IN THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH, COURT-II

CP(IB) No. 364/MB/2021

AND

I.A. No. 1637 OF 2021

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.

CP (IB) No. 364/MB/2021:

IN THE MAIN MATTER BETWEEN

J.C. Flowers Asset Reconstruction Private Limited, acting in its capacity as trustee of JCF Yes Trust 2022-23/13, having its registered office at: 12th Floor, Crompton Greaves House, Dr. Annie Besant Road, Worli, Mumbai-400030.

… Financial Creditor/Petitioner

V/s.

E Commerce Magnum Solution Limited,

A company having its registered office at: 1401, A-Wing, ONE BKC, Plot No. C-66, G-Block, Bandra Kurla Complex, Bandra (East), Mumbai, Maharashtra, PIN- 400051.

… Corporate Debtor

I.A. No. 1637 OF 2021

E-Commerce Magnum Solution Ltd.

…. Applicant

v/s.

YES Bank Limited .... Respondent

Order delivered on: - 01.07.2024.

Coram:
Hon'ble Shri Kuldip Kumar Kareer, Member (Judicial)
Hon'ble Shri Anil Raj Chellan, Member (Technical)

Appearances (in Physical Mode):

For the Financial Creditor: Adv. Sushmita Gandhi a/w Anamika Singh, Nasrin Shaikh and Kushal Boolchandani.

For the Corporate Debtor: Adv. Devanshu P. Desai

ORDER

Per: - Anil Raj Chellan, Member (Technical)

1. This Company petition is filed by M/s. J.C. Flowers Asset Reconstruction Private Limited (hereinafter referred to as "**the Applicant**" or "**the Petitioner**") under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter called "**Code**") seeking to initiate Corporate Insolvency Resolution Process (**CIRP**) of M/s E Commerce Magnum Solutions Limited (hereinafter called as "**Corporate Debtor**") for resolution of the debt in default by the Corporate Debtor to the tune of INR 340,68,36,902/- (Rupees Three Hundred and Forty Crores, Sixty-Eight Lakhs, Thirty-Six Thousand, Nine Hundred and

Two only), out of which the principal loan in default is INR 283,00,00,000/- (Rupees Two Hundred and Eighty Three Crores only), the interest on outstanding loan is INR 52,32,12,575/- and the penal interest is INR 5,36,24,327/- as on 20th February, 2021. The date of default stated in the application is 01st September 2019.

2. The Corporate Debtor, instead of filing its Reply to the captioned Company Petition had filed Interlocutory Application No. 1637 of 2021 ('said IA") for challenging the maintainability of the captioned Company Petition, which was on a submission made on behalf of the Corporate Debtor was treated as the Reply to the captioned Company Petition. The Financial Creditor filed its Reply to the said IA.

Facts of the case in brief: -

3. The captioned Company Petition was originally filed by YES Bank Limited ("Original Lender"). The Original Lender, by a registered Assignment Agreement dated 16th December, 2022 has assigned the financial assets of the Corporate Debtor along with its right, title, and interest in the financing documents and all the underlying securities created thereof, in favour of J.C. Flowers Asset Reconstruction Private Limited (acting in the capacity as trustee of JCF YES Trust 2022-23/13) i.e., the Financial Creditor. The Financial Creditor is an Asset Reconstruction Company under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (the "SARFAESI Act") and registered with the Reserve Bank of India. The Financial Creditor was substituted in the captioned Company Petition by Order dated 13 June 2023 passed by this Tribunal in Interlocutory Application No. 1798 of 2023.

4. The Original Lender, at the request of the Corporate Debtor had sanctioned a Term Loan of Rs. 500 crores ("Term Loan") by Facility Letter dated 28 September 2018. The Term Loan was sanctioned in the following manner:

Term Loan	Amount (in Rs.)
Term Loan - I **("TL** I")	180 crores
Term Loan - II **("TL** II")	320 crores
TOTAL	**500 crores**

5. The Term Loan was sanctioned for the purpose of construction and development of a project namely, "One Hughes". The terms and conditions were revised by the Original Lender by Addendum to the Facility Letter. In order to define the terms and conditions of the Term Loan, the Original Lender and the Corporate Debtor executed the Term Loan Agreement dated 28 September 2018 defining the terms and conditions of the Term Loan availed by the Corporate Debtor.

