

IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD
DIVISION BENCH
COURT - 1

ITEM No.303 - C.P.(IB)/227(AHM)2023
With
ITEM No.304 - IA/1465(AHM)2023

Order under Section 7 IBC

IN THE MATTER OF:

Intec Capital Limited
V/s
Swadesh Essfil Private Limited

.....Applicant

.....Respondent

Order delivered on: 09/05/2024

Coram:

Mr. Shammi Khan, Hon'ble Member(J)
Mr. Sameer Kakar, Hon'ble Member(T)

PRESENT:

For the Applicant :
For the Respondent :

ORDER

The case is fixed for pronouncement of the order. The order is pronounced in the open court, vide separate sheet.

-Sd-
SAMEER KAKAR
MEMBER (TECHNICAL)

-Sd-
SHAMMI KHAN
MEMBER (JUDICIAL)

**BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH -I, AHMEDABAD**

**CP(IB)/227/AHM/2023
Along with
IA No. 1465 of 2023**

In the matter of:

CP(IB)/227/AHM/2023

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

INTEC CAPITAL LIMITED

CIN: L74899DL1994PLC057410
708, Manjusha Building, 57,
Nehru Place, New Delhi-110019.

...APPLICANT/FINANCIAL CREDITOR

VERSUS

SWADESH ESSFIL PRIVATE LIMITED

CIN: U25209GJ2009PTC058238
Registered Office at:
201, Vraj Venu Complex,
18 MTR Gotri-Samta Road,
Gotri, Vadodara-390021.

...RESPONDENT/CORPORATE DEBTOR

Along with

IA No. 1465 of 2023 in CP(IB) No. 227 of 2023

[An application filed under Section 4 of IBC, 2016 r.w. Rule 11 of the NCLT Rules, 2016]

In the matter between:

SWADESH ESSFIL PRIVATE LIMITED

CIN: U25209GJ2009PTC058238

Registered Office at:

201, Vraj Venu Complex,
18 MTR Gotri-Santa Road,
Gotri, Vadodara-390021.

....Applicant/Original Respondent

VERSUS

INTEC CAPITAL LIMITED

CIN: L74899DL1994PLC057410

708, Manjusha Building, 57,
Nehru Place,
New Delhi-110019.

....Respondent/Original Applicant

Order Pronounced On: 09.05.2024

CORAM:

SH. SHAMMI KHAN, HON'BLE MEMBER (JUDICIAL)

SH. SAMEER KAKAR, HON'BLE MEMBER (TECHNICAL)

Appearance:

For the Applicant	: Mr. Harshil Patel, Advocate a/w
	: Mr. Dhruv Parwal, Advocate
For the Respondent	: Ms. Gargi Vyas, Advocate a/w
	: Mr. Shashank Trivedi, Advocate

COMMON ORDER

(PER: BENCH)

CP(IB) 227 of 2023

1. The Present Application is filed on 22.08.2023 by the Applicant - Intec Capital Limited (hereinafter referred to as **“Financial Creditor”**) against the Respondent -

Swadesh Essfil Private Limited (hereinafter referred to as **“Corporate Debtor”**) under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as **“IBC, 2016”**) read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as **“IB (AAA) Rules, 2016”**) for initiation of Corporate Insolvency Resolution Process (**CIRP**) against the Respondent/Corporate Debtor, to appoint Interim Resolution Professional (hereinafter referred to as **“IRP”**) and declare the moratorium for having defaulted in payment of its outstanding financial debt of **Rs.1,85,80,751/-** including interest and other charges. The date of default as stated to be 13.05.2017.

2. On perusal of Part-I of the Form-1 reveals that the Applicant – Financial Creditor herein is a Non-Banking Financial Institution (NBFC) having its registered office at 708, Manjusha Building, 57, Nehru Place, New Delhi-110019. The Financial Creditor was incorporated on 15.02.1994. The affidavit in support of the application is affirmed by Ms. Shikha Kadyan, Manager-Legal, Intec

Capital Limited. The Board Resolution dated 03.06.2022 authorizing Ms. Shikha Kadyan, is annexed as **Annexure-B.**

3. Part II of the Form-1 reveals that the Respondent-Corporate Debtor is Swadesh Essfil Private Limited. The Corporate Debtor was incorporated on 05.10.2009 with CIN: U25209GJ2009PTC058238. The registered office of the Corporate Debtor is situated at 201, Vraj Venu Complex, 18 MTR Gotri-Samta Road, Gotri, Vadodara - 390021.
4. Part-III of the Form-1 reveals that the Applicant – Financial Creditor has proposed the name of the Insolvency Professional (**‘IP’**) Mr. Debashis Nanda, having Registration No. IBBI/IPA-003/IP-N000040/2017-18/10316 to act as Interim Resolution Professional (**IRP**). Form 2 has been filed along with Authorisation for Assignment (AFA) as per the requirement of Rule 9(l) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. The AFA is valid till 20.12.2024.

