IN THE NATIONAL COMPANY LAW TRIBUNAL MUMBAI BENCH-VI

CP (IB) No.758/MB/2022 With IA No.4400 of 2023

[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:

INCRED FINANCIAL SERVICES LIMITED

[CIN-U74899MH199PLC340312]

Registered Office: Unit No.1203, 12th Floor

The Capital Tower, B-Wing, Plot No.C-70

G-Block, Bandra Kurla Complex, Bandra (E)

Mumbai-400051 Maharashtra.

…Financial Creditor

V/s.

M/S SUUMAYA INDUSTRIES LIMITED

[Earlier known as SUUMAYA LIFESTYLE LIMITED]

[CIN: L18100MH2011PLC220879]

Registered Office: Gala No.5F/D

Malad Industrial Units Cooperative Society Ltd.

Kanchpada Ramchandra Lane Extension, Malad (W)

Mumbai- 400064 Maharashtra.

...Corporate Debtor

Pronounced: 02.08.2024

CORAM:

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

HON'BLE SHRI SANJIV DUTT, MEMBER (TECHNICAL)

Appearances: Hybrid

Financial Creditor : Adv. Nausher Kohli a/w. Adv Rushab Chandra

Corporate Debtor : Adv. Karl F. Tamboly a/w Komal Joshi a/w. Adv. Pushkaraj Deshpande a/w Adv. Rohan Marathe a/w Puyush Padhare i/b ALMT Legal

ORDER

[PER: SANJIV DUTT, MEMBER (TECHNICAL)]

1. BACKGROUND

1.1 This is an Application bearing C.P. (IB) No. 758/MB/2022 filed by Incred Financial Services Limited, the Financial Creditor on 20.06.2022 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 through Mr. Anubhav Sinha, its Legal Manager duly authorised in this behalf for initiating Corporate Insolvency Resolution Process (CIRP) in respect of M/s Suumaya Industries Limited, the Corporate Debtor.

1.2 The Corporate Debtor approached the Financial Creditor, an NBFC, for grant of working capital facility of Rs. 5 crores which was sanctioned *vide* Sanction Letter dated 15.10.2020 by the Financial Creditor. However, the Corporate Debtor failed to repay the said facility. The first default took place on 04.12.2021 and thereafter, the loan account of the Corporate Debtor was classified as Non-Performing Asset (NPA) on 04.03.2022 as per the extant RBI guidelines. The principal amount in default as on 01.06.2022 was Rs.3,80,00,000/- (Three Crores Eighty Lakhs Rupees) along with interest and other charges of Rs.60,36,961/- and Rs.16,520/- respectively, aggregating to Rs.4,40,53,481/- (Four Crores Forty Lakhs Fifty- Three Thousand Four Hundred and Eighty-One Rupees). The Financial Creditor issued Loan Recall Notice on 02.06.2022 demanding the

Corporate Debtor to clear the outstanding dues within 10 days of receipt of the said Notice. Since the Corporate Debtor failed to repay the outstanding debt, the Financial Creditor has preferred the present Application seeking initiation of CIRP in respect of the Corporate Debtor.

2. AVERMENTS OF FINANCIAL CREDITOR

2.1 The Financial Creditor granted a working capital facility/loan of Rs.5,00,00,000/- (Five Crores Rupees) to the Corporate Debtor *vide* Sanction Letter dated 15.10.2020. The Corporate Debtor availed this facility from the Financial Creditor through a Master Facility Agreement-cum-Hypothecation Agreement dated 24.10.2020, Demand Promissory Note dated 24.10.2020 and Letter of Continuity for Demand Promissory Note to secure the amount sanctioned.

2.2 One Mr. Ushik Gala, MD of the Corporate Debtor thereafter executed a personal guarantee dated 24.10.2020 in favour of the Financial Creditor thereby undertaking irrevocably and unconditionally, in the event of failure on part of Corporate Debtor, to repay to Financial Creditor without demur and/or contest the outstanding amounts due and payable under the above-mentioned facility along with interest, commission, costs, charges, expenses and all other monies whatsoever due and payable by the Corporate Debtor.

2.3 The transaction between the Financial Creditor and the Corporate Debtor was of revolving tenure and as per the Sanction Letter, credit period from the date of invoice was 45 days.