6. Out of the total sanctioned amount of Rs.500 crores, an amount of Rs. 283 crores was disbursed by the Original Lender in favour of the Corporate Debtor in the following manner:

Dates of disbursement for TL I:

Sr. Nos.	Date of Disbursement	Amount (in Rs.)
1.	6 December 2018 *@pg.69*	141,24,00,000
2.	12 March 2019 *@pg.54*	30,00,00,000
Total		**171,24,00,000**

Dates of disbursement for TLII:

Sr. Nos.	Date of Disbursement	Amount (in Rs.)
1.	6 December 2018 *@pg.45*	43,76,00,000
2.	1 February *2019@pg.48*	3,55,00,000
3.	22 February 2019 *@pg.51*	6,45,00,000
4.	24 May 2019 *@pg.57*	4,50,00,000

5.	11 July 2019 *@pg.60*	44,06,00,000
6.	30 July 2019 *@pg.63*	1,44,00,000
7.	16 August 2019 *@pg.66*	8,00,00,000
Total		**111,76,00,000**

7. Various documents were executed, and securities were created to secure the repayment of the Term Loan. As the interests were payable on and from the first disbursement with respect to the Term Loan, the Corporate Debtor also issued post-dated cheques. After availing the Term Loan, the Corporate Debtor started committing default in its interest payment obligations under the Term Loan since 01st September 2019. Further, there was no progress in the construction and development of the said project. In view thereof, the Original Lender, having left with no alternative, stopped the disbursements. Owing to the consistent default committed, the account of the Corporate Debtor was classified as Non-Performing Asset on 30th November 2019.

8. Various reminders were issued by the Original Lender to the Corporate Debtor for making payment of the Term Loan to prevent the classification of the account of the Corporate Debtor as a Non-Performing Asset. However, there was neither any response nor any payments were made.

9. In view of the default committed, the Financial Creditor issued Loan Recall Notice dated 15th January, 2020 to the Corporate Debtor. The Corporate Debtor neither responded to the Loan Recall Notice nor made any payment towards the same. It is in view of the above default that the Original Lender filed the captioned Company Petition before this Hon'ble Tribunal.

10. **I.A. No. 1637/2021**: The objections and contentions of the Corporate Debtor placed on record by filing the above-captioned IA are briefly capitulated as follows:

i. The Applicant is engaged inter alia in the business of real estate developers in Mumbai. By and under a registered Development Agreement dated 25th October 2011 read with Supplemental Development Agreement dated 1st November 2018, Prime Downtown Estates Private Limited ("the owner") has granted development rights to the Applicant in respect of piece and parcel of land admeasuring 14,456.04 sq. mtrs. known as "Old Victoria Mills Compound" bearing Ward D-2671 (1-1 B-2), 2672, 2673 (2-3), Sub -Plot Nos.A, B & C situate at Gamdevi Road, bearing C. S. No.1551 of Girgaon Division, Mumbai - 400 007 ["Project Land"] on terms and conditions as set out therein. The Applicant was in need of financial assistance to the extent of Rs.500 crores to complete the development project.

ii. Thereafter, vide the sanction letter dated 28th September 2018, the Respondent sanctioned two term loans to the Applicant viz. Term Loan-I for INR 180 crores and Term Loan-II for INR 320 crores.

iii. The above Term Loans were sanctioned to finance construction, development and associated costs (property affairs, approval and government premium, development rights, refundable security deposits, and transaction expenses and other costs) of the project "I-Hughes". Since no repayment by way of installment or interest was feasible for initial period of three years, the project loan was made repayable in 16 quarterly

instalments after a moratorium of 36 months. The said loan carries interest at the rate of 10.85% per annum payable as and when the amounts are fallen due. The sanction letter further records the "Commercial Operation Date" (COD) of the project as 30th September 2026.

iv. Despite being fully aware that the above Term Loans were urgently and continuously required for redevelopment of the said project, the Respondent allowed the Applicant to use only a part of the disbursed amount. Out of the sanctioned limit, the Respondent withheld an exorbitant amount of Rs.59 crores (more than 10% of the total sanctioned amount) and adjusted the same in the name of "processing fees" for total project loan of Rs.500 crores. The processing fee of Rs.59 crores is approximately 20.85% of the partial disbursement of Rs.283 crores made by the Respondent. The adjustment of 20.85% of partial disbursement in the name of processing fees is shocking unjust, unfair, inequitable and contrary to all banking norms. Taking Rs.59 crores in the name of "processing fees" and not disbursing the amount constitutes an unfair trade practice. It is pertinent to note that the Respondent has adjusted and utilized Rs. 48.48 crores approximately 17.73% for adjustment of other entries and loans. The Respondent illegally transferred Rs.17.17 crores (approximately 06.07%) and adjusted for self-serving interest though the same was not due and payable as the loan had not fallen due.