5. Part-IV of the Form-1 reveals that total dues as claimed by the Applicant-Financial Creditor is Rs.1,85,80,751/- consisting principle amount, other charges as well as interest up-to 31.01.2023.
6. It is stated that the Cooperate Debtor through its Directors approached the Financial Creditor to avail financial assistance in the shape of Term Loan of Rs.40,61,619/- for purchase of Machinery and submitted loan application. The Financial Creditor after considering the loan application on 30.04.2015 sanctioned a Term Loan of Rs.40,61,619/- for purchase of Machinery to the Corporate Debtor against primary security of hypothecation of Machinery, personal guarantee and collateral security by way of deposit of interest free collateral money being 20.00% of the loan amount i.e. Rs.8,12,323.80ps. as outlined in Sanction Letter in favour of the Financial Creditor.
7. The Corporate Debtor executed and signed various loan and security documents on 30.04.2015 in favour of the Financial Creditor. The loan was to be repaid in 60 EMIs

each of Rs.93,459/- on 5th day of each month commencing from 05.06.2015 and last instalment was to be repaid on 05.05.2020. The fixed rate of interest was agreed between the parties @13.50% per annum. Further, penal charges as delay interest @3.00% per month on delay payment/Non-payment of installment compounded on monthly basis, calculated on daily basis from the cheque date till receipt of payment.

8. Accordingly, on 19.05.2015 at the request of the Corporate Debtor after deducting Collateral Money i.e. 20% of the loan amount being Rs.8,12,323.80ps., processing fees and other charges, the loan amount of Rs.31,66,101/- was disbursed to the Suppliers in two tranches to the tune of Rs.2,50,000/- and Rs.29,16,101/- to Sunstar Graphics Pvt Ltd. and Target Sign Tech Pvt Ltd respectively.
9. However, after availing the aforesaid Credit Facility, the Corporate Debtor failed to repay the installments as per terms and conditions of the loan agreement due to which loan account became irregular. Consequently, the said

account of the Corporate Debtor was recalled vide Loan Recall Notice dated 13.05.2017 and Arbitration Proceeding were initiated against the Corporate Debtor. Subsequently, an Arbitral Award with respect to the above-mentioned Credit Facility was passed ex-parte in favour of the Financial Creditor on 11.12.2017.

10. Since, the Corporate Debtor failed to honour the Arbitral award and made multiple defaults in the repayment schedule of the Loan agreement, the Financial Creditor exercised its right under Clause 2.11.3 of the Loan agreement no. LNVAD03315 - 160005609 and presented the PDCs, which were issued by the Corporate Debtor in favour of the Financial Creditor for the repayment of its loan. Accordingly, the default continued every time as per Section 18 & 19 of the Limitation Act, 1963, when the PDCs *(given as valid acknowledgment of debt on part of the Respondent}*, which were due and payable by the Corporate Debtor, were presented on their due dates and the same were dishonoured.

11. Default continued to occur as per Section 18 & 19 of the Limitation Act, 1963, when the Financial Creditor has received the last payment (given as valid acknowledgment of debt), provided by the Corporate Debtor to the Financial Creditor in Loan account no. LNVAD03315-160005609.
12. Default again occurred when the last cheque (given as valid acknowledgment of debt), provided by the Corporate Debtor to the Financial Creditor in Loan Agreement no. LNVAD033 1 5-160005609 was bounced/dishonoured and the Corporate Debtor failed to honour its financial obligation/promise to the Financial Creditor as per aforementioned clauses of the Loan agreement.
13. That, details of the last payment made by the Corporate Debtor in the Loan Account, is as follows:-

Loan A/c No.	Date	Cheque No./ ECS/ NEFT	Amount
LNVAD03315-160005609	20.02.2017	323751418A1	20,000

14. That, details of the last bounced cheque submitted by the Corporate Debtor in the Loan Account, is as follows:-

Loan A/c no.	Date	Cheque No./ ECS/ NEFT	Amount
LNVAD03315- 160005609	05.09.2019	133372	93,459

15. That the Financial Creditor has also initiated proceedings under Section 138 of Negotiable Instrument Act, 1881 against the Corporate Debtor towards the security cheque issued by the Corporate Debtor for repayment of the dues at the time of recall of the financial facility by the Financial Creditor which was dishonoured upon its presentation.

16. That the default is still continuing and every time the debt is duly acknowledged by the Corporate debtor in its balance sheets for the year (2019-2020) and (2020- 2021) as per Section 18 & 19 of the Limitation Act, 1963 and the Corporate Debtor defaulted in the repayment of its due/ financial obligation towards the Financial Creditor.

Copy of Balance sheets for the year (2019-2020) and (2020-2021) are annexed as **Annexure-O**.

