

**IN THE NATIONAL COMPANY LAW TRIBUNAL,  
KOLKATA BENCH,  
KOLKATA**

**I.A.(IB) No. 1069/KB/2021**  
**IN**  
**C.P (IB) No.572/KB/2020**

**In the matter of**

An application 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.

And

**In the matter of:**

**M/s Ashray Vyapaar Limited CIN: 51109WB2007PTC117510**, having its registered at 145, Rashbehari Avenue, Gariahat, Kolkata-700029.

*... Financial Creditor*

Versus

**In the matter of:**

**M/s Gourepore Co. Ltd. CIN U51109WB1918PLC001029**, having its Registered office at 18, Netaji Subhas Road, 1<sup>st</sup> Floor, P.S. Hare Street, Kolkata-700001.

*...Corporate Debtor*

Date of hearing : 24/11/2021(C.P. (IB) 572/KB/2020

Date of hearing: 21/12/2021 (IA (IB) No.1069/KB/2021)

Order Pronounced on : 31/01/2022

**Coram:**

**Mr. Rohit Kapoor, Member (Judicial)**

**Mr. Harish Chander Suri, Member (Technical)**

**Counsels appeared through Video Conference**

- |                                  |                                  |
|----------------------------------|----------------------------------|
| 1. Mr.Mr. Jishnu Chowdhury, Adv. | } For the Financial Creditor     |
| 2. Mr.Shaunak Mitra, Adv.        | in CP (IB) 572/KB/2020 and       |
| 3. Mr. Aritra Basu, Adv.         | Respondent in IA(IB)1069/KB/2021 |
| 4. Mr.Patita Paban Bishwal, Adv. |                                  |

- |                          |                               |
|--------------------------|-------------------------------|
| 1. Ms. Smita Das De,Adv. | } For the Official Liquidator |
|--------------------------|-------------------------------|

- |                              |                             |
|------------------------------|-----------------------------|
| 1. Ms. Manju Bhuteria, Adv.  | } For the Dolphine Vintrade |
| 2. Ms. Meenakshi Manot, Adv. | Pvt.Ltd.(Applicant)         |
| 3. Mr. Abhishek Jain , Adv.  |                             |

**ORDER**

**Per: Harish Chander Suri, Member (Technical)**

1. The Court is convened by video conference today.
2. This petition under section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 has been filed by **M/s Ashray Vyapaar Limited**, a corporate entity, having its registered at 145, Rashbehari Avenue, Gariahat, Kolkata-700029, through Mr. Vishnu Kumar Purohit, its authorised representative vide its Board Resolution dt. 11.02.2020 (Annexue-A-2), hereinafter referred to as the Financial Creditor, for initiation of Corporate Insolvency Resolution Process in respect of **M/s Gourepore Co. Ltd.**, a corporate entity with **CIN U51109WB1918PLC001029**, having its Registered office at 18, Netaji Subhas Road, 1<sup>st</sup> Floor, P.S. Hare Street, Kolkata-700001, hereinafter referred to as the Corporate Debtor.
3. It is submitted in the petition that the Financial Creditor was incorporated 28<sup>th</sup> July,2007 and the Corporate Debtor was incorporated on 29<sup>th</sup> July,1998. It is submitted that the Corporate Debtor has Authorised Share Capital of Rs.1,25,00,000/- and Paid up Share Capital of Rs.1,22,50,000/- It is submitted in the petition that the Corporate Debtor owes to the Financial Creditor a sum of Rs.2486,44,80,162.85/- as financial debt which consists of Rs.49,18,17,804.18/- and

Rs.2437,46,62,358.67/- on account of interest @ 19.75% per annum.

4. It is further submitted that in or on 07/08/1997, one of the creditors of the Corporate Debtor, namely, R.K.Garodia, & Co. filed a petition for winding up before the Hon'ble Calcutta High Court being C.P.No. 355 of 1997. Subsequently, on 26.11.1997, the Hon'ble High Court was pleased to pass *inter alia*, winding up order and directed the Official Liquidator to forthwith to take possession of the company. Copy of the order dated 26<sup>th</sup> November,1997 is annexed as **Annexure A-7**.
5. It is submitted that one of the Secured Creditors M/s Allahabad Bank filed an application under section 446 of the Companies Act,1956 before the Hon'ble Calcutta High Court, whereby, Allahabad Bank prayed for leave to execute the decree amounting of Rs.26,20,41,231.18 together with interest thereon at 19.75% P.A. from 05.03.1993 till the date of realization, in its favour in the pending certificate proceedings before the Ld. Debt Recovery Tribunal in Certificate Case No. 42 of 1996. A copy of the order dated 4<sup>th</sup> July, 1996 is annexed as **Annexure A-8**.
6. It is submitted that the said Company Application being C.A. no.352 of 1998 was taken up for hearing by Hon'ble Calcutta High Court and after considering the submissions of the Financial Creditor on 27.10.1998, an order was passed, in terms of prayer(a) of the Judge's summons. It is submitted that the Hon'ble High Court granted leave to Allahabad Bank under section 446 of the Companies Act, 1956 to proceed and to execute the decree in its favour in the pending certificate proceedings before the Debt Recovery Tribunal at Calcutta in Certificate Case No.42 of 1996 and to take all necessary steps with regard thereto so that fruits of the decree may be realized by the Bank.
7. It is submitted that on 6<sup>th</sup> July, 2007, United Bank of India assigned its

