31.03.2023. We have already taken the view that the plea of pre-existing dispute is not relevant with regard to financial debt when debt is due on the Corporate Debtor and he commits default. The submission of the Appellant that the plea of pre-existing dispute which is applicable with regard to operational debt should also be applied on principle of priority with the financial creditor is totally against the statutory scheme as delineated by the Code. We do not find any substance in the submission.

41. Under Ground No.9 under the heading 'legal conundrum', the Appellant submits that since the Resolution Professional is an appointee of the Financial Creditor, and if the IBC process is allowed to go forward, this means that the suit on behalf of the Corporate Debtor can only be prosecuted by him, which means that since all actions of the Resolution Professional are dictated by the Financial Creditor, it is clear that no steps will be taken by the Financial Creditor to ensure that the Resolution Professional diligently prosecutes the suit against his own nominator i.e. the same Financial Creditor. The mere fact that the Financial Creditor has nominated the Resolution Professional cannot be read to mean that Resolution Professional shall not exercise its functions and obligation as entrusted by the Code and the Regulations for prosecuting any suit by the Resolution Professional. Resolution Professional requires to obtain

permission of the Adjudicating Authority who is to examine all aspects of the matter while granting any such permission. The submission of the Appellant that the very filing of the Section 7 petition constitutes 'criminal contempt of court' is preposterous argument and shows the audacity of the Appellant to make all frivolous submission to support his claim.

42. Under Ground No.10 Appellant's case is that the application was barred by limitation since the date of default accepted by Adjudicating Authority was 13.03.2017 and application was filed on 12.01.2023. For considering the said submission, we need to notice Section 7 application and pleadings therein and what has been stated in the application. Both in synopsis and Part-IV, Financial Creditor has given details of OTS proposal which was received from Corporate Debtor which were clear acknowledgment of liability by the Corporate Debtor. In synopsis at page no.1486 of the Appeal, following has been mentioned with regard to OTS proposal dated 05.09.2019, 07.09.2019, 23.09.2019, 16.12.2019, 21.09.2020 and 03.11.2020:-

05.09.2019, 07.09.2019, 23.09.2019, 16.12.2019, 21.09.2020 and 03.11.2020	Thereafter, written acknowledgements of liability were executed by the Corporate Debtor in the form of numerous OTS proposals including letters dated 21.09.2020, 03.11.2020, 16.12.2019, 05.09.2019, 07.09.2019 and 23.09.2019.

43. In Part-IV of the application also Financial Creditor has referred to documents evidencing continuing acknowledgment of debt by the

Corporate Debtor. It is useful to extract following part of Part-IV of the application:-

	Documents evidencing continuing acknowledgement of debt by the Corporate Debtor: i. Letter of Acknowledgement of liability dated 26.03.2017 executed by the Corporate Debtor (annexed herewith as Annexure A-4) ii. Written One Time Settlement/ OTS offers made by the Corporate Debtor on 05.09.2019, 07.09.2019, 23.09.2019, 16.12.2019, 21.09.2020 and 03.11.2020 (collectively annexed herewith as Annexure A-5 (Colly)) iii. The Hon'ble Supreme Court of India vide its' order dated 10.01.2022 in SMW(C) No. 3 of 2020, excluded the period between 15 March 2020 to 28 February 2022 for the purpose of computing the period of limitation on account of the Covid-19 pandemic (order dated 10.01.2022 is annexed herewith as Annexure A-6) Workings for computation of amount and days of default are contained in the statements of accounts and the respective interest calculation sheets enclosed herewith.

44. It is well settled by the Hon'ble Supreme Court that any acknowledgment of liability by a Corporate Debtor is acknowledgment within the meaning of Section 18 of the Limitation Act. Hon'ble Supreme Court in ***"Dena Bank (Now Bank of Baroda) vs. C. Shivakumar Reddy and Anr- (2021) 10 SCC 330"*** laid down following in paragraph 139:-

> *"139. Section 18 of the Limitation Act cannot also be construed with pedantic rigidity in relation to proceedings under the IBC. This Court sees no reason*

why an offer of one-time settlement of a live claim, made within the period of limitation, should not also be construed as an acknowledgment to attract Section 18 of the Limitation Act. In Gaurav Hargovindbhai Dave cited by Mr Shivshankar, this Court had no occasion to consider any proposal for one-time settlement. Be that as it may, the balance sheets and financial statements of the corporate debtor for 2016-2017, as observed above, constitute acknowledgment of liability which extended the limitation by three years, apart from the fact that a certificate of recovery was issued in favour of the appellant Bank in May 2017. The NCLT rightly admitted the application by its order dated 21-3-2019."