Particulars	Term Loanl (amount in crores)	Term Loan2 (amount in crores)	Total (amount in crores)	Percentage to Total Disbursement
Processing fees including GST	21.24	37.76	59.00	20.85%
For self-service of Interest	4.10	13.07	17.17	6.07%
Utilize forother than Applicant's loans purpose	-	48.48	48.48	17.13%
Project and related purpose	145.90	12.45	158.35	55.95%
Total	**171.24**	**111.76**	**283.00**	

v. The Applicant submits that the instalments in respect of Term Loans (which were partially released) had not commenced. There was no amount fallen due on which interest could have been charged by the Applicant. The Applicant submits that it has, till date, not committed any default, much less, on 1st September 2019 as alleged by the Respondent in the Company Petition. As per the terms of the Sanction Letter dated 28th September 2018 and the Loan Agreement dated 28th November 2018, the Term Loans were repayable in quarterly instalments after a moratorium of 36 months from the date of first disbursement i.e. 6th December 2018. Clause 2.1.2 of the Sanction Letter dated 28th September 2018 in this regard is as under:

"Repayment: Each advance shall be repaid in full (as per Repayment Schedule indicated below), on the last Business Day of the Term for which such advance was drawn down ("Repayment Date").

Moratorium of 36 months and repayment in 16 equal quarterly installments as given below *(for TL -I & TL-JI)."*

vi. It is the Respondent's own case in Form - 1 that the date of disbursement in respect of the loans was on 6th December 2018. Hence, considering the terms and conditions mutually agreed upon between the parties, there still operates a moratorium of 36 months and the same will end only in December 2021 and therefore, it is too far to fathom that there is any default on the part of the Applicant in repayment of the alleged loans to the Respondent.

11. **Reply to I.A. No. 1637/2021**: The Financial Creditor has contested the aforementioned I.A. filed by the Corporate Debtor. The reply to the aforesaid I.A. is briefly summarized as under:

a. The entire challenge of the Applicant under the Application is based on the contention that no amount was due and payable in view of the alleged applicability of moratorium of 36 months over the principal amount as well as interest. It is submitted that the moratorium was only applicable in relation to the principal amount wherein the interest had become due and payable since the first date of disbursement.

b. On a bare perusal of the Facility Letter along with the Term Loan Agreements, it is apparent that the interest was due and payable on monthly basis from the date of first disbursement. The Applicant itself has submitted post-dated cheques dated from 1 January 2019 to 1 December 2019, to service the interest payments in case the Applicant fails to service the interest on the

due date. The Applicant has also raised a request in the disbursement request letters seeking disbursals of amounts to be utilized towards, inter alia, payment of interest during construction and in view of the same Respondent Bank has serviced interest from the amount sought to be disbursed to Applicant.

c. The interest amounts were debited for a period of 8 months and Applicant did not, at any given point, raise an objection that the said interest amount is not due and payable. Therefore, this contention of the Applicant is not only an afterthought but also unacceptable under the banking principles. Further, it is one of the prevalent banking principles for the interest amount to be payable since the first date of disbursement/ drawdown, in the manner set out in the facility letters/ loan agreements. In the present case, the interest was payable on a monthly basis, commencing from the first date of drawdown.

d. It is submitted that since 1 September 2019, the Applicant started committing default in the repayment obligations towards servicing of the interest payable on the Term Loans granted. Moreover, there was no progress in the construction and development of the said Project. In view thereof, Respondent, having left with no alternative, stopped the disbursements. Since no payments were made despite a passage of 90 days from the date of the default, i.e., 1 September 2019, the Respondent was constrained to declare the account of Applicant company as a - Non-Performing Asset ("NPA") on 30 November 2019 in accordance with the RBI Guidelines.

e. Despite the account of the Applicant Company running into overdue and declaration of the account of the Applicant as NPA, the Applicant Company requested the Respondent to disburse an amount of INR 31 crores to kickstart the project vide its email dated 7th December 2019, which was denied by the Respondent vide its e-mail dated 10th December 2019, owing to the repeated repayment failures of the Applicant Company. Thereafter, Respondent addressed a Notice dated 17 December 2019, inter alia, to Applicant requesting the Applicant and others to take immediate and effective steps to regularize the account. Pursuant to the failure of Applicant company to adhere to its payment obligations, the Respondent Bank issued a Loan Recall Notice on 15 January 2020 to Applicant and the guarantors/ pledgors/ mortgagors, thereby recalling the Term Loans and calling upon them to make payment of a sum of Rs.297,80,94,329/- due as on 15 January 2020. Despite the receipt of the Notice issued on 17 December 2019 and the Loan Recall Notice on 15 January 2020, the Applicant failed to respond to the same.