entire claim against the company including the benefit of all its securities in favour of M/s Teesta Multi-Purpose Articles Private Limited. Thereafter, by a Deed of Assignment dated 13<sup>th</sup> February, 2008, the said M/s Teesta Multi-Purpose Articles Private Limited assigned its entire right, title and interest in such assignment obtained by it from United Bank of India in favour of the present Financial Creditor. Copies of the Agreements dated 6<sup>th</sup> July, 2007 and 13<sup>th</sup> February, 2008 are annexed as **Annexure A-9** (Colly.).

8. It is submitted that by a Deed of Assignment dated 21<sup>st</sup> February, 2008, Indian Bank assigned its entire claim against the Company including benefit of all its securities in favour of present Financial Creditor. Copies of the Agreement dated 21<sup>st</sup> February, 2008 is annexed as **Annexure-10**.
  
9. It is further submitted that on 6<sup>th</sup> November, 2008, Allahabad Bank assigned its entire claim against the company including the benefit of all its securities in favour of the present Financial Creditor. Copy of the Agreement dated 6<sup>th</sup> November, 2008 is annexed is **Annexure A-11**. Thereafter, on 14<sup>th</sup> September, 2015, a fresh deed of assignment was duly registered between Allahabad Bank and the Financial Creditor, a copy whereof is annexed as **Annexure A-12**.
  
10. It is submitted that the Financial Creditor also entered into a One Time Settlement with the 4<sup>th</sup> Secured Creditor i.e. Industrial Investment Bank of India (previously known as Industrial Reconstruction Bank of India) and has paid the entire One Time Settlement amount to the said Secured Creditor. Documents proving the same are collectively annexed as **Annexure A-13**.
  
11. It is submitted that by a letter dated 16<sup>th</sup> February, 2009, the Financial Creditor through its Advocate has informed the Official Liquidator about

such assignment and requested the Official Liquidator to record the name of the Financial Creditor as the only Secured Creditor of the Company. A copy of the letter dated 16<sup>th</sup> February, 2009 annexed as **Annexure A-14.**

12. It is submitted that the Financial Creditor also sought time for preparing inventory of the assets and properties, lying in the Jute Mill of the Company, in the presence of a representative of the Financial Creditor.
  
13. It is submitted that thereafter, several applications had been filed to either stay the winding up proceedings or to present scheme whereby the fortune of the Corporate Debtor might be revived and the Corporate Debtor comes out of Winding up. However, none of the applications succeeded and for long time, the Corporate Debtor remained in liquidation. At regular intervals various orders were passed by the Hon'ble High Court at Calcutta to safeguard the assets of the Corporate Debtor and directions upon the Official Liquidator to adjudicate the claim filed before it. It is submitted that thereafter the Financial Creditor filed an application (being C.A.NO.107 of 2016) for revival of the Corporate Debtor by way of scheme and the said application was taken up for hearing and on 5<sup>th</sup> December,2016 the Hon'ble High Court inter alia, pleased to pass the following order:-

***“ In my view, the prayers as made in the petition cannot affect right of any of the parties since admittedly it appears that at least one of the secured creditors has assigned the debt in favour of the petitioner. The purpose is to formulate a scheme which could be acceptable to all the creditors and would be beneficial for all.***

***Under such circumstances, the petitioner shall hold separate meetings of the secured and unsecured creditors including debenture holders, if any, after publishing advertisements once in the English daily “The Times of India”, once in the Bengali daily “Aajkal” and once in the Hindi daily “Dainik Viswamitra”. Mr. Sondwip Mukherji, Advocate, Bar Library Club, is appointed as the Chairperson of the meeting of all the creditors at an initial remuneration of 4000 GMs. To be paid by the petitioner. The notice of publication and other details shall be settled by the***

***Chairperson. There shall be an order in terms of prayer (f) of the petition. The matter is made returnable on 30<sup>th</sup> January,2017. A clear notice of 21 days of the meeting shall be given by the Chairperson in respect of each class of the creditors.” Copy of the order dated 05/12/2016 is annexed as Annexure A-15.***