2.4 The Corporate Debtor first defaulted in payment of its outstanding dues on 04.12.2021 and thereafter, its loan account was declared as NPA on 04.03.2022. The Financial Creditor on 02.06.2022 through its Advocates addressed Loan Recall Notice demanding the Corporate Debtor to clear the outstanding debt to the tune of Rs.4,61,51,697/- (Four Crores Sixty-One Lakhs Fifty-One Thousand Six Hundred and Ninety-Seven Rupees) within 10 days from the receipt of such notice. However, the Corporate Debtor failed to repay the total outstanding amount.

2.5 The Financial Creditor has filed an Additional Affidavit on 10.08.2023 for the purpose of placing on record facts and documents subsequent to filing of the Application. The Financial Creditor has furnished copy of the Record of Default with NeSL dated 20.07.2022 showing date of default as 03.12.2021 and total outstanding amount at Rs.4.05 crores.

2.6 The Financial Creditor has also submitted copy of a 'Memorandum of Understanding cum Agreement' (hereinafter referred to as "the MoU") dated 17.09.2022 executed between the Financial Creditor, the Corporate Debtor, Suumaya Corporation Limited (a related entity of the Corporate Debtor hereinafter referred to as "SCL") and Mr. Ushik Mahesh Gala (MD and Promoter of Corporate Debtor) for providing additional security to secure the Corporate Debtor's dues by way of pledge of equity shares held by Mr. Ushik Mahesh Gala in Suumaya Corporation Limited. An 'Agreement for Pledge of Shares' (hereinafter referred to as "the SPA") dated 17.09.2022 came to be executed by

Mr. Ushik Mahesh Gala in favour of the Financial Creditor whereunder 21,88,008 Equity Shares of Suumaya Corporation Limited were pledged as security for the outstanding amounts.

2.7 As the Corporate Debtor failed to repay the outstanding dues even after about two months of execution of the MoU, the Financial Creditor as the pledgee invoked the pledge *vide* Pledge Invocation Notice dated 29.11.2022. Thereafter, the pledged shares came to be transferred to the Financial Creditor and part of the shares were sold to recover the outstanding dues.

2.8 Both the MoU and the SPA were consciously executed by the parties "without prejudice" to their rights and contentions. It was agreed, as per paragraph 6 of the MoU, that post-selling of shares, if the outstanding amount is not recovered, the parties shall continue to be liable for repayment of the remaining outstanding amount due and payable as on date. It is submitted that since the invocation of the pledge, only a sum of about Rs.2,34,99,185/- has been realised by way of sale of pledged shares and that as on 12.10.2023, a sum of approximately Rs.3,38,38,957/- was still outstanding.

3. I.A. No.4400 OF 2023 BY CORPORATE DEBTOR SEEKING DISMISSAL OF APPLICATION

3.1 The Corporate Debtor filed **IA No.4400/2023** on 06.10.2023 seeking dismissal of the Application on the grounds that the matter has been settled and the security pledged to the Financial Creditor has been invoked and the Financial

Creditor has already recovered the purported dues. Consequently, as per the Corporate Debtor, no outstanding financial debt remains payable to the Financial Creditor thereby rendering the Application non-maintainable.

3.2 The Corporate Debtor submits that after filing this Application, both parties immediately entered into settlement talks to amicably resolve the matter. As part of these talks, on 17.09.2022, the Corporate Debtor who was represented by its promoters and the Financial Creditor executed the MoU and an SPA. Through the MoU and the SPA, the dispute between the Corporate Debtor and the Financial Creditor was effectively resolved. According to the MoU, the Corporate Debtor agreed to repay its alleged dues to the Financial Creditor and pledged shares of the sister company of the Corporate Debtor, the SCL. Under the SPA, Mr. Ushik Gala, the promoter of Corporate Debtor, pledged 21,88,008 equity shares of SCL in favour of the Financial Creditor. At the time of pledge, these shares were valued at approximately Rs.6 crores and were sufficient to secure the Financial Creditor's claim of Rs.4,40,53,481/- as per the Application.

3.3 The Corporate Debtor submits that according to clause 4 of the MoU, the Financial Creditor had sole discretion to invoke the SCL shares and as per clause 5, Financial Creditor also had the discretion to sell the SCL shares to recover its dues. Subsequently, on 29.11.2022, the Financial Creditor sent a Pledge Invocation Notice to the Corporate Debtor, as stipulated in the MoU, to invoke and sell the SCL shares. On 06.12.2022, representatives of the Financial Creditor informed the Corporate Debtor's representatives by email that they had

instructed their attorneys to seek an adjournment when the Application would be listed, as Financial Creditor was "in the process of realising the security pledged by the promoters to recover its dues". Hence, it is evident that the MoU and the SPA pertain to the alleged dues claimed in the Application and the Financial Creditor had realised its purported dues through the invocation and sale of the SCL shares.

