**IN THE NATIONAL COMPANY LAW TRIBUNAL**
**PRINCIPAL BENCH, NEW DELHI**

**CP (IB) No.607/(PB)/2023**

**&**

**I.A. No. 595 of 2024**
**I.A. No. 1097 of 2024**

**ORDER UNDER SECTION 7 OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016 R/W RULE 4 OF THE INSOLVENCY AND BANKRUPTCY (APPLICATION TO ADJUDICATING AUTHORITY) RULES, 2016.**

**IN THE MATTER OF:**

**Proplarity Infratech Private Limited**

Registered Office: Plot No.A-26,
Sector-63 Noida, Gautam Buddha Nagar
Uttar Pradesh-201301
CIN-070102UP2013PTC05919

**... Financial Creditor**

**Versus**

**Sky High Technobuild Private Limited**

Registered Office: E-26,
Lower Ground Floor,
Panchsheel Park
New Delhi-110017
CIN No.:U70109DL2006PTC150898

**... Corporate Debtor**

**&**

**IN THE MATTER OF:**

**I.A. No. 595 of 2024**

**Sky High Technobuild Private Limited ... Applicant**

**Versus**

**Proplarity Infratech Private Limited ... Respondent**

**&**

**IN THE MATTER OF:**

**I.A. No. 1097 of 2024**

**Sky High Technobuild Private Limited ... Applicant**

**Versus**

**Proplarity Infratech Private Limited & Ors. ... Respondent**

**Order Pronounced On: 23.07.2024**

**CORAM:**

**CHIEF JUSTICE (RETD.) RAMALINGAM SUDHAKAR**
**HON'BLE PRESIDENT**

**SHRI AVINASH K. SRIVASTAVA**
**HON'BLE MEMBER (TECHNICAL)**

**Appearances:**

For the Financial Creditor: Sr. Adv. P. Nagesh, Adv. Akshay, Adv Kamal Kapoor, Adv. Aditya Nayyar

For the Corporate Debtor: Sr. Adv. Ashish Dholakia, Adv. Harsh Gattani, Adv. Anubhav Singh

**ORDER**

The present application has been filed by **Proplarity Infratech Private Limited** (hereinafter referred to as **Applicant/ Financial Creditor**) on 22.09.2023 u/s 7 of the Insolvency and Bankruptcy Code, 2016 (**the Code**), r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (the AA Rules) for initiating Corporate Insolvency Resolution Process (**CIRP**), declaring moratorium and for appointment of Interim Resolution Professional (IRP) against Sky High Technobuild Private Limited (hereinafter referred to as **Respondent/ Corporate Debtor**) for a total financial default of **Rs.4,70,00,00/-** (Rupees Four Crore Seventy Lacs Only).

**PARTIES**

1. The 'Financial Creditor' (FC) herein is a Company Limited by Shares incorporated on 29.08.2013 under the Companies Act, 2013 having its registered office at Plot No. A-26, Sector -63 Noida, Gautum Buddha Nagar, Uttar Pradesh-201301. The Financial Creditor is represented through Mr. Naveen Upadhyay.

2. The Corporate Debtor (CD) herein is Sky High Technobuild Private Limited, CIN:U70109DL2006PTC150898 having its registered office at E-26 Lower Ground Floor, Panchsheel Park, New Delhi-110017**.** The respondent herein was incorporated on 13.07.2006 under the Companies Act, 2013 with a Paid Up Capital of Rs. 1,00,000 and Authorized Capital of Rs. 1,00,000. Therefore, this Bench has jurisdiction to deal with this application. Copy of Company's Master Data has been annexed as **Annexure (A).**

**BRIEF FACTS**

**1.** It is stated that CD had approached the FC for a short-term loan facility of Rs. 2,00,00,000 (Rupees Two Crores Only) ('loan amount') for its real estate business and in pursuance of the same, the FC had advanced the loan amount to the CD by way of RTGS *vide* Cheque No. 016976 dated 08.10.2013 from A/c No. 167105000150, ICICI Bank, Vibhuti Khand, Lucknow. It is stated that the said loan amount was advanced bearing an interest rate of 18% p.a. and it was to be repaid by the CD at the earliest as per the mutual

understanding between the FC and the CD. Copy of Bank Statement of FC showing the RTGS transfer has been annexed as **Annexure C (Colly).**

**2.** It is stated that the CD has neither repaid the loan amount nor the interest arising on it. Due to non-payment of the loan amount, the FC sent a Demand Notice dated 02.05.2022 to the CD demanding the loan amount along with interest @18%. Copy of Demand Notice dated 02.05.2022 has been annexed as **Annexure E (Colly).**

**3.** Further it is stated that, the said loan amount has been acknowledged by the CD in its Profit & Loss Statement, Balance Sheet as well as Auditor's Report pertaining to the FYs 2013-2014, 2014-2015, 2015-2016, 2016-2017, 2017-2018, 2018-2019 and 2019-2020. Copy of Profit & Loss Statement, Balance Sheet along with Auditor's Report has been annexed as **Annexure D (Colly).**

**4.** It is stated by the FC that no payment in respect of the aforesaid loan amount has been made and the total debt stands at Rs. 4,70,00,000 (Rupees Four Crores Seventy Lakhs) with Rs. 2,00,00,000 (Rupees Two Crores) being the loan amount and Rs. 2,70,00,000 (Rupees Two Crores Seventy Lakhs) being the interest calculated at a rate of 18% p.a. In view of non-payment of debt by the CD, the FC has filed the present application.

