

**BEFORE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH (Court– I)  
KOLKATA**

*I.A. (I.B.C.) 967/KB/2023  
With  
C.P. (IB) 201/KB/2021*

**C.P. (IB) 201/KB/2021**

*A petition under **section 7** of the Insolvency and Bankruptcy Code,  
2016, read with rule 4 of the Insolvency and Bankruptcy (Application to  
Adjudicating Authority) Rules, 2016*

*In the matter of:*

**Indian Bank, SAM Vertical Branch Kolkata**, having PAN No. AAAC11607G and having its registered office at the Corporate Office at PB No. 5555, 254-260, Avvai Shanmugam Salai, Royapettah, Chennai – 600014.

*..... Financial Creditor/ Petitioner*

*-versus-*

**M/s. Reacon Engineers (India) Private Limited**, a company within the meaning of Companies Act, 2013 having CIN: U45201WB1988PTC045417 and having its registered office at 227, Kamalalaya Centre, 156A, Lenin Sarani, Kolkata - 700013, West Bengal.

*..... Corporate Debtor/ Respondent*

**I.A. (I.B.C.) 967/KB/2023**

*An application under **section 60(5)** of the Insolvency and Bankruptcy  
Code, 2016, read with rules 11 and 41 of the National Company Law Tribunal  
Rules, 2016*

**Indian Bank**

*....Financial Creditor*

*Versus*

**Reacon Engineers (India) Private Limited**

**In the National Company Law Tribunal,  
Kolkata Bench (Court- I)**

Indian Bank vs. Reacon Engineers (India) Pvt. Ltd.  
I.A. (I.B.C.) 967/KB/2023 with C.P (IB) 201/KB/2021

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.... *Corporate Debtor*

*And*

**Reacon Engineers (India) Private Limited**

....*Applicant*

**Date of Pronouncement of the order: 28 August 2023**

**Coram:**

**Rohit Kapoor, Member (Judicial)**

**Balraj Joshi, Member (Technical)**

**Appearances (via video conferencing/physical):**

*For the Financial Creditor:*

Mr. Ratnanko Banerji, Sr. Adv.  
Ms. Urmila Chakraborty, Adv.  
Mr. Debasish Chakrabarti, Adv.  
Mr. Snehasish Chakraborty, Adv.

*For the Corporate Debtor:*

Mr. Joy Saha, Sr. Adv.  
Mr. Siddhartha Banerjee, Adv.  
Ms. Minakshi Manot, Adv.  
Mr. Rajib Mullick, Adv.

**ORDER**

***Rohit Kapoor, Member (Judicial):***

1. This Court convened through hybrid mode.
2. This is a Company Petition under section 7 of the Insolvency and Bankruptcy Code, 2016 (herein after referred as “the Code”) by **Indian Bank**, hereinafter referred to as “*Financial Creditor*” seeking to initiate Corporate Insolvency Resolution Process (“CIRP”) against **M/s. Reacon Engineers (India) Private Limited**, hereinafter referred to as “Corporate Debtor”.

**In the National Company Law Tribunal,  
Kolkata Bench (Court- I)**

Indian Bank vs. Reacon Engineers (India) Pvt. Ltd.  
I.A. (I.B.C.) 967/KB/2023 with C.P (IB) 201/KB/2021

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3. The Corporate Debtor is a private limited company incorporated on 25 October 1988. The authorized share-capital of the company ₹15,00,00,000/- (Rupees Fifteen Crore Only) and the paid-up share capital of the company is ₹9,01,82,200/- (Rupees Nine Crore One Lakh Eighty-Two Thousand Two Hundred Only).
4. The total amount claimed to be in default by the Financial Creditor, is ₹2,58,72,27,666.11/- (Rupees Two Hundred Fifty- Eight Crore Seventy-Two Lakh Twenty- Seven Thousand Six Hundred Sixty- Six and Eleven Paisa). The date of declaration of the account of the Corporate Debtor as Non-Performing Asset is 27 January 2018.
5. The Financial Creditor has relied on the various documents in support of its claims, including:
  - a. sanction letter dated 12.12.2011, annexed as Annexure “**1-E**”;
  - b. Working Capital Consortium Agreement dated 25.09.2012, annexed as Annexure “**1-G**”;
  - c. Inter Se Agreement dated 25.09.2012, annexed as Annexure “**1-I**”;
  - d. sanction letter dated 25.06.2013, annexed as Annexure “**1-M**”;
  - e. sanction letter dated 30.08.2014, annexed as Annexure “**1-Z**”;
  - f. Balance sheet dated 31.03.2019, annexed as Annexure “**3-D**”;
6. **Averments contained in petition filed by Financial Creditor are summarized as under:**
  - 6.1 The Financial Creditor is a body corporate constituted under the Banking Companies (Acquisitions and Transfer of Undertakings) Act, 1970. The Corporate Debtor is a company engaged in Civil Government Construction work awarded by CPWD and other Government/semi-

**In the National Company Law Tribunal,  
Kolkata Bench (Court- I)**

Indian Bank vs. Reacon Engineers (India) Pvt. Ltd.  
I.A. (I.B.C.) 967/KB/2023 with C.P (IB) 201/KB/2021

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Government Agencies and also engaged in business of Real Estate Development.

6.2 Pursuant to the Gazette Notification No.133 dated 04.03.2020 of the Government of India, Allahabad Bank has been amalgamated with Indian Bank under Section 9 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970/1980. In terms of the said notification, on and from the effective date i.e. 01.04.2020, the undertaking of the Transferor Bank (Allahabad Bank) shall, without any further act, instrument, deed, stand transferred to and vest in the Transferee Bank (Indian Bank). In terms of the notification, any proceeding or cause of action, Suits, Decrees, Recovery Certificates, Orders, Appeals, Revisions, Writ Petitions, Special Leave Petition and all other proceedings pending or existing, immediately before the effective date *i.e.* 01.04.2020 before any Court, Tribunal or any other Authority, by or against the Transferor bank (Allahabad Bank), shall be continued and enforced by or against the Transferee Bank (Indian Bank). from the effective date. It shall be deemed that the same has been enforced by or against the Transferee Bank (Indian Bank).

6.3 The Financial Creditor is that the Corporate Debtor was enjoying various credit facilities from the Financial Creditor erstwhile Allahabad Bank since 1994 from its Port Blair Branch. From time to time, at the request of the Corporate Debtor, the limit was enhanced, and from time to time the charge was registered with the Registrar of Companies, West Bengal.

6.4 In the year 2011, at the request of the Corporate Debtor to meet the working capital requirement, the Financial Creditor sanctioned/enhanced the credit facilities vide sanction letter 12.12.2011 on terms and conditions which was duly accepted by the Corporate Debtor.

6.5 The Corporate Debtor, in the meeting of Board of Directors dated 31.08.2012, resolved that in order to avail the loans to the extent of ₹220

**In the National Company Law Tribunal,  
Kolkata Bench (Court- I)**

Indian Bank vs. Reacon Engineers (India) Pvt. Ltd.  
I.A. (I.B.C.) 967/KB/2023 with C.P (IB) 201/KB/2021

---

Crores from the Financial Creditor and to the extent of ₹70 Crores from the United Bank of India (presently P.N.B.), the Corporate Debtor was accepting the terms and conditions mentioned in the sanction letter dated 12.12.2011.

- 6.6 The Financial Creditor and the other consortium member being Punjab National Bank (PNB) erstwhile UBI entered into an Inter Se Agreement dated 25.09.2012 and a letter of authority was executed in favour of the Lead bank (i.e Financial Creditor) on 25.09.2012. Under the consortium arrangement, Working Capital Facilities were sanctioned to the Corporate Debtor through Allahabad Bank Consortium as mentioned in the Working Capital Consortium Agreement dated 25.09.2012.
- 6.7 Further, in order to avail the said loans, the Corporate Debtor executed various documents. On 25.09.2012, the director/ Authorised person of the Corporate Debtor created an equitable mortgage by deposit of original Title Deed in favour of the Consortium members. After the creation of the said security, the particulars of charge was registered with the Registrar of Companies (ROC) in favour of the Financial Creditor upto a limit of ₹ 316,50,00,000/-.
- 6.8 Thereafter, till 2017, the credit facilities of the Corporate Debtor were enhanced on multiple occasions including in the years 2013 (*vide* sanction letter dated 25.06.2013), 2014 (*vide* sanction letter dated 30.08.2014) and 2017 (*vide* sanction letter dated 27.10.2017). In order to avail the said credit facilities, the Corporate Debtor executed several security documents in favour of the Financial Creditor.
- 6.9 Further, at the request of the Corporate Debtor, the Financial Creditor issued bank guarantees in favour of various beneficiaries upon the terms and conditions laid down in respective guarantee bonds. The said Bank Guarantees were valid and in force but were not invoked by the beneficiary at the time of filing the instant petition.
- 6.10 The Financial Creditor have negative lien of the immovable properties of the Corporate Debtor and immovable property of M/s. Ritu Exports

**In the National Company Law Tribunal,  
Kolkata Bench (Court- I)**

Indian Bank vs. Reacon Engineers (India) Pvt. Ltd.  
I.A. (I.B.C.) 967/KB/2023 with C.P (IB) 201/KB/2021

---

& Imports Pvt. Ltd.. At the request of the Corporate Debtor and M/s. Ritu Exports & Imports Pvt. Ltd., the Financial Creditor was permitted for disposal of landed property of M/s. Ritu. Exports & Imports Pvt. Ltd. and the same may be replaced by creating Fixed Deposit of Rs.9.60 Crores.