17. That, the total outstanding financial debt after adjusting collateral security & amount repaid stands at Rs.1,85,80,751/- (Rupees: One Crore Eighty-Five Lakhs Eighty Thousand Seven Hundred Fifty-One Only) as on 31.01.2023, due & payable by Corporate Debtor in respect of the said credit facility. Copy of the statement of dues (SOD) calculated till 31.01.2023 along with computation as well as of loan transaction details maintained by the Financial Creditor are annexed as **Annexure-M** & **Annexure-N**. The calculation details of the due amount is as under;-

S. No.	Particular	Total Due Amount
1.	Overdue Installments	4,47,295
2.	Principal Outstanding	27,54,003
3.	Delay Interest @3.00% P.M. compounded on monthly basis	1,60,80,492
4.	Legal Charges	61,000
5.	Insurance Due	11,530
6.	Cheque Bouncing Charges	33,000
7.	Applicable Taxes	5,755
8.	Collateral Money (Less)	-8,12,324
9.	Net Receivables	1,85,80,151

18. The Financial Creditor is relying on the following documents:-

- a. *Copy of Certificate of Registration of Financial Creditor as NBFC, issued by Reserve Bank of India along with MCA data as **Annexure-A**;*
- b. *Copy of the Board resolution of the Financial Creditor in favour of the signatory for signing of Section 7 Application under IB Code, 2016 as **Annexure-B**;*
- c. *Copy of Master Data of the Corporate Debtor, from website of Ministry of Corporate Affairs as **Annexure-C**;*
- d. *Copy of the Written Communication in Form 2 from an Interim Resolution Professional proposed to be appointed along with Certificate of Registration and Form - B as **Annexure-D**;*
- e. *Copy of Sanction Letter dated 30.04.2015 for Loan A/c no. LNVAD03315- 160005609 through which loan sanctioned as **Annexure-E**;*
- f. *Copy of the Board Resolution passed by the Corporate Debtor for availing credit facility from Financial Creditor as **Annexure-F**;*
- g. *Copy of Loan Agreement Dt. 30.04.2015 for Loan A/c No. LNVAD03315-160005609 along with other transitional documents and addendum to the Loan-cum-hypothecation Agreement as **Annexure-G**;*
- h. *Copy of Form-8 filed with ROC to create charge along with certificate of charge for the loan account as **Annexure-H**;*

- i. *Copy of bank account statement maintained with the bank by Intec Capital showing loan disbursement to the supplier at the request of Corporate Debtor by the Financial Creditor along with copy of request letter of the disbursement as **Annexure-I**;*
- j. *Copy of the Repayment Schedule under the Loan agreement/Loan account no. LNVAD03315-160005609 as **Annexure-J**;*
- k. *Copy of Loan Recall Notice dated 13.05.2017 as **Annexure-K**;*
- l. *Copy of Arbitral Award dated 11.12.2017 in respect of Loan A/c No. LNVAD03315- 160005609 as **Annexure-L**;*
- m. *Copy of the Statement of Dues (SOD) till 31.01.2023 along with computation as **Annexure-M**;*
- n. *Copy of loan transaction details maintained by the Financial Creditor for the loan account of the Corporate Debtor as **Annexure-N**.*
- o. *Copy of Balance sheet for the year (2019- 2020) (2020-2021) as **Annexure-O**;*
- p. *Record of Default as **Annexure-P**;*

19. In terms of the above stated facts and circumstances, it is evident that the Corporate Debtor has committed default in the repayment of the Debt owed to the Financial Creditor as per Clause 11.1 of the Loan Agreement and in view of the failure of the Corporate

Debtor to repay its Financial Debt, the Financial Creditor is constrained to file the present Application under section 7 of the Code, 2016 before this Adjudicating Authority for initiation of Corporate Insolvency Resolution Process for default in repayment of the above mentioned loan amount along with interest.

20. Notice was issued to the Corporate Debtor and after due service the Corporate Debtor appeared through the counsel and filed Reply on 30.11.2023 vide inward diary No. 4791, denying various averments made in the Application.

i) It is inter-alia stated that the Arbitral Award dated 11.12.2017 (**Annexure-L**) is passed ex-parte against the Corporate Debtor. It is further stated that the Financial Creditor has surreptitiously deposited the cheque on 09.09.2019 (which bounced on its presentation), which was given as a security by the Corporate Debtor way back in May-2015, only with an intention to extend the period of limitation.

- ii) The Financial Creditor has further relied on the Balance-Sheets of the Corporate Debtor as on March 31, 2020 and March 31, 2021 respectively **(Annexure-O)** whereby the company has stated the amount due as under:-

Date of the balance sheet as on	Amount (Rs.)
March 31, 2020 (Page No. 189 of the Petition)	30,36,103/- (minus)
March 31, 2021 (Page No. 208 of the Petition)	The collateral of 8,12,324/-

- iii) However, the assertions of the Financial Creditor are ill-founded for the following reasons:-
- iv) As undated blank cheque deposited at the whim of the Financial Creditor does not extend the alleged period of limitation in its favour.
- v) The Corporate Debtor has not acknowledged the purported debt claimed by the Financial Creditor in the Company Petition in its books of accounts. As stated hereinabove, the amount due to the Financial Creditor, as per its financial records is Rs.30,36,103/-as against the purported claim of

Rs.1,85,80,751/- and the same does construe an acknowledgement of the said alleged debt.

