IN THE NATIONAL COMPANY LAW TRIBUNAL,

COURT-III, MUMBAI BENCH

C.P.(IB) 49 OF 2022

Under **Section 7** of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rule 2016)

In the matter of

Kanupriya Commercial Private Limited having address at 14, Ganesh Chandra Avenue, 2nd Floor, Kolkata – 700 013,

….. **Financial Creditor 1**

Sagun Commercials Private Limited having address at 6B, Bentick Street, 1st Floor, Room no: 17, Kolkata, West Bengal : 7000001.

…Financial Creditor 2

(together or collectively hereinafter referred as **"Financial Creditors")**

v/s

SKIL Infrastructures Limited
Skil House, 209, Bank Street Cross Lane, Fort, Mumbai- 400023

…Corporate Debtor

Order reserved on: 18.04.2023
Order pronounced on: 17.05.2023

Coram:

Hon'ble Shri H.V. Subba Rao, Member (Judicial)
Hon'ble Smt. Madhu Sinha, Member (Technical)

Appearances (via video conferencing)

For the Petitioner: Mr. Sandeep Bajaj, Mr. Soayib Qureshi, Mr. Devansh Jain and Ms. Vasudha Chadha, Advocates.

For the Respondent: Mr. Kunal Mehta, a/w Mrs. Manik Joshi, Mr. Mantul Bajpai, Mr. Vrushabh Vig, Ms. Priyam Sharma, Mr. Vikrant Nalavade, Advocates.

PER: Smt. Madhu Sinha, Member (Technical)

ORDER

The above Company Petition is filed by Kanupriya Commercial Private Limited (hereinafter referred to as **"Financial Creditor 1")** and Sagun Commercials Private Limited **(**hereinafter referred to as **"Financial Creditor 2")** (hereinafter referred collectively as "**Financial Creditors**") seeking to initiate Corporate Insolvency Resolution Process ("**CIRP"**) against SKIL Infrastructure Limited, (hereinafter referred as "**Corporate Debtor**") by invoking the provisions of Section 7 Insolvency and Bankruptcy Code (hereinafter referred "**Code**" read with Rule 4 of Insolvency & Bankruptcy (Application to Adjudication Authority) Rules, 2016 for a resolution of an unresolved Financial Debt of **Rs. 3,71,06,239/-**. (Rupees three Crores Seventy One Lakh Six Thousand Two Hundred Thirty Nine Only) (Rs. 50,00,000/- for Financial Creditor 1 and Rs. 1,50,00,000/- for Financial Creditor 2).

I. Submissions On Behalf Of The Financial Creditors :

i. The Corporate Debtor approached the Financial Creditor No. 2 seeking financial assistance in the form of a loan. The Financial Creditors state that the Corporate Debtor issued a Loan Acknowledgment Letter dated 13.04.2013 as well as a Demand Promissory Note dated 13.04.2013 in favour of the Financial Creditor No. 2. Thereafter, the Financial Creditor No. 2 agreed to advance a loan of Rs. 1,00,00,000 / - to the Corporate Debtor and accordingly transferred a said sum the bank account of the Corporate Debtor through RTGS.

ii. In order to secure the amounts under the Loan Transaction with Financial Creditor 2, the Corporate Debtor issued three post-dated cheques drawn on State Bank of India i.e. Cheque No.835596 dated 13.07.2013 for an amount of Rs.50,00,000/- and Cheque No.835597 dated 13.07.2013 for an amount of Rs.50,00,000/- cumulatively towards the principal sum and Cheque No.835599 dated 13.07.2013 for an amount of Rs.2,66,301/- towards interest.

iii. The Financial Creditor states that the Corporate Debtor was liable to make repayment of the loan amount due to Financial Creditor 2, however failed and sought an extension from time to time. Thereafter, the Corporate Debtor approached the Financial Creditor No. 1 seeking financial assistance in the form of a loan. The Corporate Debtor issued a Loan Acknowledgment Letter dated 30.01.2014 as well as a Demand Promissory Note dated 30.01.2014 in favour of the Financial Creditor No. 1.