45. Now we come to the Ground No.11 which says that letters that are written 'without prejudice, whether such caption be placed on the top of the letter or not, is immaterial. It is submitted that the view taken by NCLT holding the application within time is patently contrary to public policy which is to encourage disputants to settle their disputes, by permitting them the leeway of exchanging letters to facilitate settlement. Learned Counsel for the Appellant has relied on the judgment of the Hon'ble Supreme Court in ***"Peacock Plywood (P) Ltd. vs. Oriental Insurance Co. Ltd.- (2006) 12 SCC 673"*** (para 43). The above judgment was a case where Hon'ble Supreme Court was considering interpretation of a policy of marine insurance entered into by and between the parties covering goods in transit. A Claim by way of constructive total loss was raised by the

Appellant with the insurer which was repudiated by the insurance company. The Hon'ble Supreme Court noted the correspondences between the parties and examined the letters of insurer and thereafter made following observations in paragraph 42:-

> *"42. Only because the expression "without prejudice" was mentioned, the same, in our opinion, by itself was not sufficient and would not curtail the right of the insured to which it was otherwise entitled to. The expression "without prejudice" may have to be construed in the context in which it is used. If the purpose for which it is used is accomplished, no legitimate claim can be allowed to be defeated thereby."*

46. The Hon'ble Supreme Court held that the expression "without prejudice" may have to be construed in the context in which it is used but the said expression shall not be allowed to defeat the legitimate claim. Counsel for the Appellant has relied on paragraph 43 of the judgment which paragraph 43 of the judgment is as follows:-

> *"43. In Phipson on Evidence, 16th Edn., pp. 655-57, it is stated:*
>
> *"Without prejudice privilege is seen as a form of privilege and usually treated as such. It does not, however, have the same attributes as the law of privilege. Privilege can be waived at the behest of the party entitled to the privilege. Without prejudice privilege can only normally be waived with the*

consent of both parties to the correspondence. Whilst the rule in privilege is 'once privileged, always privileged', the rule for without prejudice is less straightforward, and at least in three-party cases, this will not always be the position. A third distinction is that in the three- party situation, which is not governed by contract, without prejudice documents are only protected in circumstances where a public policy justification can be provided, namely, where the issue is whether admissions were made. That is not a principle applicable in the law of privilege. Fourthly, whereas legal professional privilege is a substantive right, without prejudice privilege is generally a rule of admissibility. either based on a contractual or implied contractual right, or on public policy. This may have consequences relevant to proper law issues. Finally, if a party comes into possession of a privileged document, subject to equitable relief for breach of confidence, there is no reason why he should not use it and it will be admissible in evidence. But, the mere fact that a party has a without prejudice document does not entitle him to use it without the consent of the other party.

(c) When is correspondence treated as within the rule?

The first question is to determine what communications attract without prejudice privilege. The second stage is to consider when the court will, nevertheless, admit such communications.

Correspondence will only be protected by without prejudice privilege if it is written for the purpose of a genuine attempt to compromise a dispute between the parties. It is not a precondition that the correspondence bears the heading without prejudice. If it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible. The converse is that there are some circumstances in which the words are used but where the documents do not attract without prejudice privilege. This may be because although the words without prejudice were used, the negotiations were not for the purpose of a genuine attempt to settle the dispute. The most obvious cases are first, where the party writing was not involved in genuine settlement negotiations, and secondly, where although the words were used, they were used in circumstances which had nothing to do with negotiations. Surveyors' reports, for example, are sometimes headed without prejudice, although they have nothing to do with negotiations. The third case is, where the words are used in a completely different sense. Thus, in Council of Peterborough v. Mancetter Developments, the documentation was admissible because in context the words meant 'without prejudice to an alternative right and without concession to the other application' and had nothing to do with settlement.