- vi) As per the Arbitral Award, the Financial Creditor has issued legal notice on 13.05.2017, and owing to alleged non-payment of the Corporate Debtor, the disputes were referred to arbitration. Thus, the cause of action for alleged default, if any, commenced on 10.05.2017. Thus, a period of 3 (three) years expired on filing of the Company Petition and the Company Petition is time- barred on the date of its presentation.
- vii) It is stated that Financial Creditor has stated different amounts to be allegedly due before different forums and instances. Before the Arbitral Tribunal the Financial Creditor has submitted that the amount allegedly due on 10.05.2017 was 24,46,864/-.
- viii) However, as per the documents provided by the Financial Creditor to the Corporate Debtor being

calculation sheets of the interest since inception until 20.02.2023 (which is annexed with reply as **Annexure-R1**), the amount allegedly due as on 11.05.2017 is shown to be Rs.23,88,974/- whereas, in present petition at page 178, the principal amount shown as Rs. 27,54,003/-. It is further stated that if the rate of interest @13.00% p.a. is applied on either of the aforementioned amount, the figure does not meet the monetary threshold for filing the present petition.

- ix) It is stated that to inflate its claim, the Financial Creditor has consciously remained ambiguous. It is therefore imperative that the Financial Creditor be called upon to provide a detailed break- up and the components of the calculation. The Corporate Debtor therefore reserves its right to deal with the claim of the Financial Creditor, as and when presented with the legal basis and rationale of the amount arrived at by it.

x) The Corporate Debtor vehemently denied that an amount of 1,85,80,751/- is due or payable to the Financial Creditor under the Loan Agreement, as a financial debt. It is submitted that the Financial Creditor has failed to make out a case for admission of the Company Petition and/or appointment of an interim resolution professional against the Corporate Debtor, as alleged or otherwise. Furthermore, any reliance placed on the terms of the Loan Agreement for levy of compound interest on the Corporate Debtor is illegal and *de hors* the ambit of the Arbitral Award and untenable.

IA/1465(AHM)2023

21. This application has been filed by the Corporate Debtor- Swadesh Essfil Private Limited under Section 4 of the IBC, 2016 and Rule 11 of NCLT Rules, 2016 seeking the following reliefs:-

a. This Hon'ble Adjudicating Authority be pleased to dismiss CP (IB) No. 227 (AHM) of 2023; and

b. Such other and further relief, as may be deemed, just and proper, in the interest of justice, equity and good conscience.

- i) The main contention as stated in the application is that the arbitral award which is enforceable as a decree before the designated commercial court under the provisions of the Arbitration and Conciliation Act, 1996 r/w The Commercial Courts Act, 2015 and Civil Procedure Code, 1908, the Financial Creditor has not been given the liberty to charge the penal interest of 3.00% per month and the said prayer has been declined by way of the Arbitral Award.
- ii) It is submitted that the amount allegedly due pursuant of the Arbitral Award aggregates to Rs.44,93,984.16ps. being Principal outstanding as on the date of the Arbitral Award Rs.24,46,864/- and aggregate Interest as on 31.10.2023 being Rs.20,47,120.16ps. A copy of the certificate of practicing chartered accountant, M/s Dipak Rajpara & Co, dated 20.10.2023 is annexed hereto and marked as **Annexure-A.**

iii) Thus, the Company Petition is contrary to Section 4 since the amount claimed is inflated, misleading, and not met with the monetary threshold for invoking the jurisdiction of this Hon'ble Tribunal for invoking the jurisdiction of this Hon'ble Tribunal u/s 7 of the Code, which is Rs. 1.00 Crore.

22. The Financial Creditor filed reply to the I.A. on 14.03.2024 vide inward diary No. 2072. The following pleas were taken which are as under:-

- a) It is stated that the Commercial Execution Petition which was filed for enforcement of the said Arbitral Award by the Financial Creditor, has been set aside by the Ld. ADJ at Vadodara vide its Order dated 04.01.2024 and held that the said Arbitral Award having been passed unilaterally appointed Sole arbitrator is *nonest and void ab initio*.
- b) It is stated that the said Arbitral Award, which was passed, is deemed null and void which makes amply evident that the Corporate Debtor is liable to repay

its dues as per agreed contractual terms. The total amount due and payable in the present Petition is Rs.1,85,80,751/- (Rupees One Crore Eighty Five Lakhs Eighty Thousand Seven Hundred and Fifty One Only) which clearly makes apparent that the present Petition is completely within the threshold and hence it is filed after completing the minimum requirement of threshold limit as per the provisions of IBC, 2016. Thus, this itself depicts that Corporate Debtor submissions stating that the present Petition merits dismissal on the threshold, has no *locus standi* and is false.