f. Pursuant to the declaration of the account of Applicant as NPA on 30 November 2019 in accordance with the RBI Guidelines and the failure of Applicant company to regularize the account, the Respondent invoked the provisions under the SARFAESI Act and issued a Demand Notice dated 29 January 2020 under Section 13(2) of the SARFAESI Act. The Applicant, from time to time, approached the Respondent Bank with settlement proposals however, the same did not get fructified.

g. Even as regards payment of the processing fee, it is the Applicant who has authorized debiting of the amount towards facility fees by their Debit Authority Letter dated 6 December 2018. It is, therefore, apparent that only on instructions or authority of Applicant, any such amounts were debited. The Respondent says that the Applicant has twisted and concocted the facts in a desperate attempt to divert the Hon'ble Tribunal from the issue at hand i.e., a valid debt and default.

h. In light of the aforesaid, it is apparent that the Applicant has defaulted in payment of Term Loans granted to him and there is financial debt due and payable by the Applicant. Consequently, it is imperative that the captioned Company Petition is admitted, and this Application be dismissed in limine with exemplary costs.

FINDINGS AND ANALYSIS

12. We have heard the learned Counsel for the Financial Creditor and the learned Counsel for the Corporate Debtor, and we have perused the records.

13. Counsel for the Petitioner submits that a financial creditor can file an application for initiating CIRP against the Corporate Debtor when a default has occurred in respect of a financial debt. Counsel for the Petitioner further submits that the only relevant factor for the Adjudicating Authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor and it is immaterial that a financial debt is disputed so long as it is due and payable. To buttress the

aforesaid contention, the learned Counsel for the Petitioner has relied upon the judgment of the Hon'ble Supreme Court of India in Innoventive Industries Ltd v/s. ICICI Bank & Anr., reported in (2018) 1 SCC 407. Counsel for the Petitioner further submits that the moratorium period of 36 months in the loan facility was only in respect of repayment of the principal amount and not interest. Further, it is submitted on behalf of the Financial Creditor that the Corporate Debtor had specifically by letter dated 06.12.2018 authorised and instructed the Original Lender to debit their account with an amount of Rs. 59 crores towards the facility fees payable, and thus, the contentions of exorbitant processing fees are baseless and without any substance.

14. Counsel for the Corporate Debtor submits that there is no debt and default on the part of the Corporate Debtor as on the date of filing the above-captioned company petition (i.e. 26.02.2021) as the loans were to be repaid after a moratorium of 36 months in 16 quarterly instalments which were to commence on or after December 05, 2021 onwards and hence, the instant application filed u/s 7 of the Code fails. Counsel for the Corporate Debtor further submits that in view of the moratorium of 36 months, no payment default could have happened until at least December 05, 2021 and therefore, the date of default mentioned in the application i.e. September 01, 2019 is erroneous and thus, the present application u/s 7 is not maintainable.

15. Counsel for the Corporate Debtor further submits that exorbitant processing fees of INR 59 crores were charged by the Financial Creditor which otherwise ought to have been used towards the self-funding of interest, if any, that was purportedly due and payable by the

Corporate Debtor amid the moratorium and hence, during the period of moratorium, there cannot be said to be any default by the Corporate Debtor in respect of the payment of interest. The learned Counsel for the Corporate Debtor has relied upon the decision of Hon'ble NCLAT in Dheeraj Wadhawan v/s. Yes Bank & Anr., [Company Appeal (AT)(Ins.) No. 953/2021, Judgment dated 16th March, 2022] squarely applies to the facts of the present case, as in the aforesaid case, the Hon'ble NCLAT had considered the issue of exorbitant and unreasonable processing fees charged by the Bank and reversed the CIRP order passed by the Adjudicating Authority

16. We have carefully weighed, examined and considered the aforesaid rival contentions.

17. The Loan Agreement dated 28th November, 2018 (annexed at Exhibit 'F' to the petition) executed between YES Bank Ltd (now known as J.C. Flowers Asset Reconstruction Private Limited) and the Corporate Debtor to avail the credit facilities to the tune of INR 500 crores, the disbursement request letters annexed at Exhibit 'C1' and the Facility Letter dated 28th September, 2018 issued by the YES Bank (annexed at Exhibit 'I' to the petition), duly establish the existence of financial debt between the Financial Creditor and the Corporate Debtor.

18. The Financial Creditor (then known as 'YES Bank') has disbursed loans of INR 283 crores out of the sanctioned limit of INR 500 crores, the details of which have been more comprehensively given in the tables in Part IV of the Petition. The Statement of Accounts in respect of the Corporate Debtor (annexed by the Applicant at Exhibit 'C2' of the petition) read with the Certificate under the Bankers' Books Evidence Act, 1891 (annexed at Exhibit 'H' to the petition) shows that

the term loans aggregating to INR 283 crores have been disbursed by the Financial Creditor to the account of the Corporate Debtor on various dates as given in the tables at Para 6 of this order. Thus, the factum of disbursal stands proven on record.