- 6.11 The Corporate Debtor failed and neglected to submit stock statements regularly, the sale proceeds were also not deposited by the Corporate Debtor, which caused irregularities in the said account. The Corporate Debtor thus committed breaches of the agreements and made defaults in payments of interest and instalments. The Financial Creditor repeatedly requested the Corporate Debtor to regularize the said loan accounts, but the said Corporate Debtor failed and neglected to comply with the same and as such the loan account of the company has been classified Non Performing Assets (NPA) on 27.01.2018.
- 6.12 As such, the Financial Creditor in exercise of powers conferred on it under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act, 2002) initiated action against the Corporate Debtor but the said Corporate Debtor did not pay any amount against their dues to the Financial Creditor.
- 6.13 One Diamond Steel Enterprise, an Operational Creditor of the Corporate Debtor had also filed a petition under Section 9 of the Insolvency & Bankruptcy Code 2016 being C.P.(IB) No.476/KB/2017 before this Adjudicating Authority. The said application had been admitted on 05.12.2018 and moratorium order was passed for public announcement. However, the Corporate Debtor and the Operational Creditor being Diamond Steel Enterprise reached a settlement prior to constitution of Committee of Creditors. Thereafter, the Corporate Debtor preferred an Appeal before the National Company Law Appellate Tribunal, New Delhi being Company Appeal (AT) (Insolvency) No.794 of 208. The Hon'ble National Company Law Appellate Tribunal passed a Judgement

**In the National Company Law Tribunal,  
Kolkata Bench (Court- I)**

Indian Bank vs. Reacon Engineers (India) Pvt. Ltd.  
I.A. (I.B.C.) 967/KB/2023 with C.P (IB) 201/KB/2021

---

on 12.03.2019, inter alia, passed the order that "However this order will not come in the way of other creditors (Financial Creditor or Operational Creditors) to move appropriate application before a Court or Competent Jurisdiction or Adjudicate Authorities."

6.14 The Corporate Debtor herein has filed a balance sheet before the ROC Kolkata as at 31.03.2019 wherefrom the said Corporate Debtor admitted the default in repayment of the loan lying with Financial Creditor.

6.15 As on 31.05.2021, the total amount due from the Corporate Debtor to the Financial Creditor is an aggregate sum of Rs. 2,58,72,27,666.11 (Rupees Two Hundred Fifty Eight Crores, Seventy Two Lacs, Twenty Seven Thousand Six Hundred Sixty Six and Eleven paise) in respect of in respect of loan Accounts with further interest @ 13.20% per annum with monthly rests till realization.

**7. Submissions made in the Reply- Affidavit filed by Corporate Debtor are summarized as under:**

7.1 The Corporate Debtor had availed consortium loans from the Financial Creditor and has already repaid the said term loan to the full and final satisfaction of the Financial Creditor.

7.2 At the time of sanction and disbursement of the credit facilities, the Financial Creditor caused the Corporate Debtor and its directors to put their seals and signatures on several blank and unfilled documents, including inter alia, printed forms. Afterwards, the said signed forms and documents have been altered and manipulated in order to levy upon the Corporate Debtor exorbitant rates of interest and to make the the Corporate Debtor and its directors stand as guarantors and other unfair purposes. There was no consensus ad idem behind the execution of the documents mentioned above and therefore, such documents have no sanctity in law.

7.3 Prior to disbursement of the credit facilities and enhancement of the same, the Financial Creditor insisted upon depositing Title Deeds pertaining to, inter alia, two valuable immoveable properties owned by

**In the National Company Law Tribunal,  
Kolkata Bench (Court- I)**

Indian Bank vs. Reacon Engineers (India) Pvt. Ltd.  
I.A. (I.B.C.) 967/KB/2023 with C.P (IB) 201/KB/2021

---

the Corporate Debtor. The Corporate Debtor, in January 2012, executed Supplementary agreement for the Title Deeds pertaining to the said properties and deposited the same with the Financial Creditor. However, such supplementary agreement of title was not coupled with any intention to create mortgage.

7.4 The Corporate Debtor and its directors were never made aware of the exact terms regulating the repayment of the credit facilities sanctioned by the Financial Creditor. Despite being kept in dark regarding the interest levied on the loans, the Corporate Debtor went on making payment of substantive amounts to the Financial Creditor at frequent intervals as per its dictates.

7.5 Towards 2014-2015, due to global recession, a huge amount became due and outstanding to the Corporate Debtor from its debtors and the company suffered a temporary financial crisis. The said Corporate Debtor made repeated requests to the Financial Creditor to extend co-operation and to lend further assistances. However, the Financial Creditor refused and declined to discharge its duties and obligations as a responsible lender.

7.6 Instead, the Financial Creditor issued a purported notice on 28<sup>th</sup> December 2016 complaining of failure on the part of Corporate Debtor to service interest. As the said purported notice dated 28<sup>th</sup> December 2016 itself suggests, even on the date of issuance of the said purported letter, the loan accounts were healthy and performing. The said notice was issued to exert pressure upon the borrowers and to extort money.

7.7 The credit facilities-in-question were not sanctioned as a standalone loan. Rather, such credit facilities were sanctioned as consortium loan. As such, the Financial Creditor did not have the authority to singlehandedly initiate the instant proceedings without the consent of the other consortium member. Further, the Financial Creditor did not have an exclusive security interest over the properties of the Corporate Debtor. Punjab National Bank (previously UBI), the other consortium

**In the National Company Law Tribunal,  
Kolkata Bench (Court- I)**

Indian Bank vs. Reacon Engineers (India) Pvt. Ltd.  
I.A. (I.B.C.) 967/KB/2023 with C.P (IB) 201/KB/2021

---

member, was another *pari passu* charge holder in respect of such properties.

7.8 Further, it is inconceivable that as on the date of formation of the bank consortium *i.e* 25.09.2012 and the date on which the loan documents were executed by the proposed borrowers is the same.

7.9 On receipt of the notice dated 28<sup>th</sup> December 2016, the Corporate Debtor held negotiations with the Financial Creditor and was assured of a positive measure for restructuring the loan accounts. Despite such assurances, no positive step was taken from the end of the Financial Creditor. As such, the Corporate Debtor was compelled to make a detailed representation in writing to the Financial Creditor on 10th July, 2017, a copy whereof is annexed Reply-Affidavit and marked as Annexure - "H".

7.10 In the said representation made on 10th July, 2017, the Corporate Debtor not only complained of levy of interest at exorbitant rates but also apprised of the peculiarities of the circumstances, by reason whereof, the Corporate Debtor had faced a temporary financial crisis. The case made by the Corporate Debtor was that due to the failure on the part of the clients of the Corporate Debtor (*i.e.* departments of Central Government ) to pay the legitimate dues of the Corporate Debtor as well, the Corporate Debtor had faced financial crunches. In the said representation made on 10th July, 2017, the Corporate Debtor also forwarded a definite time bound proposal for resolution of the issues. The Financial Creditor never replied to the said representation.

7.11 Instead, the Financial Creditor issued a purported notice on 21<sup>st</sup> July 2017, a copy thereof is annexed to the Reply-Affidavit and marked as Annexure - "I". The Corporate Debtor, in reply to the said notice, issued another representation dated 10<sup>th</sup> August 2017 wherein the Corporate Debtor again explained his situation and re-iterated his proposal for settlement of the dues.