**Submissions of the Ld. Counsel appearing for the Corporate Debtor are:**

**5.** Notice was issued to the CD for filing of reply. After due service, the CD appeared through its counsel and filed its reply denying averments made in the Section 7 application on the following grounds:

A. Firstly it is submitted by the CD that petition is liable to be dismissed on the ground that there is no financial contract entered into between the parties and that the FC has out of its own whims and fancies levied an interest of 18%whereas there exists no agreement to substantiate that the loan was advanced at 18% interest p.a. The CD has further submitted that as per the mandate of Section 7(3)(a) of the Code, the Applicant has to furnish a record of default and that in the present case,

the Applicant has failed to do so. Reliance has also been placed on Rule 3(1)(d) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 to state that existence of contract is necessary to file a Section 7 petition.

B. Secondly it is submitted by the CD that the transaction between the parties does not constitute to be a "Financial Debt" and that the FC has filed the present petition for recovery of loan amount in the garb of insolvency proceeding. It is submitted by CD that the FC had approached the Respondent for purchasing a plot of land measuring 20,000 sq. mtrs in Sector 140, Noida, Uttar Pradesh valued at Rs. 25,00,00,000/- (Rupees Twenty-Five Crores Only) and that as per the arrangement arrived at between the parties, the FC was required to pay a token amount of Rs. 2,00,00,000/- (Rupees Two Crores Only) and the remaining amount of Rs. 23,00,00,000/- (Rupees Twenty-Three Crores Only) was to be paid within a period of three years from the date of the payment of the token amount. That the aforesaid token amount was received by the CD on 08.10.2013. That subsequent to the said transaction, the CD *vide* letter dated 09.10.2013 acknowledged the receipt of Rs. 2,00,00,000/- (Rupees Two Crores Only) as token money and further stated that the FC was required to pay the balance payment within a period of three years. Copy of letter dated 09.10.2013 has been annexed as **Annexure C-3.**

C. That due to non- receipt of any further payment from the FC even after lapse of two years, the CD *vide* letter dated 17.10.2016 requested the FC to pay the balance amount in order to avoid the forfeiture of the above-mentioned token money. Due to non- payment of the balance amount, the CD *vide* letter dated 15.04.2021 informed the FC that the token amount of Rs. 2,00,00,000/- (Rupees Two Crores Only) paid by the FC had been forfeited. Copies of letter dated 17.10.2016 and 15.04.2021 have been annexed as **Annexure C-4 &C-5.**

D. Further it is submitted by the CD that FC transferred the amount of Rs. 2,00,00,000 as token money with respect to plot, therefore the said amount is visible in the books of CD under the heading of Inter Corporate Deposit. Though the amount is visible in the books it does not ipso facto constitutes a loan or a "financial debt" under the Code. The CD has relied upon ***Seaview Merchants Private Limited v. Ashish Vincom Private Limited C.P (IB) 2011/KB/2019, SRF Limited v. Kesoram Industries Limited, I.A. No. 957/KB/2023 in CP(IB) No. 250/KB/2021*** to state that Inter- Corporate Deposit are not Financial Debt unless the loan advanced is proved by way of documentary evidence

E. It is further submitted by CD that the FC has to mandatorily satisfy the essentials of Section 5(7) and 5(8) read with Section 7 of the Code which in the present case, has not been done. In this context the CD has relied upon***, Anuj Jain v. Axis Bank Ltd.(2020) 8 SCC 401, Carnoustie Management India Pvt. Ltd v. CBS International Project Private Limited C.P (IB) 792(PB)/2018, Phoenix Arc Pvt. Ltd. V. Spade Financial Services Ltd. & Ors. (2021)3 SCC 475, Earth Gracia Buildcon Pvt. Ltd v. Earth Limited Infrastructure (2021 SCC Online NCLAT 502) etc.***

F. Thirdly it is submitted that the petition is not maintainable in view of non- existence of default. Reliance has been places on Section 3(12) of the Code to state that that no default has occurred on the part of the CD as neither the whole of the debt nor any instalment thereto has become due and payable. CD relies on ***Swiss Ribbons v. Union of India (2019) 4 SCC 17*** (Para 37) to further strengthen his arguements.

G. Further it is stated by CD that no specific "date of default" has been provided in the petition by the FC and that the FC had no licence to operate as an NBFC and distribute loans to other corporates. That the FC had a paid-up share capital of Rs. 1,00,00,000/- (Rupees One Crore Only) and thus, could not have advanced an unsecured loan of Rs.

2,00,00,000/- (Rupees Two Crores Only). Even after six years of forfeiture of the token amount, the FC did not raise any demands from the Respondent and that now, with malafide intention, the Applicant has initiated the present insolvency proceedings on the basis of an imaginary loan which is not substantiated by any financial contract nor loan agreement. That any claim with respect to transaction of 08.10.2013 is now barred by limitation.

The present petition is nothing but a malicious prosecution and recovery proceedings under the garb of Insolvency Proceeding, and the petition should be dismissed.

**6.** Rejoinder was filed by the FC denying the averments made by the CD in its reply.

**7.** We have heard the parties on both sides and perused the pleadings filed by both sides. In the above-backdrop it would be convenient to deal with the present petition issue wise.

## Analysis and Findings

**ISSUE-1**

**Whether Non-Existence of a Financial Contract renders a Section 7 Petition Non-Maintanable?**

**8.** It is the case of CD that the FC has not relied upon any loan agreement or financial contract to substantiate its claim of Rs. 2,00,00,000 and hence in absence of such financial contract between the parties, the petition is liable to be dismissed outrightly. CD has relied upon Rule 3(1)(d) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 ***(in short "AA Rules")*** to strengthen its argument. It is further stated by CD that FC out of its own whims and fancies has levied an interest @18% p.a.

