IN THE NATIONAL COMPANY LAW TRIBUNAL MUMBAI BENCH-VI

CP (IB) No.1154/MB/2022

[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:

STCI FINANCE LIMITED

[CIN: U51900MH1994PLC078303]

A/B, 1-802, A- Wing, 8th Floor

Marathon Innova, Marathon Nextgen Compound

Off Ganpatrao Kadam Marg, Lower Parel (W)

Mumbai- 400013

Maharashtra.

…Financial Creditor

Vs.

JAYNEER INFRAPOWER & MULTIVENTURES PRIVATE LIMITED

[CIN- U74110MH1986PTC039204]

18th Floor, A Wing

Marathon Futurex, N. M. Joshi Marg

Lower Parel, Mumbai 400013

Maharashtra.

...Corporate Debtor

Pronounced: 25.10.2024

CORAM:

HON'BLE SHRI K. R. SAJI KUMAR, MEMBER (JUDICIAL)

HON'BLE SHRI SANJIV DUTT, MEMBER (TECHNICAL)

Appearances:

Financial Creditor: Adv. Ferzana Behramkamdin a/w Adv. Kalyani Deshmukh i/b FZB & Associates

Corporate Debtor: Adv. Ashish Pyasi a/w Adv. Avinash Khanolkar, Adv. Surekha Yadav i/b Adv. Avinash Khanolkar

ORDER

[PER: SANJIV DUTT, MEMBER (TECHNICAL)]

1. **BACKGROUND**

1.1 This is an Application bearing C.P. (IB) No.1154/MB/2022 filed by STCI Finance Limited, the Financial Creditor, on 19.10.2022 under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "the Code") read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process (hereinafter referred to as "CIRP") in respect of Jayneer Infrapower & Multiventures Private Limited, the Corporate Debtor**.**

1.2 The Corporate Debtor approached the Financial Creditor to avail a corporate loan against collateral of liquid securities for general corporate purposes. A credit facility in the form of financial assistance amounting to Rs.125 Crore was provided by the Financial Creditor to the Corporate Debtor *vide* Sanction Letter dated 01.03.2018. However, the Corporate Debtor failed to repay the dues pursuant to which the loan account of the Corporate Debtor was declared as NPA on 31.03.2020. The total amount of debt due and payable by the Corporate Debtor as on 31.08.2022 amounts to Rs.99,35,37,454/- [Ninety-Nine Crores Thirty-Five Lakhs Thirty-Seven Thousand Four Hundred and Fifty-Four Rupees]. Consequently, the Financial Creditor seeks initiation of CIRP in respect of the Corporate Debtor under Section 7 of the Code.

2. **AVERMENTS OF FINANCIAL CREDITOR**

2.1 The Financial Creditor sanctioned Corporate Loan of Rs.125 Crores to the Corporate Debtor for a tenure of 36 months from the date of first disbursement carrying interest @ 9.25% p.a. payable quarterly *vide* Letter of Intent (hereinafter referred to as "the LOI") dated 01.03.2018. The primary security for the loan was by way of pledge of Optionally Convertible Debentures (OCDs) issued by Pan India Infraprojects Private Limited. Collateral security and asset cover were offered by way of pledge of shares by third party security providers. Both the parties executed the Facility Agreement on 14.03.2018 and duly accepted the terms of the said sanction.

2.2 Out of the total amount of financial debt of Rs.125 Crore, a sum of Rs.100 Crore was disbursed on 16.03.2018 and the balance sum of Rs.25 Crore was disbursed on 01.06.2018.

2.3 Security was created *via* Share Pledge Agreement dated 14.03.2018 executed between the Corporate Debtor, Financial Creditor and Third Party Pledgors i.e., (1) Cyquator Media Services Private Limited, (2) Direct Media Distribution Ventures Private Limited, (3) 25 FPS Media Private Limited, (4) Arm Infra & Utilities Private Limited, (5) the Corporate Debtor and (6) Direct Media Solutions LLP.

2.4 In order to maintain the asset cover as provided in the LOI read with the FA, the Financial Creditor and Mr. Subhash Chandra (Mortgagor) executed a Memorandum of Entry recording the creation of a Mortgage by Deposit of Title Deeds dated 29.11.2018 in respect of Bungalow No.1, Jolly Maker I, Cuffe

Prade, Mumbai owned by Sri. Subhash Chandra for the corporate loan of Rs.125 Crore.

2.5 However, the Corporate Debtor failed to repay the dues and on 13.05.2019, a notice for Event of Default and Recall of Loan was sent to the Corporate Debtor by the Financial Creditor recalling the loan and initiating the sale of pledged shares. Pursuant to receipt of the said notice, the Corporate Debtor made part payments from its own funds and consented to sell the pledged shares for adjustment towards its dues. The Financial Creditor sold the pledged shares and the amounts received from sale of shares between 31.07.2019 and 26.09.2019 were adjusted towards the outstanding amount of principal debt as well as interest.

2.6 Thereafter, the Corporate Debtor once again defaulted in making payment of the interest which fell due on 01.01.2020 and consequently, the loan account of the Corporate Debtor was declared as NPA on 31.03.2020.