14. It is submitted that being aggrieved with the order dated 05/12/2016, M/s Carnation Distributors Pvt.Ltd. preferred an appeal before the Hon'ble Division Bench, High Court of Calcutta and ultimately, on 09/08/2017, the Hon'ble Division Bench was pleased to set aside the impugned order dated 5<sup>th</sup> December, 2016 passed by Ld. Single Judge.
15. Thereafter, the Official Liquidator started to adjudicate the claims as well as making an inventory of the assets of the Corporate Debtor. However, the Official Liquidator has not sold the assets of the Corporate Debtor to realize the claim of the Financial Creditor. However, by an order dated 19<sup>th</sup> December, 2019, the Hon'ble High Court "Single Bench" has been, inter alia, pleased to dismiss the Company Petition being C.P.No.355 of 1997 for want of prosecution. All interim orders passed in the matter were also vacated. The concerned department and also the computer section were directed to take note of the dismissal and make necessary entries in the ledger as well as in the electronic records of the Court. Copy of the order dated 19<sup>th</sup> December, 2019 is annexed as **Annexure A-16**.
16. In view of the above, the Financial Creditor has sought to move the present application under section 7 for the reliefs mentioned therein.
17. It is submitted that a sum of Rs.2486,44,80,162.85 inclusive of interest, fell due on 19.12.2019.
18. It is submitted that the Financial Creditor has held as security, all the immovable properties belonging to the Corporate Debtor situated at

Garifa, P.S. Naihati, in the state of West Bengal with all buildings, sheds, structures and all other fixed and moveable plant and machinery, and all other moveable properties of any kind present or future, wherever situated, having estimated valuation of around Rs.200 crores ( more or less).

19. Notice was issued to the Corporate Debtor, on 21<sup>st</sup> February,2020, there was, however, no representation on behalf of the Corporate Debtor on the next date i.e. 11<sup>th</sup> December, 2020 when the Registry was directed to issue Court notice to the Respondent and Respondent was given three weeks time to file reply to the said application. An application was however, filed by Dolphine Vintrade Pvt.Ltd. in I.A. No. 1069 of 2021, who sought leave of the Adjudicating Authority to file an application to intervene in the proceedings as an unsecured creditor. On 25<sup>th</sup> March, 2021, the Official Liquidator was present on being served notice dated 4<sup>th</sup> January, 2021 along with copy of order dated 11<sup>th</sup> December, 2020 passed by this Adjudicating Authority.
20. This Adjudicating Authority, however, issued notice to the Liquidator once again on 2<sup>nd</sup> August, 2021 because there was no representation on his behalf. On 21<sup>st</sup> September, 2021, all the Ld. Counsel were present including Ms. Smita Das De, for the Liquidator.
21. The matter was listed for hearing on 24<sup>th</sup> November, 2021 when the parties were heard and the matter was reserved for orders.

**IA (IB) 1069/KB/2021**

22. Once the matter was reserved on 24<sup>th</sup> November, 2021, an application was filed on 15<sup>th</sup> December, 2021 being **I.A.(IB) No. 1069/KB/2021** filed by Dolphin Vintrade Pvt. Ltd. seeking the following reliefs:-

**VI. Prayer**

*“ In view of the facts mentioned above, the applicant prays for the following reliefs:*

- 1) Leave be granted to serve a copy of this application upon the Official Liquidator having its office at 9, Old Post Office Street, Kolkata-700001 which is the custodia legis over the assets of the Corporate Debtor under the order of the Hon’ble High Court at Calcutta.*
- 2) The present C.P(IB) No.572/KB/2020 be dismissed with cost.*
- 3) Stay of all further proceeding till disposal of the present application.*
- 4) Such further order or orders be passed and/or direction or directions be given as this Hon’ble may deem fit and proper”.*

23. The applicant in this application has submitted that the applicant is one of the unsecured creditors and has also filed an application for scheme for revival of the Corporate Debtor which is in liquidation before the Hon’ble High Court of Calcutta. It is submitted that the present application has been filed to bring to the notice of this Adjudicating Authority mischief and fraudulent activities of the Financial Creditor, who has filed the present application under section 7 of the IBC,2016 with unclean hands and without disclosing the orders as passed by the Hon’ble High Court of Calcutta and also the Hon’ble Supreme Court of India.

24. It is submitted that on or about 1988, the Corporate Debtor namely M/s Gourepore Company Limited became a sick Industrial Company (Special Provisions Act, 1985). By an order dated 12<sup>th</sup> September, 1991, the Ld. Board for Industrial and Financial Reconstruction (BIFR) was pleased to form an opinion that it is just and equitable to wind up the said company being the Corporate Debtor herein and forwarded its opinion to the Hon’ble High Court for issuance of an order of Winding up as against the Corporate Debtor. On 9<sup>th</sup> October, 1991 an appeal was preferred before the AIFR by the Corporate Debtor and by an order dated March 25,1992, the said appeal was admitted. However, vide order dated August 5,1992 the said appeal was later dismissed and the AAIFR had