3.4 Following the Invocation Notice, the SCL shares were debited as "Confiscated" from Mr. Ushik Gala's Demat Account on 09.12.2022. The value of the shares on the date of transfer to the Financial Creditor i.e., 09.12.2022 was Rs.21.9 per share. Thus, the total value of the shares invoked amounted to Rs.4,79,17,375/. It is submitted that subsequent to invocation of the pledged shares, the Corporate Debtor's attorneys addressed a letter dated 12.01.2023 to the Financial Creditor's attorneys detailing the events including invocation of the pledged shares as per the SPA and the MoU following the filing of the Application by the Financial Creditor and requesting them to seek appropriate instructions from their clients and accordingly make submissions before this Tribunal on the next date of hearing i.e., 16.01.2023. It is submitted that the Corporate Debtor's attorneys did not receive any reply to the said letter.

3.5 The Corporate Debtor submits that the Financial Creditor has already secured itself by invoking shares worth approximately Rs.4.7 Crores, exceeding the purported claim in the Application and hence, the claim of the Financial Creditor no longer stands. Thus, there is no "financial debt" remaining in terms of Section

5(8) of the Code. Consequently, the Financial Creditor also ceases to be a "financial creditor" of the Corporate Debtor under Section 5(7) of the Code. In the circumstances, it is prayed that this Tribunal may be pleased to dismiss the Application.

4. **REPLY BY FINANCIAL CREDITOR TO IA No.4400 OF 2023**

4.1 In response to the IA, the Financial Creditor submits that during the course of ongoing proceedings, the Corporate Debtor had approached the Financial Creditor to work out a repayment plan. However, no full and final settlement of the Financial Creditor's dues could be reached. Instead, on 17.09.2022, the MoU and SPA were executed between the parties. According to the MoU, the Corporate Debtor acknowledged outstanding dues of Rs.4,67,45,605.54/- for Loan Account No.LNMUM33120-211070882 (pertaining to the Corporate Debtor) and Rs.27,32,300/- for Loan Account No. LNMUM33131-223373026 pertaining to SCL as on 14.09.2022. It is submitted that the Corporate Debtor admitted to have been facing financial difficulties, resulting in failure to maintain financial discipline and adhere to the loan documentation terms, leading to overdue loan accounts. Thus, the debt, default and inability to repay the debt were acknowledged by the Corporate Debtor.

4.2 Despite passage of approximately two months after the MoU's execution, the Corporate Debtor failed to repay the outstanding dues to the Financial Creditor. Consequently, the Financial Creditor invoked the additional security *vide* its

Pledge Innovation Notice dated 29.11.2022. Upon invocation of the pledge in exercise of its rights as pledgee under the SPA, the pledged shares were transferred to the Financial Creditor which were later sold to recover the outstanding dues.

4.3 The Financial Creditor sent an email on 06.12.2022 to the Corporate Debtor, instructing their lawyers to request for an adjournment before this Tribunal due to the ongoing process of realising the security pledged by the promoters to recover its dues.

4.4 Both the MoU and the SPA were entered into by the parties "without prejudice" to their rights and contentions. The Corporate Debtor was not prevented from filing a reply to the merits of the main Application especially when nearly fifteen months had already passed since time was sought for filing reply *vide* order of this Tribunal dated 27.06.2022. The Corporate Debtor cannot now claim that since MoU was executed and the Financial Creditor is enforcing security, the matter is settled and no reply was required to be filed.

4.5 The creation of additional security under the SPA by the promoter and its enforcement as envisioned in the MoU were never intended by the Financial Creditor or the Corporate Debtor to be considered as a 'full and final settlement' of the debt due and payable.

4.6 The invocation of pledge was a measure taken by the Financial Creditor to recover its dues and the present Application was filed to seek initiation of CIRP against the Corporate Debtor. Thus, the aforesaid two measures have a distinct

purpose. Therefore, since the invocation of the pledge as a recovery measure, approximately Rs.2,34,99,185/- has been realised through the sale of pledged shares and still approximately Rs.3,38,38,957/- was outstanding and due from the Corporate Debtor as on 12.10.2023. A financial debt of over Rs.1 crore continues to be in default by the Corporate Debtor, and hence, this is a fit case for admission.