2.7 Therefore, the Financial Creditor has annexed to the Application record of default with the Information Utility showing date of default as 01.01.2020. Notice under Section 13(2) of the SARFAESI Act, 2002 (SARFAESI Act) dated 08.01.2021 was issued to the Corporate Debtor and Mr. Subhash Chandra (Mortgagor) calling upon them to pay the outstanding dues within a period of 60 days from the date of receipt of said notice, failing which appropriate action would be taken in terms of provisions of the SARFAESI Act. However, the Corporate Debtor again failed to honor its debt obligations. This led the Financial Creditor to prefer this Application under Section 7 of the Code. The

total amount of debt claimed to be in default as on 31.08.2022 is shown at Rs.99,35,37,454/- [Ninety-Nine Crores Thirty-Five Lakhs Thirty-Seven Thousand Four Hundred and Fifty-Four Rupees] in Part-IV of the Application consisting of principal sum of Rs.66,08,74,816/- and interest at the rate of 14.50% p.a. (including additional interest) of Rs.33,26,62,638/-. In light of the foregoing, it is prayed that this Tribunal may be pleased to initiate CIRP in respect of the Corporate Debtor.

3. **CONTENTIONS OF CORPORATE DEBTOR**

The Corporate Debtor *vide* an Affidavit-in-Reply dated 03.10.2023 has made the following submissions:-

3.1 The actions of the Financial Creditor are bad and illegal. Firstly, the Financial Creditor rejected the One-Time Settlement (OTS) offer presented by the Corporate Debtor *vide* letter dated 25.05.2021 which was based on the underlying value of shares. This indicates that the Financial Creditor is not interested in finding a resolution and is only focused on recovering value through the sale of shares. Despite rejecting the OTS *vide* letter dated 23.09.2021, it has not yet sold the shares and has only invoked and kept them in custody. Secondly, the Financial Creditor arbitrarily increased the interest rate from 9.25% to 12.50% in January, 2019 (effective from 16.03.2019) within nine months of sanction by invoking and then revoking a call option. The Financial Creditor has also acted maliciously and arbitrarily by increasing the interest rate, thus changing the contract terms. Further, the Financial Creditor

has invoked the provisions of the SARFAESI Act, but after issuing notice under Section 13(2), it has not taken any further steps. Moreover, the value of the properties mentioned in the Application is significantly higher according to Financial Creditors' records. However, it has undervalued these properties at approximately Rs.11 crore in the Application which shows its *malafide* intention.

3.2 Recall of loan is bad and has been duly waived. If the Financial Creditor's claim of recalling the loan in May, 2019 is accepted, making the entire amount due, the account could not have been classified as an NPA in March, 2020 with the first date of default being 01.01.2020. According to RBI regulations, an account becomes an NPA 90 days after the first default date. The Financial Creditor received sufficient consideration from the sale of shares in September and November, 2019 through the sale of Zee Entertainment Enterprises Ltd. shares, effectively waiving the loan recall. The principal overdues as on 31.03.2020 are incorrect because the loan recall was defective and waived. No fresh recall notice was issued thereafter. Without a proper recall, the principal amount would only be due at the end of three years. The alleged default on installments is unsustainable, as the loan was to be repaid in a lump sum after three years and any installment after the waiver of recall of loan in 2019 could fall due only after March, 2020.Therefore, the Application is based on misleading dates and grounds.

3.3 The Financial Creditor recalled the entire loan on 13.05.2019. Consequently, the first default should be considered as occurring on this date making the

account eligible to be classified as an NPA by August, 2019 within the 90-day period. However, the Application lists the date of default as 01.01.2020, indicating that the loan recall was waived and the stated date of default is not correct. The Financial Creditor amended the default date in the Application from 31.01.2020 to bring it outside the CIRP suspension period. According to established law, the Financial Creditor cannot change the date of default at its convenience. Therefore, this Application is not maintainable. This is supported by the judgment of Hon'ble Supreme Court in ***Ramesh Kymal v. Siemens Gamesa Renewable Power Pvt. Ltd. [(2021) 3 SCC 224]***.

3.4 According to the LOI dated 01.03.2018, the loan term was 36 months and first disbursement was made on 16.03.3018. Therefore, default would have taken place only on 16.03.2021 and before or after as the term was 3 years with bullet repayment from the date of first disbursement. Thus, the said date, i.e., 16.03.2021 falls within Section 10A of CIRP suspension period.

3.5 The initial default occurred on 19.05.2019, when the loan was recalled by the Financial Creditor. Therefore, the first cause of action for filing the present Application arose on that date. There is no document on record indicating that the Financial Creditor revoked the recall letter dated 19.05.2019. Consequently, the limitation period prescribed under Section 238A of the Code expired on 18.05.2022. However, the present Application was filed on 18.10.2022 making it clearly time-barred. Further, the Financial Creditor has not sought condonation of delay for the same.

3.6 The Power of Attorney annexed with the Application grants the signatory general powers to represent the Financial Creditor but does not specifically authorise the initiation of insolvency proceedings against the Corporate Debtor. This is supported by the order in CP (IB) 2161/MB/2019 in the matter of *M/s. Rushabh Civil Contractors Private Limited vs. Centrio Lifespaces Limited* where a coordinate Bench of this Tribunal dismissed the Petition on similar grounds.

