IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH (COURT – II)

Item No. 202
(IB)-590/ND/2023

IN THE MATTER OF:

M/s Kaliber Associates Pvt. Ltd.
Through its Liquidator,
Mr. Mohan Lal Jain
B-1/12, 2nd Floor, Safdarjung Enclave,
New Delhi—110029

... Applicant/ Financial Creditor

Versus

M/s Lion Buildcon Pvt. Ltd.
Registered Office at:
B-132, S/F KH NO 776/704/508
Gali No 7, Hardevpuri Shahdara,
Delhi East Delhi DL 110093

... Respondent

Under Section: 7 of IBC, 2016

Order delivered on 03.07.2024

CORAM:
SH. ASHOK KUMAR BHARDWAJ, HON'BLE MEMBER (J)
SH. SUBRATA KUMAR DASH, HON'BLE MEMBER (T)

PRESENT:

For the Applicant	**:**	Adv. Anirban Bhattacharya, Adv. Rajeev Choudhary, Adv. Priyanka Bhatt
For the Respondent	**:**	Adv. Aditya Madaan, Adv. Aishwarya Adlakha

Hearing Through: VC and Physical (Hybrid) Mode

ORAL ORDER

The present petition has been preferred under Section 7 of IBC, 2016. On 04.10.2023 when the petition was listed afresh, there was no appearance on behalf of the Petitioner, thus the same was dismissed for want of prosecution. The order dated 04.10.2023 reads thus:

> *"There is no appearance on behalf of the petitioner,* ***thus the petition is dismissed for want of prosecution.****"*

2. Subsequently, on 30.10.2023, the RA-175/2023 was allowed and the petition was restored to its original position. In terms of the order of even date,

the notice was issued in the petition viz. IB-590/ND/2023 to the Respondent. The notice was made returnable on 29.11.2023. The order dated 30.10.2023 reads thus:

> ***"RA-175/2023:*** *In view of the averments made in the application and the submissions put forth by the Ld. Counsel for the Applicant,* ***the RA is allowed.***
>
> ***IB-590/ND/2023:*** *Issue notice to the Respondent returnable on 29.11.2023. The Applicant undertakes to serve notice upon the Respondent through all modes viz. registered post, speed post, courier service, and E-mail. Affidavit of service be filed within one week. Reply be filed by the Respondent within one week from the date of receipt of the notice. Rejoinder, if any, may be filed before the next date of hearing.*
>
> *List the matter on 29.11.2023."*

3. On 29.11.2023, there was no appearance on behalf of the Corporate Debtor despite service of notice. Nevertheless, in the interest of justice, the hearing was deferred to 02.01.2024. On 02.01.2024, Ld. Counsel for the CD submitted that as on 29.11.2023, he was on his legs before the Principal Bench of this Tribunal, thus could not remain present in the proceedings qua the captioned application, therefore the order dated 29.11.2023, in terms of which the proceedings qua Corporate Debtors were set ex-parte needed to be recalled. He also submitted that he had already preferred an application for recalling the order dated 29.11.2023 (ibid). At the request made by the Ld. Counsel for the Corporate Debtor, the hearing was deferred to 10.01.2024 to enable the Corporate Debtor to get its application filed for recalling the order dated 29.11.2023 listed for consideration before this Court. On 10.01.2024, the IA-6754/ND/2023 was allowed and the order passed by this Tribunal setting the proceedings qua the Corporate Debtor as ex-parte was recalled.

On 11.01.2024, on the request made by the Ld. Counsel for the Corporate Debtor one-week time was granted for filing reply to the application. On 31.01.2024, it was submitted on behalf of the Respondent that the parties were exploring the possibility of settlement qua the defaulted amount. In the wake of such stand taken on behalf of the Corporate Debtor, hearing was deferred to 07.02.2024. The order dated 31.01.2024 reads thus:

> *"Ld. Counsel for the CD submitted that the parties are exploring the settlement qua the defaulted amount. Let an affidavit to the effect be filed by tomorrow. List the petition on 07.02.2024.*
>
> *Liquidator qua Kaliber Associates Pvt. Ltd. is directed to remain present in person either virtually or physically.*
>
> *It would also be open to the CD to file its reply within 2 days. Filing of reply may not prejudice the settlement."*

4. Again on 07.02.2024, even though the Applicant before us i.e. M/s Kaliber Associates Pvt. Ltd. seriously and sincerely disputed the stand taken on behalf of the Corporate Debtor that the settlement talk was in progress, at the strength of the order passed by the Hon'ble Supreme Court in **E S Krishnamurthy & Ors. vs. M/s Bharath Hi Tech Builders Pvt. Ltd.** [Civil Appeal No 3325 of 2020) only with reference to the stand taken on behalf of the Corporate Debtor we disposed of the petition to enable the Corporate Debtor to enter into settlement with the Applicant before us. The order dated 07.02.2024 read thus:

> *"The present petition has been preferred by Liquidator qua M/s Kaliber Associates Pvt. Ltd. The amount of default as mentioned in Part-IV of the petition is Rs. 2,50,00,000/- (Rupees Two Crores Fifty Lakhs Only). Part-IV (1) reads thus:*

Part - IV

PARTICULARS OF FINANCIAL DEBT

1.	TOTAL AMOUNT OF DEBT GRANTED DATE(S) OF DISBURSEMENT	That as per the records of the Corporate Debtor available with the Liquidator an amount of Rs. 2,50,00,000/- (Rupees Two Crores Fifty Lakhs Only) was disbursed by the Financial Creditor as loans and advances to the Corporate Debtor in following two tranches: a. an amount of Rs. 2,00,00,000/- (Rupees Two Crores Only) was disbursed by the Financial Creditor to the Corporate Debtor on 18.10.2013. b. an amount of 50,00,000/- (Rupees Fifty Lakhs Only) was disbursed by the Financial Creditor to the Corporate Debtor on 09.11.2013. The disbursement of loans and advances is clearly reflected in the bank statement of the Financial Creditor. A copy of the Bank Statement and copy of the Ledger of C.D as maintained by the Financial Creditor is annexed herewith and marked as **ANNEXURE- 5.**

2. Mr. Anirban Bhattacharya, Ld. Counsel appearing for the Petitioner could draw our attention to the balance-sheet placed on record at page No. 109 of the petition to show that the amount of debt defaulted to be paid by the CD could be acknowledged and the present petition is within the prescribed period of limitation. He could also draw our attention to Annexure A-13 to the petition to show that the amount of default has been reported to information utility and the NeSL has also given certificate to the effect. To buttress his plea that once the default has been reported with information utility, no further verification or investigation is needed to be carried by this Adjudicating Authority, relied upon the judgment of the Hon'ble NCLAT in ***Company Appeal (AT) (Insolvency) No. 470 of 2022.*** *Para 16 of the judgment reads thus:*

> *"16. In the light of the detailed discussion as above, it is clear that in case the record of Information Utility shows that there is a debt which is in default, the Adjudicating Authority or the Appellate Authority are not required to further examine the record maintained by the Information Utility, moreso when the record of the Information Utility is deemed authenticated and no dispute or refutation of said record has been done by the corporate debtor*

earlier. We also note that in the judgment of ***Rushabh Civil Contractors Pvt. Ltd. vs. Centrio Lifespaces Ltd. (supra),*** *which has been cited by the Learned Counsel for Appellant, the record that formed the basis for financial debt and default was found to be forged and fabricated, which is not the case in the present appeal. Therefore, this judgment does not come to the rescue of the Appellant."*

3. In the wake of the submissions made by the Ld. Counsel for the Applicant, the amount of debt defaulted to be paid is established and the default committed by the CD also acknowledged, the present petition deserves to be admitted.

4. Nevertheless, the Ld. Counsel appearing for the CD submitted that the CD is endeavouring to enter into settlement qua the defaulted amount with the Applicant/Petitioner and has already given a proposal to Petitioner to the effect. Mr. Anirban Bhattacharya, Ld. Counsel express ignorance about any such proposal.

5. In ***E S Krishnamurthy & Ors. vs. M/s Bharath Hi Tech Builders Pvt. Ltd.*** *[Civil Appeal No 3325 of 2020] passed by the Hon'ble Supreme Court it could be viewed that after the finding regarding the default committed by the CD is arrived at, this Tribunal may encourage the settlement between the parties. Para 28 of the judgment reads thus:*

"28 Undoubtedly, settlements have to be encouraged because the ultimate purpose of the IBC is to facilitate the continuance and rehabilitation of a corporate debtor, as distinct from allowing it to go into liquidation. As the Statement of Objects and Reasons accompanying the introduction of the Bill indicates, the objective of the IBC is to facilitate insolvency resolution "in a time bound manner" for maximisation of the value of assets, promotion of entrepreneurship, ensuring the availability of credit and balancing the interest of all stakeholders. What the Adjudicating Authority and Appellate Authority, however, have proceeded to do in the present case is to abdicate their jurisdiction to decide a petition under Section 7 by directing the respondent to settle the remaining claims within three months and leaving it open to the original petitioners, who are aggrieved by the settlement process, to move fresh proceedings in accordance with law. Such a course of action is not contemplated by the IBC."

6. In the wake of the view taken by the Hon'ble Supreme Court and the submission made by the Ld. Counsel for the CD at bar that it is keen to enter into settlement with the petitioner regarding the defaulted amount, 2 weeks' time is granted to the CD to enter into settlement. With such observation, the petition is disposed of.