5. REJOINDER BY CORPORATE DEBTOR

5.1 In its Affidavit-in-Rejoinder dated 19.12.2023, the Corporate Debtor submits that instead of immediately selling the SCL shares, the Financial Creditor held onto the shares received for an extended period, hoping for a rise in share prices in order to realise higher value than its claim in the Application thereby aiming for unjust enrichment. However, due to market volatility, the share price fluctuated and the Financial Creditor now claims inability to recover its purported dues.

5.2 There is a disputed question of fact as to whether the debt has been settled in light of the MoU executed on 17.09.2022. At the time of asset transfer, the value of shares exceeded the claim amount due to the Financial Creditor. It is argued that a special tribunal like the NCLT lacks the authority to adjudicate matters involving disputed facts as it cannot appreciate evidence under the Code. The Financial Creditor will have to file recovery proceedings before the appropriate Civil Court as the question required to be adjudicated is whether the debt has

been extinguished subsequent to the transfer of an asset having equal or higher value as compared to the claim amount on the date of the transfer.

5.3 The Financial Creditor has only annexed internal documents such as ledgers and account statements and has not provided actual bank statements evidencing the money received from the sale of the shares. The Financial Creditor relies on the statement of the loan account which allegedly shows the adjustment of proceeds from the sale of shares towards settling the claim amount. However, the Corporate Debtor contests the authenticity and veracity of this statement as it was never shared previously with the Corporate Debtor. Further, it is claimed that the statement is an internal document of the Financial Creditor and not certified bank statement. It is contended that the legality and veracity of the said documents needs to be proved by adducing evidence which cannot be done in the present proceedings under Section 7 of the Code. It is argued that the authenticity of these documents is a matter of trial and, therefore, they should not be considered in the present proceedings. It is submitted that the Financial Creditor should not be permitted to use this Tribunal as a recovery mechanism.

5.4 In its Written Submissions, the Corporate Debtor asserts that pursuant to execution of the MoU, the cause of action as envisaged under the present Application came to be obliterated as the parties were required to abide by the terms of the MoU. Thus, the terms of the Master Financing Agreement and other loan documents came to be superseded by the MoU. The Corporate Debtor had duly satisfied the purported debt by 09.12.2022 by transferring the SCL shares

worth much more than the purported debt/ claim amount to the Financial Creditor. However, instead of selling the pledged shares in one go, the Financial Creditor did so in a staggered manner over a period of 8 months from December, 2022 to August, 2023. Had it sold the SCL shares after its first notice on 29.11.2022, it would have realised a much higher amount than the amount claimed in the Application. Therefore, the Financial Creditor cannot take advantage of its own wrong. In this regard, the Corporate Debtor has referred to judgments of Hon'ble Supreme Court in ***Eureka Forbes Ltd. Vs. Allahabad Bank (2010) 6 SCC 193, Mumtaz Yarud Dowla Wakf Vs. M/s.Badam Balakrishna Hotel Pvt. Ltd. and Ors. [SLP(C) No.997 of 2022]*** and ***Ashok Kapil Vs. Sana Ullah (dead) and Others (1996) 6 SCC 342*** and contended that the Financial Creditor cannot be permitted to take advantage of its own wrongdoing and actions done with ulterior motives of unjust enrichment.

5.5 The Financial Creditor has used the proceedings under the Code as a mode of recovery mechanism which is against the legislative intent of the Code, as held by the Hon'ble Supreme Court in ***Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd. (2018) 1 SCC 353.*** The Corporate Debtor is a solvent company and a going concern having over 40 employees and ought not to be admitted into insolvency at the behest of one creditor. As per settled law in ***Vidarbha Industries Power Ltd. Vs. Axis Bank Ltd. (2022) 9 SCC 352***, the Adjudicating Authority must satisfy itself if there is existence of debt and default before using its discretion to admit the application and initiate CIRP.

6. **ANALYSIS AND FINDINGS**

6.1 We have perused the materials available on record and heard Ld. Counsel for the parties in both I.A and the main Application which are being disposed of by this common order.

6.2 It is noticed from the record that instead of filing its reply to the main Application under Section 7 of the Code, the Corporate Debtor has filed I.A. No.4400/2023 challenging the maintainability of the Application on the ground that the debt claimed by the Financial Creditor has already been settled under the MoU executed between the parties and hence, no claim is due and payable to the Financial Creditor. As the Corporate Debtor has questioned the very maintainability of the Application and sought its dismissal on various grounds, it is first proposed to deal with the issues raised in the I.A. which are as under:-

I. Whether there was a full and final settlement of the purported debt owed to the Financial Creditor under the terms of the MoU and the SPA dated 17.09.2022?