granted a relief of Rs. 58.41 crores against the claim of 4 secured creditors namely Indian Bank, Allahabad Bank, United Bank of India and Industrial Bank of India (IIBI). A Writ Petition was however, moved by the Worker's Union of the Corporate Debtor against the order of Appellate Tribunal and subsequently in the year 1993, Indian Bank had filed a suit for Rs.16,92,08,930/- against the Corporate Debtor and had obtained a certificate from Debts Recovery Tribunal along with interest. On 4<sup>th</sup> July, 1996, Allahabad Bank, filed a suit for recovery of its dues and obtained a decree from Debts Recovery Tribunal interest. On 4<sup>th</sup> July, 1996, Allahabad Bank had filed a suit for recovery of its dues and obtained a decree from the Debts Recovery Tribunal for a sum of Rs.26.20 Crores along with interest @ 19.75% from March, 1993.

25. On August 7, 1997, one M/s R.K.Garodia & Company filed a winding up proceedings under section 433 and 434 of the Companies Act, 1956 being C.P. No. 355 of 1997 on the ground that the company has failed to pay its dues amounting to Rs.39,34,206.74 and interest thereon. The said Winding up petition was admitted by the Hon'ble High Court, Calcutta vide order dated 9<sup>th</sup> September, 1997 and on 26<sup>th</sup> November, 1997 the Hon'ble High Court directed the winding up of the Corporate Debtor and passed directions for liquidation. Since then, the Corporate Debtor is in liquidation and its assets are in possession of the Official Liquidator under the orders of the Hon'ble High Court at Calcutta.
26. It is further submitted that some time in July 6, 2007, one of the 4 secured creditors assigned its claim against the Corporate Debtor in favour of one Teesta Multipurpose Private Ltd. for a sum of Rs. 45 lacs, which is stated to be un-registered documents. Thereafter, vide assignment deed 6<sup>th</sup> July, 2007 Teesta Multipurpose Private Limited has assigned its right to the present Financial Creditor namely Ashray Vyaapar Private Limited.
27. It is submitted that Teesta Multipurpose Private Limited had approached

the assignor for assignment of all the Debts recoverable by the Assignor from the Corporate Debtor which by that time is already (in liquidation) and the rights of the Assignor in the Hypothecated assets including the Plant and Machinery belonging to the Corporate Debtor was for a sum of Rs. 45 lacs only, and a suit has been filed being T.S. No. 143 of 1991 which has since been transferred to Debts Recovery Tribunal-I, being T.A. No. 34 of 2001 for recovery of its dues and that the said suit was still pending without the debt being adjudicated and crystallised. Thus, unless the details of the debts are disclosed and crystallised and that such claim is adjudicated, the alleged financial Creditor cannot claim to have any right in respect of the said assignment made by the United Bank of India. Further, Teesta Multipurpose Private Limited had thereafter assigned its rights under the Deed of Assignment dated July 6, 2007 to the “present alleged Financial Creditor” namely Ashray Vyaapar Private Limited by another deed of assignment dated February 13, 2008, another unregistered document. It is needless to say that the first assignment itself being bad, the subsequent assignment continues to be bad. The said Ashray Vyaapar Private Limited is merely a special purpose vehicle without any background, a Private Limited Company having authorised share capital of Rs. 2.00 Lacs and paid up share capital of Rs. 1.00 lac which cannot have the permission of the Reserve Bank of India to take assignment of all such debts from the Banks or Financial Institutions. A Copy of the said deed of assignment dated February 13, 2008 from Teesta Multipurpose to Ashray Vyapaar is annexed as Annexure D.

28. It is submitted that by another Deed of Assignment dated February 21, 2008, the Indian Bank which is also one of the 4 secured creditors as mentioned hereinbefore had assigned its claim against Gourepur Company Limited (in Liquidation ) to the said Ashray Vyaapar Private Limited for a sum of Rs. 2.50 Crores on “as is where is, whatever there is” basis upon unconditional release of all the personal and Corporate guarantees and securities. It is needless to say that the Corporate

Debtor was by that time already (in liquidation) and by this assignment only the personal and Corporate guarantees were released and the suit which was originally filed by the Indian Bank pending before the Debts Recovery Tribunal -I, Kolkata being T.A. No. 7 of 2002 for a sum of Rs.16,92,08,930/- was dismissed as withdrawn. Thus, even the claim of the Bank is yet to be adjudicated, and unless Ashray Vyaapar Private Limited proves such claims, neither can it be said to be a Financial Creditor, nor it can claim such amount. A copy of the said deed of assignment dated February 21, 2008 is annexed as Annexure-E.