7. It is made clear that if no settlement is arrived at within given time, Mr. Anirban Bhattacharya, Ld. Counsel would be entitled to mention orally before this Bench for revival of the present petition. ***The petition is disposed of."***

5. Nevertheless, no settlement could take place and the Petitioner had to mention the matter before this Tribunal on 08.04.2024 for reviving the IB-590/ND/2023 and we passed the following order:-

"IB-590/ND/2023: *On 07.02.2024 we passed the order with consent of the Counsel for the parties. The paras 6 & 7 of the order reads thus:-*

> *"6. In the wake of the view taken by the Hon'ble Supreme Court and the submission made by the Ld. Counsel for the CD at bar that it is keen to enter into settlement with the petitioner regarding the defaulted amount, 2 weeks' time is granted to the CD to enter into settlement. With such observation, the petition is disposed of.*
>
> *7. It is made clear that if no settlement is arrived at within given time, Mr. Anirban Bhattacharya, Ld. Counsel would be entitled to mention orally before this Bench for revival of the present petition. The petition is disposed of."*

In the wake, Mr. Anirban Bhattacharya, Ld. Counsel for the Financial Creditor mentioned that the settlement as referred to in the aforementioned order has not materialized, thus the petition may be revived.

In the wake, the CP-(IB)-950/ND/2023 is directed to be revived. Issue notice of information to the CD returnable on 22.04.2024. The Applicant undertakes to serve notice upon the Respondent through all modes viz. registered post, speed post, courier service and E-mail. Affidavit of service be filed within one week. Reply, if any, may be

filed by the Respondent within one week from the date of receipt of the notice. Rejoinder, if any, may be filed before the next date of hearing.

List the matter on 22.04.2024."

6. On 24.04.2024, we again issued notice to the Corporate Debtor. In response to the notice, appearance was entered on behalf of the Corporate Debtor on 08.05.2024 and an adjournment was sought to report the further development. On 06.06.2024, the matter could not be taken up for hearing.

7. Today, when the matter was called for hearing, it was submitted on behalf of the Corporate Debtor that further time is required to place on record certain documents to prove that the settlement was in progress. In view of the fact that we had granted opportunity to file additional affidavit on 08.05.2024 and even today also, the Ld. Counsel for the CD sought adjournment to file documents to support the plea raised in the additional affidavit while the IBC provides only 14 days' time to take decision regarding admission or rejection of the application, we are constrained not to entertain the further request for adjournment made by the CD to place the additional documents on record to support the additional affidavit, which was allegedly re-filed only yesterday. As we had granted time to file additional affidavit on 08.05.2024, today on 03.07.2024 i.e. almost after 2 months we do not think it appropriate to defer the hearing any more also for the reason that having persuaded this Tribunal to pass an order by creating an impression that it had all intention to enter into settlement with the Applicant, the Respondent/CD did not honour its commitment (when we were dictated the order, Ld. Counsel for the Corporate Debtor submitted that Corporate Debtor made efforts. Nevertheless, from the tenure of submissions made on behalf of the Corporate Debtor, we are unable

to gather an impression that the Corporate Debtor ever intended to arrive at any settlement regarding the defaulted amount with the Financial Creditor. What the Ld. Counsel appearing for the Corporate Debtor tried to espouse that since the Liquidator had intended to transfer the amount of financial debt for Rs. 8 lacs to third party it should not have resorted to the present proceedings against the Corporate Debtor. Such argument raised on behalf of the Respondent may be submission on merits but is not an offer for settlement by any stretch of imagination). Mr. Anirban Bhattacharya, Ld. Counsel appearing for the Petitioner commenced his submissions by referring to page 45 of the paper book to show that an amount of Rs. 2,00,00,000/- was paid to the Corporate Debtor on 18.10.2013 and further amount of Rs. 50,00,000/- was paid to it on 09.11.2013. From the statement of account of the Applicant/FC, the amount is reflected to have been disbursed to the Corporate Debtor. Mr. Anirban Bhattacharya further refer to Annexure-13 (at page No. 114 of the paper book) i.e. the NeSL report to show the default committed in repayment of loan. From Annexure-9 to the application at page No. 109, we could see that in the Balance-sheet maintained by the Corporate Debtor, the amount of loan disbursed to it by the FC has been acknowledged.

8. We could also see from Annexure-10 to the application that the Applicant had sent a notice dated 31.01.2019 to Respondent, demanding the amount of loan, but the Respondent failed to repay the same. It is also seen that the RP Mr. Gaurav Kapoor has given his consent to act as IRP qua the Corporate Debtor and his declaration that no legal proceedings are pending against him is there available at page No. 122 of the petition (point-4).

9. Mr. Aditya Madaan, Ld. Counsel appearing for the Respondent submitted that:-

(i) the Liquidator has no locus standi to file the present application as he has no permission to institute the present proceedings.