**9.** It is noteworthy to mention herein that an application under section 7 of the Code is initiated by a Financial Creditor either by himself or jointly with other Financial Creditors for initiation of Corporate Insolvency Resolution Process against Corporate Debtor where there exists a 'debt' and a consequent 'default.' The *AA Rules, 2016* are the rules which prescribe the form and manner of filing of application by the Financial Creditors. Section 7 (3) (a) of the Code r/w Rule 4 of *The AA Rules* mandate FC to file the application in Form-1 accompanied with documents and records as specified in CIRP Regulation, 2016 to substantiate its claim.

**10.** Regulation 8 of the CIRP Regulations 2016 specifies that the existence of debt due to Financial Creditor may be proved on the basis of following documents i.e. either *records available with an information utility or other relevant documents including financial contract, an order of court or tribunal, financial statement etc.* From the bare reading of Regulation 8, it is clear that the FC can rely upon any relevant document including financial contract to prove the existence of debt. The regulation does not contemplate existence of all documents rather it uses the word "or" which indicates that by any relevant document the existence of debt can be proved. Regulation 8 of the CIRP Regulations 2016 is hereby extracted for ready reference:

***Regulation 8 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations)***

***8. Claims by financial creditors.***

*(2) The existence of debt due to the financial creditor may be proved on the basis of –*

*(a) the records available with an information utility, if any; or*

*(b) other relevant documents, including –*

*(i) a financial contract supported by financial statements as evidence of the debt;*

*(ii) a record evidencing that the amounts committed by the financial creditor to the corporate debtor under a facility has been drawn by the corporate debtor;*

*(iii) financial statements showing that the debt has not been repaid; or*

*(iv) an order of a court or tribunal that has adjudicated upon the non-payment of a debt, if any*

**11.** In this context we refer to the relevant paragraphs of the judgment passed by Hon'ble NCLAT in ***Agarwal Polysacks Ltd. v. K.K. Agro Foods & Storage Ltd., 2023 SCC OnLine NCLAT 624*** wherein specific question was framed as to whether to prove a financial debt a Financial Creditor has to enter into a written financial contract**.** Relevant paragraph of the judgment is extracted below;

> ***21. When we look into the statutory scheme as reflected in the Application to Adjudicating Authority Rules, 2016 and CIRP Regulations, 2016, it is clear that financial debt can be proved from other relevant documents and it is not mandatory that written financial contract can be only basis for proving the financial debt. We, thus, answer Issue No. 1 holding that it is not necessary that written financial contract be the only material to prove the financial debt.***

**12.** Taking note of the dictum laid down by Hon'ble NCLAT in above mentioned judgement, we are of considered view that it is not necessary that a transaction should involve written financial contract in order to come under the purview of Section 7 of IBC, 2016. However a financial contract may serve as a crucial document to prove the debt as it lays down the terms and condition entered into between the parties, but existence of debt can be proved through other documents in case parties have not entered into financial contract and financial contract is not a pre-condition. The reliance placed by CD on ***PV Potluri Ventures (P) Ltd. v. Benita Industries Ltd., 2024 SCC OnLine NCLAT 210*** cannot be sustained since the judgment in Para 16 and 17 itself mentions that *no document* has been relied upon by the appellant which indicates that FC can rely upon any other document. Para 16, 17 of *PV Potluri* (*supra*) is extracted below for ready reference:

> *16. We also note that in section 7 application, Part V, wherein the particulars of financial debt (documents, records and evidence of default) have to be attached,* ***no document has been attached in any of the columns to show particulars of security, record of default, copy of financial contract or any other document to prove the existence of financial debt, the amount and the date of default.*** *Furthermore, the balance sheet of the Appellant shows that the said amount is a "non-interest bearing business development investment"*

17. ***Therefore, in the absence of any document to evidence the financial contract for debt, the Appellant has mainly relied on his e-mail dated 17.11.2020, to show that there was a plan/schedule for the return of the loan amount sent by Mr. T. Satish to Mr. Prasad V. Potluri. We have earlier found that the authorisation of Mr. T. Satish by the Respondent or authorisation of Mr. Prasad V. Potluri by the Appellant to enter into trans*actions relating to financial debt, have not been established by the Appellant.** *In such a situation it would be difficult to believe that these amounts were given by Appellant M/s. PV. Potluri Ventures Pvt. Ltd. to M/s. Benita Industries Ltd. (Respondent) and at best, there was some transaction between Prasad V Potluri and T. Satish.*

**13.** The Hon'ble NCLAT in Para 20 of ***PV Potluri (supra)*** differentiated ***Agarwal Polysacks Limited (supra)*** on the basis that**,** *in* ***PV Potluri (supra)****,* the Appellant was not able to establish debt or date/existence of default in a conclusive manner, wherein in ***Agarwal Polysacks (supra)*** the FC was able to demonstrate through balance sheet that the loan was repayable on demand. Para 20 of ***PV Potluri (supra)*** is extracted below:

***20. The Learned Senior Counsel for Appellant has cited the judgment of this Tribunal in the matter of Agarwal Polysacks Limited vs. K.K. Agro Foods and Storage Limited (2023 SCC Online NCLAT 624) in support of his contention that the transaction as evidenced in the bank statement of the Respondent has been taken as conclusive proof of the existence of financial debt. In this regard we note that in the said judgment, the bank statement of the Respondent Company, which had received the loan amount was shown as evidence and furthermore, the balance sheet very clearly showed the amount as "advance recoverable in cash or in kind". On this basis, the term of the loan and its repayment as reflected in the balance sheet was also seen as being 'on demand'. Thus, this judgment has found both debt and default, whereas in the present matter, the Appellant has not been able to establish debt or date/existence of default in a conclusive manner.***