II. Whether the dispute settled by the MoU supersedes the Master Facility Agreement, Hypothecation Agreement, Demand Promissory Note and Letter of Continuity for Demand Promissory Note dated 24.10.2020?

III. Whether post-execution of the MoU and the SPA, there is any debt left due and payable by the Corporate Debtor to the Financial

Creditor and if so, whether it will fall under the definition of 'financial debt' under the Code?

6.3 *Issue I:* It is noticed from the record that the MoU dated 17.09.2022 was entered into between the Financial Creditor, the Corporate Debtor, SCL and Mr. Ushik Mahesh Gala (promoter of the Corporate Debtor) "without prejudice". It is observed that both the Corporate Debtor and SCL had availed working capital loans from the Financial Creditor *vide* separate loan agreements and later defaulted in repayment of the said loans. The preamble to the MoU faithfully records that "whereas due to some financial difficulties", the Corporate Debtor and SCL had "failed to maintain financial discipline and adhere to the Terms and Conditions of the Loan Agreement" due to which their loan accounts had "become overdue", they were entering into the MoU with the intention to clear the overdue amount owed to the Financial Creditor "as on 14.09.2022". Clauses 1 and 2 of the MoU provide that Mr. Ushik Mahesh Gala has agreed to offer the shares owned by him in SCL as security against the outstanding amount and the SPA has been executed in this behalf. Clauses 9 and 10 of the MoU make it clear that the loan accounts of the Corporate Debtor and SCL "shall be treated as Settled/Closed for all purposes" only "after clearing the outstanding amount". As per Clause 12 of the MoU, all the parties mutually agree "*that this Agreement shall be treated as a part and parcel of the respective Loan Agreement and all the terms and conditions applicable as per the said Loan Agreement shall be read as part of this Agreement*".

6.4 As stated above, the loan accounts of the Corporate Debtor and SCL were to be treated as "settled" in terms of the MoU "only after clearing" the outstanding amounts to the Financial Creditor. Thus, the contentions raised by the Corporate Debtor that "the purported repayment of debt came to be duly settled under the MoU" or that the purported debt was "duly satisfied" on 09.12.2022 merely by transferring the pledged shares to the Financial Creditor are found to be devoid of merit and are accordingly rejected. A careful analysis of the MoU leaves no room for doubt that the debt in question was to be considered as settled neither on mere execution of the MoU and the SPA nor on the transfer and sale of the pledged shares but only on full and final repayment of the outstanding dues of the Financial Creditor. The creation of additional security under the SPA by the promoter and its enforcement in terms of the MoU were never intended by the parties to be treated as "full and final settlement" of the debt owed to the Financial Creditor. All the parties were aware that the price of SCL shares had been continuously falling in the market due to which the Financial Creditor might not be able to recover its entire dues out of the sale of pledged shares. In this context, it would be pertinent to take note of Clause 6 of the MoU which categorically and unequivocally specifies that *"post selling of shares, if the outstanding amount is not recovered/ cleared"*, the Corporate Debtor, SCL and Mr. Ushik Mahesh Gala "*shall continue to be liable for repayment of the remaining outstanding amount due and payable as on date*".

6.5 Similar clauses are found even in the SPA. For instance, Clause 15 of the SPA, *inter alia,* provides that the Financial Creditor shall not be responsible "*for any loss or depreciation in value*" of the pledged securities arising from or through any cause whatsoever and if "*any deficiency*" whatsoever and however arises, the Pledgor, Mr. Ushik Mahesh Gala agrees to make good the same and pay it on demand to the Financial Creditor. Again, Clause 23 of the SPA provides that pursuant to the invocation of pledge, in the event of default by the Corporate Debtor and SCL, the Financial Creditor shall be entitled to sell or dispose of the said securities *"and appropriate the sale proceeds first in payment of the cost, secondly towards repayment of the balance amount due with interest and cost in any of the loan accounts"* of the said borrowers and "*the shortfall left, if any, in any of the loan account of the Borrower after such appropriation shall be made good by the Borrower and /or Pledgor on demand*" by the Financial Creditor. Since the Financial Creditor was able to recover only a part of its dues from sale of pledged shares of SCL and balance debt of about Rs.3,38,38,957/- remained due and payable as on 12.10.2023 and no steps were taken by the Corporate Debtor and SCL to make good the shortfall, as undertaken in terms of the MoU as well as the SPA, it can by no stretch of imagination be said that there was a full and final settlement under the MoU of the debt claimed to be in default in the Application. As a matter of fact, the Corporate Debtor acknowledged the debt but failed to clear the balance amount of outstanding debt under the MoU. Thus, *Issue I* is decided against the Corporate Debtor.