(ii) There is no debt payable by the CD, which can be perceived as financial debt.

(iii) There is no financial agreement between the Applicant and the Respondent.

(iv) Since the amount which was allegedly disbursed in the year 2013 is now claimed by the Financial Creditor without interest, no time, value of money is involved, thus the present proceedings are barred by Section 5(8) of IBC, 2016.

(v) In terms of the provisions of Section 186 of the Companies Act, 2013, the Applicant is not eligible to disbursed the financial debt.

(vi) When according to the Applicant, the amount was disbursed in the year 2013, in NeSL report it is mentioned that the debt started from 31.03.2017. Such factual discrepancy creates doubt about the veracity of NeSL report itself.

(vii) When there is no financial contract, the rate of interest as indicated in NeSL report is 12%. Thus the NeSL report itself is not above board.

(viii) With reference to para 7 of the reply it can be seen that the present application is not maintainable. Para 6 of the rejoinder reveals that the Liquidator could not get complete information from the Corporate Debtor, thus it is beyond comprehension that how could he perceive that the Respondent has defaulted to repay the amount of some debt to the Applicant.

10. To buttress his argument that in the absence of time, value of money, the amount paid by the Applicant to Corporate Debtor cannot be perceive as financial debt Mr. Madaan referred to the judgment of Mumbai Bench of this Tribunal in Mr. Dinesh Changela vs. Berkmann Wine Cellars India Limited in CP(IB)-1420/I&BP/MB/2019. Para 13 of the order reads thus:

"13. From the careful perusal of the definition of Financial Debt and the above case laws relied upon by the Corporate Debtor makes it clear that a debt will not become financial debt if it was not advanced for time value money. The letter dated 03.04.2016 at annexure 'D' and the various balance sheets relied upon by the Petitioner makes it abundantly clear that there is no interest payable on the loan advanced by the Petitioner. Apart from the above, no time is fixed for repayment in the absence of which it cannot be said that the loan was lent for time value money. In the light of the above discussion we have no hesitation in holding that the above amount claimed in the above Petition does not fall under the definition of financial debt and the above Company Petition is liable to be dismissed. Since we are dismissing the above Company Petition on the very nature of the claim, the other contentions raised by the Corporate Debtor with regard to obtaining prior permission from RBI by the applicant for lending the above amount to the Corporate Debtor the applicant being NRI and the observations in the auditors report relied upon by them to the effect that the amount is a mere book entry in the books of accounts of the Corporate Debtor are not dealt with."

11. We heard the Ld. Counsels for the parties and perused the record. As far as the plea of there being no financial debt and non-availability of any agreement regarding financial debt is concerned, in Gp. Capt Atul Jain vs. Tripathi Hospital Pvt. Ltd. in Company Appeal (AT) (Insolvency) No. 655 of 2020 passed by Hon'ble NCLAT it could be viewed that the Adjudicating Authority has to merely see the records of the information utility/evidence used by the Financial Creditor to satisfy itself that a default has occurred. Para 16 of the judgment order reads thus:

"16. In support of his argument, the Appellant has adverted attention to the ratio contained in judgment of this Tribunal in ***M/s Precious Energy Holdings Limited vs. SBI in Company Appeal (AT) (CH)***

(Ins) 89/2022 *and in* ***Vipul Himatlal Shah vs. Teco Industries in Company Appeal (AT) (Ins) 470/2022*** *wherein it has been held that in the case of a Corporate Debtor who commits a default of a financial debt, the Adjudicating Authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It was added that not only there is no need to produce any document or agreement or written contract to adduce proof of loan given by the applicant to the Corporate Debtor, but that the "Deemed to be Authenticated" default report contained in the NeSL/Information Utility Report in respect of the Corporate Debtor was sufficient evidence of loan and default. It was also pointed out that a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the Corporate Debtor in terms of the explanation clause to Section 7 and hence the Appellant was entitled to factorize the debt owed by the Corporate Debtor to others also."*

12. Also in Vipul Himatlal Shah vs. Teco Industries in Company Appeal (AT) (Insolvency) No. 470 of 2022 passed by Hon'ble NCLAT, it could be viewed that where the record of information utility show that there is a debt which is defaulted to be paid, the Adjudicating Authority is not required to further examine the record to maintained by the information utility. Para 15 & 16 of the judgment reads thus:

"15. We also note the judgment of Hon'ble Supreme Court in the matter of ***Innoventive Industries vs. ICICI Bank (2018) 1 SCC 407****, wherein in para 21 it is held as follows:-*

> *"21. Section 12 provides for a time limit for completion of the insolvency resolution process and reads as follows: "Sec. 12. Time-limit for completion of insolvency resolution process.- (1) Subject to sub-section (2), the corporate insolvency resolution process shall be completed within a period of one hundred and eighty days from the date of admission of the application to initiate such process. (2) The resolution professional shall file an application to the Adjudicating Authority to extend the*

period of the corporate insolvency resolution process beyond one hundred and eighty days, if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of seventy-five per cent. of the voting shares. (3) On receipt of an application under sub-section (2), if the Adjudicating Authority is satisfied that the subject matter of the case is such that corporate insolvency resolution process cannot be completed within one hundred and eighty days, it may by order extend the duration of such process beyond one hundred and eighty days by such further period as it thinks fit, but not exceeding ninety days: Provided that any extension of the period of corporate insolvency resolution process under this section shall not be granted more than once."