3.7 As stated by the Financial Creditor, it is secured against the loan with shares of entities like Zee Entertainment, Dish TV and Zee Media. Currently, the value of these shares and the mortgaged properties is approximately Rs.100 crores, while the principal amount claimed through the Application is Rs.71 crore. Further, the Financial Creditor continues to hold OCDs provided at the time of loan sanction for reasons known only to it. Therefore, the Financial Creditor can recover the loan by realising its security provided by the Corporate Debtor, eliminating the need for insolvency proceedings. This position is supported by the judgment of Hon'ble Supreme Court in ***M/s. Vidarbha Industries Power Limited Vs. Axis Bank [(2022) 8 SCC 352]*** which held that before admitting a Petition under Section 7 of the Code, the difficulties of the Corporate Debtor should be considered and a fair chance for revival should be granted.

3.8 Moreover, the Corporate Debtor proposed an OTS *vide* letter dated 25.05.2021 which was rejected indicating that the Corporate Debtor should increase the amount offered based on the value of the pledged shares. This, along with the Financial Creditor's decision not to take further steps under the

SARFAESI Act, and to retain the OCDs demonstrates that the Financial Creditor is focused on recovery rather than the fair revival of the Corporate Debtor. It is also stated that the Corporate Debtor is ready and willing to pay the debt and revive itself, which suggests that the balance of convenience lies with the Corporate Debtor. Thus, this Application appears to be merely an attempt at debt recovery. Further, during this period, the Financial Creditor has sold some of the pledged shares, realising Rs.26,24,47,859.87/- as on 24.09.2019, yet this amount was not reflected in the Ledger annexed with the Application. The Corporate Debtor has sought clarity on the appropriation of these funds, but no such clarity is evident from the record. This indicates that the Financial Creditor is interested in recovery rather than the revival of the Corporate Debtor.

3.9 In its Written Submissions, the Corporate Debtor contends that the rejoinder and the additional rejoinder filed by the Financial Creditor should not be taken on record, because the latter has brought on record new documents and pleaded an entirely new case which is legally not permissible under Rule 42 of NCLT Rules, as held by the Hon'ble NCLAT in the matter of ***SBI Vs. India Power Corporation Limited*** [CA (AT) (Ins.) No. 87 of 2023]. It is argued that the loan was repayable after 36 months from the date of first disbursement i.e., 16.03.2018 and therefore, the loan would have been repayable only on 16.03.2021 which falls within the suspension period covered by Section 10A of the Code. In order to avoid the suspension period, the Financial Creditor has fraudulently suggested the date of default as 01.01.2020. It is a settled

law that the date of default cannot be shifted, as held by the Hon'ble Supreme Court in the case of ***B K Education Services Private Limited Vs. Parag Gupta & Associates*** [(2019) 11 SCC 633]. Further, this Tribunal in *Inaskhi Sobti Vs. Starlight Systems Private Limited* (IA No. 5054 of 2023 in CP (IB) No. 778 of 20123 has held that a financial creditor under Section 7 of the code does not have a right in law to change the date of default.

3.10 It is argued that the Corporate Debtor had arranged sufficient funds to ensure payment of interest during the tenure of the loan i.e., 36 months but the appropriation made by the Financial Creditor towards principal debt was incorrect. The due date of the loan was categorically falling under Section 10A period. However, it is only due to improper appropriation of funds towards principal by the Financial Creditor in the year 2019 that the Financial Creditor is claiming date of default in January, 2020. It is contended that improper appropriation of amounts was done to avoid the bar or prohibition under Section 10A of the Code. It is submitted that the Financial Creditor's reliance on the emails dated 07.01.2020 and 30.06.2020 addressed by the Corporate Debtor to the Financial Creditor cannot be relied upon. In support of the aforesaid submissions, reliance is placed on ***Joshi Technologies International Inc Vs. Union of India*** [(2015) 7 SCC 728].

4. REJOINDER BY FINANCIAL CREDITOR

4.1 In the Affidavit-in-Rejoinder dated 12.10.2023, the Financial Creditor has made the following submissions:-

4.2 The present Application is maintainable, as the Financial Creditor is exercising its rights under Section 7 of the Code to proceed against the Corporate Debtor within three years from the date of default, i.e., 01.01.2020. The Financial Creditor is not merely attempting to recover its amount but is within its legal rights. No Financial Creditor would accept an OTS that is lower than the market value of the available securities. On 23.09.2021, the Financial Creditor requested the Corporate Debtor to increase the OTS offer because the value of the shares offered as security had increased substantially. The Corporate Debtor did not improve the OTS offer. As the Financial Creditor did not receive payment of its outstanding dues, it exercised its remedy under Section 7 of the Code. Further, selling pledged shares is an option available to the Financial Creditor, not an obligation. The Financial Creditor has the right to choose whether to exercise this option. Therefore, it cannot be stated that the Financial Creditor is not interested in a resolution simply because it has not sold all the pledged shares. The realisation of shares or OCDs is an option, not an obligation, and this cannot be cited to avoid action under Section 7 of the Code.

4.3 The Corporate Debtor has attempted to mislead regarding the actual value of the shares and OCDs pledged with the Financial Creditor. The value of these OCDs was Rs.125 crore on the date of sanction of the loan. However, due to market fluctuations and poor performance of the third-party pledgor companies, the value of the shares has been constantly depreciating, causing the asset cover to fall below the mandated levels in the LOI. This is evident

from the various margin call notices issued by the Financial Creditor to the Corporate Debtor. Further, the Corporate Debtor has not requested the Financial Creditor to sell any of the securities since 26.09.2019. The OCDs held by the Financial Creditor currently have no value, as Pan India Infraprojects Private Limited was admitted to CIRP on 16.07.2020 and subsequently to liquidation on 04.10.2023.