*24. Lastly, we do not think that we can rely on merely one e-mail dated 17.11.2020, that too addressed by Mr. T. Satish (who claims to represent the Appellant company)*

*to Mr. Prasad V. Potluri, which is quite vague, to conclusively accept it as proof of 'financial debt' and 'default'.* ***No other document, whether by way of financial contract or any e-mail or any agreement oral or otherwise, has been produced in evidence of the existence of financial debt and default.***

***26. In the above situation, we find that in the facts of the case, neither the Appellant M/s. PV. Potluri Ventures Pvt. Ltd. has been able to establish itself as financial creditor, nor any 'financial debt' and 'default' has been established through documentary evidence by the Appellant. Therefore, in the absence of financial debt and default, we are clear that the Appellant has not been able to make out a case for admission of section 7 application.***

Therefore, the stand taken by CD is wholly misconceived. However we make it clear that the FC has to prove the debt through other documents, cogently, in order to substantiate its claim.

Thus Issue No.1 is answered accordingly.

**ISSUE-2**

**Whether the transaction of Rs. 2,00,00,000 qualifies to be a financial debt under Section 5(8) of the Code?**

**14.** It is vehemently argued by the CD that the transaction of Rs. 2,00,00,000 between the parties does not qualifies to be a 'Financial Debt' as the said amount was never disbursed against the consideration for time value of money and the FC has not even relied upon any document evidencing that the said transaction was against time value of money. Before dwelling into the issue it is relevant to mention the provisions of law under the code:

**15.** Section **3 (11)** defines "**debt**" to mean a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt, ***Section 3(12)*** *defines default to mean non-payment of debt when whole or any part or installment of the amount has become due and payable and is not paid by the debtor*

*or the corporate debtor, as the case may. Further Section 5(8) defines financial debt to mean:*

> ***(8) "financial debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money*** *and includes—*
> *(a) money borrowed against the payment of interest;*
> *(b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;*
> *(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;*
> *(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;*
> *(e) receivables sold or discounted other than any receivables sold on non-recourse basis;*
> *(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing; ….*

**16.** A perusal of the aforesaid provision shows that for a transaction to be considered as a financial debt under the Code, there should be '*disbursal against consideration for the time value of money*.' It is relevant herein to refer to the judgments of the Hon'ble Supreme Court on the issue of what constitutes a "financial debt" and who can be considered as a "financial creditor" for the purpose of the Code. The Hon'ble Supreme Court in ***Jaypee Infratech Ltd. Interim Resolution Professional v. Axis Bank Ltd., (2020) 8 SCC 401*** have expounded the basic essentials of Financial debt to mean:

> ***The essentials for financial debt and financial creditor***
> **46.** *Applying the aforementioned fundamental principles to the definition occurring in Section 5(8) of the Code, we have not an iota of doubt that for a debt to become "financial debt" for the purpose of Part II of the Code, the basic elements are that it ought to be a disbursal against the consideration for time value of money. It may include any of the methods for raising money or incurring liability by the modes prescribed in clauses (a) to (f) of Section 5(8); it may also include any derivative transaction or counter-indemnity obligation as per clauses (g) and (h) of Section 5(8); and it may also be the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in clauses (a) to (h).* ***The requirement of existence of a debt, which is disbursed against the consideration for the time value of money, in our view, remains an essential part even in respect of any of the transactions/dealings stated in clauses (a) to (i) of Section 5(8), even if it is not necessarily stated therein****. In any case, the definition, by its very frame, cannot be read so expansive, rather infinitely wide, that the root requirements of*

*"disbursement" against "the consideration for the time value of money" could be forsaken in the manner that any transaction could stand alone to become a financial debt. In other words, any of the transactions stated in the said clauses (a) to (i) of Section 5(8) would be falling within the ambit of "financial debt" only if it carries the essential elements stated in the principal clause or at least has the features which could be traced to such essential elements in the principal clause.* ***In yet other words, the essential element of disbursal, and that too against the consideration for time value of money, needs to be found in the genesis of any debt before it may be treated as "financial debt" within the meaning of Section 5(8) of the Code. This debt may be of any nature but a part of it is always required to be carrying, or corresponding to, or at least having some traces of disbursal against consideration for the time value of money.***

***47.*** *As noticed, the root requirement for a creditor to become financial creditor for the purpose of Part II of the Code, there must be a financial debt which is owed to that person. He may be the principal creditor to whom the financial debt is owed or he may be an assignee in terms of extended meaning of this definition but, and nevertheless, the requirement of existence of a debt being owed is not forsaken.*

***50.*** *A conjoint reading of the statutory provisions with the enunciation of this Court in Swiss Ribbons [Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17] , leaves nothing to doubt that in the scheme of the IBC,* ***what is intended by the expression "financial creditor" is a person who has direct engagement in the functioning of the corporate debtor; who is involved right from the beginning while assessing the viability of the corporate debtor; who would engage in restructuring of the loan as well as in reorganisation of the corporate debtor's business when there is financial stress. In other words, the financial creditor, by its own direct involvement in a functional existence of corporate debtor, acquires unique position, who could be entrusted with the task of ensuring the sustenance and growth of the corporate debtor, akin to that of a guardian****. In the context of insolvency resolution process, this class of stakeholders, namely, financial creditors, is entrusted by the legislature with such a role that it would look forward to ensure that the corporate debtor is rejuvenated and gets back to its wheels with reasonable capacity of repaying its debts and to attend on its other obligations. Protection of the rights of all other stakeholders, including other creditors, would obviously be concomitant of such resurgence of the corporate debtor.*

**17.** Time value of money has been defined as a concept meaning "a sum of money is worth more now than the same sum of money in the future. Further the report of the Insolvency Law Committee dated 26-3-2018 describes **"**time value" to mean compensation or the price paid for the length of time for which the money has been disbursed.