29. It is submitted that by another Deed of Assignment dated November 6,2008, Allahabad Bank had also filed a claim which was pending before the Debts Recovery Tribunal-I and had obtained a certificate being certificate No. 42 of 1996 against the Corporate Debtor and two of its directors for a sum of Rs.26,20,41,231/- on July 1, 1996. Thereafter, a recovery proceeding was initiated being R.P. No.42 of 1996 and while the company was (in liquidation), by the said Deed of Assignment, the alleged claim was assigned to the said Ashray Vyaapar Private Limited.
30. It is submitted that as a precondition to the said deed of assignment, Allahabad Bank had confirmed that the company ( in liquidation) stood discharged from liabilities whatsoever and shall withdraw the recovery proceeding initiated by it pending before the Learned Debts Recovery Tribunal-I. It is submitted that the said recovery proceeding was basically in the nature of an execution of a decree. Had the certificate which was issued on July 1, 1996 being assigned to Ashray Vyaapar Private Limited, then Ashray Vyaapar Private Limited ought to have got itself substituted in its place in the said recovery proceeding or had initiated a fresh suit by making the Official Liquidator of the party before the competent court of law. However, no such proceeding was initiated and the said recovery proceeding was in fact withdrawn. Instead, the entire payment was made as a settlement amount on behalf of the Corporate Debtor without the knowledge and consent of the Official

Liquidator or permission of the Hon'ble High Court at Calcutta. A copy of the said certificate and Deed of Assignment dated November 6, 2008 are annexed as Annexure-F.

31. It is submitted that subsequently, by another indenture dated September 14, 2015 Allahabad Bank had once again, fraudulently, assigned the very same certificate in favour of Ashray Vyaapar Private Limited by registering it before the Additional Registrar of Assurance-IV, Kolkata whereas on the day of Registration it had already withdrawn its recovery proceeding stating that the company (in liquidation) stood discharged of its liabilities and the personal and Corporate guarantee have also been discharged. Thus, there was nothing as on September 14, 2015 which could have been assigned in favour of Ashray Vyaapar Private Limited and as such the said purported deed of assignment is bad in law. A Copy of the said registered Deed of Assignment dated September 14, 2015 is annexed as Annexure-G.
32. It is submitted that Ashray Vyaapar Private Limited falls within the definition of Financial Creditor as envisaged under section 5(7) of the Insolvency and Bankruptcy Code, 2016 nor the said Ashray Vyaapar Private Limited falls under the definition of financial institution or financial service provider.
33. It is submitted by the applicant that the Financial Creditor herein cannot step into shoes of the secured creditors. It is submitted that all the deeds of the Assignments are wrongful, illegal void and are not sustainable in the eye of law and Ashray Vyaapar cannot be treated to be the secured creditor of the company in liquidation.
34. The applicant in this matter has submitted that the order of winding up passed on 24 years back and all its plant and machinery has become scrap due to passage of time.

35. It is submitted that the present proceedings have been initiated without obtaining sanction/leave of the Hon'ble High Court. It is submitted that the company being in liquidation by the Hon'ble Company Court for 24 years has to be ordered if at all to be transferred to NCLT by the Hon'ble High Court and as such NCLT cannot take up the matter suo motu.
36. It is submitted that the assets of the company in liquidation are under the custodia legis of the Hon'ble High Court and Official Liquidator of the Hon'ble High Court of Calcutta and is in the process of sale and there is no scope of its revival, save and except land, there are no other assets and most of the workers have either joined other employment or are not serving. It is submitted that company petition filed under section 7 of the Code is not maintainable and is liable to be dismissed.
37. It is pertinent to mention here that section 5(7) defines "**Financial Creditor**", ***means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;***"
38. Section 7(1) is reproduced as under:-  
**Initiation of corporate insolvency resolution process by financial creditor-** (1) "***A Financial Creditor either by itself or jointly with [ other financial creditors, or any other person on behalf of the financial creditor , as may be notified by the Central Government] may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred***".
39. Ld. Counsel for the applicant has submitted that the deeds of assignment by the Banks are bad in law. It is submitted that Title Deed once released by the Bank goes in favour of the Official Liquidator as no one else can claim to such title.
40. On the question of *Locus standi* of the applicant, the applicant referred and relied upon the case of **S.P.Chengalvaraya Naidu Vs. Jagannath**

**(1994) 1 SCC 1.** The Financial however, alleged that the applicant has no locus standi and cannot be heard by this Adjudicating Authority.