- c) It is stated that the outstanding amount with interest and other charges demanded in the CP (IB) by the Financial Creditor is in accordance with the understanding agreed as mentioned under the Sanction Letter and Loan Agreement executed between both the parties.
- d) That the charged interest amount is calculated as per the stipulated clause in Sanction Letter which

is amply evident from the fact that delay payment charges under the Penal Charges at Page 55 of the Petition depicts about charging **3.00%** per month on delay payment/non-payment of instalment compounded on monthly basis.

- e) Further, Reserve Bank of India in its circular dated July 1, 2015 has already prescribed the mechanism for NBFC'S with respect to charging the rate of interest. Same is reiterated herein for the quick reference:-

(viii) Regulation of excessive interest charged by NBFCs (a) The Board of each NBFC shall adopt an interest rate model taking into account relevant factors such as cost of funds, margin and risk premium and determine the rate of interest to be charged for loans and advances. The rate of interest and the approach for gradations of risk and rationale for charging different rate of interest to different categories of borrowers shall be disclosed to the borrower or customer in the application form and communicated explicitly in the sanction letter.

- f) Thus, the total amount outstanding till the date of filing the present Petition stands at Rs.1,85,80,751/ - is due and payable. Calculation is already annexed at Page 178 as **Annexure-M** along with the main

Petition. It is further pertinent to mention that the charges which are added in the consolidated debt in default as depicted under the statement of dues are also added as per the accordance with the terms and conditions of the Loan agreement and Sanction letter and under the transitional documents.

23. In response to the reply, rejoinder has been filed by the Corporate Debtor in IA No. 1465 of 2023 on 03.04.2024 vide inward diary No. 2842 contradicting the allegations and reiterating its averments made in the I.A.

i) It is stated that the commercial execution petition No. 107 of 2022 for execution of arbitral award was set aside as a nullity and non-set by the learned ADJ, Vadodara, the same fact has been suppressed by the Financial Creditor before this Tribunal. This material suppression deserves the maximum penalty under Section 65 read with 75 of the Code and warrants dismissal on this ground alone.

- ii) The main Petition is beyond the period of limitation under Section 18 of the Limitation Act, 1963 , ('the Act') i.e., after 3 (three) years, the Financial Creditor has advanced the case of the Corporate Debtor by now placing on record the Order whereby the Ld. 4th ADJ at Vadodara has declared the ex-parte Arbitral proceedings and consequential award as non-est and void ab initio. Since the Arbitral Award is now void, the purported continuation of period of limitation as asserted by the Financial Creditor on the said basis, does not survive.
- iii) In addition thereto, the purported continuation of limitation asserted by the Financial Creditor owing to alleged dishonour of undated cheques of the Corporate Debtor presented by the former on 20.02.2017, and 05.10.2019 for the recovery of any purported dues is also untenable in law and not a valid acknowledgement of debt under Section 18 and 19 of the Limitation Act, 1963.

- iv) Reliance is also placed by the Financial Creditor on the Auditors Report and Balance Sheet for the financial years 2019-2020 and 2020 2021 of the Corporate Debtor to allege continuation of period of limitation since 13.05.2017, (**Annexure K** to the Company Petition) i.e. Loan Recall cum Arbitration Notice. The cause of action arising out of the alleged date of default, if any, expired on 13.05.2020. The balance sheet for the financial year 2019-2020 has been signed on 27.10.2020, which is beyond the period of 3 years. Further, no material has been placed on record to demonstrate any alleged acknowledgment by Corporate Debtor of debt during the intervening period from purported date of default.
- v) It is stated that assuming whilst denying that any amount stated to be due in the balance sheet of the Corporate debtor is a valid acknowledgment, the amount therein is significantly lesser than what has been stated in the Company Petition. The amount

stated in the Balance Sheet for the year 2019-20 and 2020-2021 is Rs.30,36,103/- whereas the alleged debt according to Financial Creditor as on 31.01.2023 is Rs.1,85,80,751/-. Thus, the financials of the Corporate Debtor do not tantamount to acknowledgement of debt claimed by the Financial Creditor. Even otherwise, the Company Petition warrants dismissal because the monetary threshold of Rs.1.00 Crore is not being met.

24. The Financial Creditor as well as the Corporate Debtor filed written submissions and relied upon various judgments in support of contentions in their favour. Both the sides also placed on record relevant RBI Circulars.
25. The Financial Creditor has filed Form-D being record of debt and default issued by National E-Governance Services Limited (“NeSL”) in which date of default is recorded as 30.06.2018 and default amount is mentioned as Rs.1,85,80,751/- with status “Deemed to be Authenticated”.