**18.** The ratio emerging from the aforesaid judgment is that for a debt to be considered as a "financial debt" under the Code, it is to be seen that the money was disbursed and that such disbursal was against a consideration for the time value of money.

Similarly, for an Applicant to be considered as a "financial creditor" under the Code, it is to be seen that such Applicant had assessed the financial viability of the corporate debtor and would engage in restructuring of the loan or reorganization of the corporate debtor's business if the latter would fall in a financial stress. Further it would be noteworthy to mention that Hon'ble Supreme Court in ***Orator Marketing (P) Ltd. v. Samtex Desinz (P) Ltd., (2023) 3 SCC 753*** has even considered interest free loans to fall under the definition of Financial Debt having commercial effect of borrowing as defined under Section 5(8)(f) of the Code. In effect, transaction involving payment of interest along with principal is one type of financial debt and that if the transaction does not involve *'payment of interest'* the said transaction would not be outside the purview of section 5(8) of the Code.

**19.** Now resorting back to the facts of the present case, it is observed that transfer of Rs. 2,00,00,000 by way of RTGS is proven by the bank record **(Annexure C of the petition**) and the same has not been disputed by the CD. It is submitted by FC that alleged transaction of Rs. 2,00,00,000 was given as a loan @18%interest p.a. and the said amount has been acknowledged by the CD in its Balance Sheet 2013-14, 2014-15, 2015-16, 2016-17, 2017-18, 2018-19, 2019-20, 2020-21. We may now look at the Balance Sheet of the CD as relied upon by FC. It is observed from the balance sheet of CD that the amount of Rs. 2,00,00,000 has been shown as Inter Corporate Deposit under the heading "Long Term Borrowing" from the period 2013-2017 and from the period 2018-2021, the said amount has been shown as "Unsecured Loans" under the heading "Long Term Borrowing." However, the said amount has been removed from the Balance Sheet for the F.Y. 2021-22. It is the contention of the FC that after the receipt of demand notice dated 02.05.2022 the CD has unilaterally removed this liability from its Balance Sheet for year ending 31.03.2022, Per contra it is submitted by CD that the said amount has been forfeited since the FC has not been able to pay the balance amount against the purchase of the property. However, it is noteworthy to mention herein that the Balance Sheet of the CD nowhere mentions when the said alleged loan was repayable and at how much interest, if any.

**20.** Mere recording of transaction in the balance sheet of the CD as "Inter-Corporate Deposit" would not constitute it as Financial Debt unless proved by supporting document. Further, it is observed from Part V of the petition that FC has not relied upon any other document apart from Balance Sheet and Demand Notice to substantiate its claim of Rs. 2,00,00,000 along with interest and that Balance Sheet & Demand Notice are not conclusive proof of the repayment of alleged loan. It is iterated that Balance Sheet as relied upon by the FC does not contemplate any *"note forming part of Balance Sheet"* which relates to repayment of the said alleged loan, hence not conclusive. Part-V of the petition is extracted below:

**PART V**

**PARTICULAR OF FINANCIAL DEBT (DOCUMENTS, RECORDS AND EVIDENCE OF DEFAULT**

| | |
|---|---|
| 1. | Particulars of security held, if any, the date of creation, its estimated value as per the creditor. |

| | |
|---|---|
| | Attach a copy of a certificate of registration of charge issued by the Registrar of Companies (if the corporate debtor is a company).<br>No formal registered charge was created hence, no such copy of a certificate of registration of charge issued by the registrar of companies is available to the Financial Creditor/Applicant. |
| 2. | Particulars of an order of a court, tribunal or arbitral panel adjudicating on the default, if any (attach a copy of the order)<br>No Court order is available for both the financial creditor as no court matter is pending in any court or tribunal as on the date of filing the present application between the parties. |
| 3. | Record of default with the information utility, if any (attach a copy of such record)<br>Not known |

| | |
|---|---|
| 4. | Details of succession certificate, or probate of a will, or letter of administration, or court decree (as may be applicable), under the Indian Succession Act, 1925 (10 of 1925) attach a copy)<br>Not applicable |
| 5. | The latest and complete copy of the financial contract reflecting all amendments and waivers to date (attach a copy)<br>a. Short Term Loan extended in terms of board resolution dated 5.10.2013. Copy is annexed herein as **Annexure-B**. |
| 6. | A record of default as available with any credit information company (attach a copy).<br>Not Known |

| | |
|---|---|
| 7. | Copies of entries in a banker's book in accordance with the Banker's Book Evidence Act, 1891 (18 of 1891) (attach a copy)<br>1. Copy of Bank Statement of financial creditor along with certificates as per Banker's Book of Evidence Act, 1891 issued by Bank to demonstrate RTGS transfer transaction of Rupee Two Crore Only on 8.10.2013 in favour of Corporate Debtor i.e. SkyhighTechnobuild Private Limited.Copy is annexed herein as **Annexure-C Colly**. |
| 8. | List of other documents attached to this application in order to prove the existence of financial debt, the amount and date of default.<br>a. The Corporate DebtorAcknowledge and made admission of Short Term Loan of Rs. 2,00,00,000/- (Rupee Two Crore Only) from Financial Creditor;continuously in theirP&L, Balance Sheet, and Auditors Report of the Financial Years 2013-2014, 2014-2015, 2015-2016,2016-2017, 2017-2018, 2018-2019 and2019-2020. Copiesare annexed herein as **Annexure-D (colly)**.<br>b. Copy of Demand Notice along with its postal receipts dated 2.5.2022 along with delivery track reports. Copiesare annexed herein as **Annexure-E (colly)**.<br>c. Written communication by the proposed interim resolution professional as set out in Form 2 of the Insolvency and Bankruptcy (Application to Adjudicating Authority Rules, 2016. |