4.4 As per the terms of the LOI, the Financial Creditor was well within its rights to revise the rate of interest. There was nothing malicious or arbitrary about it. It may be noted that the interest rate was increased from 9.25% p.a. to 12.50% p.a. payable quarterly *vide* Supplemental LOI dated 07.01.2019 which has been duly signed and accepted by the Corporate Debtor. The interest rate was revised pursuant to exercise of call option by the Financial Creditor *vide* notice dated 03.01.2019 and the Corporate Debtor had knowingly and willingly accepted the terms of the Supplemental LOI in order to continue the loan facility. This fact has been deliberately suppressed by the Corporate Debtor in its reply and instead falls and malicious allegations have been made against the Financial Creditor.

4.5 Further, the proceedings under SARFAESI Act are independent of the proceedings under the Code. Moreover, a notice under Section 13(2) of the SARFAESI Act dated 08.01.2021 was issued to the Mortgagor and the Corporate Debtor. However, as Company Petition (IB) 97 of 2022 and Company Petition (IB) 98 of 2022 had been filed by Indiabulls Housing

Finance Limited before the NCLT, Delhi against the Mortgagor, interim moratorium under Section 96(1) of the Code was operational. The Financial Creditor has thus been rendered remediless with proceeding under the provisions of the SARFAESI Act.

4.6 The Financial Creditor denies any waiver of the loan recall stating that the payments were received either from the Corporate Debtor or by way of sale of pledged shares after the event of default notice dated 13.05.2019. The proceeds from the sale of pledged shares were proportionately allocated by the Financial Creditor towards the outstanding amounts of both the Corporate Debtor and Essel Corp Resources Private Limited in their respective loan accounts.

4.7 Thereafter, the Corporate Debtor failed to pay the interest for the quarter ending December, 2019 which became due and payable on 01.01.2020. Therefore, 01.01.2020 is considered the date of default in Part-IV of the Application. The actions described by the Corporate Debtor do not amount to a waiver of loan recall. The NeSL report annexed to the Application also confirms 01.01.2020 as the date of default. The Corporate Debtor's classification as NPA on 31.03.2020 is within the limit set by RBI circulars. While the LOI provides for a bullet repayment after 3 years, it also allows the Financial Creditor to recall the loan in case of default before this period.

4.8 There has been no improper appropriation of amounts from the sale of pledged shares to avoid the bar under Section 10A of the Code. The date of

default is 01.01.2020 which falls outside the period mentioned in Section 10A of the Code. The NPA certificate initially reflected the date of classification of account as NPA as on 31.03.2021 instead of 31.03.2020 due to a typographical error which was allowed to be corrected by the Tribunal. Therefore, allegations of changing the date of default for the sake of convenience or mentioning it as 31.01.2020 are incorrect. Moreover, neither Section 7 nor Section 10A of the Code makes reference to the date of NPA. Therefore, the Application is well within limitation and is not barred by the provisions of Section 10A of the Code.

4.9 The Corporate Debtor submitted its OTS proposal to the Financial Creditor by its letter dated 25.05.2021. The said letter is clear admission of liability and is an acknowledgment in writing as per the provisions of the Limitation Act, 1963 (Limitation Act) and hence present Application is filed within the period of limitation.

4.10 The Power of Attorney authorises the signatory of the Application to commence, institute, conduct any suit, action or other legal proceedings in any court, tribunal or other authority which would cover the authority to initiate the present proceedings. The reliance of the Corporate Debtor on the order of co-ordinate Bench of this Tribunal in CP (IB) 2161/MB/2019 (supra) is misplaced as the facts of the present case are different.

4.11 Further, the Corporate Debtor failed to demonstrate a case for a fair chance of revival. There is no evidence provided regarding the Corporate Debtor's

current business operations, turnover, employees, or efforts toward revival. Therefore, the judgment in ***M/s. Vidharba Power Industries Limited*** (supra) is not applicable. The OCDs currently hold no value and the mortgaged property cannot be realised presently. Thus, the Financial Creditor's only remedy is to proceed under Section 7 of the Code. The Financial Creditor rejected the OTS proposal on 23.09.2021, as the value of the underlying listed shares exceeded the OTS offer. No further OTS offer has been made by the Corporate Debtor, which belies its claim of readiness and willingness to pay the debt. The judgment passed by Chennai Bench of Hon'ble NCLAT in the matter of TA(AT) 227/2021 [CA (AT) (Ins) No.326/2020] has no application as the Corporate Debtor has failed to prove that it is a solvent company.

5. **ADDITIONAL REJOINDER BY FINANCIAL CREDITOR**

5.1 The Financial Creditor was given liberty on 15.12.2023 to file an additional affidavit to clarify certain issues regarding the event of default notice and the limitation. It is stated that the notice of event of default and recall was given on 13.05.2019. Immediately after receipt of the said notice, the Corporate Debtor made 10 payments aggregating to Rs.3,06,83,280/- up to 24.06.2019 which were adjusted towards the overdue interest. Further payments were also made towards interest which fell due for the June and September, 2019 quarters. Besides the Corporate Debtor consented to the Financial Creditor's selling the pledge shares between July and September, 2019.