16. In the light of the detailed discussion as above, it is clear that in case the record of Information Utility shows that there is a debt which is in default, the Adjudicating Authority or the Appellate Authority are not required to further examine the record maintained by the Information Utility, moreso when the record of the Information Utility is deemed authenticated and no dispute or refutation of said record has been done by the corporate debtor earlier. We also note that in the judgment of ***Rushabh Civil Contractors Pvt. Ltd. vs. Centrio Lifespaces Ltd. (supra),*** *which has been cited by the Learned Counsel for Appellant, the record that formed the basis for financial debt and default was found to be forged and fabricated, which is not the case in the present appeal. Therefore, this judgment does not come to the rescue of the Appellant."*

13. It is the view taken by Hon'ble NCLAT in M/s Aggarwal Polysacks Limited vs. M/s K.K. Agro Foods and Storage Limited in Company Appeal (AT) (Insolvency) No. 1126/2022 that the Balance-sheet can also be looked into to find out existence of financial debt. Para 17 & 20 of the judgement reads thus:

"17. What was held in Para 7 that Appellant has failed to show any record showing financial debt to be there. Thus, above judgment also does not lay down that unless there is written contract, the Financial

Creditor is precluded to prove financial debt by any other relevant material.

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20. The above judgment also thus indicate that Balance Sheets can also be looked into to find out existence of financial debt. Learned counsel for the Appellant has relied on judgment of this Tribunal in ***"Satish Balan VS Mrs. Neeta Navin Nagda & Anr., Company Appeal (AT) (Ins.) No. 718 of 2023"*** decided on 04.07.2023, where in Para 14 and 15 following has been laid down:

"14. This 'Appellate Tribunal' observe that the Code nowhere prescribes that there should be a written agreement between the parties to prove the loan and its disbursement to be treated as financial debts. It is also observed that if there are acknowledgments by the 'Corporate Debtor' and where the statements of accounts of the 'Corporate Debtor' are in position to proof disbursement of loan and payment of interest, the absence of formal written agreement would not bar the 'Financial Creditor' (the Respondent No. 1 herein) from initiating the CIRP."

15. We take note from the record made available that there have been clear acknowledgments which have been issued by the 'Corporate Debtor' for the money Company Appeal (AT) Insolvency No. 1126 of 2022 received from the Respondent No. 1 which also mentioned the quantum of interest payment to be made by the 'Corporate Debtor' to the Respondent No. 1. Similarly, we also take into account the fact that TDS was deducted regarding interest paid and the name of the Appellant as 'dedutor' and the name of the Respondent No. 1 as 'deductee' is clearly evident. This does not give any scope for benefits of the 'Appellant'."

14. Also in Mr. Praful Nanji Satra vs. Vistra ITCL (India) Limited in Company Appeal (AT) (Ins.) No. 713 of 2020, it could be viewed that this Tribunal need to give credence to the record maintained by information utility to arrive at a conclusion regarding the debt and default. Para 25 & 26 of the judgement reads thus:

"25. The Learned Senior Counsel for Appellant has referred to the judgments of Hon'ble Supreme Court in ***Garware Wall Ropes***

Limited v. Coastal Marine Constructions and Engineering Limited (2019) 9 SCC 209 and SMS Tea Estates Private Limited v. Chandmari Tea company Private Limited (supra) *to claim that documents that are insufficiently stamped cannot be admitted as evidence, and therefore, the Redeemable Non-Convertible Debenture Subscription Agreement and Debenture Trust Deed should not have been considered by the Adjudicating Authority while adjudicating the section 7 application. On the other hand, the Learned Counsel for Respondents has claimed that the Hon'ble Supreme Court has overturned the above two judgments in* ***Garware Wall Ropes Limited (supra) and SMS Tea Estates Private Limited (supra)*** *by its judgment in* ***N.N. Global Mercantile Pvt. Ltd. (supra)*** *holding therein that there is no requirement for stamping and registration of arbitration agreement, which constitutes a separate agreement under the theory of separability and kompetenz – kompetenz. We are of the view all the three judgments relate to the question of arbitration in relation to a contract. In our view, the corporate debtor has not raised any issue about the execution of the two documents in question in this case and hence we do not consider that these judgments (supra) will be applicable in the present case.*