There are circumstances in which the correspondence is initiated with a view to settlement

but the parties do not intend that the correspondence should be without prejudice. It may be that the parties positively want any subsequent court to see the correspondence and always had in mind that it should be open correspondence. It may be a nice point whether negotiations at which no one mentioned the words 'without prejudice' should be admitted in evidence: for example at an early meeting between the parties when the dispute first developed. There is no easy rule here. On the other hand, even when a letter is sent as the 'opening shot' in negotiations, and is not preceded by any previous correspondence, it may be without prejudice. There are authorities in both directions on this and it will depend on the facts.

It has been said that if one is seeking to change the basis of the correspondence from without prejudice to open it is incumbent on that person to make the change clear, although that may be more a pointer than a rule. There is no reason why every letter for which without prejudice is claimed should contain an offer or consideration of an offer, so long as the without prejudice correspondence is part of a body of negotiation correspondence."

47. Paragraph 43 of the judgment only extract Phipson on Evidence, 16th Edn. Pp. 655-57. Paragraph 43 does not contain any ratio of the judgment. One Time Settlement and expression 'without prejudice' came to be considered in judgment of the Hon'ble Supreme Court in ***"ITC Ltd. v. Blue Coast Hotels Ltd., (2018) 15 SCC 99".*** The Hon'ble Supreme Court in the

said judgment had occasion to consider letter of undertaking without prejudice. Hon'ble Supreme Court laid down that mere introduction of words 'without prejudice' have no significance when the debtor acknowledges the debt even after action was initiated under the Act (SARFAESI Act, 2002). In paragraph 33 of the judgment, following has been held:-

> ***"33.*** *Much was sought to be made of the words "without prejudice" in the letter [Dated 25-11-2013] containing the undertaking that if the debt was not paid, the creditor could take over the secured assets. The submission on behalf of the debtor that the letter of undertaking was given in the course of negotiations and cannot be held to be an evidence of the acknowledgement of liability of the debtor, apart from being untenable in law, reiterates the attempt to evade liability and must be rejected. The submission that the letter was written without prejudice to the legal rights and remedies available under any law and therefore the acknowledgement or the undertaking has no legal effect must likewise be rejected. This letter is reminiscent of a letter that fell for consideration in Spencer case [Spencer v. Hemmerde, (1922) 2 AC 507 (HL)] as pointed out by Mr Harish Salve,*
>
> > *"as a rule the debtor who writes such letters has no intention to bind himself further than he is bound already, no intention of paying so long as he can avoid payment, and nothing before his mind but a desire, somehow or other, to gain time and avert pressure".(AC p. 526)*

It was argued in a subsequent case [Bradford & Bingley Plc v. Rashid, (2006) 1 WLR 2066 (HL)] that an acknowledgment made "without prejudice" in the case of negotiations cannot be used as evidence of anything expressly or impliedly admitted. The House of Lords observed as follows: (WLR p. 2072, para 16)

> *"16. … But when a statement is used as an acknowledgment for the purposes of Section 29(5), it is not being used as evidence of anything. The statement is not evidence of an acknowledgment.It is the acknowledgement."*
>
> *(emphasis in original)*

Therefore, the "without prejudice" rule could have no application. It said: (WLR p. 2091, para 83)

> *"83. Here, the [respondent], Mr Rashid was not offering any concession. On the contrary, he was seeking one in respect of an undisputed debt. Neither an offer of payment nor actual payment…."*
>
> *(emphasis in original)*

We, thus, find that the mere introduction of the words "without prejudice" have no significance and the debtor clearly acknowledged the debt even after action was initiated under the Act and even after payment of a smaller sum, the debtor has consistently refused to pay up."

48. The above judgment of the Hon'ble Supreme Court in ***"ITC Ltd. v. Blue Coast Hotels Ltd."*** (supra) fully covers the issue raised by the Appellant. There is clear acknowledgment of debt in various letters for One Time Settlement as given by the Appellant which was also pleaded categorically clearly in Section 7 Application. We have already noticed that

in pursuance of One Time Settlement, amount of Rs.2 Crore is claimed to be deposited by the Appellant and other two companies those One Time settlement offers were clear acknowledgment of Corporate Debtor its liability and dues and showed his anxiety to settle the issue. We have already noticed various orders passed in this appeal at the instance of the Appellant where he offered to submit settlement offer and liquidate the debt of the financial creditor even after admission of Section 7 application by the Adjudicating Authority. When the Appellant right from 2018 has been submitting proposal for One Time settlement as pleaded in Section 7 application and noticed by the Adjudicating Authority and also in this Appeal, submission of the Appellant that there is no acknowledgment cannot be accepted and has to be rejected.