**In the National Company Law Tribunal,  
Kolkata Bench (Court- I)**

Indian Bank vs. Reacon Engineers (India) Pvt. Ltd.  
I.A. (I.B.C.) 967/KB/2023 with C.P (IB) 201/KB/2021

---

- 7.12 Not only did the Financial Creditor not extend cooperation to the Corporate Debtor, the Financial Creditor took measures which were extremely prejudicial to the Corporate Debtor. The Financial Creditor, without any rhyme or reason, issued multiple letters to the esteemed customers of the Corporate Debtor, informing the customers that the Corporate Debtor was not able to pay the Bank's interest from the month of July 2017. The said communication resulted in deterioration of the long-term relation in between the Corporate Debtor and its esteemed clients. On cancellation of one large work, nine other works under the same Department of Defence, were subsequently cancelled, based on the same reason of alleged financial weakness, as was explained by the branch Manager of the Financial Creditor to the clients of the Corporate Debtor. As a result, the Corporate Debtor not only suffered huge monetary losses but also suffered unprecedented losses in terms of its goodwill and reputation. In this context, copies of several contemporaneous communications evidencing the highhandedness on the part of the Financial Creditor are annexed to the Reply-Affidavit and collectively marked as Annexure - "K".
- 7.13 In such factual backdrop of the case, the Corporate Debtor made another representation to the Financial Creditor on 21st October, 2017 once again requesting the said Financial Creditor to take suitable and adequate measures. However, even the representation made on 21 October, 2017 could not make good sense prevail upon the Financial Creditor. On 29th January, 2018, the Financial Creditor issued a purported notice of demand upon the Managing Director of the Corporate Debtor claiming an exorbitant amount. In the said notice dated 29<sup>th</sup> January 2018, it was mentioned that the loan account of the Corporate Debtor was declared NPA on 28<sup>th</sup> January 2018. The said notice dated 29<sup>th</sup> January 2018 is annexed to the Reply-Affidavit and marked as Annexure - "O".
- 7.14 Shortly after, the Corporate Debtor was served a notice dated 01.02.2018 issued under Section 13(2) of the SARFAESI Act, a copy

**In the National Company Law Tribunal,  
Kolkata Bench (Court- I)**

Indian Bank vs. Reacon Engineers (India) Pvt. Ltd.  
I.A. (I.B.C.) 967/KB/2023 with C.P (IB) 201/KB/2021

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whereof is annexed hereto and marked as Annexure- "P". The notice issued on 01 February, 2018 was then followed by several purported possession notices claimed to have been issued under Section 13(4) of the said Act.

- 7.15 The Corporate Debtor, as a result, was constrained to file an application under section 17 (S.A. No. 4 of 2019) of the Learned Debt Recovery Tribunal No. II- Kolkata (DRT), seeking appropriate reliefs against the Financial Creditor.
- 7.16 During the pendency of the said application, the Financial Creditor withdrew all the previous measures taken by them under the provisions of the SARFAESI Act against the Corporate Debtor and its directors. S.A. No. 4 of 2019 thus became infructuous and was accordingly disposed of by the Learned Tribunal.
- 7.17 In course of pendency of S.A. No. 4 of 2019 before the Learned DRT, the Financial Creditor issued a purported notice under Section 13(2) of the said Act upon the Corporate Debtor and its directors on 5 August, 2019. A copy of the said purported notice of demand issued by the Financial Creditor on 5th August, 2019 is annexed hereto and marked as Annexure - "R". The notice of demand was, however, not served upon the directors of the Corporate Debtor.
- 7.18 Without taking any step to serve the purported notice of demand dated 05.08.2019 upon the directors of the Corporate Debtor, the Financial Creditor hurriedly published a purported notice of demand in the Business Standard on 23.08.2019. A copy of the relevant excerpt of the newspaper publication dated 23.08.2019 is annexed hereto and marked as Annexure- "S".
- 7.19 The Financial Creditor had no manner of right or jurisdiction to make public a demand notice in newspapers without first attempting to serve such notice upon the Corporate Debtor and its directors by post. Since in the present case, no such attempt was ever made, the publication of

**In the National Company Law Tribunal,  
Kolkata Bench (Court- I)**

Indian Bank vs. Reacon Engineers (India) Pvt. Ltd.  
I.A. (I.B.C.) 967/KB/2023 with C.P (IB) 201/KB/2021

---

the purported notice of demand in the newspaper on 23rd August, 2019 was wholly without jurisdiction and palpably bad in law.

- 7.20 The Corporate Debtor has made multiple attempts towards settlement of its dues or implementation of a corrective Action Plan, but the Financial Creditor never cooperated with the Corporate Debtor.
- 7.21 The other consortium member, namely, Punjab National bank (formerly known as United Bank of India), has initiated a proceeding under Section 19 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 against the Corporate Debtor before the Learned DRT. The Financial Creditor herein has also been impleaded in the said proceeding and therefore, is aware of the pendency thereof. The application so taken out by United Bank of India under Section 19 of the said Act of 1993 has been registered as O.A. No. 221 of 2016 and the same is pending adjudication. In such circumstances, it was all the more not desirable or warranted for the Financial Creditor to hastily proceeded under the provisions of the said Act of 2002.
- 7.22 The Corporate Debtor had also initiated talks for one time settlement with the Financial Creditor on 2nd March, 2020, despite having their claim against the Financial Creditor for Rs. 335 crores for which a money suit M.S. No. 35 of 2019 was filed by the Corporate Debtor at the civil district court of Port Blair. To show its *bona fide*, the Corporate Debtor had made over a cheque covering an amount of Rs.1 crore to be kept as seed money. However, on failure of the said settlement, the Financial Creditor did not refund the seed money.
- 7.23 By reason of the illegalities taken resort to by the Financial Creditor, the Corporate Debtor has suffered damages to tune of not less than Rs.335,21,00,000/-, for recovery whereof, a suit has already been instituted before an appropriate forum and the same has been registered as Money Suit No.35 of 2019. The said suit is still pending adjudication. Curiously enough, the properties of the Corporate Debtor were sought

**In the National Company Law Tribunal,  
Kolkata Bench (Court- I)**

Indian Bank vs. Reacon Engineers (India) Pvt. Ltd.  
I.A. (I.B.C.) 967/KB/2023 with C.P (IB) 201/KB/2021

---

to be sold by the Financial Creditor even, suppressing pendency of the suit instituted by the Corporate Debtor for recovery of damages.

7.24 The Financial Creditor has dishonestly approached this Adjudicating Authority to squeeze money from the Corporate Debtor on the basis of an inflated claim, to which, the Financial Creditor is not entitled to either in law or on the facts of the present case.

8. **Submissions made in the Rejoinder filed by Financial Creditor are summarized as under:**

8.1 The Financial Creditor has denied that that the Corporate Debtor has repaid the term loan to the full and final satisfaction of the Financial Creditor as alleged or at all.

8.2 The Corporate Debtor after going through the contents of all documents and being satisfied has executed the same so the allegation of the Corporate Debtor that the Financial Creditor caused the Corporate Debtor and its directors to put their seal and signature on several blank document is completely false, frivolous and baseless. Further, the Adjudicating Authority is not the forum for scrutiny of the loan documents executed by the Corporate Debtor at the time of sanction of loan for which the appropriate forum is the Debts Recovery Tribunal (DRT) where appropriate proceedings are pending adjudication.

8.3 Further, it has also specifically been denied that the Corporate Debtor did not intend to create mortgage as alleged or at all in as much as the said Corporate Debtor has executed the letters of mortgage evidencing deposit of title deeds and the said original title deed is with the Financial Creditor.

8.4 It is denied the Corporate Debtor was not aware of the rate of interest levied towards repayment of the loans as alleged or at all since in the various sanction letters and the working capital consortium agreement executed and/or acknowledged by the Corporate Debtor, specific information with regards to the rate of interest has been provided to the borrower.

**In the National Company Law Tribunal,  
Kolkata Bench (Court- I)**

Indian Bank vs. Reacon Engineers (India) Pvt. Ltd.  
I.A. (I.B.C.) 967/KB/2023 with C.P (IB) 201/KB/2021

---

- 8.5 It is denied that the Corporate Debtor were not explained the purpose of the documents including supplementary agreement for creation of equitable mortgage by deposit of title deeds as alleged or at all. It is denied that there could have been no consensus ad idem behind execution as alleged or at all. It is submitted that the company has completed all formalities of mortgage creation along with deposition of title deeds, and execution of other loan documents voluntarily to secure the financial assistance granted to it. All these documents are adequately signed/stamped. It is further denied that the directors never stood as guarantors guaranteeing the repayment of credit facilities as alleged or at all.
- 8.6 In any event the present Section 7 Application is not concerned about the guarantors of the Corporate Debtor. Thus the plea of inconsistencies in the guarantee documents is squarely unsustainable, misconceived and unrelated to the present proceeding.
- 8.7 The Corporate Debtor itself has admitted that a huge amount became due and outstanding from its debtors and reason for which it could not repay to the Financial Creditor. So the default is admitted.
- 8.8 Further it is submitted that the applicants refer to recession in 2014-15 causing hindrance to their business profitability. However, from time to time, at the request of the Corporate Debtor, their credit facilities were renewed.
- 8.9 It is denied that the Financial Creditor did not take consent of the consortium partner however it is now settled law that any of the secured creditor can file the Section 7 Application, which is also indicated in the Inter Se Agreement.
- 8.10 Moreover the representation of the Corporate Debtor on 10th July, 2017 for settlement of the debt was not at all an effective remedy since in that the Corporate Debtor has taken the plea on the basis of uncrystallised arbitral awards. The consortium lender banks did not accept the same since the repayment of the substantial portion was anticipated out of

**In the National Company Law Tribunal,  
Kolkata Bench (Court- I)**

Indian Bank vs. Reacon Engineers (India) Pvt. Ltd.  
I.A. (I.B.C.) 967/KB/2023 with C.P (IB) 201/KB/2021

---

arbitral award of bank guarantees which themselves were contingent in nature and beyond control of the company and its lenders.