19. As the existence of financial debt and its disbursal to the Corporate Debtor have been proved, we shall now proceed to ascertain the factum of default on the part of the Corporate Debtor in repaying the financial debt to the Financial Creditor.

20. The NeSL report at Exhibit 'E' to the application, dated 24.02.2021, has given the status of authentication as "DEEMED TO BE AUTHENTICATED" with Color Code: YELLOW. Thus, it is evident that the Corporate Debtor has not disputed the information of default. As stated in the record of default filed by the Financial Creditor with the Information Utility (i.e. NeSL), the date of default is 01.09.2019, and the amount of default which is deemed to be authenticated by the Information Utility exceeds far beyond the minimum threshold of Rs. 1 crore required to trigger the CIRP of the Corporate Debtor. Thus, the default has been satisfactorily established from the above-mentioned NeSL report.

21. As per the Statement of Account at Exhibit 'C2' read with the Certificate under the Bankers' Books Evidence Act, 1891 (annexed at Exhibit 'H' to the petition), the amount of loan outstanding remaining in default as on 20.02.2021 is INR 340,68,36,902/-, out of which the principal outstanding is INR 283 crores, the normal interest is INR 52,32,12,575/- and the penal interest is INR 5,36,24,327/-. On perusal of the Statement of Account at Exhibit 'C2', it is evident that the Corporate Debtor had been making payments towards the interest on

term loans until the month of August, 2019 and the last payment made towards the normal interest is on 16th August, 2019 and thereafter, the Corporate Debtor failed to make any payment towards the interest. Therefore, in our considered view, the Financial Creditor has rightly determined the date of default as September 01, 2019 and duly classified the term loan account of the Corporate Debtor as Non-Performing Asset on 30.11.2019 as per the RBI guidelines. Due to the continuing defaults on the part of the Corporate Debtor in payment of interest, the entire loan facility (including interest) amounting to INR 297,80,94,329/- was recalled vide Loan Recall Notice dated 15.01.2020 which was served upon the Corporate Debtor by registered post on 20.01.2020. We also notice that as the Corporate Debtor failed to repay the outstanding term loans despite the service of loan recall notice, the Financial Creditor proceeded to enforce its security interest by issuing a Demand Notice dated January 29, 2020, u/s 13(2) of the SARFAESI Act, 2002 calling upon the Corporate Debtor to pay a sum of INR 297,88,09,285/- and thereafter proceeded to issue Possession Notice dated August 29, 2020 for realisation of its security interest. This corroborates the factum of continuing and subsisting default on the part of the Corporate Debtor in repayment of term loans due and payable to the Financial Creditor. The Notice u/s 138 of the Negotiable Instruments Act, 1881 dated March 09, 2020 issued by the Financial Creditor (then known as 'YES Bank') to the Corporate Debtor states that the three cheques signed by the directors on behalf of the Corporate Debtor amounting to INR 184,99,31,506/- were presented for payment on 26.02.2020 which returned dishonoured vide three Cheque Return Memos dated 27.02.2020. Thus, we conclude that the default on the part of the Corporate Debtor in repayment of

financial debt to the Financial Creditor of over Rs. 1 crore has been satisfactorily established from the records.

22. As per the Loan Agreement dated 28.11.2018 read with Schedule IV to the aforesaid loan agreement, the interest was payable monthly. As discussed earlier, the date of default is September 01, 2019 and since the present petition was filed on 27.02.2021, the same is held to be within the period of limitation i.e. three years from the date when the default occurred, as prescribed under Article 137 of the Schedule to the Limitation Act, 1963.

23. As per the Loan Recall Notice dated 15.01.2020, the Corporate Debtor was required to pay the aforesaid amount within 7 days of the receipt of the notice i.e. on or before 27.01.2020. However, since the term loan was not repaid despite the service of the aforementioned loan recall notice, we hold that the default has not been committed during the period prohibited u/s 10-A of the Code.