5.2 However, when the interest for the December, 2019 fell due on 01.01.2020, the same was not paid. No amounts were in fact received by the Financial Creditor after 01.01.2020 and hence 01.01.2020 is taken as the date of default. In view of this, the Application filed by the Financial Creditor on 19.10.2022 is well within the period of limitation. The date of default is relevant only for calculating the limitation period. The OTS proposal dated 25.05.2021 submitted by the Corporate Debtor constitutes a written acknowledgment of debt under the Limitation Act, thereby extending the limitation period, as held by the Hon'ble Supreme Court in the case of ***Dena Bank vs. C. Shivakumar Reddy & Anr. [(2021) 10 SCC 330].***

6. **ANALYSIS AND FINDINGS**

6.1 Upon careful consideration of all the documents, pleadings and written submissions and hearing both the learned Counsel for the Financial Creditor and the Corporate Debtor, the following issues arise for examination and determination in this case:-

I) Whether the signatory to the Application has the authority to file this Application;

II) Whether the Application is barred by limitation;

III) Whether the present Application is hit by Section 10A of the Code;

IV) Whether 01.01.2020 as pleaded by the Financial Creditor post-amendment is the correct date of default; and

V) Whether the Rejoinder and the Additional Rejoinder filed by the Financial Creditor should be taken on record?

Issue- I

6.2 The Corporate Debtor has raised an objection that no authority to initiate insolvency proceedings in present case has been granted to the signatory of the Application on behalf of the Financial Creditor. The Corporate Debtor relies upon the decision of this Tribunal in *M/s. Rushabh Civil Contractors Private Limited (supra),* wherein the Tribunal dismissed the Petition on similar grounds. However, in the present case, upon careful examination of the Board Resolution dated 28.01.2021 and the Power of Attorney dated 12.03.2021, it is clear that Ms. Shamina Nasikwala, Chief Manager of the Financial Creditor, was duly authorised to represent the company in legal proceedings related to the company's lending activity. This authorisation is further backed by the Power of Attorney which as per clause authorises Ms. Shamina Nasikwala to commence, institute and conduct any suit, action, or other legal proceedings in any court, tribunal, or other authority. The Financial Creditor has rightly argued that the reliance on the order in above-mentioned matter is misplaced as the facts of the present case are different. Therefore, we do not find any substance in the submission of the Corporate Debtor that signatory to the Application does not have the necessary authority to file this Application. **Issue-I** is decided accordingly.

Issue- II

6.3 The Corporate Debtor contends that the initial default occurred on 13.05.2019 when the loan was recalled by the Financial Creditor. Therefore, the first cause of action for filing the present Application arose on that date and since there was no revocation of the recall letter dated 13.05.2019, the limitation period expired on 12.05.2022, whereas the Application was filed on 19.10.2022, making it time-barred. However, it is observed from the record that the Financial Creditor prayed for the amendment of Part-IV in respect of the date of default from 13.05.2019 to 01.01.2020 which was granted by this Tribunal. Therefore, taking 01.01.2020 as the date of default, we find that the present Application filed on 19.10.2022 is well within the three-year limitation period laid down in Article 137 of the Limitation Act read with Section 238A of the Code.

6.4 Even if 13.05.2019 is considered to be the date of default, as contended by the Corporate Debtor, we find that the Application will still be within the period of limitation. This is so, because the Corporate Debtor had made an OTS proposal dated 25.05.2021 to the Financial Creditor which would qualify to be treated as an acknowledgment of debt within the meaning of Section 18 of the Limitation Act and would thereby extend the limitation period, as held by the Hon'ble Supreme Court in ***Dena Bank vs. C. Shivakumar Reddy and Anr. [(2021) 10 SCC 330].*** Thus, we do not find any merit in the Corporate Debtor's plea of bar of limitation and the same is dismissed. **Issue-II** is decided accordingly.

Issue-III

6.5 The Corporate Debtor contends that as per the terms of the LOI dated 01.03.2018, the tenure of the loan was 36 months and the repayment was only a bullet repayment from the date of first disbursement, i.e., 16.03.2018. Therefore, according to the Corporate Debtor, the repayment would have fallen due only on 16.03.2021 which falls within the suspension period covered under Section 10A of the Code. On the other hand, the Financial Creditor submits that the date of default is 01.01.2020 which is outside the period mentioned in Section 10A.

6.6 In this connection, it will be pertinent to first consider the provisions of Section 10A of the Code which was inserted by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2020 with effect from 05.06.2020. Section 10A mandates that notwithstanding anything contained in Sections 7, 9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed for any default arising during the period from 25.03.2020 to 24.03.2021. The proviso to Section 10A makes it clear that for the default occurring during the aforesaid period, no application shall ever be filed for initiation of CIRP of a corporate debtor. The Explanation below Section 10A clarifies that the provisions of this section shall not apply to any default committed under Sections 7, 9 and 10 before 25.03.2020.

6.7 In view of above legal position, what is relevant is not the date when the debt in question would have fallen due for repayment but the date when the Corporate Debtor committed default in repayment of such debt. Since the

default occurred in the present case on 01.01.2020 much before the suspension period commenced on 25.03.2020, it can by no stretch of imagination be said that the Application is hit by the bar under Section 10A of the Code. Merely because the loan account of the Corporate Debtor was declared as NPA on 31.03.2020, Section 10A will not get attracted as Section 10A is triggered only in respect of defaults "arising or occurring during the suspension period from 25.03.2020 to 24.03.2021" and not in respect of loan accounts classified as NPA during the said period. Therefore, we find that the Corporate Debtor's plea that this Application is barred by Section 10A is nothing more than a fanciful contention devoid of substance and the same is hence dismissed. **Issue-III** is decided accordingly.