iv. Pursuant to which, the Financial Creditor No. 1 agreed to advance a loan of Rs.50,00,000/- to the Corporate Debtor and transferred the said sum to the bank account of the Corporate Debtor through RTGS. In order to secure the amounts under the Loan Transaction with Financial Creditor 1, the Corporate Debtor issued three post-dated cheques drawn on State Bank of India, N.G.N. Vaidya Marg

Branch, Fort, Mumbai i.e., Cheque No.026419 dated 30.05.2014 for an amount of Rs.50,00,000 / - towards the principal sum, Cheque No.026421 dated 30.05.2014 for an amount of Rs. 1,09,110/- towards interest and Cheque No.026422 dated 31.03.2014 for an amount of Rs. 1,12,808/- towards interest.

v. The Financial Creditors state that the Corporate Debtor was liable to make repayment of the loan amount due to Financial Creditor 1, however failed and sought an extension from time to time. Further, the Corporate Debtor vide its letter dated 30.05.2014 acknowledged the extension of the said Loan thereby extending the timeline for repayment thereof by a further period of 4 months i.e. by 30.09.2014. The Corporate Debtor also issued a Demand Promissory Note dated 30.05.2014 thereby agreeing to repay the said loan amount of Rs.50,00,000/-.

vi. The Financial Creditor states that the Corporate Debtor sought the last extension for repayment of loan due to Financial Creditor 2 wherein the Corporate Debtor requested for a further extension of three months i.e. till 12.01.2015 to repay the amounts under the loan transaction. That in order to secure the amounts under the loan transactions, the Corporate Debtor once again issued two post-dated cheques drawn on State Bank of India, N.G.N. Vaidya Marg Branch, Fort, Mumbai i.e Cheque No.507118 dated 30.09.2014 for an amount of Rs.50,00,000/- towards the principal sum and Cheque No. 0507117 dated 30.09.2014 for an amount of

Rs.2,27,466/- towards interest. However, the Corporate debtor failed to pay the loan and again approached the Financial Creditor No.1 thereby expressing its inability to repay the said Loan at the relevant time and seeking another extension of the same. The Corporate Debtor once again vide its Letter dated 30.09.2014 acknowledged the extension of the said Loan thereby extending the timeline for repayment thereof by a further period of 3 months i.e. by 31.12.2014. The Corporate Debtor along with the said letter also issued two post-dated cheques drawn on State Bank of India, N.G.N. Vaidya Marg Branch, Fort, Mumbai i.e. Cheque No.507146 dated 31.12.2014 for an amount of Rs.50,00,000/- towards principal loan amount and Cheque No.0507147 dated 31.12.2014 for an amount of Rs. 1,70,137 / - towards interest and a Demand Promissory note dated 30.09.2014 in order to secure the amounts under the Loan Transactions. The Corporate Debtor once again issued two post-dated cheques drawn on State Bank of India i.e. Cheque No.507141 date 12.01.2015 for an amount of Rs. 1,00,00,000/- (Rupees One Crores Only) towards principal loan amount and Cheque No.507142 dated 12.01.2015 for an amount of Rs.2,69,260/- towards interest in order to secure the amounts under the Loan Transactions.

vii. The Financial Creditors state that post the last Loan Extension Letter, Corporate Debtor has been orally seeking extensions to repay the said loan amounts due to its inability to repay the same at the relevant point in time. It is stated that the Financial Creditors, keeping in mind its frequent dealings with the Corporate Debtor, never objected to the oral requests made by the Corporate Debtor. It is material to state that even though the Corporate Debtor failed to repay the loan amount and the interest amount to the Financial Creditors. However, the Corporate Debtor all throughout from the year 2014 till 2019 has been duly depositing the amount of TDS component on the interest accrued upon the loan amount to the creditor of the Financial No. 1 with the Income Tax Authorities which amounts to part repayment of the debt. The same is duly reflected in the Form 26AS of the Financial Creditors which has been extracted from the TRACES website of the Income Tax Department, Government of India.

viii. The Financial Creditors states that in the year 2019, the Corporate Debtor failed to seek any extension from the Financial Creditor No.2 for the purposes of repayment of the said loan amount. The Financial Creditor No.1 and 2 caused a Legal Notice dated 02.09.2021 to be served upon the Corporate Debtor thereby seeking payment of the defaults in repayment of Rs. 1,36,62,465/ - and Rs.2,30,51,915/-, respectively, as it stood at the time of the said legal notice. The Corporate Debtor replied to the said Legal Notice on 20.09.2021 thereby denying its liability to make the repayment of the said loan amount to the Financial Creditor No. 1 and Financial Creditor No.2.