6.6 ***Issue II*:** As brought out above, the MoU dated 17.09.2022 was to be treated as an essential or integral part of the original loan agreements executed between the parties. There is nothing on record to show that the MoU was intended to supersede or supplant the original Sanction Letter dated 15.10.2020 and Master Facility Agreement and other related loan documents dated 24.10.2020. We have already arrived at a finding above that there was no full and final settlement of outstanding dues of the Financial Creditor in terms of the MoU and the SPA. Clause 13 of the MoU does record that the "*Parties undertake that they will abide by the terms of this Settlement Agreement"*, but it is noticed from the record that it was the Corporate Debtor which failed to abide by the terms and conditions of the MoU and the SPA. The liability of the Corporate Debtor did not come to an end merely by creating additional security in favour of the Financial Creditor under the SPA. We have taken note of relevant Clauses of the MoU and the SPA in the preceding paras indicating that if the Financial Creditor was unable to recover the entire outstanding amount from the sale of pledged shares, the Corporate Debtor shall continue to be liable for repayment of the remaining outstanding amount of debt and shall make good the shortfall left in its loan account. The Corporate Debtor having failed to do so cannot legitimately claim that the debt has been "duly settled". The Corporate Debtor cannot disregard the fact that under Clause 10 of the MoU, its loan account was to be treated as "Settled/ Closed for all purposes" only upon clearing the outstanding amount owed to the Financial Creditor and in no other manner.

6.7 Again, the Corporate Debtor also cannot conveniently brush aside the fact that the price of SCL shares (being a scrip listed on BSE) had been showing a declining trend in the market for the last two years since June, 2022, and even prior thereto, and is presently hovering around Rs.4/- per share, as revealed by the data available in public domain viz., BSE website. In these circumstances, the Corporate Debtor cannot be said to have any valid or justifiable reason to presume that 21,88,008 shares having value of Rs.4.79 crores approximately at the rate of Rs.21.9 per share as on the date of transfer i.e., 09.12.2022 would fetch more or less the same price when these are later sold in the open market. The Corporate Debtor has not placed on record any concrete documentary evidence or data to show that as many as 21,88,008 shares of SCL representing promoter's shareholding could have been sold in the market within a week or so without any impact on the share price and thereby a higher value for the same could have been realised. As a matter of fact, the share price fell sharply from Rs.21.9 on 09.12.2022 to around Rs.12/- in the month of January, 2023. Be that as it may, quite contrary to the contention of the Corporate Debtor, it is noticed on perusal of the SPA that the Financial Creditor was not to be held answerable or responsible for any loss or any temporary or permanent depreciation in value of the pledged securities arising from any cause whatsoever and that in fact, any shortfall or deficiency arising on this account was to be made good by the Pledgor to the Financial Creditor. For instance, Clause 16 of the SPA clearly states that in the event of a temporary or permanent depreciation in value of pledged securities, the Pledgor undertakes either to pay the Financial Creditor in moneys

the difference between the market value of such securities on the date when they were deposited with it and on the date when such payment as aforesaid may be made or to deposit with the Financial Creditor other approved securities equivalent in value to the market deterioration. Therefore, the Corporate Debtor has no valid justification to contend in the present proceedings that the Financial Creditor has committed mistake in delaying the sale of SCL shares and realising a lower sale value in the process. In view of this, the reliance placed by the Corporate Debtor on the judgments of Hon'ble Apex Court in ***Eureka Forbes Ltd.*** (supra), ***Mumtaz Yarud Dowla Wakf*** (supra) and ***Ashok Kapil*** (supra) will be of no help.