8.11 It is denied that Financial Creditor made false representations to the clients of the company as alleged or at all. It is stated that the fact of the financial bankruptcy was confirmed from the company website itself. The fact is also supported by one of the letters of the Financial Creditor dated 21.07.2017, wherein the branch head had sent one letter to Shri Pinaki Roy (the director) alarming of the insufficient cash inflows leading the account towards slippage, wherein it was asked to stop routing transactions through other banks and close Current Accounts elsewhere as per RBI norms. The said letter has been annexed as ANNEXURE 'I' to Reply- Affidavit. Supporting statements to the said letter dated 21.07.2017, it is found out from the Forensic Audit report, that the Corporate Debtor was actually routing its transactions through other banks. The Corporate Debtor are flouting RBI norms and washing away the cash flow for their own ulterior motive, without servicing interests to the bank.

8.12 It is reiterated that the plea regarding SARFAESI Act and the alleged irregularities as pleaded in the present reply is totally irrelevant to the purpose and content of Section 7 Application. The account has rightly been declared as NPA which the Financial Creditor has clarified in its supplementary affidavit. So there is no scope to dispute the default. The Corporate Debtor has already filed appropriate application before the DRT for its grievances under the SARFAESI Act and thus it cannot again bring the same grievances in NCLT which is not the correct forum for the same. Further, from the JLM dated 09.04.2021, it will be found that it was unanimously decided by all the lenders to initiate all sorts of recovery measures since the Corporate Debtor consecutively failed to keep their commitment in honoring the payments for upfront money towards proposed One Time Settlement. So the Financial Creditor can

**In the National Company Law Tribunal,  
Kolkata Bench (Court- I)**

Indian Bank vs. Reacon Engineers (India) Pvt. Ltd.  
I.A. (I.B.C.) 967/KB/2023 with C.P (IB) 201/KB/2021

---

- file the Section 7 Application independently. A copy of the JLM dated 09.04.2021 is annexed to the Rejoinder and marked as ANNEXURE-'A'.
- 8.13 The corrective action plan proposed by the Corporate Debtor was discussed in JLM dated 18.04.2018 wherein one of the consortium lender namely United Bank of India clearly expressed their doubt on the revival plan since the company was primarily relying on the claim of the arbitral award for the repayment of the dues which themselves were contingent in nature and beyond control of the company and its lenders.
- 8.14 UBI, presently Punjab National Bank (PNB) had also moved to DRT by then by filing OA of 221/2016 for recovery of their dues and by the judgement and order dated 17.12.2018 the Learned DRT allowed the claim of the PNB and declared that the Corporate Debtor was liable to pay a sum of Rs.37,66,37,694/- with simple interest @11% per annum with *pendente lite* and future interest from 01.03.2016 till realization of the said amount. The decision of rejection of the OTS was correct in as much as the Corporate Debtor had given one letter dated 17.03.2021 stating that there is practically no scope of receipt of any arbitration awards from any projects in favour of M/s. Reacon Engineers India Pvt. Ltd. The copy of the JLM dated 18.04.2018 is annexed herewith and marked as ANNEXURE-'B'. The copy of the letter dated 17.03.2021 is annexed herewith and marked as ANNEXURE-C.
- 8.15 It is also stated that the money suit filed at Port Blair, wherein it has been alleged that the applicants suffered an alleged loss to the tune of Rs. 335 Crores, in any case cannot injunct the Financial Creditor from availing the remedies available under IBC.
- 8.16 It is reiterated that the Financial Creditor have taken all measures in strict compliance with the statutory provisions. The rates at which the demand of the 13(2) notice was calculated was the contracted rate of 1 year MCLR (which is a floating rate) plus 4.65%, the said rate was also duly acknowledged by the borrower and the Guarantors on 27.10.2017 at the time of receipt of the renewed loan quantum of Rs 220 Crores. The penal

**In the National Company Law Tribunal,  
Kolkata Bench (Court- I)**

Indian Bank vs. Reacon Engineers (India) Pvt. Ltd.  
I.A. (I.B.C.) 967/KB/2023 with C.P (IB) 201/KB/2021

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interest clause was also incorporated in the General Letter of Hypothecation executed on 27.01.2018, duly stamped by the company and signed by the Director Pinaki Roy.

- 8.17 It is further stated that there had been several rounds of talks starting from 2020 March for OTS. The Corporate Debtor had submitted their First OTS proposal on 02.03.2020, wherein they proposed to settle the account with 25% of the Ledger O's and cover/surrender all O's BGs (total of Rs 41.87 Crores + BG Coverage of Rs 32.41 Crores ie. Rs 74.28 Crores) within a period of 12 months from the date of sanction. However, the OTS was returned from the competent authority of Indian bank and had been communicated to them vide our letter dated 04.09.2020.
- 8.18 The Corporate Debtor failed to deposit their seed money every time they were given a chance, ultimately their Cheque no.05322 amounted at Rs.3.10 Crores dated 21.03.2021 (deposited towards OTS) bounced due to insufficient funds. Finally, the consortium members vide JLM dated 09.04.2021 decided that there can be no further time granted to them and recovery action would be initiated as per norms. Accordingly the Corporate Debtor was informed by Bank's letter dated 17.04.2021, which the Company also acknowledged vide their reply on 19.04.2021. It is to be noted that, though the Corporate Debtor promised to pay the upfront of Rs.5 Crores by June 2021 in the letter dated 19.04.2021, however that commitment was also never fulfilled. The aforementioned series of events gave a clear signal that the Corporate Debtor would never honour the OTS commitment with the lenders.
- 8.19 Further SA 87/2020 is filed before Ld. DRT-3, where pleadings are yet to be completed, also, there is no order restraining from sale of assets through SARFAESI norms Furthermore, it is submitted that S.A. No. 521/2021 is filed before the Learned Debts Recovery Tribunal--III, wherein sale of one asset belonging to the name of Avishek Roy and P.K. Acharya is challenged. The sale took place on 15.09.2020 after

**In the National Company Law Tribunal,  
Kolkata Bench (Court- I)**

Indian Bank vs. Reacon Engineers (India) Pvt. Ltd.  
I.A. (I.B.C.) 967/KB/2023 with C.P (IB) 201/KB/2021

---

getting the said property handed over to the Financial Creditor with express consent by Shri Pinaki Roy, the director of M/s. Reacon Engineers (India) Ltd. Yet after the sale, the Corporate Debtor have challenged the same on fictitious grounds where pleadings are yet to be completed.

- 8.20 Also, the Corporate Debtor has frivolously challenged the order passed by Ld. CMM on 24th November 2021, and the subsequent execution of the said orders by the Head Assistant and Police on 7th April 2021. Further, the entire CMM order is related to properties of the Corporate Debtor at 142, Lenin Sarani and 156A, Lenin Sarani, Kolkata-700 013, which falls under the jurisdiction of Ld. DRT-1. Challenging the same the Corporate Debtor have also filed one SA being no. 135/2022 before Ld DRT-1. The present allegations are the subject matter of other proceedings before the DRT which is not the subject matter of this Adjudicating Authority.
- 8.21 It is submitted that the Financial Creditor quite rightfully and legally has filed the present Section 7 Application for initiating the Corporate Insolvency Resolution Process of the Corporate Debtor herein. The claim which the Financial Creditor has sought for from the Corporate Debtor is Rs.2,58,72,27,666.11 is backed and/or supported by the detailed statement of account maintained by the Financial Creditor with respect to the loan accounts of the Corporate Debtor. Thus, the plea that the said claim is a hypothetical claim and the same is not due and payable is false, illusory and misconceived.
- 8.22 It is submitted the Financial Creditor herein is the lead bank of the consortium has been given a letter of authority to execute and perform all acts, deeds and thing which the Financial Creditor herein may deem appropriate as the lead bank of the consortium. Thus, the Financial Creditor herein can always initiate the Section 7 Application.
- 8.23 The balance sheets referred in the main petition are express admission of debt as well as default by the Corporate Debtor and as such owing to

**In the National Company Law Tribunal,  
Kolkata Bench (Court- I)**

Indian Bank vs. Reacon Engineers (India) Pvt. Ltd.  
I.A. (I.B.C.) 967/KB/2023 with C.P (IB) 201/KB/2021

---

such fact, the application is well within the laws of limitation. Further in the JLM dated 18.04.2018 Mr. Pinaki Roy, CMD of the Corporate Debtor has informed to the member of JLM that the account with lead bank, the Financial Creditor herein has also slipped to NPA on 27.01.2018. So default has been admitted and from that date of acknowledgement, the three years completed on 26.01.2021.