**21.** The FC has relied upon ***M/s IFCI Limited, v. Sutanu Sinha Company Appeal (AT) (CH) (INS.) NO. 108/2023 (Para 32) & Agarwal Polysacks supra (Para 20)*** to state that entries in balance sheet is enough evidence to establish the existence of Financial Debt. However in ***Sutanu Sinha (supra)***, the Hon'ble NCLAT at para 32 clearly mentioned that "it would depend upon the facts and circumstances of each case as to whether such an entry in the balance sheet construes a financial debt." Para 32 is extracted below:

> *32. It is evidenced from the material on record that as per terms of the CLA between the Lenders Consortium, assigned to ACRE and the Corporate Debtor, the Corporate Debtor was prohibited from taking any further debt without the consent of the assignee. The Record does not show anywhere that any such approval was sought by the Corporate Debtor from the Lenders Consortium. At the time of disbursal of the amount, it was to be treated as Equity alone and not as 'Debt'.* ***Even if these***

***amounts were reflected in the financial statements of the Corporate Debtor as 'Other Financial Liability', it would depend on the facts of each case as to whether such an entry in the balance sheet construes a 'Financial Debt' as defined under the Code****. In the instant case, the terms of the DSA, CLA and the 'Share Agreement' have to be read together with the fact that it was the Sponsor Company which was liable to pay the interest component and not the Corporate Debtor.*

Further in ***Agarwal Polysacks (supra),*** the Appellant was able to show the nature of debt through the Balance Sheet and it was clearly mentioned that the loan is "***repayable on demand."*** Relevant para of ***Agarwal Polysacks (supra)*** is extracted below for ready reference:

> ***25.*** *From the aforesaid Balance Sheet following can be deciphered:*
>
> *(i) The Corporate Debtor has referred to amount received from the Appellant as 'Long Terms Borrowing'.*
>
> *(ii) M/s Agarwal Polysacks Ltd. is mentioned as 'unsecured' under the heading 'Term Loan'*
>
> ***(iii) Term of payment of loan indicates that loan of M/s Agarwal Polysacks Ltd. is 'repayable on demand'.***
>
> ***26. The above clearly prove that there was tenure of the loan i.e. repayment on demand****. Further, loan was unsecured loan and thereby the loan was coupled with interest component since in the Balance Sheet of FY 2017-18 amount mentioned was Rs. 79,70,250 which was increased to Rs. 88,42,993 in the FY 2018-19, which is on account of interest component.*

In the present case, the FC has not been able to corroborate through balance sheet as to when the alleged loan was repayable, interest component (if any) etc. Therefore the stand taken by FC is wholly misconceived.

**22.** Per contra, at the outset it is noteworthy to mention herein that in the balance sheet of the FC for the FY 2013-2014, 2014-2015, 2015-2016 the amount of Rs. 2,00,00,000 has been shown as "Advance Against Property" and no such explanation has been accorded by the Financial Creditor in its rejoinder.

**23.** In the above backdrop due to non- furnishing of any loan agreement/ financial contract/ any other document *(including Balance Sheet/Notes forming part of Balance Sheet*) which evidences that the amount of Rs. 2,00,00,000 was in the nature of loan, it cannot be ascertained as to when the "default", under Section 5(12) of the Code occurred. Although the FC has stated that a demand notice dated 02.05.2022 was served upon the CD on 05.05.2022, it is pertinent to note that the date on which the said transaction of Rs. 2,00,00,000/- had occurred was 08.10.2013 and nothing has been brought on record before this Adjudicating Authority which would show that the FC took steps to recover the said amount from the CD prior to serving of the above- mentioned demand notice. A substantial time of 9 years (before serving of demand notice) has passed and that FC took no steps to recover the said alleged loan amount.

**24.** It is once again reiterated that in the absence of any loan agreement, financial contract or any other supporting document which would indicate the intention of the advancement of loan from the FC to the CD, the date by which the amount is to be repaid, the interest rate arising on such loan and other terms and conditions thereof, the FC has failed to establish that the aforesaid transaction of Rs. 2,00,00,000/- (Rupees Two Crores Only) was in the nature of a loan advance to the CD which would constitute a "financial debt" for the purpose of this Code and that the applicant is a Financial Creditor within the meaning of the Code. Therefore none of the essential ingredients as mentioned above have been satisfied by the FC to ascertain the nature of transaction in question.

Thus, Issue No.2 is answered accordingly.

**25.** The CD has also stated that the alleged loan of Rs. 2,00,00,000 (stated to be provided by FC) is four times the paid up share capital of the FC *(paid up share capital being 50,00,000 in the year 2013).* It is stated by the CD that it is incomprehensible as to how the FC advanced the alleged loan amount being four times of its paid up capital as it being in gross violation of Section 186(4) of the Companies Act, 2013. In this context it is relevant to mention Section 186 of the Companies Act, 2013 relevant portion of which is extracted below:

**Section 186 of the Companies Act, 2013**

***(2) No company shall directly or indirectly —***

***(a) give any loan to any person or other body corporate.***

*(b) give any guarantee or provide security in connection with a loan to any other body corporate or person; and*

*(c) acquire by way of subscription, purchase or otherwise, the securities of any other body corporate,* ***exceeding sixty per cent. of its paid-up share capital, free reserves and securities premium account or one hundred per cent. of its free reserves and securities premium account, whichever is more.***