ix. The Financial Creditors states that as on the date of filing the present Company Petition i.e., 30.09.2021, the Corporate Debtor has committed a default of Rs.3,71,06,239.64 / - including Rs.2,21,06,239.64/- being interest at the rate of 15% per annum payable to the Financial Creditor No. 1 and interest at the rate of 12% per annum payable to the Financial Creditor No.2. Despite the issuance of the said Legal Notice dated 02.09.2021, the Corporate Debtor is yet to come forward for repayment of the loan amount which is admittedly due from the Corporate Debtor to the Financial Creditor No. 1 and Financial Creditor No. 2. Hence the present Application.

II. <u>REPLY FILED IN BEHALF OF THE CORPORATE DEBTOR</u>

i. The Corporate Debtor had filed the Affidavit- In-Reply on 07.07.2022 by opposing all the averments and contentions raised by the Petitioner. The Corporate Debtor further states that the present Company Petition is not maintainable as it violates the mandator of Section 4 read with Section 7 of the Insolvency and Bankruptcy Code. 2016 ("IBC') for the following reasons:

a. The Corporate Debtor states that the Petition is jointly filed by two financial Creditors namely Kanupriya Commercial Pvt Ltd ("Financial Creditor 1") and one Sagun Commercials Pvt Ltd. ("Financial Creditor 2"). The Corporate Debtor with respect to the

Financial Creditor No. 2 the Corporate Debtor states that it is an undisputed position that the purported loan of Rs. 1 crore was disbursed on 13 April 2013 and it is admitted that this purported loan was to be repaid after the period of 3 months which was due on 13 July 2013. The present Petition is filed in 2022 which is clearly filed beyond the 3 years period from 13 July 2013 and therefore, ex-facie barred by limitation.

b. The Corporate Debtor states that the only manner in which the Financial Creditor 1 seeks to justify the limitation is that the Corporate Debtor issued a loan extension letter and a demand promissory note dated 13th October 2014 and thereafter made oral requests for extension of the loan. Whilst all allegations of having sought oral extension of time are denied, it is submitted that this cannot constitute an extension of the period of limitation for the purpose of saving the petition from the bar of limitation.

c. The Corporate Debtor states that the loan extension letter and the promissory note constitute an acknowledgement of liability and the 3-year period from the date of these documents ended on 13 October 2017. Therefore, these cannot be an answer to the bar of limitation.

d. When faced with the aforesaid situation, all that the Financial Creditor 2 seeks to rely upon are copies of Form 26AS which are annexed as Annexure A-19. These are from the year 2014 till

2019. Insofar as the documents at Annexure A-19 colly are concerned, the Corporate Debtor submits that these merely constitute a record that TDS was deducted and deposited by the Corporate Debtor. It is settled law that deduction or deposit of TDS does not constitute an acknowledgement of liability and cannot be relied upon as a circumstance that would extend limitation nor constitute part payment of a debt.

e. In any event and without prejudice, the Corporate Debtor states that the deposit of TDS can constitute a part payment and it is merely an acknowledgement of liability towards the interest. Therefore, it cannot be construed as an acknowledgement of liability for the entire debt. On all of the aforesaid counts, the Petition is barred by limitation in so far.

f. With respect to purported loan granted by Financial Creditor 1, the Petition cannot be maintained by Financial Creditor 1 (since the principal component which it asserts is only a sum of' Rs. 50 lakhs), it is submitted that even that claim is barred by limitation. This is apparent from the following: The sum of Rs. 50 lakhs was disbursed on 30th January 2014 and it fell due on 30th May 2014. The Petition having been filed in 2022 is clearly barred by limitation. The subsequent letter of 30th May 2014 would only take the due date 10 30th September 2014 and similarly, the letter of 30th September 2014 would take the due date to 31st December 2014. For the