6.8 Similarly, the Corporate Debtor's plea that by holding on to the shares in the hope of rise in share prices, the Financial Creditor was aiming for unjust enrichment also does not hold water, because Clause 7 of the MoU clearly provides that post-selling of shares, if any surplus amount is left, the Financial Creditor shall transfer the surplus amount to Mr. Ushik Mahesh Gala. Likewise, the Corporate Debtor's reliance on the judgment of Hon'ble Supreme Court in ***Vidharbha Industries Power Ltd.*** (supra) will be of no avail, because it has failed to demonstrate on the strength of credible evidence viz., audited financial statements etc., that it is a solvent company. A company is considered to be solvent, if it can pay its debts as and when they fall due and its assets exceed its liabilities. The Corporate Debtor having defaulted in repayment of debt in question on more than one occasion can by no means claim to be a solvent company. Thus, it is noticed that the default in repayment of outstanding debt

continued on the part of the Corporate Debtor even after the execution of the MoU and consequently, its liability for such repayment also continues under the original loan documents such as the Master Facility Agreement etc. Since there was no full and final settlement of the debt in terms of the MoU and the default continued, there was no question of the cause of action in the present Application getting extinguished or the original loan documents getting replaced or substituted by the MoU. Therefore, the contentions raised by the Corporate Debtor that by virtue of the MoU, the cause of action as envisaged under the Application "came to be obliterated" and that the terms of Master Facility Agreement etc. "came to be superseded by the MoU" are found to be misconceived and are accordingly rejected. In view of above, *Issue II* is also decided against the Corporate Debtor.

6.9 **Issue III:** It is noticed from the record that pursuant to sale of pledged shares, the Financial Creditor has admittedly realised a sum of approximately Rs.2,34,99,185/- and the balance debt of Rs.3,38,38,957/- was still outstanding, due and payable by the Corporate Debtor as on 12.10.2023. The Financial Creditor has submitted copies of the sale ledger and latest statement of account of the Corporate Debtor in support of its case v*ide* Affidavit-in-Reply dated 13.10.2023. The Corporate Debtor has contested the authenticity of these documents and argued that the same needs to be proved by leading evidence in a trial in civil court which cannot be done in a proceeding under Section 7 of the Code. However, it is pertinent to mention that the Financial Creditor has

furnished the above documents by way of an affidavit under solemn affirmation and, therefore, these documents have evidentiary value unless these are proved to be untrue or incorrect. Moreover, it is noted that SCL shares are listed on the Bombay Stock Exchange where the shares are traded on a fully automated and electronic trading system in a transparent manner and the opening, closing, low and high prices on a given day get recorded and are available in public domain. Further, all transactions take place through cheques/electronic transfer in the bank accounts of the ultimate clients. In this background, it can be safely inferred that the sale proceeds of the SCL shares realised from time to time must have come to the bank account of the Financial Creditor which in turn must have given appropriate credit thereof in the latest statement of account of the Corporate Debtor. Therefore, the plea challenging the veracity of the above documents and contending it to be a matter of trial before a civil court lacks merit and must be seen as a vain attempt to escape the clutches of the Code.

6.10 As regards the Corporate Debtor's plea that there is a disputed question of fact as to whether the debt has been settled in light of the MoU, the issue pertaining to alleged settlement of debt has already been discussed and adjudicated in the preceding paras and needs no reiteration. There is no dispute that the Corporate Debtor had availed working capital loan from the Financial Creditor and that it had committed default in repayment thereof due to which the Financial Creditor issued a Loan Recall Notice on 02.06.2022 calling upon the Corporate Debtor to clear the outstanding dues of Rs.4,61,51,697/-. If at all there is a dispute, it is

only with regard to the actual amount of financial debt owed to the FC, as evident from the response of the CD furnished to the NeSL during the process of authentication of the Record of Default. As held by the Hon'ble Supreme Court in ***Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors. 2019 SCC OnLine SC 73*** "*in the case of a corporate debtor who commits a default of a financial debt, the Adjudicating Authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is —due i.e. payable unless interdicted by some law*…". Since the debt exceeding one crore rupees is due and payable by the Corporate Debtor to the Financial Creditor in the instant case, the alleged dispute as to the exact quantum of such debt is of little consequence while considering an application under Section 7 of the Code.