*(3) Where the giving of any loan or guarantee or providing any security or the acquisition under sub-section (2) exceeds the limits specified in that subsection,* ***prior approval by means of a special resolution passed at a general meeting shall be necessary.***

*(4) The company shall disclose to the members in the financial statement the full particulars of the loans given, investment made, or guarantee given or security provided and the purpose for which the loan or guarantee or security is proposed to be utilized by the recipient of the loan or guarantee or security.*

**26.** What can be elucidated from the above provision is that a company cannot give loan to any person or body corporate exceeding 60% of its *paid-up share capital, free reserves and securities premium account or one hundred per cent of its free reserves and securities premium account, whichever is more.* The alleged loan amount of Rs.2,00,00,000 is stated to be provided in the year 2013. However, from the balance sheet of the FC it is observed that the paid up capital in the year 2013 is Rs. 50,00,000, there being no Security Premium Account or Reserves and Surplus. Hence FC could have only provided 60% of the said 50,00,000 as loan without any resolution being passed at the general meeting. No, special resolution passed at the general meeting has been annexed by the FC. In this regard it is relevant to quote ***UKG Steel (P) Ltd. v. Erotic Buildcon (P) Ltd., 2021 SCC OnLine NCLT 434*** passed by Hon'ble NCLAT, the relevant paragraphs of which are extracted below:

***12.*** *To calculate whether the Petitioner-financial creditor has given loan in terms of Section 186 of Companies Act, 2013 we refer to Page 50 of the Petition, wherein the Balance Sheet of the Financial Creditor has annexed which depicts that the Paid-Up Share Capital of the Petitioner-financial creditor company is of Rs. 97,75,020 and Reserves and Surplus are of Rs. 66,58,072. The information of Security Premium Account has not been separately provided in the Balance Sheet. That the aggregate of Paid-Up Share Capital and Reserves and Surplus amounts to Rs. 1,64,33,092 and 60% of that amount is Rs. 98,59,855.2. If we compare both the amounts, then we observe that the loan amount disbursed by the Financial Creditor is more than 3*

*Crore which is much more than 60% of aggregate of Paid-up Share Capital and Reserve and Surplus.*

***13. That the Petitioner has neither made the disclosure of such Inter Corporate Loan in its Balance Sheet nor it had produced the Special Resolution passed in the EGM of Shareholders for the purpose of compliance of Section 186(3) of Companies Act, 2013. Further, the Loan Agreement does not speak about any such resolution passed by the shareholders.***

***14. Therefore, the material available on the record suggest that the borrowing given by the Petitioner is contrary to the limit prescribed under Companies Act, 2013 which amounts to an ultra vires act committed by the Petitioner. Hence the loan advanced by the Petitioner is not a legally enforceable debt.***

**27.** As discussed above FC has failed to establish that the aforesaid transaction of Rs. 2,00,00,000/- was in the nature of a loan advanced to the CD which would constitute a "financial debt" for the purpose of this Code. Even if we assume that the said transaction was in the nature of loan, material available on the record suggest that the amount given by the Petitioner is contrary to the limit prescribed under Companies Act, 2013 which amounts to an ultra vires act and is not a legally enforceable debt.

For the aforesaid reasons, we are inclined to dismiss the Section 7 petition filed by Proplarity Infratech Private Limited.

**28.** Furthermore the FC in its rejoinder has stated that, the CD has attempted to play fraud on this Tribunal by way of submitting three documents dated 09.10.2013, 17.10.2016 and 15.04.2021 during the course of the proceedings. By way of the said documents, the CD had attempted to show that the loan amount was in fact an advance against purchase of property by FC which was forfeited due to non-payment of the balance amount. The FC contended that the said documents were in fact back dated documents created after the institution of the present petition and that the CD had failed to show that the aforesaid letters were even received by the FC. Per Contra, the CD in its sur-rejoinder has stated that while the said transaction was going on, the CD asked the FC to provide the address and the FC has itself provided the same address.

**29.** However, we are of considered view that the FC has not been able to demonstrate that the alleged transaction of Rs. 2,00,00,000 constitutes "financial debt" and as to when the default occurred. Therefore there is no occasion for this Tribunal to go into the merits of the allegations made by the FC that the CD had attempted to play fraud on this Tribunal by submitting forged and backdated documents.

**30**. During the course of the proceedings, another Interlocutory Application ***[I.A. No. 595/20204]*** dated 02.02.2024 was filed by the CD wherein it is prayed that the FC should be held liable for malicious prosecution under Section 65 of the Code. The contention raised by the CD was that the FC had deliberately not attached its balance sheets for the FYs 2013-14, 2014-15, 2015-16 wherein the alleged transaction of Rs. 2,00,00,000/- was mentioned under the head "Advance Given Against Property." Further, the CD alleged that the Board Resolution dated 05.10.2013 annexed as Annexure B of the petition was a fabricated back dated document.

**31**. In this regard Hon'ble NCLAT in ***Monotrone Leasing Private Limited v. PM Cold Storage Private Limited, 2020 SCC OnLine NCLAT 581*** had made the following observation regarding the objective of Section 65 as well as the need to furnish documentary evidence to show fraudulent/ malicious intent:

> ***34.*** *Section 65 of the Code provides for penal action for initiating Insolvency Resolution Process with a fraudulent or malicious intent or for any purpose other than the resolution. However, the same cannot be construed to mean that if a petition is filed under Section 7, 9 or 10 of the Code without any malicious or fraudulent intent, then also such a petition can be rejected by the Adjudicating Authority on the ground that the intent of the Applicant/Petitioner was not resolution for Corporate Insolvency Resolution Process.* ***As the proceedings under IBC are summary in nature, it is difficult to determine the intent of the Applicant filing an application under Section 7, 9 or 10 of the Code unless shown explicitly by way of documentary evidence. This situation may arise in specific instances where a petition is filed under IBC specifically with a fraudulent or malicious intent.***