41. The Ld. Counsel has also relied upon an order of the Hon'ble Supreme Court in **Civil Appeal No. 7641/2019** in the matter of **Beacon Trusteeship Limited vs. Earthcon Infracon Private Limited & Anr.**
42. We have gone through the application and heard the applicant in I.A. (I B) No. 1069/KB/2021.
43. We have heard the Ld. Counsel for the applicant and also Ld. Counsel for the Financial Creditor, we do not find any substance in the contentions of the Ld. Counsel for the applicant so far as the present facts are concerned. The Financial Creditor has filed the petition under section 7 of the IBC,2016 having been duly assigned the debt by four banks.
44. The Financial Creditor, however, has relied upon judgement of Hon'ble Supreme Court passed in **A. NAVINCHANDRA STEELS PRIVATE LIMITED vs. SERI EQUIPMENT FINANCE LIMITED AND OTHERS (2021) 4 SCC 435.** The relevant paragraph of the aforesaid judgement is reproduced as follows:-

***“ 29. Dr. Singhvi and Shri Ranjit Kumar have vehemently argued that SERI has suppressed the winding-up proceeding in its application under section 7 IBC before NCLT and has restored to Section 7 only as a subterfuge to avoid moving a transfer application before the High Court in the pending winding up proceeding. These arguments do not avail the appellant for the simple reason that Section 7 is an independent proceeding, as has been held in a catena of judgements of this Court, which has to be tried on its own merits. Any “Suppression” of the winding up proceeding would, therefore, not be of any effect in deciding a Section 7 petition on the basis of the provisions contained in the IBC. Equally, it cannot be said that any subterfuge has been availed of for the same reason that Section 7 is an independent proceeding that stands by itself. As has been correctly pointed out by Shri Sinha, a discretionary jurisdiction under the fifth proviso to Section 434(1)(c) of the Companies Act,2013 cannot prevail over the undoubted jurisdiction of NCLT under the IBC***

**once the parameters of Section 7 and other provisions of the IBC have been met. For all these reasons, therefore, the appeal is dismissed and the interim order that has been passed by this Court on 18-12-2020 shall stand immediately vacated”.**

45. Ld. Counsel for the Financial Creditor has further referred to and relied an order of NCLT, Allahabad in the case of **M/s Kalendonia Jute and Fibres Pvt.Ltd. vs. M/s Axis Nirman and Industries Limited** in **Company Petition(IB) No. 25/ALD/2020**. In the above matter, the Hon’ble Bench held as under:-

*“ 5. Further it was brought to the notice that the Hon’ble Supreme Court in Civil Appeal No. 3735 of 2020, in the matter related to same parties has ordered that the proceedings for winding up pending before the company Court (Allahabad High Court) against the respondent to be transferred to NCLT, Allahabad and to be taken up along with the application under Sec 7 IBC.*

*6. The factual background of the winding up petition is that one M/s Girdhar Trading Company, filed a petition as Company Petition No. 24 of 2015 before the Hon’ble High Court of Allahabad u/s 433 of the Companies Act, 1956 for the winding up of the Respondent company on the Ground that the company was unable to pay its debts in which the Court issued notice to the Respondent but the Respondent failed to appear before the company Court.*

*7. Thereafter, the Company Court passed an order dated 10.03.2016 directing the winding up of the 1<sup>st</sup> respondent Company on the ground that the Company has been unable to pay its debts and that it was just and equitable to wind up the respondent Company and appointed the official liquidator attached to the High Court of Allahabad as the Liquidator and directed him to take over the assets and books of accounts of the Company. Thereafter, the Respondent company “herein referred to as corporate debtor” filed an application for recalling the order of winding up dated 10.03.2016 and in order to prove their bonafides paid the entire amount due to the creditor along with costs. Therefore, the creditor had no objection to recall the order of winding up but the official liquidator opposed the application for recall on the ground that the respondent company owed money to various creditors to the tune of Rs. 27 Crores and that unless the said amount is paid, the order of winding up cannot be recalled. The Official Liquidator also submitted that he had already taken over charge of the assets of the Company.*

8. Further, the Company Court has passed an order on 22.08.2016 keeping the winding up order dated 10.03.2016 in abeyance however, the company court directed the official liquidator to continue to be in the custody of the asset of the company. Meanwhile the creditor “herein referred to as an applicant” filed a petition u/s 7 of IBC stating that the claim of the applicant was due and respondent i.e. corporate debtor was liable to pay a sum of Rs. 32 lacs and despite repeated demand the Respondent failed to pay the said amount.

9. Thereafter, the applicant moved an application in Civil Miscellaneous Application No.23 of 2020 before the Company Court (High Court) seeking a transfer of the winding up petition to the NCLT, Allahabad which was rejected by the Company Court by a cryptic order dated 24.02.2020, on the sole ground that the requirement of Rule 24 had already been complied with and that a winding up order had already been passed. Thus, the financial creditor moved to Hon’ble Apex Court against the order of refusal to transfer the winding up proceeding before the NCLT, Allahabad to which the Hon’ble Apex Court held that the proceedings for winding up pending before company Court (Allahabad High Court) to be transferred to NCLT, Allahabad and to be taken up along with section 7 IBC Petition.