8.24 It is submitted that in that in the wake of the COVID 19 Pandemic the Hon'ble Supreme Court by its *suo moto* order dated 10th January, 2022 has directed that the period from 15.03.2020 till 28.02.2022 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings. In any event the present application has been filed on 21.07.2021 is within the exclusion period in computing limitation as directed by the Hon'ble Supreme Court. As such, the instant section 7 Application is well within the laws of limitation.

9. **Submissions made in supplementary affidavit filed by Financial Creditor are summarized as under:**

9.1 The instant company petition had come up for hearing before this Adjudicating Authority on 14th December 2021 when the Financial Creditor was directed to explain and/or clarify the date of default along with supporting documents. The instant supplementary affidavit dated 21.12.2021 had been filed by the Financial Creditor in compliance of the said direction.

9.2 The Financial Creditor has submitted that in this matter, the loan facility in the form of Cash Credit interchangeability with Bank Guarantee for a sum of Rs. 220 Lacs was availed by the Corporate Debtor. Further at the request of the Corporate Debtor the said Loan Accounts were finally reviewed or renewed on 27.10.2017. The loan is payable by monthly resets and as such the Corporate Debtor was required to service the interest month by month but the said Corporate Debtor has failed to credit the amount in the loan account to cover the interest debited during

**In the National Company Law Tribunal,  
Kolkata Bench (Court- I)**

Indian Bank vs. Reacon Engineers (India) Pvt. Ltd.  
I.A. (I.B.C.) 967/KB/2023 with C.P (IB) 201/KB/2021

---

the same period for the month end of October that is on 31.10.2017. As on 31.10.2017 the combined CC/BG outstanding was Rs.2,29,79,78,688.26 against the sanction limit of Rs. 220 crores. As per banks norms if there is a default of 15 days in crediting the account the same is coming under the slab of Income Recognition and Assets Clarification Norms 1 (IRAC 1).

9.3 The Financial Creditor has enclosed the statement of account of Cash Credit and Bank Guarantee containing the entries of relevant period when the applicant has committed the default. From the statement of accounts of Cash Credit it will be found thereafter also for consecutive 30 days that is upto 29.11.2017 no payment was received so the loan account comes to the slab of IRAC 2. Thereafter again the said Corporate Debtor has defaulted payment for another 30 days. So the said loan account comes under the slab of IRAC 3 as in 28.12.2017. The said Corporate Debtor has committed further consecutive defaults for another 30 days that is upto 26.01.2018 so the said loan account has come under the category of IRAC 4. Now the status of loan account is loss assets as per IRAC norms.

9.4 As per RBI directives if the loan account comes under the stage of IRAC 4, due to no credit continuity in the account for more than 90 days which shall not cover the overdue interest in the loan Accounts, the account can be declared as NPA and as such the bank has declared the account as NPA on 27.1.2018. Also, from the entries of the Statement of Account from 1.10.2017 onwards it will be found that the Corporate Debtor has failed to service the interest in the Loan which shall cover the overdue interest in the Loan Accounts and as such the outstanding liability has exceeded the sanction limit. So the default has been committed on and from 31.10.2017 and the same is persisting as on date.

9.5 **When this petition was reserved for orders, Corporate Debtor filed an I.A. (I.B.C)/967(KB)/2023 on 11.05.2023, seeking the dismissal of the company petition.**

**In the National Company Law Tribunal,  
Kolkata Bench (Court- I)**

Indian Bank vs. Reacon Engineers (India) Pvt. Ltd.  
I.A. (I.B.C.) 967/KB/2023 with C.P (IB) 201/KB/2021

---

10. Submissions made in interlocutory application 967/2023 filed by Corporate Debtor are summarized as under:

10.1 The instant interlocutory application being I.A. (IBC) No. 967/KB/2023 has been filed by the Corporate Debtor seeking the following reliefs:

- i. *Dismissal of CP (IB) No.201 of 2021;*
- ii. *Stay of all further proceedings in CP (IB) No.201 of 2021;*
- iii. *That the order dated 25th April 2023 concluding the hearing of CP (IB) No. 201 of 2021 and reserving the same for orders be stayed and/or set;*
- iv. *That the Order dated 25th April, 2023 passed in the present proceeding be kept in abeyance;*
- v. *Ad interim orders in terms of prayers above;*
- vi. *To pass such further or other order or orders, as to this Learned Tribunal may deem fit and proper;*

10.2 It is submitted on behalf of the Corporate Debtor that on or about 4th June, 2019 the Corporate Debtor as the plaintiff instituted Money Suit No.35 of 2019 against the Allahabad Bank and others in the Court of the Learned Civil Judge (Senior Division) Port Blair. Almost two years after the institution of the said Money Suit No.35 of 2019 on 4th June, 2019, the Financial Creditor instituted C.P. (I.B.) No. 201 of 2021 under section 7 of the Insolvency and Bankruptcy Code 2016 as a counter blast to the pending suit. Though a period of approximately 27 months had expired from the date of institution of the said money suit, the Financial Creditor, had not filed any Written Statement in the money suit, obviously for the lack of any defense on merits to the claims of the Corporate Debtor in the said suit.

10.3 It is stated that the purported claim of the Financial Creditor in the said C.P. (I.B.) No. 201 of 2021 suffers from the vice of *suppressio veri* and *suggestio falsi*. The institution and existence of the said Money Suit No.35

**In the National Company Law Tribunal,  
Kolkata Bench (Court- I)**

Indian Bank vs. Reacon Engineers (India) Pvt. Ltd.  
I.A. (I.B.C.) 967/KB/2023 with C.P (IB) 201/KB/2021

---

of 2019 has been completely suppressed in the said C.P. (I.B.) No. 201 of 2021.

- 10.4 It is stated that the alleged default on the part of the Corporate Debtor is the direct fallout of the acts and omissions on the part of the Financial Creditor. The Financial Creditor indiscriminately issued multiple letters to the esteemed customers of the Corporate Debtor behind the back of the Corporate Debtor, falsely informing the customers that the Corporate Debtor was not in good financial health and was incapable of completing the work contracts.
- 10.5 By reason of receipt of such false information, the esteemed customers of the Corporate Debtor cancelled all the work orders overnight. As a result, payments were stalled and the Corporate Debtor suffered severe financial distress. The Corporate Debtor suffered monetary damages to the tune of not less than Rs.335,21,00,000.00/-, for recovery whereof, Money Suit No. 35 of 2019 was instituted before the Learned Civil Judge (Senior Division) at Port Blair and is pending adjudication.
- 10.6 The Hon'ble Supreme Court of India in the matter of ***Vidarbha Industries Power Limited versus Axis Bank Limited*** reported in 2022 (8) SCC 352 has inter alia held as follows:-

*“75. Significantly, the legislature has in its wisdom used the word "may" in Section 7(5)(a) IBC in respect of an application for CIRP initiated by a Financial Creditor against a Corporate Debtor but has used the expression 'shall' in the otherwise almost identical provision of Section 9(5) IBC relating to the initiation of CIRP by an operational creditor.*

*76. The fact that the legislature used "may" in Section 7(5)(a) IBC but a different word, that is, "shall" in the otherwise almost identical provision of Section 9(5)(a) shows that "may" and "shall" in the two provisions are*

**In the National Company Law Tribunal,  
Kolkata Bench (Court- I)**

Indian Bank vs. Reacon Engineers (India) Pvt. Ltd.  
I.A. (I.B.C.) 967/KB/2023 with C.P (IB) 201/KB/2021

---

*intended to convey a different meaning. It is apparent that the legislature intended Section 9(5)(a) IBC to be mandatory and Section 7(5)(a) IBC to be discretionary. An application of an operational creditor for initiation of CIRP under Section 9(2) IBC is mandatorily required to be admitted if the application is complete in all respects and in compliance of the requisites of the IBC and the rules and regulations thereunder, there is no payment of the unpaid operational debt, if notices for payment or the invoice have been delivered to the Corporate Debtor by the operational creditor and no notice of dispute has been received by the operational creditor. The IBC does not countenance dishonesty or deliberate failure to repay the dues of an operational creditor. 77. On the other hand, in the case of an application by a Financial Creditor who might even initiate proceedings in a representative capacity on behalf of all Financial Creditors, the adjudicating authority might examine the expedience of initiation of CIRP, taking into account all relevant facts and circumstances, including the overall financial health and viability of the Corporate Debtor. The adjudicating authority may in its discretion not admit the application of a Financial Creditor."*

- 10.7 It will thus appear that even if there is existence of a debt or default the Learned Adjudicating Authority in its wisdom and discretion may in appropriate cases refuse to admit a Corporate Debtor to the corporate insolvency resolution process.
- 10.8 In terms of the said decision of the Hon'ble Supreme Court in the matter of **Vidarbha Industries (supra)** the admission of a Corporate Debtor to

**In the National Company Law Tribunal,  
Kolkata Bench (Court- I)**

Indian Bank vs. Reacon Engineers (India) Pvt. Ltd.  
I.A. (I.B.C.) 967/KB/2023 with C.P (IB) 201/KB/2021

---

the corporate insolvency resolution process is no longer automatic or mandatory upon the finding of the existence of a debt or a default.