24. We shall now deal with the main objections of the Corporate Debtor against this petition in seriatim.

25. i. As per the Loan Agreement dated 28.11.2018 read with Schedule IV laid thereunder, the tenor of the two term loans sanctioned to the Corporate Debtor was for 84 months, out of which there was a moratorium of 36 months. Counsel for the Petitioner has contended that since there was a moratorium for 36 months and the loan was to be repaid in 16 equal quarterly instalments after the period of moratorium, no debt was due during the period of moratorium from the years 2018-2021.

ii. Per contra, the learned Counsel for the Corporate Debtor has submitted that interest was payable during the moratorium and since the same was not paid by the Corporate Debtor, there was a default on the part of the Corporate Debtor.

iii. We have examined the issue of the moratorium and the liability to pay interest amid moratorium.

iv. On perusal of the Loan Agreement dated 28.11.2018, we find that Clause 2.4(ii) of the said loan agreement, *inter-alia,* states that the interest shall be paid by the borrower (i.e. the Corporate Debtor) on interest payment dates. Under Schedule IV to the aforesaid loan agreement read with the Facility Letter dated 28.09.2018, the interest payment dates are monthly which makes it clear that the interest shall be payable on a monthly basis. Further, as per Clause 2.4(i) of the said loan agreement, *the borrower shall be liable to pay to the Bank interest on the amounts due under the Facilities at applicable rate of interest prevailing* ***on the date of first drawdown*** and such rate shall be applicable to all drawdowns till the next MCLR reset date. In the present case, the first drawdown under the two term loan facilities took place on 06th December, 2018, and therefore, the liability to pay interest commences from January, 2019 onwards. Therefore, the contention of the learned Counsel for the Corporate Debtor that no principal or interest was due towards the loan repayment during the period of loan moratorium is devoid of any merit. Even otherwise, we find that the Corporate Debtor was paying monthly interest until the month of August, 2019 and the last such payment was made on 16.08.2019. Therefore, now the Corporate Debtor is prevented by the principle of estoppel from taking a contrary stand.

26. i. Counsel for the Corporate Debtor has contended that out of the total sanctioned loan facility of INR 500 crores, only INR 283 crores were disbursed and further, an exorbitant processing fee of INR 59 crores was levied by the Financial Creditor, due to which the funds could not be fully utilized for the purpose for which they were raised; as a result of which the real estate project undertaken by the Corporate Debtor suffered from crunches and it could not be completed in time leading to the failure of the project and the consequent default in repayment of term loans. Thus, the learned Counsel for the Corporate Debtor submits that in the instant case, the default is not attributable to his client but rather the Financial Creditor is responsible for the default in loan repayment. Hence, the learned Counsel for the Corporate Debtor argues that the Corporate Debtor should not be pushed into insolvency when the blame for default is directly attributable to the Financial Creditor sanctioning the loan.

ii. Per contra, the learned Counsel for the Petitioner has submitted that the processing fee has been charged as per the loan agreement and the facility sanction letter. Thus, the Corporate Debtor was aware of such facility fees right from the inception and yet chose to avail the loan facility, and therefore, the Corporate Debtor is now precluded from disputing the same as exorbitant or unreasonable. Counsel for the Corporate Debtor contends that the moment the debt and default on the part of the Corporate Debtor have been established, Adjudicating Authority has no choice or discretion but to admit the Corporate Debtor into insolvency. Therefore, according to learned Counsel for the Corporate Debtor, the disputes regarding exorbitant processing fees and/or non-disbursal of fully sanctioned loan cannot be entertained while adjudicating an application u/s 7 of the Code.

iii. We have given our careful consideration to the aforesaid submissions.

iv. The Hon'ble Supreme Court of India in the case of **Innoventive Industries Ltd. Vs. ICICI Bank** and Anr., reported in (2018) 1 SCC 407, has clearly held that:

*"28. ……The moment the adjudicating authority is satisfied that a default has occurred, the application **must** be admitted unless it is incomplete, in which case it may give notice to the application to rectify the defect within 7 days receipt of a notice from the adjudicating authority.*

*30. On the other hand, as we have seen, in the case of a Corporate Debtor who commits a default of financial debt, the adjudicating authority has merely to see the records of the information utility, or other evidence produced by the Financial Creditor to satisfy itself that a default has occurred. **It is of no matter that the debt is disputed so, long as the debt is "due" i.e., payable** unless interdicted by some law, or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority it may reject an application and not otherwise"* (Emphasis Supplied)

v. Thus, it is settled law that "dispute" vis-à-vis a financial debt, is not a bar to the admission of an application u/s 7 of the Code, if the ingredients required for admission of such an application is satisfied, dehors such a dispute. Accordingly, the Hon'ble NCLAT in a catena of decisions[1] has held that a dispute pertaining to the "quantum" of money "due" or in "default" does not bar the admission of an application u/s 7 of the Code.

[1] (1) T. Johnson v/s. Phoenix ARC, Company Appeal (AT)(Insolvency) No. 32 of 2019; (2) Vineet Khsola v/s. Edelweiss Asset Reconstruction Co. Ltd, Company Appeal (AT)(Ins.) No. 441 of 2019; (3) Ajay Agarwal v/s. Central Bank of India, Company Appeal (AT)(Ins.) No. 180 of 2017, (4) Vikas Agarwal v/s. State Bank of India, Company Appeal (AT)(Ins.) No. 587 of 2018.