10. Before Proceeding with the applications, I would like to refer to the judgment of Hon’ble Supreme Court “**A. Navinchandra Steels Private Limited v. SREI Equipment Finance Limited & Ors. 2021 SCC Online SC 149**” in which it was observed that :

**16.** ..... it is important to restate a few fundamentals. Given the object of the IBC as delineated in paras 25 to 28 of *Swiss Ribbons (P) Ltd. v. Union of India* [*Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17*] [“*Swiss Ribbons*”], it is clear that the IBC is a special statute dealing with revival of companies that are in the red, winding up only being restored to in case all attempts of revival fail. Vis-à-vis the Companies Act, which is a general statute dealing with companies, including companies that are in the red, the IBC is not only a special statute which must prevail in the event of conflict, but has a non obstante clause contained in Section 238, which makes it even clearer that in case of conflict, the provisions of the IBC will prevail.

**25.** A conspectus of the aforesaid authorities would show that a petition either under Section 7 or Section 9 IBC is an independent proceeding which is unaffected by winding-up proceedings that may be filed qua the same company. Given the object sought to be achieved by the IBC, it is clear that only where a company in winding up is near corporate death that no transfer of the winding-up proceeding would then take place to NCLT to be tried as a proceeding under the IBC. Short of an irresistible conclusion that

*corporate death is inevitable, every effort should be made to resuscitate the corporate debtor in the larger public interest, which includes not only the workmen of the corporate debtor, but also its creditors and the goods it produces in the larger interest of the economy of the country. It is, thus, not possible to accede to the argument on behalf of the appellant that given Section 446 of the Companies Act, 1956/Section 279 of the Companies Act, 2013, once a winding-up petition is admitted, the winding-up petition should trump any subsequent attempt at revival of the company through a Section 7 or Section 9 petition filed under the IBC.*

*What is clear by this Section is that a compromise or arrangement can also be entered into in an IBC proceeding if liquidation is ordered. However, what is of importance is that under the Companies Act, it is only winding up that can be ordered, whereas under the IBC, the primary emphasis is on revival of the corporate debtor through infusion of a new management.*

*11. Referring to the above, this Adjudicating Authority is of the view that Sec 7 IBC is an independent proceedings and it will be in the interest of justice that petition under Sec 7 IBC to be decided as there can be chances for revival of the company and further insolvency proceedings have an overriding effect over winding up proceedings under Companies Act, thus the petition under Sec 7 IBC is accordingly dealt with.*

*12. Thus the mere plain reading of the provision shows that in order to make an application under Section 7 (1) the financial creditor / petitioner is required to establish:*

- i. Whether there is duly established financial debt.*
- ii. Whether there is default in payment by the corporate debtor.*
- iii. Whether the documents attached with the applicant show that there is default in payment of debt and name of resolution professional is proposed to act as IRP and no disciplinary proceedings are pending against the proposed resolution professional.*

*13. Referring to the decision of Hon'ble Supreme Court in **Innoventive Industries Ltd. v. ICICI Bank, (2017)205 Comp Cas 57(SC)** it was held **that***

***“..... The moment the Adjudicating Authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete...”***

*14. Based on the submissions made by the Applicant and the documents produced and placed on record before this Adjudicating Authority, the*

*Bench is of the opinion that there is a 'default' on the part of the Corporate Debtor by not fulfilling the debt owed to the Financial Creditor, the application filed on behalf of financial creditor/Applicant under Section 7 of IBC is found complete. The present petition being filed on 18.12.2019 found well within limitation as the copy of statement of account is of 01.04.2018 reflects the amount credited to the corporate debtor.*

*15. Therefore, in light of the aforesaid provisions, this Adjudicating Authority is of the considered view that the total amount claimed in default is of Rs. 32,00,000/- which is more than Rs One Lakh to trigger the Corporate Insolvency Resolution Process against the Corporate Debtor. The increase is threshold limit to initiate CIRP from Rs. 1 lakh to 1 Crore vide notification of the MCA dated March 24, 2020 does not in any way apply to the present matter as the application was pending adjudication much before the notification came into force”.*

46. The objection of the applicant in I.A.(IB) 1069/KB/2021, that the debt of the Banks could not have been validly assigned to the present Financial Creditor does not stand to any reason. There cannot be any bar if a Lender/Bank assigns the debt to any other legal person. It will not make any difference or invalidate the 'assignment of debt' transaction, even if the debt is assigned by a registered or an unregistered deed or if a deed is registered at a later date as has been done in the case of **Allahabad Bank** .
47. Even if the liquidation proceedings are not transferred to the NCLT by the Hon'ble High Court, it will not be a bar for a Financial Creditor to approach the NCLT under section 7 of the Code independent of that proceedings.
48. If the loan has already been assigned and entrusted with all their rights and interest by the assignors in favour of the Financial Creditor herein, by way of assignment deeds, the Financial Creditor has validly and legally entered into the shoes of the assignor banks and is very much competent to pursue the proceedings already going on against the Corporate Debtor in all the Forums including the Hon'ble High Court or the NCLT.