- 10.9 Following the proposition of law laid down by the Hon'ble Supreme Court of India in the matter of *Vidarbha (supra)*, this Adjudicating Authority in the matter of *Central Bank of India versus Simplex infrastructure Ltd.* being CP (ID) No. 186 of 2021, by an order dated 4th May 2023 refused to admit the application filed by the Central Bank of India under section 7 of the Insolvency and Bankruptcy Code in spite of the existence of a debt and default and consequently dismissed CP (IB) No. 186 of 2021.
- 10.10 Having regard to the discretion vested in the Adjudicating Authority by the use of the word "may" in Section 7 of the Insolvency and Bankruptcy Code it is respectfully submitted that such discretion be exercised in the present case in favour of the Corporate Debtor to dismiss CP (IB) No.201 of 2021.
- 10.11 It is submitted that in the event C.P.(IB) No.201 (KB) of 2021 is admitted during the pendency of Money Suit No. 35 of 2019, the same would completely frustrate the previously instituted lis; wherein, the Financial Creditor has already lost its right to contest the lis by filing a written statement. In such an event, the Financial Creditor would also succeed in achieving something indirectly which the Financial Creditor has been found by the Hon'ble Court to be disentitled to achieve directly.
- 10.12 Further, in the event C.P.(IB) No.201 (KB) of 2021 is admitted, the Committee of Creditors would be led by none other than the Financial Creditor. The Financial Creditor, in such an event, would have a deep and pervasive control over and would also be in a position to control and manage the previously instituted lis in a manner prejudicial to the interest of the Corporate Debtor. In any event, the Financial Creditor, being the defendant in Money Suit No. 35 of 2019, cannot be entrusted with the control of the previously instituted lis since in such an event,

**In the National Company Law Tribunal,  
Kolkata Bench (Court- I)**

Indian Bank vs. Reacon Engineers (India) Pvt. Ltd.  
I.A. (I.B.C.) 967/KB/2023 with C.P (IB) 201/KB/2021

---

even the specific orders passed by the Hon'ble High Court at Calcutta in several rounds of litigations would be frustrated, negated and bypassed.

- 10.13 The issues involved in the present proceeding are also directly and substantially in issue in the previously instituted Money Suit No. 35 of 2019, now pending adjudication before the Learned Civil Judge (Senior Division) at Port Blair for expeditious disposal whereof specific order has already been passed by the Hon'ble High Court at Calcutta on 28.04.2023. As such, it is submitted that such specific direction passed by the Hon'ble Court would stand negated in the event the C.P.(IB) No.201 (KB) of 2021 is admitted and the Corporate Debtor is sent to moratorium upon appointment of an interim resolution professional.
- 10.14 The Corporate Debtor is functioning as a going concern and is presently involved in multiple projects. The applicant repeats and reiterates that the entire object of the 2016 Code and also of the present proceeding under Section 7 of such Code would get frustrated if the orders, prayed for hereunder are not immediately passed.

**10. Analysis and Findings:**

- 11.1 We have heard Ld. Counsel for the parties in I.A.(I.B.C)/967(KB)/2023 as well as CP (IB) 201/KB/2021.
- 11.2 I.A.(I.B.C)/967(KB)/2023 has been filed by the Corporate Debtor on 11.05.2023, seeking the dismissal of the company petition. Ld. Counsel appearing for Financial Creditor has vehemently opposed the filing of this I.A. stating that once the matter has been reserved for orders, no such I.A. could have been filed. Therefore, this I.A. is liable to be dismissed on this score alone.
- 11.3 Ld. Counsel while opposing this application, has relied upon the judgment passed by Hon'ble Supreme Court of India in the matter of *Arjun Singh vs. Mohindra Kumar and Others*, reported in AIR 964 SC Page-993 of Paragraph-20. The relevant portion of the paragraph 20 has been extracted and reproduced hereinunder;

**In the National Company Law Tribunal,  
Kolkata Bench (Court- I)**

Indian Bank vs. Reacon Engineers (India) Pvt. Ltd.  
I.A. (I.B.C.) 967/KB/2023 with C.P (IB) 201/KB/2021

---

“.....In the present context when once the hearing starts, the Code contemplates only two stages in the trial of the suit: (1) where the hearing is adjourned or (2) where the hearing is completed. Where, the hearing is completed the parties have no further rights or privileges in the matter and it is only for the convenience of the Court that Order XX. Rule 1 permits judgment to be delivered after interval after the hearing is completed. It would, therefore, follow that after the stage contemplated by Order IX. Rule 7 is passed the next stage is only the passing of a decree which on the terms of Order IX. Rule 6 the Court is competent to pass. And then follows the remedy of the party to have that decree set aside by application under Order IX. Rule 13.”

- 11.4 The Ld. Counsel appearing for Financial Creditor has also relied upon an orders passed by Co-ordinate Benched of NCLT in the matters of :
- i. **Macro Cast Private Limited vs. Jayasiddi Ganesh Enterprises Private Limited** [2019 SCC onLine NCLT 30171 , Paragraph 3];
  - ii. **State Bank of India vs. Anil Dhirajlal Ambani** [2020 SC onLine NCLT 779, Paragraphs 2 and 3].
- 11.5 Ld. Counsel appearing for Corporate Debtor has, however, stated that initiating insolvency has serious implications and no prejudice shall be caused if judgment passed by Hon’ble Supreme Court in the matter of **Vidarbha Industries Power Limited versus Axis Bank Limited** (*supra*) is considered even at this stage.
- 11.6 The applicant has stated that if its case is considered in view of judgment passed by Hon’ble Supreme Court as referred above, the application under section 7 of IBC requires to be rejected as the amount claimed in civil suit filed by Corporate Debtor is much more than the amount alleged to be in default. The Ld. Counsel has further argued in an endeavour to seek its dues through civil suit, the applicant had

**In the National Company Law Tribunal,  
Kolkata Bench (Court- I)**

Indian Bank vs. Reacon Engineers (India) Pvt. Ltd.  
I.A. (I.B.C.) 967/KB/2023 with C.P (IB) 201/KB/2021

---

approached the Hon'ble High Court at Calcutta seeking expeditious disposal of its money suit and *vide* order dated 18.08.2022, Hon'ble High Court at Calcutta has requested that the suit be disposed of as expeditiously as possible. This shows the *bona fide* of the applicant in recovering its legitimate dues which, as pointed out above, are much more than the amount claimed to be in default by the Financial Creditor.

- 11.7 Ld. Counsel appearing for the Financial Creditor while opposing the plea of Corporate Debtor *qua* the judgment of Hon'ble Supreme Court in ***Vidhraba Industries (supra)***, has relied upon the order passed by Hon'ble National Company Law Tribunal (NCLAT) in the matter of ***State Bank of India vs. N.S. Engineering Projects Pvt. Ltd.***
- 11.8 Ld. Counsel has relied upon Paragraph 28 and 29 of the aforesaid NCLAT order dated 03.02.2023 while stating that pendency of Civil Suit is no reason for rejecting of application under section 7 of IBC. Paragraphs 28 and 29 of order dated 03.02.2023 are reproduced hereinafter.

*“28. The Hon'ble Apex Court has held that petition under Article 226 of the Constitution would certainly lie to direct performance of a statutory due by "other authority". There cannot be any quarrel to the proposition laid down by the Hon'ble Supreme Court in the above judgment. The above case was a case where Writ Petition was filed for Writ of Mandamus on the principle of promissory estoppel and the High Court found the State Undertaking was bound by that promissory estoppel. Present is a case where Section 7 Application has been filed by the Financial Creditors claiming 'debt' and 'default' on the Corporate Debtor. As noted above, Suit was filed by the Corporate Debtor in the Calcutta High Court, where various reliefs have been claimed as noted above. The reliefs claimed in Suit filed in the Calcutta High Court by the Corporate Debtor against the*

**In the National Company Law Tribunal,  
Kolkata Bench (Court- I)**

Indian Bank vs. Reacon Engineers (India) Pvt. Ltd.  
I.A. (I.B.C.) 967/KB/2023 with C.P (IB) 201/KB/2021

---

Financial Creditors is a separate issue, which is for adjudication of the High Court. In the Suit, it can be at best held that Corporate Debtor has raised certain claims against the Financial Creditors, which are yet to be determined, but the mere fact that Corporate Debtor has raised certain claims against the Financial Creditors cannot be a ground to not consider the Section 7 Application.

29. The Adjudicating Authority in the impugned order as noted above has observed that adjudication of the Suit by the High Court will result in determination of the default. The determination by the High Court can at best be for the purposes of Suit filed in the High Court and cannot be reasoned for not entertaining Section 7 Application filed by Financial Creditors claiming default on the part of Corporate Debtor. We are of the view that Adjudicating Authority erred in relying on Suit filed by the Corporate Debtor in the Calcutta High Court for rejecting Section 7 Application. Reliance on filing of a Suit by the Corporate Debtor was not relevant for rejecting Section 7 Application.”