Petition to be within limitation, it would have had to be filed by 31st December 2017. Therefore, the only manner in Financial Creditor 1 is also seeking to answer limitation is the Form 26AS that it has annexed at Annexure A-12 Colly. It is once again reiterated that none of these forms or the fact that TDS was deposited can be construed as an acknowledgement of liability or a part payment to the Financial Creditor. Hence, this purported loan is also hit by the bar of limitation. From the above it is apparent that the entries in the Form 26AS and the reliance placed thereon by the Financial Creditor is clearly misplaced. It is unclear as to whether the TDS deducted is towards the purported loan or interest that is asserted in the Petition. In any event and without prejudice, it is apparent that the TDS has been incorrectly deducted and the Corporate Debtor will take remedial steps to undo this deduction. No monies were payable to the Financial Creditor by the Corporate Debtor. The Corporate Debtor disputes and denies that the deduction of the TDS can be construed as an acknowledgement of liability or a part payment or and purpose of computing a fresh period of limitation.

FINDINGS AND OBSERVATIONS

1. Heard the submissions made by the Learned Counsel for the parties and perused the file, including the pleadings, documents and written submissions placed on record. The present Company Petition is filed

under the section 7 by two Financial Creditors against the Corporate Debtor for an amount of **Rs. 3,71,06,239/-**. The first and foremost issue which is required to be decided by this Adjudicating Authority is the point of limitation as raised by the Learned Counsel for the Corporate Debtor. In so far as the point of limitation is concerned, from the brief facts which are narrated above, it is observed that the Financial Creditors have relied on the oral extensions requested by the Corporate Debtor (para 31, pg.31 of the Petition) and payment of T.D.S. for the year 2015 to 2019. On a plain reading of Part IV, a loan of Rs. 1 Crore by the Financial Creditor no. 1 was disbursed to the Corporate Debtor on 13.04.2013 which fell due on 13.07.2013. Further, Financial Creditor no. 2 advanced a loan of 50 lakhs to Corporate Debtor on 30.01.2014 which fell due on 30.05.2014 and the present Company Petition is filed on 21.02.2022. The Financial Creditor has relied on the oral extensions made by the Corporate Debtor which as an acknowledgement extended the timeline of the limitation period. Countering the above argument, the Corporate Debtor has placed his reliance on Section 19 of the Limitation Act which demonstrates the requirement of acknowledgement in writing signed by the person against whom the right is being claimed. The Corporate debtor has placed its reliance on the ruling of " ***Khan Bahadur Shapoor Fredoom Mazda v Durga Prasad Chamaria and Others AIR 1961 SC 1236***" wherein it was held that :

> *PARA 5: Section 19(1) says inter alia, that were before the expiration of the period prescribed for a suit in respect of any right,*

an acknowledgment of liability in respect of such right has been made in writing signed by the party against whom such right is claimed, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed. It would be noticed that some of the relevant essential requirements of a valid acknowledgment are that it must be made before the relevant period of limitation has expired, it must be in regard to the liability in respect of the right in question and it must be made in writing and must be signed by the party against whom such right is claimed. Section 19(2) provides that where the writing containing the acknowledgment is undated oral evidence may be given about the time when it was signed but it prescribes that subject to the provisions of the Indian Evidence Act, 1872, oral evidence of its contents shall not be received; in other words, though oral evidence may be given about the date oral evidence about the contents of the document is excluded. Explanation 1 is also relevant. It provides, inter alia, that for the purpose of Section 19 an acknowledgment may be sufficient though it omits to specify the exact nature of the right or avers that the time for payment have not yet come, or is accompanied by a refusal to pay, or is coupled with a claim to a set off, or is addressed to a person other than the person entitled to the right.

Further in the ruling of "***Kamal Narayana v Baniram AIR 1923 Nagpur 332"*** wherein it was held that :

Para 7 : On appeal the District Judge, Akola, finds that the plaintiffs right of action accrued on 27-1-18 the date on which defendant broke the contract by not delivering the cotton seed agreed to be sold and that the period of limitation could not be extended by any subsequent settlement alleged by the plaintiff. The alleged oral settlement does not fall within Section 19 and 20 of the Limitation Act. The appeal was decide on this point alone and the claim was held to be barred by limitation on the ground that the suit was instituted more than three years after the breach took place.