26. We have heard the Ld. Counsel for the Financial Creditor as well as the Corporate Debtor and perused the records.
27. It is an admitted position that Term loan to the tune of Rs. 40,61,619/- was sanctioned by the Financial Creditor to the Corporate Debtor vide Sanction Letter dated 30.04.2015 for which various loan security documents were executed by the Corporate Debtor in favour of the Financial Creditor.
28. It is also admitted position that the loan was to be repaid in 60 EMIs of each Rs.93,459/- 5th day of each month commencing from 05.06.2015 and last instalment was to be repaid on 05.05.2020. The fixed rate of interest was agreed between the parties @13.50% per annum. Further, penal charges as delay interest @3.00% per month on delay payment/Non-payment of installment compounded on monthly basis, calculated on daily basis from the cheque date till receipt of the payment as per the terms and conditions of Sanction Letter and Loan Agreement dated 30.04.2015.

- 29.** Further, admittedly on 19.05.2015 at the request of the Corporate Debtor after deducting Collateral Money 20% of the loan amount being Rs.8,12,323.80ps., processing fees and other charges, the loan amount of Rs.31,66,101/- was disbursed to the Suppliers in two tranches to the tune of Rs.2,50,000/- and Rs.29,16,101/- to Sunstar Graphics Pvt Ltd. and Target Sign Tech Pvt Ltd respectively.
- 30.** However, after availing the aforesaid Term Loan Facility, the Corporate Debtor failed to repay the installments as per terms and conditions of the Loan Agreement and the first default was made on 05.02.2017 as only part payment of Rs.20,000/- was made on 20.02.2017 against EMI of Rs.93,459/- due to which loan account became irregular. Consequently, the said account of the Corporate Debtor was recalled vide Loan Recall Notice dated 13.05.2017.
- 31.** It is also admitted position that Arbitration proceedings as well as proceedings under Section 138 of the

Negotiable Instrument Act were initiated against the Cooperate Debtor by the Financial Creditor for the bounced cheque dated 05.09.2019 submitted by the Corporate Debtor in the Loan Account. Whereas, the Arbitral Award passed on 11.12.2017 was quashed and set aside in Commercial Execution Petition No. 107 of 2022 by the Ld. 4th ADJ at Vadodara vide its Order dated 04.01.2024.

32. It is observed from the facts and pleadings placed before this Tribunal that the penal interest/ charges have been levied @ 3.00% per month or say 36.00% P.A on delay payment/Non-payment of installment and has been compounded on monthly basis as per the Terms & Conditions of Section letter and Loan Agreement dated 30.04.2015. Hence, delayed Interest has been claimed as **Rs.1,60,80,491/-** w.e.f. 05.06.2016 to 31.01.2023 which reflects from the Calculation Sheet of Delay Interest filed by Responded/Corporate Debtor in its Reply as **Annexure R1** page 12 to 15 and the same is not disputed by the Financial Creditor.

33. The calculation details of the amount due alongwith delayed interest @3.00% per month or say 36.00% p.a. on delay payment/Non-payment of installments compounded on monthly basis as per Financial Creditor w.e.f. 05.06.2016 to 31.01.2023 annexed as **Annexure-M** with main Application is as under;-

S. No.	Particular	Total Due Amount
1.	Overdue Installments	4,47,295
2.	Principal Outstanding	27,54,003
3.	Delay Interest @3.00% P.M. compounded on monthly basis	1,60,80,492
4.	Legal Charges	61,000
5.	Insurance Due	11,530
6.	Cheque Bouncing Charges	33,000
7.	Applicable Taxes	5,755
8.	Collateral Money (Less)	-8,12,324
9.	Net Receivables	1,85,80,151

34. The Corporate Debtor has also demonstrated in the said Calculation Sheet of Delayed Interest @3.00% p.m. or say 36.00% p.a. simple i.e. without compounding effect which comes to **Rs.49,59,422/-**. Considering the same, the total amount due w.e.f. 05.06.2016 to 31.01.2023 comes as under :-

S. No.	Particular	Total Due Amount
1.	Overdue Installments	4,47,295
2.	Principal Outstanding	27,54,003
3.	Delay Interest @3.00% P.M. simple i.e. without compounding effect.	49,59,422
4.	Legal Charges	61,000
5.	Insurance Due	11,530
6.	Cheque Bouncing Charges	33,000
7.	Applicable Taxes	5,755
8.	Collateral Money (Less)	-8,12,324
9.	Net Receivables	74,59,681

35. However, the Corporate Debtor has taken one of the plea that the Financial Creditor has charged penal charges as delay interest @3.00% per month making the claim amount more than Rs.1.00 Crore to cross the threshold limit for admitting the CP (IB) under Section 7 of the IBC whereas, the penal interest charged by the Financial Creditor at the rate of 3.00% per month is contrary to the **RBI Guidelines on Fair Practices Code for NBFCs** dated 18.02.2013 RBI/2012-13/416 DNBS.CC.PD.No.320/03.10.01/2012-13 which is annexed at page No. 146 -156 of compendium on behalf

of Corporate Debtor. Page No.152 internal page 7 of which reads as under:-

“(c) The rate of interest should be annualised rates so that the borrower is aware of the exact rates that would be charged to the account.”