11.9 Ld. Counsel has also relied upon Paragraph 30 of this order dated 03.02.2023 wherein it was held that the Adjudicating Authority found the order of admission dated 28.06.2022 by the Adjudicating Authority to be flawed and the same was, therefore, set aside. On the basis of this position, this I.A. filed by Corporate Debtor is also liable to be rejected outrightly. Paragraph 30 of the said judgment is reproduced hereinafter:

*“30. Now we come to the submission of Shri Krishnendu Datta made on behalf of IDBI Bank Ltd. that there are several other distinguishable facts in the case of IDBI from the N.S. Engineering Projects Pvt. Ltd. case. It is submitted*

**In the National Company Law Tribunal,  
Kolkata Bench (Court- I)**

Indian Bank vs. Reacon Engineers (India) Pvt. Ltd.  
I.A. (I.B.C.) 967/KB/2023 with C.P (IB) 201/KB/2021

---

*that leaving the view of the Adjudicating Authority in N.S. Engineering Projects Pvt. Ltd. aside, there were other distinguishable facts in the case, which had not been noticed by the Adjudicating Authority in its order rejecting Section 7 Application. Suffice, to say that we having already held that view of the Adjudicating Authority in the State Bank of India vs. N.S. Engineering Projects Pvt. Ltd. in the impugned order dated 28.06.2022 being a flawed view, which is unsustainable, we see no necessity to enter into other submissions raised by Shri Krishnendu Datta to distinguish his case from N.S. Engineering Projects Pvt. Ltd. in order dated 29.06.2022, by which Adjudicating Authority rejected the Section 7 Application of IDBI Bank Ltd. Only reason given by the Adjudicating Authority is the view taken by the Adjudicating Authority in State Bank of India vs. N.S. Engineering Projects Pvt. Ltd., which is reflected in paragraph 5.2. The order passed by the Adjudicating Authority dated 29.06.2022, which is essentially based on judgment of the Adjudicating Authority in State Bank of India vs. N.S. Engineering Projects Pvt. Ltd. cannot be sustained.”*

11.10 We have considered the plea of the Applicant seeking deferment of the instant petition filed under section 7 of I.B.C in view of the observations of Hon’ble Supreme Court in Paragraph 88 of **Vidharba Industries** judgment (supra). Paragraph 88 is reproduced hereinafter:

*“88. The adjudicating authority (NCLT) has to consider the grounds made out by the Corporate Debtor against admission, on its own merits. For example, when admission is opposed on the ground of existence of an award or a decree in favour of the Corporate Debtor, and the awarded/decretal amount exceeds the amount of the debt, the adjudicating authority*

**In the National Company Law Tribunal,  
Kolkata Bench (Court- I)**

Indian Bank vs. Reacon Engineers (India) Pvt. Ltd.  
I.A. (I.B.C.) 967/KB/2023 with C.P (IB) 201/KB/2021

---

*would have to exercise its discretion under Section 7(5)(a) IBC to keep the admission of the application of the Financial Creditor in abeyance, unless there is good reason not to do so. The adjudicating authority may, for example, admit the application of the Financial Creditor, notwithstanding any award or decree, if the award/decretal amount is incapable of realisation. The example is only illustrative.”*

- 11.11 Ld. Senior Counsel appearing for the Corporate Debtor has argued that the situations mentioned in Paragraph 88 of Vidharba judgment are merely illustrative and there can be other situations also, like the present one wherein the applicant has filed the Civil Suit and is pursuing its vigorously, as such the admission of the application under Section-7 IBC should be kept in abeyance.
- 11.12 After giving a thoughtful consideration to the submission of Ld. Senior Counsel and after perusal of the law laid down by Hon'ble Supreme Court, we are of the opinion that though the word “example” has been used in the judgment, there has to be situation/akin to award/decree in favour of the Corporate Debtor before the admission of an application under section 7 of the Code can be considered to be kept in abeyance by the Adjudicating Authority. Mere institution of a civil suit or its pendency, in our opinion, is not a situation similar to or that envisaged in paragraph 88 of above referred judgment of Hon'ble Supreme Court of India.
- 11.13 The judgment of the Hon'ble Supreme Court came to be passed on 12.07.2022, whereas the order of NCLAT in the matter of *N.S. Engineering Projects Pvt. Ltd (supra)* was passed on 03.02.2023 wherein it was observed that a pendency of civil suit cannot be a ground for not entertaining a section 7 application filed by a Financial Creditor. It is to be noted that the view of Adjudicating Authority in this regard in CP (IB) No. 1905/KB/2019 was found to be erroneous and flawed and

**In the National Company Law Tribunal,  
Kolkata Bench (Court- I)**

Indian Bank vs. Reacon Engineers (India) Pvt. Ltd.  
I.A. (I.B.C.) 967/KB/2023 with C.P (IB) 201/KB/2021

---

the same was set aside by NCLAT's order wherein the Adjudicating Authority was directed to pass an order of admission in Section-7 application.

11.14 For the foregoing reasons, we find there is no merit in I.A.(I.B.C)/967(KB)/2023 I.A. which is hereby *rejected*.

11.15 We are also of the considered opinion in fact this I.A. could not have been filed in view of law laid down by the Hon'ble Supreme Court in *Arjun Singh vs. Mohindra Kumar and Others (supra)* and the coordinate benches of NCLT in *Macro Cast Private Limited vs. Jayasiddi Ganesh Enterprises Private Limited (supra)* and *State Bank of India vs. Anil Dhirajlal Ambani (supra)*.

**11.16** This Adjudicating Authority is required to ascertain the existence of debt and default on the basis of evidence [*Innoventive Industries Limited vs. ICICI Bank & Ors., paragraph 28<sup>1</sup>*]

11.17 The Corporate Debtor has contended that no debt is due from it to the Financial Creditor as it has already repaid the term loan to the full and final satisfaction of the Financial Creditor. However, upon perusal of the balance sheet for the year ending on 31.03.2019, specifically page 910, it can be seen that the Corporate Debtor has admitted to the debt due from it to the Consortium of Banks. Further, it has also admitted to its accounts being declared a NPA and the reason for the same. Page 910 of the petition has been extracted and reproduced herein under:

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<sup>1</sup> MANU/SC/1063/2017

**In the National Company Law Tribunal,  
Kolkata Bench (Court- I)**

Indian Bank vs. Reacon Engineers (India) Pvt. Ltd.  
I.A. (I.B.C.) 967/KB/2023 with C.P (IB) 201/KB/2021

- 910 -

- 2.39 Travelling and Conveyance incurred / reimbursed for / to Directors have not been segregated in the absence of necessary details.
- 2.40 Some of the balances under current Assets, Loan and Advances and Current Liabilities are confirmed.
- 2.41 As against the payments shown by account payee cheque or draft, the original cheque & draft were in custody of the banks, which are confirmed by the management as correct; payments made by cash were accounted for as per office vouchers of the company in the absence of receipts from payees in some cases.
- 2.42 In respect of expenses of traveling, telephone, rent and other revenue expenses, it is contended that no expenses of personal nature were included therein and wherever applicable have been paid directly by the concerned persons.
- 2.43 Interest or penalty payable, if any, either on non-deduction of TDS, non-payment as well as delay thereof to the Govt. Account as per law have been provided for to the extent ascertained by the company and the additional liability in this regard, if any, will be accounted for as and when payable.
- 2.44 Disclosure of loan between secured & unsecured has been made as per records available with the company.
- 2.45 Income from contract work has been taken into account in terms of bills value statement.
- 2.46 Provision for Gratuity and Leave Encashment liability based on actuarial valuation has not been made as required under the Accounting Standard (AS- 15) issued by the Institute of Chartered Accountants of India. Quantum of such liability has been provided as per management estimate.
- 2.47 The Company incurred significant amount of losses, and as a result its current liabilities became much in excess of current assets and consequently net worth of the company got eroded.

The consortium Banks which had provided funds towards working capital has declared the company's loans accounts as NPA as per Reserve Bank of India guidelines. All loans have been recalled. The company has already protested against the same since as per the statement given by the company, the NPA was caused due to cancellation of the various defense contracts which took place due to certain information intimated to the clients (MES) from the Bank.

As the bank loans are declared NPA, Lenders are not providing interest annually. The company has also stopped providing for interest / penal interest thereon, if any in its the books of account w. e. f 01.01.2018. The position of Bank loans is as under:

Positions of Banks Loans	Current Year (Rs. in Lacs)	Previous Year (Rs. in Lacs)
Working Capital Loans availed are secured against Hypothecation of Stocks, Books Debts & Other Current Assets both present & future	204,58.13	204,68.83



Reacon Engineers (India) Pvt. Ltd. FOR REACON ENGINEERS (INDIA) PVT. LTD.  
 Director  
 Managing Director

11.18 Further, in paragraph 38 on page no. 12 and paragraph 41 on page no. 13 of the Reply-Affidavit to the petition, the Corporate Debtor has again admitted to being incapacitated in repaying its dues.