In SBI v/s. NS Engineering Projects Pvt Ltd. [Company Appeal (AT)(Insolvency) No. 978, 1000 and 1039 of 2022], where it was alleged that the entire loan was not disbursed, the Hon'ble NCLAT held that the mere factum of partial disbursal does not bar the admission of a corporate debtor into CIRP in an application u/s 7 of the Code.

vi. In view of the settled law, as discussed above, we are unable to appreciate the contentions advanced by the learned Counsel for the Corporate Debtor pertaining to disputes with respect to financial debt due and payable by the Corporate Debtor to the Financial Creditor.

27. i. During the course of arguments, the Corporate Debtor's counsel contended that the Financial Creditor levied an excessive processing/facility fee of Rs. 59 crores (including 18% GST) for a sanctioned loan of Rs. 500 crores, of which only Rs. 283 crores was disbursed. He has argued that the fee should only apply to the disbursed amount, and any excess should have been adjusted against outstanding interest to prevent default, citing Dheeraj Wadhawan v/s. Yes Bank Ltd & Anr. (Company Appeal (AT)(Insolvency) No. 953 of 2021). The counsel asserts that had the fee been adjusted as per the cited case, default would have been avoided, thus the Petition should be dismissed on this basis.

ii. We have thoughtfully considered the aforesaid contention of the ld. Counsel for the Corporate Debtor and have also gone through the case law cited by him. However, we are not convinced with the aforesaid contention. In Dheeraj Wadhawan v/s. YES Bank Ltd (supra), Belief Realtors Pvt Ltd sought a Rs. 1,700 crore term loan from Yes Bank for a property development in Bandra (West), Mumbai. The loan was divided into two tranches: Rs. 750 crores to

Belief Realtors Pvt Ltd and Rs. 950 crores to RKW Project Management Pvt. Ltd ('RKW'). The first tranche was fully disbursed on June 28, 2018, after deduction of a facility fee of Rs. 118 crores. On December 12, 2018, RKW requested cancellation of the second tranche of INR 950 crores, which the bank approved the next day. On July 29, 2019, the borrower (i.e. Belief Realtors Pvt Ltd) asked for a refund of proportionate facility fee to the tune of Rs. 55.88 crores in respect of the cancelled tranche. The bank partially refunded Rs. 10 crores in September but did not address the remaining Rs. 45.88 crores. It was in this context, the Hon'ble NCLAT had observed that the Adjudicating Authority failed to consider that after crediting Rs. 45.88 crores, there was no default by the appellant on August 1, 2019, which was the basis for Section 7 proceeding.

iii. In the instant case, there is no co-borrower, and no loan facility has been cancelled. The Corporate Debtor did not request a refund of the facility fee, nor did the Financial Creditor agree to give any refund or adjustment of the facility fee for the undisbursed loan amount. In the above-cited case, the entire loan of Rs. 750 crores was fully disbursed to the borrower, with no partial disbursement involved. However, in the present case, there was a partial disbursement of the term loan and the Financial Creditor has blamed the Corporate Debtor for such partial disbursals by pleading in its affidavit in reply to I.A. No. 1637/2021, that due to the Corporate Debtor's default in repaying the interest on the term loans and the lack of progress in the project, further disbursements were stopped. Therefore, the above-cited case is clearly distinguishable and cannot be applied to the instant case.

28. The Loan Agreement dated 28.11.2018 defines "Commitment Charges" at Clause 1.1 as follows: *"Commitment Charges" shall mean* ***non-refundable*** *commitment charges, if any, to be paid by Borrower at the rate as specified in the Schedule IV hereof on the Limit of the Facilities during the Availability Period."* As per the Schedule IV to the above-referred loan agreement, the facility fee of 10% (applicable taxes) was payable upfront at the time of acceptance of sanction. Hence, it is abundantly clear that the facility fees (i.e. commitment charges) were non-refundable and the same was known to the Corporate Debtor right from the beginning when the loan facilities were sanctioned by the Financial Creditor (then known as "YES Bank"). It is also pertinent to note that vide Debit Authority Letter dated 06.12.2018 (copy of which is annexed at Exhibit 'I' to the Affidavit-in-Reply to I.A. No. 1637 of 2021), the Corporate Debtor had authorised the Financial Creditor to deduct/debit the facility fees to the extent of INR 59 crores from the current account maintained by the Corporate Debtor with the Financial Creditor. It is also pertinent to note that there is nothing on record to show that the Corporate Debtor had asked the Financial Creditor for partial refund of loan processing fee before filing of this petition. It is only at the time of contesting the petition by way of filing the above-captioned IA, the Corporate Debtor raised the issue of processing fee for the first time. Thus, we have a reason to believe that the issue of processing fee/facility fee, which is now raked up by the Corporate Debtor in its defence, is nothing but an afterthought. In view of the above, the Corporate Debtor is now precluded from raising a dispute that the quantum of facility fees, charged or deducted from the loan disbursal, was excessive or unreasonable. We also hold that since the facility fees were non-