36. It is observed that **Hon’ble Supreme Court** in matter of **Central Bank of India Vs Ravindra And Ors.** on 18 October, 2001, AIR 2001 SC 3095 has held which is reproduced hereunder:-

“..... However, we propose to place on record a few incidental observations, without which, we feel, our answer will not be complete and that we do as under :-

(1) Though interest can be capitalised on the analogy that the interest falling due on the accrued date and remaining unpaid, partakes the character of amount advanced on that date, **yet penal interest**, which is charged by way of penalty for non-payment, cannot be capitalised. Further interest, i.e. interest on interest, whether simple, compound or penal, cannot be claimed on the amount of penal interest. **Penal interest cannot be capitalised.** It will be opposed to public policy.

.....”

37. The Reserve Bank of India vide Notification no. RBI/DBR/2015-2016/20 Master Direction DNBR.DIR.No. 85/13.03.00/2015-16 dated 03.03.2016

provides inter-alia the direction with regard to Penal interest.

“Penal Interest: Banks shall formulate a Board approved policy for charging penal interest on advances which shall be fair and transparent. The rate of penal interest shall be decided after taking into account incentive to service the debt and due regard to genuine difficulties of customers.”

38. Further, now Reserve Bank of India also issued various guidelines to the Regulated Entities (REs) vide RBI/2023-24/53, DoR.MCS.REC.28/01.01.001/2023-24 dated 18.08.2023 on Fair Lending Practice - Penal Charges in Loan Accounts. The relevant portion is reproduced here under:-

“Reserve Bank has issued various guidelines to the Regulated Entities (REs) to ensure reasonableness and transparency in disclosure of penal interest. Under the extant guidelines, lending institutions have the operational autonomy to formulate Board approved policy for levy of penal rates of interest. It has been observed that many REs use penal rates of interest, over and above the applicable interest rates, in case of defaults / non-compliance by the borrower with the terms on which credit facilities were sanctioned.

2. The intent of levying penal interest/charges is essentially to inculcate a sense of credit discipline and such charges are not meant to be used as a revenue enhancement tool over and above the contracted rate of interest. However, supervisory reviews have indicated divergent

practices amongst the REs with regard to levy of penal interest/charges leading to customer grievances and disputes.

3. On a review of the practices followed by REs for charging penal interest/charges on loans, the following instructions are issued for adoption.

- (i) Penalty, if charged, for non-compliance of material terms and conditions of loan contract by the borrower shall be treated as 'penal charges' and shall not be levied in the form of 'penal interest' that is added to the rate of interest charged on the advances. **There shall be no capitalisation of penal charges** i.e., **no further interest computed on such charges**. However, this will not affect the normal procedures for compounding of interest in the loan account.
- (ii) The REs shall not introduce any additional component to the rate of interest and ensure compliance to these guidelines in both letter and spirit.
- (iii) The REs shall formulate a Board approved policy on penal charges or similar charges on loans, by whatever name called.
- (iv) The quantum of penal charges shall be reasonable and commensurate with the non-compliance of material terms and conditions of loan contract without being discriminatory within a particular loan / product category.
- (v) The penal charges in case of loans sanctioned to 'individual borrowers, for purposes other than business', shall not be higher than the penal charges applicable to non-individual borrowers for similar non-compliance of material terms and conditions.
- (vi) The quantum and reason for penal charges shall be clearly disclosed by REs to the customers in the loan agreement and most

important terms & conditions / Key Fact Statement (KFS) as applicable, in addition to being displayed on REs website under Interest rates and Service Charges.”

39. The question arises here in the present case is **(a)** whether the penal interest/charge @3.00% p.m. or say 36.00% p.a. compounded on monthly basis as charged on delay in payment/Non-payment of installments as per Financial Creditor policy complies with the directions issued by the **Reserve Bank India** vide no. RBI/DBR/2015-2016/20 Master Direction DNBR.DIR.No. 85/13.03.00/2015-16 dated 03.03.2016, with regard to its fairness. **(b)** Further, whether the compounding of penal interest is permissible in view of the settled legal position by the **Hon’ble Supreme Court** in the matter of **Central Bank of India Vs Ravindra And Ors.?**
40. With regard to questions (a) & (b) the charging of penal interest/charges @3.00% p.m. or say 36.00% p.a. compounded on monthly basis is not only excessive as explicit from the record but also against the well settled law of the land as mentioned above, which has resulted in escalation of outstanding principal amount to

Rs.1,85,80,151/- within a period of 6 (six) years. This clearly indicate the unfair practice being adopted by the Financial Creditor just to enhance its claim. The Reserve Bank of India has also in its recent Master direction circular of Fair Lending Practices - Penal Charges in Loan accounts clearly prohibited such unfair practices.