Issue-IV

6.8 Before examining the issue of date of default, it will not be out of place to consider the settled legal position with regard to the role of the Adjudicating Authority while dealing with an application under Section 7 of the Code. Section 7(1) of the Code provides that a financial creditor may file an application for initiating CIRP against the corporate debtor before the Adjudicating Authority when a default has occurred. It is well- established that the moment the Adjudicating Authority is satisfied that a default has occurred, the application must be admitted. It is of no matter that the debt is disputed so long as the debt is due and payable unless interdicted by some law ***[Innoventive Industries Ltd. Vs. ICICI Bank [(2018) 1 SCC 407]***. It is also well-settled that in the case of a Section 7 application, unlike Sections 8 and

9 of the Code, there is no statutory requirement for a financial creditor to issue a demand notice/recall notice to the corporate debtor before filing an Application under Section 7 of the Code.

6.9 Under Section 3(12) of the Code, the term "default" is defined as *"non-payment of debt when the whole or any part or instalment of the amount of debt has become due and payable and is not repaid.*" Therefore, a default occurs within the meaning of Section 3(12) when either the whole amount, any part, or an instalment of the debt has not been paid. Further, there is no legal requirement that a Section 7 application must be filed at the very first default. Section 7 of the Code nowhere indicates that unless an application is filed on occurrence of first default, no application can be filed when subsequent defaults are committed, as held by the Hon'ble NCLAT in ***Koncentric Investments Ltd. Vs. Standard Chartered Bank, London and Anr.*** *[(2022) SCC OnLine NCLAT 1254]* as under**:-**

> ***"****21. ….The Financial Creditor is at liberty to file Section 7 Application but it is neither mandatory nor necessary that on first default, Financial Creditor should rush to the Insolvency Court. Financial Creditor may await and give more time to Corporate Debtor to find out as to whether actually the Corporate Debtor has become insolvent and unable to repay the debt and even when Financial Creditor ignores non-payment of interest when the Corporate Debtor first defaulted, it shall not lose its right to file Application under Section 7 of the Code when default of instalment or whole amount became due. ……..*
>
> *……*

> *25. …….. IBC does not comprehend that on first default committed by any debtor, all creditors should rush to IBC. The core objective of IBC is resolution of insolvency of a Corporate Debtor. All provisions have been made; the entire scheme of the IBC has been contemplated to achieve the aforesaid object……. ".*

Therefore, in light of the aforesaid settled legal position, the contentions raised by the Corporate Debtor in the present case that the initial recall notice was bad or that there was no issuance of a fresh recall notice or that the Financial Creditor ought to have filed the Application upon the occurrence of the first default do not hold water and the same are dismissed.

6.10 Coming to the facts of the present case, it is undisputed that the corporate loan of Rs.125 crore sanctioned by the Financial Creditor to the Corporate Debtor *vide* LOI dated 01.03.2018 having been disbursed against consideration for the time value of money/payment of interest is a "financial debt" within the meaning of Section 5(8) of the Code. It is also an undisputed fact that the Financial Creditor disbursed a sum of Rs.100 crore to the Corporate Debtor on 16.03.2018 and the balance sum of Rs.25 crore on 01.06.2018. This is also evidenced by the Ledger Account of the Corporate Debtor annexed to the Application.

6.11 Next, we come to the determination of default concerning the said debt. At this juncture, it will be pertinent to take note of relevant clauses of the LOI. Clause 4 of Annexure-I to the LOI provides that interest @9.25% per annum would be payable quarterly and interest charged for the quarter shall fall due for payment on the first day of succeeding quarter. Clause 8 of Annexure-I to the LOI deals with the "Put/Call Option" and states that the Financial Creditor shall

have the right to call back the loan and Corporate Debtor shall have the right to repay the loan at the end of every 12 months from the date of first disbursement by giving 15 Business days prior written notice of intention to exercise the option. Clause 17 of Terms and Conditions to the LOI provides that in case of default committed in servicing the interest or repayment of principal, Financial Creditor shall have the right to recall the loan and initiate recovery proceedings as per terms of sanction at the cost and consequence of the Corporate Debtor. Clause 19 of the Other Terms and Conditions to the LOI states that the Financial Creditor reserves the right to recall the entire loan or any part thereof at once, if the Corporate Debtor has violated any of the terms and conditions of the sanction. It is observed that the said LOI along with its Annexure has been duly signed and accepted by the Corporate Debtor.

6.12 It is noticed from the record that prior to amendment, the Financial Creditor had mentioned 13.05.2019 as the date of default in the Application. In this connection, the Financial Creditor submits that the interest was overdue from 01.04.2019. Subsequently, it sent a recall notice dated 13.05.2019 to the Corporate Debtor, recalling the entire loan along with interest as per Clause 17 of the LOI referred to above. The Financial Creditor also filed an additional rejoinder dated 08.01.2024 clarifying the circumstances and subsequent events under which the said date of default had to be modified. The Financial Creditor has annexed to the Application Ledger Account of the Corporate Debtor showing that soon after receipt of the recall notice dated 13.05.2019,

the Corporate Debtor made payments aggregating to Rs.3,06,83,280/- up to 24.06.2019 which were adjusted towards the overdue interest for the quarter ended March, 2019. In this manner, the loan account of the Corporate Debtor for the quarter ended March, 2019 no longer remained in default. Thereafter, interest of Rs.3,96,69,519/- for the June quarter fell due on 01.07.2019. With the consent of the Corporate Debtor, the pledged shares were sold and a sum of Rs.11,56,69,519/- was realised on 30.07.2019 out of which Rs.3,96,69,519/- was adjusted towards the interest due as on 01.07.2019 and the balance was adjusted towards the principal debt. Additional shares were sold and amounts aggregating about Rs.38.62 crore were received between 31.07.2019 and 11.09.2019 which were adjusted towards the outstanding principal debt as per the agreement between the parties. The Financial Creditor in its Rejoinder/ Additional Rejoinder/Additional Written Submissions has placed on record certain contemporaneous and other email exchanges with the Corporate Debtor supporting such appropriation/ adjustment which have not been answered by the Corporate Debtor.