26. The Hon'ble Calcutta High Court in W. P. No. 5595 (W) of 2020 With C.A.N. 3347 of 2020 Univalue Projects Pvt. Ltd. Versus The Union of India & Ors. And W.P. No. 5861 (W) of 2020 With C.A.N. 3937 OF 2020 Cygnus Investments and Finance Pvt. Ltd. & Anr. Versus The Union of India & Ors., while quoting various judgments of the Hon'ble Supreme Court, has held as under:

"50. The Supreme Court in ***Innoventive Industries (supra),*** *while considering Section 7 of the IBC, 2016 directed itself to the AA Rules, 2016 and observed the following vis-à-vis Rule 4 and its appendage Form-1:*

"28. …[U]nder Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein.

Form 1 is a detailed form in 5 parts, which requires….documents, records and evidence of default in Part V….[T]he speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility ***or*** *on the basis of the evidence furnished by the financial creditor, is important."*

"30. On the other hand, as we have seen, in case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred…"

(Emphasis supplied)

Rohinton Nariman, J., relied upon the above quoted paragraphs of ***Innoventive Industries (supra)*** *while authoring his judgment in* ***Swiss Ribbons (P) Ltd. (supra)****. In addition to this, he also considered the pertinence of the IU in paragraph 31 before quoting the other sources of evidence which evidence a financial debt, in the following words:*

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

a) Particulars of security held, if any, the date of its creation, its estimated value as per the creditor;

b) Certificate of registration of charge issued by the registrar of companies (if the corporate debtor is a company);

c) Order of a court, tribunal or arbitral panel adjudicating on the default;

d) Record of default with the information utility;

e) Details of succession certificate, or probate of a will, or letter of administration, or court decree (as may be applicable), under the Indian Succession Act, 1925;

f) The latest and complete copy of the financial contract reflecting all amendments and waivers to date;

g) A record of default as available with any credit information company;

h) Copies of entries in a bankers book in accordance with the Bankers Books Evidence Act, 1891."

(Emphasis supplied)

Therefore, all ***eight classes of documents enumerated under Part V of Form-1 appended to the AA Rules, 2016*** *have been held by the Supreme Court to be 'other sources which evidence a financial debt'. On a close due diligence of the various provisions above, including section 7 of the IBC, 2016 read with Rule 4 of the AA Rules, 2016 and Form-1 therein, and regulation 8 of the CIRP Regulations, 2016, observations of the Supreme Court in paragraph 32 (provided above), it becomes crystal clear that apart from the financial information of the IU, eight classes of documents can be considered to be sources that evidence a "financial debt".*

On a close due diligence of the various provisions above, including section 7 of the IBC, 2016 read with Rule 4 of the AA Rules, 2016 and Form-1 therein, and regulation 8 of the CIRP Regulations, 2016, observations of the Supreme Court in paragraph 32 (provided above), it becomes crystal clear that apart from the financial information of the IU, eight classes of documents can be considered to be sources that evidence a "financial debt".

15. From the aforementioned judgements of Hon'ble NCLAT, it is clear that the absence of financial contract/agreement could not vitiate the maintainability of the application. Regarding the time value of money, though the view taken by Mumbai Bench of this Tribunal in Mr. Dinesh Changela vs. Berkmann Wine Cellars India Limited in CP(IB)-1420/I&BP/MB/2019 support the submissions put forth by Mr. Madaan, but this is contrary view taken by Hon'ble NCLAT in Arunkumar Jayantilal Muchhala vs. Awaita

Properties Pvt. Ltd. and Another [2024 SCC OnLine NCLAT 428] wherein it is viewed that the absence of document or agreement providing for rate of interest would not render the application filed under Section 7 of IBC, 2016 as not maintainable. Para 12, 18 & 19 of the judgment reads thus:

> ***"12.*** *Equally important to note is the judgment of Hon'ble Supreme Court in Orator Marketing (P) Ltd. v. Samtex Desinz (P) Ltd., (2023) 3 SCC 753, wherein it has been clearly held that financial debt does not expressly exclude an interest-free loan. The Hon'ble Supreme Court in this judgment has observed:*
>
> > *"21. The definition of "financial debt" in Section 5(8) IBC has been quoted above. Section 5(8) defines "financial debt" to mean "a debt along with interest if any which is disbursed against the consideration of the time value of money and includes money borrowed against the payment of interest, as per Section 5(8)(a) IBC. The definition of "financial debt" in Section 5(8) includes the components of sub-clauses (a) to (i) of the said Section.*
> >
> > *22. NCLT and NCLAT have overlooked the words "if any" which could not have been intended to be otiose. "Financial debt" means outstanding principal due in respect of a loan and would also include interest thereon, if any interest were payable thereon. If there is no interest payable on the loan, only the outstanding principal would qualify as a financial debt. Both NCLAT and NCLT have failed to notice clause (f) of Section 5(8), in terms whereof "financial debt" includes any amount raised under any other transaction, having the commercial effect of borrowing.*
> >
> > *23. Furthermore, sub-clauses (a) to (i) of sub-section (8) of Section 5 IBC are apparently illustrative and not exhaustive. Legislature has the power to define a word in a statute. Such definition may either be restrictive or be extensive. Where the word is defined to include something, the definition is prima facie extensive.*
> >
> > *31. At the cost of repetition, it is reiterated that the trigger for initiation of the corporate insolvency resolution process by a financial creditor under Section 7 IBC is the occurrence of a default by the corporate debtor. "Default" means non-payment of debt in whole or part when the debt has become due and payable and debt means a liability or obligation in respect of a claim which is due from any person and includes financial debt and operational debt. The definition of "debt" is also expansive and the same includes, inter*