49. In Ground No.12, the Appellant submits that the NCLT has made huge conceptual error in paragraph 11 when its OTS offer submitted by Appellant are acceptance of defaulted amount. It is submitted that the letter (03.11.2020), at best, refers to debt and not to default. Counsel for the Appellant has referred to paragraph 11 of the NCLT and submits that NCLT has erroneously observed that settlement after offer dated 03.11.2020 is acknowledgment of defaulted amount.

50. The extension of limitation under Section 18 of the Limitation Act is on an acknowledgment of debt. When the debt is acknowledged the Financial Creditor is entitled to claim for extension of limitation. Section 18 uses expression 'an acknowledgment of liability' which is made in writing

signed by parties. The OTS proposal to settle the outstanding debt by making an offer by the Corporate Debtor is nothing but acknowledgment of liability which acknowledgment is to extend the limitation under Section 18 of the Limitation Act. Adjudicating Authority has rightly held that on the basis of OTS offer i.e. acknowledgement what is relevant is acknowledgment of liability.

51. Now coming to Ground No.13. Appellant's case is that the Financial Creditor had authorized one Nidhi Kumar through a Power of Attorney dated 01.09.2021 to act on its behalf, but Ms. Nidhi Kumar nominated Mr. Pawan Sharma to be true and lawful Attorney of the Financial Creditor. Section 7 application was submitted by Affidavit of Pawan Sharma claiming to be authorised representative of the applicant's bank authorised to sign the application. The Power of Attorney was also filed along with the Section 7 application which is brought on record at page 1501 to 1507 of the Appeal.

52. The Power of Attorney was signed by Nidhi Kumar in favour of Shri. Pawan Sharma on 22.12.2021 as it is clear from documents filed at Page Nos. 1502-1507. The Power of Attorney refers to Power of Attorney dated 01.09.2021 which empowers Nidhi Kumar to nominate, constitute and appoint. Following statement in Power of Attorney given by Nidhi Sharma is as follows:-

> *"NOW KNOW YE AND THESE PRESENTS WITNESS that by virtue of the said Power to substitute contained in the said Power of Attorney dated 1st September*

2021 for all or any of the Powers contained therein and enabling me, I hereby nominate, constitute and appoint Mr. Pawan Sharma, (EC No. 102555), now in the service of the Bank as Senior Manager at Zonal Stressed Asset Recovery Branch (ZOSARB), New Delhi and who has been identified for posting at Zonal Stressed Asset Recovery Branch (ZOSARB), New Delhi to be the true and lawful attorney of the Bank at New Delhi or any place or places in India (including Head office at Baroda) or at any other place or places abroad for and on behalf of the Bank and in the name of the Bank or in my name to do and perform all or any of the acts, matters, powers and things set out in the Schedule hereto which I am authorised to do and perform by virtue of the said Power of Attorney dated 1st September 2021 in the same manner and as effectively as the Bank or as I might now do them or any of them or the said Mr. Pawan Sharma could have done them or any of them if he had in my stead received authority thereto under the Power of Attorney dated 1st September 2021."

53. Nidhi Kumar was fully empowered to nominate, constitute and appoint any one as lawful attorney of the bank at New Delhi. Pawan Sharma himself was Senior Manager, Zonal Stressed Assets Recovery Branch as noted above. We, thus, do not find any error in filing the application duly signed by Pawan Sharma supported by Affidavit of Pawan Sharma and submission of the Appellant that NCLT has no jurisdiction to entertain application filed by Pawan Sharma is to be rejected.

54. In view of the foregoing discussions and conclusions, we do not find any substance in any of the submissions raised by the Counsel for the Appellant to interfere with the impugned order of the Adjudicating Authority. There is no merit in the Appeal. The Appeal is dismissed.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

[Arun Baroka]
Member (Technical)

NEW DELHI

13th December, 2023

Anjali