11.19 In light of such admissions by the Corporate Debtor, it becomes clear that a debt was due from the the Corporate Debtor to the Financial Creditor and that the Corporate Debtor has committed a default in payment of the same.

**In the National Company Law Tribunal,  
Kolkata Bench (Court- I)**

Indian Bank vs. Reacon Engineers (India) Pvt. Ltd.  
I.A. (I.B.C.) 967/KB/2023 with C.P (IB) 201/KB/2021

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11.20 While adjudicating upon the issue of limitation, we see that the date of declaration of the Corporate Debtor's account as NPA is 27.01.2017. In the original petition filed by the Financial Creditor, the date on which the account of the Corporate Debtor was declared as NPA was mentioned as 27.01.2018. Thereafter on 14.12.2021, this Adjudicating Authority directed the Financial Creditor to clarify the date of default along with supporting documents. In compliance of the said order, the Financial Creditor filed a supplementary affidavit dated 21.12.2021 wherein the Financial Creditor, in paragraph 6, has mentioned the date of default to be 31.10.2017 and explained in detail the reasoning behind it. This position of the Financial Creditor is uncontroverted by the Corporate Debtor.

11.21 Further, taking into account the admission of the Corporate Debtor in the balance sheet for the year ending on 31.03.2019, the limitation period will also be extended in light of section 18 of the Limitation Act 1964. The new limitation period, after taking into consideration the provision of section 18, will end on 31.03.2022. Therefore, the instant petition filed on 27.07.2021 is within the limitation period.

11.22 It be also noted that the Hon'ble Supreme Court in a suo moto order(3) dated 10.01.2022 has directed in paragraph 5 that the period from 15.03.2020 to 28.02.2022 shall stand excluded for the purposes of computing limitation in civil as well as criminal matters. It has further directed that for cases where the limitation period would have expired during the period between 15.03.2020 till 28.02.2022, all persons shall have a limitation period of 90 days from 01.03.2022. The relevant paragraph from the said order is reproduced hereinunder:

*“[I] The order dated 23.03.2020 is restored and in continuation of the subsequent orders dated 08.03.2021, 27.04.2021 and 23.09.2021, it is directed that the period from 15.03.2020 till 28.02.2022 shall stand excluded for the purposes of limitation as may be prescribed under any*

**In the National Company Law Tribunal,  
Kolkata Bench (Court- I)**

Indian Bank vs. Reacon Engineers (India) Pvt. Ltd.  
I.A. (I.B.C.) 967/KB/2023 with C.P (IB) 201/KB/2021

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*general or special laws in respect of all judicial or quasi-judicial proceedings.*

*... [III] In cases where the limitation would have expired during the period between 15.03.2020 till 28.02.2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 01.03.2022.”*

From the above, it is clear that the present petition is well within the period of limitation.

11.23 Further, the Corporate Debtor has taken the defence that the Financial Creditor has sanctioned the credit facilities to the Corporate Debtor under a consortium agreement. As such, the Financial Creditor cannot single-handedly proceed against the Corporate Debtor under section 7 of the Code. Upon perusal of the Inter-se agreement executed by the consortium members on 25.09.2012, specifically clause 9 of the agreement (page 138 of the petition), it is clear that the lead banker of the consortium *i.e* the Financial Creditor was entitled to institute suits and other proceedings for itself as well as on behalf of other consortium members. Further, from the minutes of the JLM dated 09.04.2021 which is annexed to the Rejoinder as ANNEXURE-'A', it is evident that the consortium members had unanimously agreed to move an application under section 7 of the Code. As such, the instant proceedings by the Financial Creditor are allowed under the inter se agreement and the defense taken by the Corporate Debtor is not maintainable.

11.24 Lastly, the Corporate Debtor has also contended that the Financial Creditor had made the Corporate Debtor and its directors sign on blank documents and unfilled forms which were later manipulated to levy exorbitant interest rates upon the loans taken by the Corporate Debtor. It is noted that the Corporate Debtor has availed multiple credit facilities over the years from the bank consortium. Even if it is assumed that in

**In the National Company Law Tribunal,  
Kolkata Bench (Court- I)**

Indian Bank vs. Reacon Engineers (India) Pvt. Ltd.  
I.A. (I.B.C.) 967/KB/2023 with C.P (IB) 201/KB/2021

---

2011, the Corporate Debtor was made to sign on blank documents and was forced to pay extortionate interests on the said loan, it is hardly conceivable that the Corporate Debtor would approach the same consortium for further loans, let alone make the mistake of signing on blank documents again and paying the interest for the subsequent enhancements as well. The allegations of obtaining signatures on blank documents etc are prima facie baseless, incorrect and merely an afterthought and are as such rejected.

- 11.25 From the position brought on hereinabove and on the basis of the record, debt and default are established and the amount of the debt is also more than Rs. One Crore *i.e* the pecuniary threshold for initiating a petition under section 7 of the Code.
- 11.26 In light of the above-mentioned facts and reasoning, this Adjudicating Authority is satisfied the instant petition filed by the Financial Creditor is complete in all respects as required by law and should be ***admitted***.
- 11.27 The particulars of Interim Resolution Professional (IRP) have been proposed in the petition. The petition is within the period of limitation. As such, the instant petition is complete in all respects.
- 11.28 It is, accordingly, hereby ordered as follows:-
- i. The application bearing **CP (IB) No. 201/KB/2021** filed by **Indian Bank** (*Financial Creditor*), under section 7 of the Code read with rule 4 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against **Reacon Engineers India Private Limited** (CIN U45201WB1988PTC045417), the Corporate Debtor, is ***admitted***.
  - ii. There shall be a moratorium under section 14 of the IBC.
  - iii. The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.

**In the National Company Law Tribunal,  
Kolkata Bench (Court- I)**

Indian Bank vs. Reacon Engineers (India) Pvt. Ltd.  
I.A. (I.B.C.) 967/KB/2023 with C.P (IB) 201/KB/2021

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- iv. Public announcement of the CIRP shall be made immediately as specified under section 13 of the Code read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- v. **Mr. Pratim Bayal**, having registration number **IBBI/IPA-003/IP-N00213/2018-19/12385**, email: **pratimbayal@gmail.com** is hereby appointed as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the Code subject to submission of a valid Authorisation of Assignment in terms of regulation 7A of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016.
- vi. The fee payable to IRP or the RP, as the case may be, shall be compliant with such Regulations, Circulars and Directions as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out his functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the Code.
- vii. During the CIRP period, the management of the Corporate Debtor shall vest in the IRP or the RP, as the case may be, in terms of section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within one week from the date of receipt of this Order, in default of which coercive steps will follow.
- viii. The IRP/RP shall submit to this Adjudicating Authority periodical reports with regard to the progress of the CIRP in respect of the Corporate Debtor.
- ix. The Financial Creditor shall initially deposit a sum of ₹\_4,00,000/- (Rupees Four lakh only) with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors (CoC). Further, the Fees of the IRP will be subject to the approval of the

**In the National Company Law Tribunal,  
Kolkata Bench (Court- I)**

Indian Bank vs. Reacon Engineers (India) Pvt. Ltd.  
I.A. (I.B.C.) 967/KB/2023 with C.P (IB) 201/KB/2021

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COC in accordance with Notification No. IBBI/2022-23/GN/REG091 dated 13.09.2022, issued by the Insolvency and Bankruptcy Board of India, as published in the in the Official Gazette.

- x. In terms of section 7(5)(a) of the Code, Court Officer of this Court is hereby directed to communicate this Order to the Financial Creditor, the Corporate Debtor and the IRP by Speed Post, email and WhatsApp immediately, and in any case, not later than two days from the date of this Order.
  - xi. Additionally, the Financial Creditor shall serve a copy of this Order on the IRP and on the Registrar of Companies, West Bengal, Kolkata by all available means for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court within seven days from the date of receipt of a copy of this order.
12. **I.A. (IBC) 967/KB/2023** shall stand *dismissed vide* paragraph no. 11.14 (*supra*).
13. **CP (IB) No. 201/KB/2021** to come up on **4.09.2023** for filing the progress report.
14. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

**Balraj Joshi**  
**Member (Technical)**

**Rohit Kapoor**  
**Member (Judicial)**

*Signed on this, the 28<sup>th</sup> day of August, 2023*

**In the National Company Law Tribunal,  
Kolkata Bench (Court- I)**

Indian Bank vs. Reacon Engineers (India) Pvt. Ltd.  
I.A. (I.B.C.) 967/KB/2023 with C.P (IB) 201/KB/2021

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SM(LRA)/Bibhas(Steno)