alia, financial debt. The definition of "financial debt" in Section 5(8) IBC does not expressly exclude an interest free loan. "Financial debt" would have to be construed to include interest free loans advanced to finance the business operations of a corporate body."

(Emphasis supplied)

***** *** *** *** *****

18. *In the present case, the Respondent No. 1 has submitted a bank certificate to substantiate the disbursal of funds to the Corporate Debtor and validated the same with the Annual Reports and Balance Sheets of the Corporate Debtor to show that it was a loan. Respondent No. 1 has placed on record the Balance Sheet of the Corporate Debtor wherein this amount has been shown under the head of 'Long Term Borrowings - Unsecured loan from Related Parties'. This clearly evidences that the disbursal was a loan. Even the notice sent by the Respondent No. 1 on 20.02.2018 as placed at pages 58-59 of the APB clearly stated that they had extended a loan to the Corporate Debtor to meet its working capital requirements repayable on demand at an interest rate of 15% p.a. Keeping in mind that there was no document/agreement in respect of the loan amount, it is quite natural that there was no document/agreement which determined the payment of interest and the rate of interest but that cannot be a ground for assuming that the loan was not interest-bearing. It is an undisputed fact that the Respondent No. 1 has not placed on record any document which shows that the disbursal made was in the nature of loan wherein interest was specifically payable. Be that as it may, we are of the considered opinion that the IBC does not provide for any prescriptive requirement for the Financial Creditor to place on record formal written agreements/documents between the parties to establish that the disbursal made was in the form of loan with interest. Given this background we therefore find that the Adjudicating Authority committed no error in holding that there was a financial debt owed by the Corporate Debtor to Respondent No. 1.*

19. *As long as there are clear acknowledgments of such debts in the statements of accounts of the Corporate Debtor, the Financial Creditor*

is not impeded in filing a Section 7 application and the Adjudicating Authority is required to look into the evidence of default as furnished in Part-V of Form-1 of the application filed by the Financial Creditor. Both these requirements have been met in the present case. In terms of Section 7 of IBC, a financial creditor is entitled to file an application for initiation of CIRP of the Corporate Debtor when a default is committed by the Corporate Debtor. The Financial Creditor is required to file the Section 7 application along with proof of default above the threshold limit."

16. We may also not have ignored the submission made by Mr. Anirban Bhattacharya that when certain amount of money is disbursed by the Creditor to debtor, with passage of time, the value of that money to the extent it diminish/depreciate has to be accepted as time value of money. Besides, when the creditor is deprived to utilise certain money and the Corporate Debtor utilise the same, obviously it is gain in value of money for the Corporate Debtor on account of passage of time while the same is loss to the Financial Creditor. In the wake, we are not in a position to accept the plea espoused on behalf of the Corporate Debtor that the amount of debt disbursed to it by the Financial Creditor did not involve any time value of money.

17. In terms of the provisions of Section 7(3) read with Section 7 (5) of IBC, 2016, what this Tribunal need to see while considering the application filed under Section 7 of IBC, 2016 is whether there is any entry in the bankers book showing the disbursement of amount of debt and there is default in repayment of the same. Besides this Tribunal need to satisfy itself about the availability of the consent of the RP and a declaration by him that no legal proceedings are pending against him.

18. From the NeSL report, the statement of bank account of the Financial Creditor and the Balance-sheet/Financial Statement of the Corporate Debtor it is clear that the amount of Rs. 2.5 crores was disbursed by the Financial Creditor to the Respondent. The declaration by the IP proposed to be appointed as IRP, by the Applicant to the effect that no legal proceedings are pending against him is also available on record. There is no other deficiency in the application.