2. Furthermore, advancing the arguments to substantiate the ground of limitation, the Financial Creditors has relied on the payment of TDS by the Corporate Debtor for the year 2014 to 2015 attached as Form 26AS as an acknowledgement of debt which has the effect of extending the limitation. To support the contention the Financial Creditors have relied upon the ruling by the Punjab and Haryana High Court ***in Aryan Vintrade Pvt Ltd vs Hamukjan Tea Pvt Ltd MANU/GH/1011/2017*** and ***the Gauhati High Court in Ranjiv Kumar v. Raksha Devi, 2018 SCC OnLine*** which states that, to submit that the deposit of TDS amounts to an acknowledgement for the purposes of limitation under Section 19 of the Limitation Act. The Financial Creditor has contended that a similar issue vis a vis payment of TDS amounting to acknowledgement of liability was covered and an order was passed against the very same Corporate Debtor in the

judgement passed by the coordinate bench of this Hon'ble Tribunal in the matter of ***Amluckie v SKIL Infrastructure 2021 SCC OnLine NCLT 7099.*** However, the Corporate Debtor has drawn the attention of this Bench to the fact that the reliance placed by the Financial Creditor in the matter of Amluckie V SKIL Infrastructure should have not been relied upon by the Financial Creditor in the first place as the concerned Parties namely Amluckie Investment Co. Ltd and the present Corporate Debtor arrived at a settlement and accordingly, the judgment was recalled by the Hon'ble NCLAT.

3. Next adverting to the above issue, the Corporate Debtor has relied on the ruling of ***Gajendra Investment Ltd. v Bleu Noir Infrastructure Development Private Limited - NCLAT*** wherein it was held that there is no binding precedent that deduction of TDS from the interest component shall be considered as part payment for the purpose of extending the period of limitation. In any event, the Hon'ble NCLAT has reviewed the legal position and clarified the law in its judgment of Gajendra Investment v Bleu Noir (supra). The Corporate Debtor further contested that once the NCLAT has categorically held that deposit of TDS would not constitute acknowledgment of liability or part payment of the underlying debt, therefore no question arises of Amluckie's judgment being relied upon as this Tribunal is bound by the view of the NCLAT in Gajendra Investment v Bleu Noir (supra). **Further, the Corporate Debtor has placed its reliance** in the judgement passed

by ***Bombay High Court has in the case of S.P. Brothers 2008 SCC Online Bom 1599*** wherein it was held as:

"The issuance of TDS certificate does not amount to an acknowledgment of defendant within the meaning of section 25 of the Indian Evidence Act and the Full Bench judgment of this Court in the case of Jyotsna (supra) puts the matter beyond doubt. The TDS certificate is primarily to acknowledge the deduction of tax at source. The certificate does not refer to any amount of loan or even the rate of interest which is payable on the said principal amount. It does not refer to any contract between the parties and even a transaction"

4. At this juncture, the Bench has relied on the judgement passed by the Hon'ble NCLAT in the ruling of ***PM Storage Private Limited vs Goouksheer Farm Fresh Private Limited*** wherein it was held that the Corporate Debtor has paid TDS on interest payable cannot be considered as acknowledgment in writing of the liability by the corporate debtor and therefore, such TDS payment will not have any effect of being an acknowledgment of said debt.

5. Considering the above analogy, it is a settled position that TDS deposit is not an acknowledgement of debt for the purposes of the Limitation Act which has been reiterated by this Tribunal, the Hon'ble NCLAT and the Bombay High Court in Gajendra Investment v Bleu Noir (supra), PM Storage Private Limited vs

Goouksheer Farm Fresh Private Limited (supra) and S.P Brothers (supra) respectively. Therefore, the deposit of TDS cannot be construed as an acknowledgment of liability. It is merely a document which acknowledges the deduction of tax. Hence, it has been judicially considered as not being an acknowledgment of the underlying liability and would therefore, not have the effect of extending time for the purpose of limitation. Thus, viewing from any angle, this Bench has no hesitation in holding that the claims of the Financial Creditors in the above Company Petition are hopelessly barred by limitation and the Company Petition deserves to be dismissed.

SD/-	**SD/-**
MADHU SINHA	**H.V. SUBBA RAO**
MEMBER (TECHNICAL)	**MEMBER (JUDICIAL)**

//RENUKA//LRA//