refundable, the same can neither be refunded to the Corporate Debtor nor adjusted against the loan amount including the interest. Hence, the plea of the Corporate Debtor that there is no default in the moratorium period had the processing fees/facility fees been adjusted against the outstanding loan or outstanding interest on loan, is rejected.

29. No other contentions have been advanced. There is no other issue which remains to be addressed.

30. It has also been brought to our notice that a coordinate bench of this Tribunal (Bench IV), on a Company Petition No. 1123/2021 filed by the Original Lender against the corporate guarantor i.e., Radius Infra Holdings Private Ltd initiated CIRP against it vide Order dated 09.05.2022. In the aforesaid case, the corporate guarantor had given guarantee in relation to the debts owed by the Corporate Debtor to the Financial Creditor. Thus, the debt and default by the Corporate Debtor were recognized in those proceedings too.

31. In view of the foregoing findings, analysis and discussions, we are satisfied that in the facts and circumstances of the present case, there has been a financial debt due and payable by the Corporate Debtor to the Financial Creditor in respect of which the default of well over Rs. 1 crore has been committed by the Corporate Debtor. Further, we are also fully convinced that the present petition has been filed within the period of limitation and it is also not barred by Section 10-A of the Code. Hence, we are left with no choice but to admit the Corporate Debtor into the Corporate Insolvency Resolution Process and accordingly, we pass the following orders: -

ORDER

(a) The petition bearing **CP(IB)-364/MB/2021** prosecuted by M/s. **J.C. FLOWERS ASSET RECONSTRUCTION PRIVATE LIMITED,** the Financial Creditor, under Section 7 of the IBC, 2016 read with rule 4(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process (CIRP) of the Corporate Debtor, namely, M/s. **E COMMERCE MAGNUM SOLUTION LIMITED** [CIN: U70100MH1999PLC122294] is hereby **admitted**

(b) **Mr. Ayyagiri Viswanadha Sarma**, an Insolvency Professional having registration No. **IBBI/IPA-001/IP-P-01524/2018-2019/12396,** (email: vsarma.ext@deloitte.com/ayya.vish@gmail.com), **is hereby appointed as Interim Resolution Professional** to carry out the functions as mentioned under IBC, the fee payable to IRP/RP shall comply with the IBBI Regulations/ Circulars/Directions issued in this regard. The IRP shall carry out functions as contemplated by Sections 15,17,18,19,20,21 of the IBC.

(c) There shall be a moratorium under Section 14 of the IBC, in regard to the following:

(i) 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;

(ii) Transferring, encumbering, alienating or disposing of by the

Corporate Debtor any of its assets or any legal right or beneficial interest therein;

(iii) 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 (SARFAESI) Act, 2002;

(iv) The recovery of any property by an owner or lessor where such property is occupied by or in possession of the Corporate Debtor.

(d) Notwithstanding the above, during the period of moratorium-

i. The supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period;

ii. That the provisions of sub-section (1) of section 14 of the IBC shall not apply to such transactions as may be notified by the Central Government in consultation with any sectoral regulator;

(e) The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Tribunal approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.

(f) Public announcement of the CIRP shall be made immediately as specified under section 13 of the IBC read with regulation 6 of the

Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

(g) During the CIRP Period, the management of the Corporate Debtor shall vest in the IRP or, as the case may be, the RP in terms of section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within a period of one week from the date of receipt of this Order, in default of which coercive steps will follow.

(h) The Financial Creditor shall deposit a sum of **₹ 5,00,000/-** (Rupees Five Lakhs only) with the IRP towards the initial **CIRP costs** by way of a Demand Draft drawn in favour of the Interim Resolution Professional appointed herein, immediately upon communication of this Order.

(i) The Registry is directed to communicate this Order to the Financial Creditor, the Corporate Debtor and the IRP by Speed Post and email immediately, and in any case, not later than two days from the date of this Order.

(j) A copy of this Order be sent to the Registrar of Companies, Maharashtra, Mumbai, for updating the Master Data of the Corporate Debtor.

(k) **I.A. No. 1637 of 2021** is hereby **rejected**.

Sd/-

ANIL RAJ CHELLAN
Member (Technical)

Sd/-

KULDIP KUMAR KAREER
Member (Judicial)