19. As far as non-availability of the leave to Liquidator to institute the present proceedings is concerned, as can be seen from the order dated 21.02.2022 passed by this Tribunal in IA-5846/2021 titled "Relan Buildwell Pvt. Ltd. vs. Kaliber Associates Pvt. Ltd." in [IB-228(PB)/2018], the Liquidator had taken leave from this Tribunal to institute the required proceedings on behalf of the Corporate Debtor i.e. Kaliber Associates Pvt. Ltd. regarding the debt payable by various parties. The order reads thus:

> ***"CA-1342/2019-*** *Ld. Counsel appearing for the Liquidator submits that he wishes to amend the application by deleting the name of R-43 namely, Mr. Raj Kamal Sarogi and file the amended memo of parties. Heard, the prayer is allowed.*
>
> *List the matter on 3rd March, 2022.*
>
> ***IA-5846/2021-*** *By filing this IA, the applicant has prayed for granting prior approval to the Applicant to institute suits / legal proceedings on behalf of the CD including filing applications under Section 7 of the Code for initiation of CIRP against the Companies/Borrowers of the Corporate Debtor having outstanding dues of above Rs.1,00,000/ (Rupees One Lakh Only) to Rs. 3,00,000/- (Rupees Three Crores Only) for recovery of dues/default committed by such companies/borrowers in payment of their debt.*

Heard the Ld. Counsel appearing for the Applicant and perused the averments made in the application. Considering the submissions and the averments made in the application, we hereby allow the prayer. The Liquidator is directed to take all steps in accordance with the provision of law.

With this, the present IA stands disposed of."

20. As far as the plea regarding mention of rate of interest in the NeSL report and no claim by the Applicant regarding the same is concerned, we are of the view that in these proceedings, this Tribunal is not required to go into the amount of debt and default claimed by the Applicant. Since the object of the Code is to rescue the CD and put it back to its feet, what we need to see is only that, whether the threshold limit of defaulted amount of debt is fulfilled or not. Moreover, when the Respondent itself offer settlement regarding the defaulted amount, no credence can be given to the mention of the rate of interest or the date of commencement of debt in the NeSL report. Fact remains that the Applicant/CD had disbursed certain amount to CD as loan, which has been acknowledged in the financial statement of the CD in the present proceedings. Admittedly, the amount has not been repaid, thus, the CD cannot be allowed to take benefit of technicalities. Since in the Balance-sheet for the period ending on 31.03.2022, the CD could acknowledge the amount of debt, the present application is within the period of limitation. Regarding violation of the provisions of Companies Act in disbursement of loan to the CD, we are of the view that such violation may invite action under the Companies Act, but would not give rise to a defence to the CD in the present proceedings. As has been noted hereinabove, the object of the present proceedings is only to see whether the CD is capable to repay the debt received by it and has committed default in repaying the same. If the CD has committed

default in repaying the amount of debt of more than Rs. 1 crore, it has to be remitted to CIRP for resolution of its insolvency.

21. **In view of the aforementioned, we are left with no option but to admit the present application. Ordered accordingly.**

22. **In the backdrop, moratorium as provided under Section 14 of IBC, 2016 is declared qua the CD** and as a necessary consequence thereof the following prohibitions are imposed, which must be followed by all and sundry:

(a) The institution of suits or continuation of pending suits or proceedings against the Respondent 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 Respondent 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 Respondent in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(d) The recovery of any property by an owner or lessor, where such property is occupied by or in the possession of the Respondent.

23. As proposed by the Petitioner, Mr. Gaurav Kapoor, having Registration No. IBBI/IPA-001/IP-P01283/2018-2019/12002 and E-mail id: Gaurav.kapoor@icai.org, is appointed as IRP, subject to the condition that no disciplinary proceeding is pending against him and disclosures as required under IBBI Regulations, 2016 are made by him within a period of one week from this Order.

24. It is further ordered that Mr. Gaurav Kapoor, having Registration No. IBBI/IPA-001/IP-P01283/2018-2019/12002, shall take charge of the CIRP of the Corporate Debtor with immediate effect and would take steps as mandated under the IBC specifically under Section 15, 17, 18, 20 and 21 of IBC, 2016 read with extend provisions of IBBI (Insolvency Resolution of Corporate Persons) Regulations, 2016."

25. The Petitioner is directed to deposit Rs. 2,00,000/- only with the IRP to meet the immediate expenses. The amount, however, will be subject to adjustment by the Committee of Creditors as accounted for by Interim Resolution Professional and shall be paid back to the Financial Creditor.

26. A copy of this Order shall immediately be communicated by the Registry/Court Officer of this Tribunal to the Petitioner /Financial Creditor, the Respondent/Corporate Debtor and the IRP mentioned above.

27. In addition, a copy of this Order shall also be forwarded by the Registry/Court Officer of this Tribunal to the IBBI for their records.

Sd/-
(SUBRATA KUMAR DASH)
MEMBER (T)

Sd/-
(ASHOK KUMAR BHARDWAJ)
MEMBER (J)

Upasana/Tarun