6.13 It is further observed that interest of Rs.2,08,22,083/- for the quarter ending December, 2019 fell due on 01.01.2020 which remained unpaid by the Corporate Debtor. Thus, the Corporate Debtor again defaulted in its payment obligation and in fact, no amounts were received by the Financial Creditor after 01.01.2020. In other words, the non-payment of the interest amount due and payable as on 01.01.2020 constituted a ‘default’ within the meaning of Section 3(12) of the Code. Record of Default issued by NeSL also shows the

date of default as 01.01.2020. Hence, we find that 01.01.2020 has correctly been recognised by the Financial Debtor as the date of default. We also find that the amendment of date of default by the Financial Creditor was not an arbitrary, whimsical or capricious act but was carried out for valid reasons backed by credible evidence. In view of this, reliance of the Corporate Debtor on judgment of Hon'ble Apex Court in ***B K Education Services Private Limited (supra)*** and order of this Bench in *Inaskhi Sobti (supra)* will be of no avail. Therefore, **Issue-IV** is decided accordingly.

Issue-V

6.14 In its Written Submissions, the Corporate Debtor vehemently contends that the Rejoinder and Additional Rejoinder filed by the Financial Creditor ought not to be taken on record, because the latter has brought on record certain new documents in its Rejoinder and tried to set up a new case altogether. In this connection, it is noticed from the record that the Ld. Counsel for the Financial Creditor was permitted to file Rejoinder, if any, as well as Additional Affidavit *vide* orders of this Bench dated 14.09.2023 and 08.01.2024. Thus, we find that both the Rejoinder and the Additional Rejoinder were placed on record with prior leave of this Bench. As the Corporate Debtor's reply referred to additional facts such as letter of rejection of OTS by the Financial Creditor and copies of emails for appropriation of the sale proceeds of pledged shares, the Bench in exercise of its discretion under Rule 42 of NCLT Rules, 2016, permitted the Financial Creditor to file a Rejoinder/ Additional Rejoinder.

6.15 Let us now consider the nature and contents of documents which have been brought on record by the Financial Creditor. First, the Financial Creditor has placed on record copy of the OTS proposal made by the Corporate Debtor to the Financial Creditor *vide* letter dated 25.05.2021 so as to meet the challenge of limitation mounted by the Corporate Debtor in its Affidavit-in-Reply. Secondly, the Financial Creditor has submitted copy of NCLT order dated 30.05.2022 in CP (IB) No.97(ND) 2022 filed by the Indiabulls Housing Finance Limited Vs. Mr. Subhash Chandra under Section 95(1) of the Code under which interim moratorium was in operation along with copy of Master Direction of RBI dated 01.09.2016 which are essentially public documents. Finally, the Financial Creditor has produced copies of e-mails dated 07.01.2020 and 30.06.2020 addressed by the Corporate Debtor to the Financial Creditor informing that "*we are accounting all payments made to STCI Ltd. (Financial Creditor) for ECRPL and Jayneer Loans Vide sale of Pledges share as an adjustment towards principal"*.

6.16 Thus, we find that the primary object of the Financial Creditor in filing Rejoinder and Additional Rejoinder was to bring on record relevant documentary evidences so as to effectively deal with the objections raised by the Corporate Debtor in its Affidavit-in-Reply and to buttress its own case. We do not find that pursuant to filing of Rejoinder and Additional Rejoinder, the Financial Creditor has come out with a new case altogether. The judgment of Hon'ble NCLAT in the matter of ***State Bank of India*** (supra) is distinguishable as the facts in present case are different in as much as no new case has been

made out by the Financial Creditor in the Rejoinders. The actual reason behind the Corporate Debtor's strong opposition appears to be that the two e-mails dated 07.01.2020 and 30.06.2020 expose the falsity of its claim before the Tribunal that it had arranged adequate funds for meeting interest obligations whereas, in reality, it had accounted for all appropriations by the Financial Creditor from sale proceeds of pledged shares as an adjustment towards principal debt. Therefore, in view of the facts and circumstances stated above, we find that the Corporate Debtor's contention in this regard is only self-serving, dishonest, misleading and intended to misrepresent facts before this Tribunal and the same hence deserves to be dismissed. **Issue-V** is decided accordingly.