49. Since the Corporate Debtor had already committed default in making the payment of the outstanding financial debt to the Banks, and the Financial Creditor has validly initiated the proceedings before this Adjudicating Authority against the Corporate Debtor which is presently in the hands of the Official Liquidator appointed by the Hon'ble High Court of Calcutta, whatever decision in this matter is taken, the same would be binding on the Official Liquidator as well, who is in possession of all the properties, assets etc. of the Corporate Debtor.
50. We have heard Ld. Counsel for the applicant in (IA (IB) No. 1069/KB/2021) and have also heard the Ld. Counsel for the Financial Creditor on the question of maintainability and have gone through their pleadings as well. We do not find any merit in the contention of the applicant and even the judgements cited by the applicant do not help it. We, therefore, dismissed the **IA (IB) No. 1069/KB/2021**, being devoid of any merits, and hold that in view of the judgments of Hon'ble Supreme Court and the orders of NCLT quoted above, the petition under section 7 of IBC is very much maintainable.
51. The Financial Creditor proposed the name of **Mr. Suresh Chandra Pattanayak**, to act as an IRP having Registration No. **IBBI/IPA-002/IPN00759/2018-19/12384**, who has consented vide his affidavit and Form-2 and submitted that he has agreed to accept the appointment as IRP if an order admitting the present application is passed by this Adjudicating Authority. He has further submitted that no disciplinary proceedings are pending against him with the Board or Institute of Insolvency Professionals of ICAI.
52. We have heard Ld. Counsel for the Financial Creditor and the Official Liquidator, and the applicant in IA (IB) No. 1069/KB/2021 in these proceedings, even though this IA(IB) 1069/KB/2021 has been considered and dismissed.

53. We have also gone through the petition and the Annexures and documents enclosed therewith along with orders of the Hon'ble High Court placed on record.
54. We are satisfied that the petition of the Financial Creditor is very much maintainable and the Financial Creditor is entitled to the relief sought in the petition.
55. On the basis of the submissions made by the Financial Creditor and the documents placed on record since the Corporate Debtor has failed to make any payment of the financial debt due to the Financial Creditor, we are of the opinion that there is a default on the part of the Corporate Debtor by not repaying the debt owed to the Financial Creditor and in view of the fact that the application is otherwise complete and there is no other hindrance in the admission of the petition, we are of the considered view that this petition ought to be admitted and Corporate Insolvency Resolution Process ought to be initiated against the Corporate Debtor. Accordingly, we pass the following orders:-

### **O R D E R S**

- i) The application filed by the Financial Creditor under Section 7 of the Insolvency & Bankruptcy Code, 2016 for initiating Corporate Insolvency Resolution Process against the Corporate Debtor is hereby **admitted**.
- ii) We hereby declare a moratorium and public announcement in accordance with Sections 13 and 15 of the I & B Code, 2016.
- iii) Moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The I.R.P. shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of

claims under Section 15. The public announcement referred to in clause (b) of sub-section (1) of Section 15 of Insolvency & Bankruptcy Code, 2016 shall be made immediately.

- iv) Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:
- 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 Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);
  - d) The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.
- v) The supply of essential goods or services rendered to the corporate debtor as may be specified shall not be terminated, suspended, or interrupted during the moratorium period.

- vi) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- vii) The order of moratorium shall have effect from the date of admission till the completion of the corporate insolvency resolution process.
- viii) Provided that where at any time during the Corporate Insolvency Resolution Process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of the corporate debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.
- ix) **Mr. Suresh Chandra Pattanayak**, registered with Insolvency and Bankruptcy Board of India, having Registration No. **IBBI/IPA-002/IPN00759/2018-19/12384**, Email suresh.pattanayak@yahoo.co.in hereby appointed as Interim Resolution Professional for ascertaining the particulars of creditors and convening a Committee of Creditors for evolving a resolution plan subject to production of written consent within one week from the date of receipt of this order.
- x) The Interim Resolution Professional should convene a meeting of the Committee of Creditors and submit the resolution passed by the Committee of Creditors and shall identify the prospective Resolution Applicant within 105 days from the insolvency commencement date.

- xi) The Financial Creditor/Applicant is directed to deposit **Rs. 5,00,000/- (Rupees Five Lakhs Only)** with the IRP appointed hereinabove within **three** days from this order. IRP can claim the preliminary expenses and fees subject to the approval by the CoC and after constitution of CoC.
- xii) Registry is hereby directed to communicate the order to the Financial Creditor, the Corporate Debtor, the I.R.P. and the jurisdictional Registrar of Companies by Speed Post as well as through email.
- xiii) List the matter on **04/04/2022** for the filing of the progress report.
- xiv) Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

**(Harish Chander Suri)**  
**Member (Technical)**

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

Order signed on, this 31 day of January, 2022

Pj