**32.** Further it has been held in catena of judgments that the Adjudicating Authority needs to form a *prima facie* opinion to hold a party liable under section 65 of the code. In ***Amit Katyal v. Meera Ahuja, 2020 SCC OnLine NCLAT 748,*** the Hon'ble NCLAT held as under:

> ***47. It is necessary to keep in mind that Sec 65 of the Code is not meant to negate the process u/s 7 or 9 of the Code. Penal action u/s Sec 65 can be taken only when the provision of the Code has been invoked fraudulently, with malicious intent. The Hon'ble Supreme Court in Pioneer's case has given an instance of Home Buyer/Allottee, who does not have an interest in taking the possession and is only an investor, it has initiated the proceeding with malicious intent. The Allottee does not want to go ahead with its obligation to take possession of the flat/Apartment under RERA but wants to jump ship and wants to get back the monies already paid, by way of this coercive measure. In such cases, the use of Sec 65 is held justified, because one 'Home Buyer' by misusing his position could not stall the entire Real Estate Project. But it does not mean that any 'Insolvency Application' satisfying the requirements of Sec 7 or 9 of the I&B Code, could be dismissed Arbitrarily under the guise of Sec 65 of the Code.***
>
> ***"49. ……To levy a penalty under Section 65 of the Code, a 'prima facie' opinion is required to be arrived at that a person has filed the petition for initiation of proceedings fraudulently or with malicious intent. No penalty can be saddled either under Section 65(1) or (2) of the Code without recording an opinion that a prima facie case is established to suggest that a person "fraudulently" or with malicious intent for the purpose other than the resolution of Insolvency or Liquidation or with an intent to defraud any person has filed the Application."***

**33.** Further, another Interlocutory Application *[**I.A. No. 1097/2024**]* dated 05.02.2024 was filed by the CD under Section 340 CrPC r/w Rule 11 of the NCLT Rules, 2016 wherein it was *inter alia* prayed that proceedings be initiated against the FC under Sections 191/192/196/197/198/199/200/202/209 of the Indian Penal Code, read with Sections 120-B and 176 IPC and other provisions of law. To support his prayer, the CD contended that the FC had willfully and deliberately made false statements on duly sworn affidavits knowing them to be false and that the FC had complete knowledge of the fact that no loan had been advanced by it to the CD. It was again alleged that the FC had wilfully and knowingly manufactured and fabricated backdated Board Resolution dated 05.10.2013.

**34.** It is pertinent to mention that the Hon'ble NCLAT in ***Mist Direct Sales (P) Ltd. v. Nitin Batra, 2024 SCC OnLine NCLAT 134*** held that for initiating any investigation under Section 340 CrPC, the court needs to form an opinion that it is expedient to do so in the interest of justice. Relevant extract of the order is reproduced here below:

> *"**14.** .....*
> *"The mere fact that a person has made a contradictory statement in a judicial proceeding is not by itself always sufficient to justify a prosecution under Sections 199 and 200 of the Indian Penal Code (45 of 1860) (hereinafter referred to as "the IPC"); but it must be shown that the defendant has intentionally given a false statement at any stage of the judicial proceedings or fabricated false evidence for the purpose of using the same at any stage of the judicial proceedings. Even after the above position has emerged also,* ***still the court has to form an opinion that it is expedient in the interests of justice to initiate an inquiry into the offences of false evidence and offences against public justice and more specifically referred in Section 340(1) of the CrPC, having regard to the overall factual matrix as well as the probable consequences of such a prosecution."***
>
> ***15. The Hon'ble Supreme Court in the above case of Amarsang Nathaji has held that Court has to form an opinion that it is expedient in the interests of justice to initiate an inquiry into the offences of false evidence and offences against public justice and more specifically referred in Section 340(1) CrPC. The Adjudicating Authority has rightly not initiated proceeding under Section 340 of CrPC****. In view of the facts of the present case, we see no error in decision of the Adjudicating Authority not to direct any action under Section 340(1) of the CrPC."*

**35.** Thus, for taking action under Section 65 of the Code for malicious prosecution against the FC, as prayed by the CD, it is necessary that documentary evidence is brought on record of this Tribunal which leads it to form a prima facie opinion that the proceedings have been initiated with such intention. Likewise for initiating an inquiry u/s 340 CrPc, this adjudicating authority has to form a prima facie opinion that it is necessary to initiate an inquiry into the offences as may be alleged.

**36.** In the present case there are allegations and counter allegations of forgery, fabrication of documents etc. However since we are dismissing the application filed u/s 7 of the Code, we do not intend to delve further into the issue. However, we observe that the documents

submitted by CD do not enable us to form a prima facie opinion as required for meeting the rigors of Section 65 of the Code or Section 340 of CrPc.

**ORDER**

1. Accordingly, Company Petition bearing No. **CP (IB)-607(PB)/2023** filed by the Proplarity Infratech Private Limited against Sky High Technobuild Private Limited under Section 7 of IBC, 2016 for initiation of Corporate Insolvency Resolution Process is **DISMISSED.**

2. I.A. No. 595/2024 and I.A. No. 1097/2024 are also dismissed
3. No order as to cost.
4. Any other pending IA(s) /CA(s) are also disposed of.
5. A copy of this order may be given to the parties free of cost.
6. The file may be consigned to the record storage (current).

**Sd/-**
**RAMALINGAM SUDHAKAR**
**(PRESIDENT)**

**Sd/-**
**AVINASH K. SRIVASTAVA**
**(MEMBER TECHNICAL)**