41. Even as per the A/c Statement filed by the Financial Creditor as **Annexure-M** at page 178, the Principal Outstanding as on 11.05.2017 is shown to be **Rs.27,54,003/-**. The fixed rate of interest @13.50% p.a. applied till 31.01.2023 on the aforementioned amount comes to be **Rs.21,06,812/-** and Delayed Interest @3.00% p.m. or say 36.00% p.a. simple i.e. without compounding effect applied till 31.01.2023 comes to be **Rs.49,59,422/-**. Further, after the other charges being Overdue Installments, Legal Charges, Insurance charges, Cheque Bouncing Charges, Applicable Taxes are added and the amount held as Collateral is deducted, then total amount due w.e.f. 05.06.2016 to 31.01.2023 comes as under, which is below the threshold limit:-

S. No.	Particular	Total Due Amount
1.	Overdue Installments	4,47,295
2.	Principal Outstanding	27,54,003
3.	fixed rate of interest @13.50% p.a.	21,06,812
4.	Delay Interest @3.00% P.M. simple i.e. without compounding effect.	49,59,422
5.	Legal Charges	61,000
6.	Insurance Due	11,530
7.	Cheque Bouncing Charges	33,000
8.	Applicable Taxes	5,755
9.	Collateral Money (Less)	-8,12,324
10.	Net Receivables	95,66,493

42. It will not be out of place to mention here that the present application was filed by the Financial Creditor by relying upon the Arbitral Award dated 11.12.2017 which was given in the favour of Financial Creditor. The Ld. Arbitrator has granted interest @13.50% p.a. simple on the principal amount of Rs.24,46,864/-. No other charges or penal interest was allowed in said Award. However, on perusal of the entire petition as well as the reply filed by the Respondent it is clear that the Financial Creditor unilaterally calculated the outstanding debt as per the terms of the loan documents adding and capitalising the penal interest, completely ignoring the Arbitral Award. It is evident that Financial Creditor has

not calculated the outstanding Financial Debt as per the Arbitral Award intentionally as if the total outstanding calculated as per the Award then it would have been below the threshold limit.

43. Further, the Present Application has been filed by the Financial Creditor for a total Financial Debt of Rs.1,85,80,751/-, consisting Principal Outstanding, Rs.27,54,003/-, Delay Interest @3.00% p.m. compounded on monthly basis Rs.1,60,80,492/- Overdue Installments Rs.4,47,295/- and for other applicable charges. Financial Creditor has relied upon Balance Sheets of the Corporate Debtor for the year (2019-2020) and (2020- 2021) for the purpose of limitation which are annexed with the application as **Annexure-O**. However, on perusal of these Balance Sheets the year (2019-2020) and (2020- 2021) reflects that the Cooperate Debtor has acknowledged the debt liability only to the extent of Rs.30,36,103/-.

44. The amount of Rs.1,85,80,751/-, which is claimed in default in the Part IV of section 7 application, is hugely

different from either the original sanctioned loan amount of Rs.40,61,619/-, or disbursed loan amount of Rs.31,66,101/- or the amount of Rs.30,36,103/- appearing in the Balance Sheets from for the year (2019-2020) and (2020- 2021). Thus, the acknowledgements in the Balance Sheets which widely differ from the claim made in section 7 application does not provide any extension of limitation to the debt claimed in section 7 application. Therefore, these acknowledgments through the Balance Sheets, as claimed by the Applicant, do not pertain to the loan amount claimed by the Applicant.

45. Therefore, the present Application filed U/s 7 of the IBC, 2016 is also barred by limitation since the acknowledgements do not provide for unequivocal and unambiguous acknowledgement of the alleged debt as claimed in the section 7 application as held by Hon'ble NCLAT in ***Deepak Vegpro Pvt. Ltd. Vs. Shree Hari Agro Industries Ltd*** decided on 11.10.202 (2022) ibclaw.in 829 NCLAT.

46. In view of above, we hold that neither outstanding financial debt meet the monetary threshold limit as per section 4 of the Code for filing the present Application U/s 7 of the IBC, 2016 nor the present Application is filed within three years of limitation.
47. Accordingly, **CP (IB) No.227 of 2023** stands rejected and **IA No. 1465 of 2023** disposed of accordingly.
48. A certified copy of this order may be issued, if applied for, upon compliance of all requisite formalities.

-Sd-
SAMEER KAKAR
MEMBER (TECHNICAL)

-Sd-
SHAMMI KHAN
MEMBER (JUDICIAL)

MD