6.18 As regards Corporate Debtor's contention that the present Application has been filed with the object of recovery, we do not find any force in the argument. Facts placed on record by the Financial Creditor clearly show that the Corporate Debtor has failed to stand on its own feet during the last over four years and Essel Group entities have been undergoing severe financial stress, as brought out in Paragraphs 4.2, 4.3 and 4.11 above. Although the Corporate Debtor claims that it is ready and willing to pay the debt and revive itself, it is pertinent to note that it had admittedly not paid any money to the Financial Creditor since January, 2020 against outstanding dues of over Rs.99 crore. In this background, reliance of the Corporate Debtor on the judgment of Hon'ble Supreme Court in ***Vidarbha Industries Power Ltd.*** (supra) will not help to advance its case, because not even an iota of evidence has been placed on

record to demonstrate that it stands any "fair chance of revival". It has not produced its latest audited financial statements in order to substantiate the claim that the Corporate Debtor is in a financially sound position to discharge its debt obligations. The Corporate Debtor's contention that it does not deserve to be pushed into insolvency is thus wholly erroneous, unfounded and not borne out from the materials available on record and is accordingly dismissed. In view of this, we do not deem it necessary to deal with other issues raised by the Corporate Debtor disputing the debt and pledging of share, OCDs, inflated interest, etc.

6.19 In view of above discussions, we find that the Financial Creditor in the present case has placed on record necessary evidence to demonstrate the existence of the debt due and payable by the Corporate Debtor exceeding the minimum threshold of Rs.1 crore as prescribed under Section 4 of the Code as well as the default in repayment thereof by the Corporate Debtor. The Application has been filed in the prescribed form and is complete. The Corporate Debtor has not shown that the debt in question is interdicted by any other law. The Financial Creditor has also filed a fresh Affidavit of the Interim Resolution Professional (IRP) in compliance with Section 7(3)(b) of the Code. The Financial Creditor has proposed the name of Mr.Hari Kishan Bhoklay, a registered Insolvency Professional as the Interim Resolution Professional (IRP) to carry out the functions as mentioned under the Code and has provided his valid AFA in Form B and also given his declaration in Form 2 dated 12.09.2022, *inter alia,* stating that no disciplinary proceedings is

pending against him. Therefore, we find that all pre-requisites of Section 7(5)(a) of the Code are fulfilled and, accordingly, we are satisfied that the instant Application is fit for admission under Section 7 of the Code.

ORDER

In view of the aforesaid findings, this Application bearing C.P.(IB) No.1154/MB/2022 filed under Section 7 of the Code by STCI Finance Limited, the Financial Creditor, for initiating CIRP in respect of Jayneer Infrapower & Multiventures Private Limited, the Corporate Debtor is **admitted**.

We further declare moratorium u/s 14 of the IBC, with consequential directions as follows:

1. We prohibit-
   a) the institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
   b) transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;
   c) any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the SARFAESI Act; and

d) the recovery of any property by an owner or lessor where such property is occupied by or in possession of the Corporate Debtor.

2. That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period.

3. That the order of moratorium shall have effect from the date of this order till the completion of the CIRP or until this Tribunal approves the resolution plan under Section 31(1) of the Code or passes an order for the liquidation of the Corporate Debtor under Section 33 thereof, as the case may be.

4. That public announcement of the CIRP shall be made in immediately as specified under Section 13 of the Code read with Regulation 6 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and other Rules and Regulations made thereunder.

5. That this Bench hereby appoints Mr. Hari Kishan Bhoklay**, a registered Insolvency Professional** having Registration No.IBBI/IPA-003/IP-N00228/ 2019-2020/12696 and e-mail address bhoklay.hk@hotmail.com having valid Authorisation for Assignment up to 20.11.2024 as the IRP to carry out the functions under the IBC, the fee payable to IRP/RP shall be in accordance with the Regulations/Circulars issued by the IBBI.

6. That the fee payable to IRP/RP shall be in accordance with such Regulations/Circulars/ Directions as may be issued by the IBBI.

7. That during the CIRP Period, the management of the Corporate Debtor shall vest in the IRP or, as the case may be, the RP in terms of Section 17 or Section 25, as the case may be, of the Code. The officers and managers of the Corporate Debtor is directed to provide effective assistance to the IRP as and when he takes charge of the assets and management of the Corporate Debtor. 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/RP within a period of one week from the date of receipt of this Order and shall not commit any offence punishable under Chapter VII of Part II of the Code. Coercive steps will follow against them under the provisions of the Code read with Rule 11 of the NCLT Rules for any violation of law.

8. That the IRP/IP shall submit to this Tribunal periodical reports with regard to the progress of the CIRP in respect of the Corporate Debtor.

9. In exercise of the powers under Rule 11 of the NCLT Rules, the Financial Creditor is directed to deposit a sum of Rs.5,00,000/- (Five Lakh Rupees) with the IRP to meet the initial CIRP cost arising out of issuing public notice and inviting claims, etc. The amount so deposited shall be interim finance and paid back to the Financial Creditor on priority upon the funds available with IRP/RP from the Committee of Creditors (CoC). The expenses incurred by IRP out of this fund are subject to approval by the CoC.

10. A copy of this Order be sent to the Registrar of Companies, Maharashtra, Mumbai for updating the Master Data of the Corporate Debtor.

11. A copy of the Order shall also be forwarded to the IBBI for record and dissemination on their website.

12. The Registry is directed to immediately communicate this Order to the Financial Creditor, the Corporate Debtor and the IRP by way of Speed Post, e-mail and WhatsApp.

13. **Compliance report of the order by Designated Registrar is to be submitted today.**

Sd/-

SANJIV DUTT
MEMBER (TECHNICAL)

Sd/-

K. R. SAJI KUMAR
MEMBER (JUDICIAL)

// LRA-Deepa //