6.11 Thus, it is clear that the Corporate Debtor continues to be liable for repayment of the remaining outstanding amount of Rs.3,38,38,957/- due and payable in terms of clause 6 of the MoU and clause 23 of the SPA. The liability of the Corporate Debtor will get extinguished in terms of the MoU only after clearing the outstanding amount, as specified in clause 10 of the MoU. The Corporate Debtor has failed to draw attention to any of the clauses of the MoU as well as the SPA under which the debt was to be treated as extinguished merely on subsequent transfer of an asset having equal or higher value as compared to the claim of amount on the date of transfer. The aforesaid plea taken up by the Corporate Debtor is thus found to be untenable and is accordingly dismissed. Further, it is

found that post-execution of the MoU and the SPA, financial debt of Rs.3,38,38,957/- was still due and payable as the liability of the Corporate Debtor under the MoU as well as the original loan documents continued to subsist and was to get fully discharged only on clearing the outstanding dues of the Financial Creditor which never happened. Hence, *Issue III* is also decided against the Corporate Debtor.

6.12 In light of aforesaid discussion, we are of the considered view that the Corporate Debtor has not been able to make out a successful case against the maintainability of the main Application and hence, **IA No.4400 of 2023** filed by it is found to be devoid of merit and is accordingly **dismissed**.

6.13 Coming now to the merits of the main Application, we find that the Financial Creditor has annexed to the Application copies of Sanction Letter dated 15.10.2020, Master Facility Agreement-cum-Hypothecation Agreement dated 24.10.2020, Personal Guarantee Deed dated 24.10.2020, Demand Promissory Note dated 24.10.2020 and Letter of Continuity for Demand Promissory Note dated 24.10.2020 in order to prove the existence of 'financial debt' within the meaning of Section 5(8) of the Code. The Financial Creditor has also furnished copy of the Loan Recall Notice dated 02.06.2022 so as to prove the factum of default. The Financial Creditor has also placed on record copy of Record of Default dated 20.07.2022 with the NeSL showing date of default as 03.12.2021 and the default amount at Rs.4.05 Crores. In Part-B of the NeSL report, the Corporate Debtor has admitted that the "debt exists", though the outstanding

amount is wrong. The Financial Creditor has also furnished copy of the financial statements of the Corporate Debtor downloaded from www.corpository.com as on 14.06.2022 showing the amount of financial debt of Rs.5,00,00,000/- availed from the Financial Creditor. Thus, we find that the Financial Creditor has brought on record sufficient materials to prove the existence of 'financial debt' under Section 5(8) of the Code and default in repayment thereof on part of the Corporate Debtor. It is also noticed from the record that the Financial Creditor has claimed the total amount in default to be Rs.4,40,53,481/- in the Application out of which it has realised a sum of Rs.2,34,99,185/- from sale of pledged SCL shares. In other words, financial debt of Rs.2,05,54,296/- [Rs.4,40,53,481-Rs.2,34,99,185] is found to be still due and payable by the Corporate Debtor to the Financial Creditor under the original loan documents.

6.14 Thus, we find that financial debt exceeding the threshold limit of one crore rupees remains due and payable by the Corporate Debtor which has committed default in repayment thereof. The Application has been filed in the prescribed form and is complete. There is nothing to show that the debt due and payable by the Corporate Debtor is interdicted by any other law. The Financial Creditor has proposed the name of Mr. Pawan Kumar Singal having Registration Number IBBI/IPA-001/IP-P01172/2018-2019/12229 and e-mail ID pawansingal50@gmail.com and valid Authorisation for Assignment till 30.06.2025 to act as IRP. On perusal of Form 2 containing written consent of the proposed IRP, it is observed that no disciplinary proceeding is pending against

him. In light of the above, it is concluded that all the requirements of Section 7(5)(a) of the Code are satisfied and the present case is fit for admission.

ORDER

In view of aforesaid findings, this Application bearing C.P. (IB) No.758/MB/2022 filed under Section 7 of the Code by Incred Financial Services Ltd., the Financial Creditor, for initiating CIRP in respect of Suumaya Industries Limited, the Corporate Debtor, is **admitted.**

We further declare moratorium under Section 14 of the Code with consequential directions as mentioned below:-

We further declare moratorium under Section 14 of the Code with consequential directions as mentioned below:-

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 Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

d) the recovery of any property by an owner or lessor where such property is occupied by or in 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 the 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. Pawan Kumar Singal, a registered Insolvency Professional** having **Registration Number IBBI/IPA-001/IP-P01172/2018-2019/12229** and **e-mail address** pawansingal50@gmail.com having valid Authorisation for Assignment up to 05.12.2024 as the IRP to carry out the functions under the Code.

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 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, 2016, 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/- **Sd/-**

SANJIV DUTT **K. R. SAJI KUMAR**
MEMBER (TECHNICAL) **MEMBER (JUDICIAL)**

// LRA Deepa //