

**THE NATIONAL COMPANY LAW TRIBUNAL
CHANDIGARH BENCH, CHANDIGARH
(Exercising powers of Adjudicating Authority under
the Insolvency and Bankruptcy Code, 2016)**

**IA Nos. 1327/2022, 1004/2023
and
CP (IB) No. 330/Chd/Chd/2019**

**Under Section 7 of the
Insolvency & Bankruptcy
Code, 2016**

In the matter of:

Utsav Securities Private Limited
CIN No.U65993DL1995PTC063997
203, Aman Chamber, Pusa road
Rajinder Place Metro Station, New Delhi
Email. LtsavsecuBities@gmail.com
Ph. 01147476071, 9891095232

...Financial Creditor

Versus

India Circuits Limited
CIN No.U31200CH2007PLCO30682
Booth No. 7, Sector 7C
Chandigarh 160019
Email ac@gargelectronics.com

...Corporate Debtor

In the matter of IA No.1327/2022

India Circuits Limited
Booth No. 7, Sector 7C, Chandigarh-160019.
ac@gargelectronics.com

... Applicant

Versus

1. Utsav Securities Pvt. Limited 203,
Aman Chamber, PUSA Road,
Rajinder Place Metro Station, New Delhi
utsavsecurities@gmail.com

2. Virender Jain
Director, Utsav Securities Private Limited,

Jain Bhawan, 16/121-122, Faiz Road, Karol Bagh,
Near Lal Masjid, New Delhi- 110005
utsavsecurities@gmail.com

3. Insolvency and Bankruptcy Board of India (IBBI),
7th Floor, Mayur Bhawan, Shankar Market, Connaught Circus,
New Delhi, 110001
Through its Chairperson
Legal.proceedings@ibbi.gov.in

4. Ministry of Corporate Affairs,
A Wing, Shashtri Bhawan, Rajendra Prasad Road,
New Delhi-110001
Through its Secretary
secy.mca@nic.in

... Respondents

And in the matter of IA No.1004/2023

Utsav Securities Private Limited
CIN: U65993DL1995PTC063997
203, Aman Chamber, Pusa Road Rajinder Place Metro Station,
New Delhi

...Applicant

VERSUS

India Circuits Limited
CIN: U31200CH2007PLC030682
Booth No. 7, Sector 7C
Chandigarh - 160019

... Respondent

Judgment delivered on: 16.04.2024

**Coram: HON'BLE MR. HARNAM SINGH THAKUR, MEMBER (JUDICIAL)
HON'BLE MR. SUBRATA KUMAR DASH, MEMBER (TECHNICAL)**

Present:

For the Petitioner-Financial Creditor and
Applicant in IA No. 1004/23

: Mr. Anand Chhibbar, Senior Adv.
Ms. Swati Vashisth, PCA
Mr. S.S. Brar, Advocate
Mr. Samrath Shandilya, Advocate

For the Respondent-Corporate Debtor and
applicant in IA No. 1327/22

: Mr. Akshay Bhan, Senior Advocate
Mr. Vaibhav Gupta, Advocate

PER: HARNAM SINGH THAKUR, MEMBER (JUDICIAL)
SUBRATA KUMAR DASH, MEMBER (TECHNICAL)

I.A. No. 1327/2022

The present application has been filed by the applicant, i.e., **India Circuits Limited (the respondent in the main C.P.)**, against the respondent, i.e., **Utsav Securities Pvt. Ltd. and others** to issue directions for initiation of the proceedings in terms of the Section 236 of the Code, 2016 for the offences committed by the respondent no. 1 and 2 under Section 75, Section 235A, Section 447 of the Companies Act and also under various provisions of the Indian Penal Code and till the time the proceedings under Section 236 of the Code, 2016 are not completed, the petition filed under Section 7 of the IBC, 2016 may be kept in abeyance. It is alleged that the main petition has been filed by the respondent without there being any 'financial contract' between the parties. Similar petitions have been filed by the respondent and its sister concerns before various Hon'ble NCLT's, which have been dismissed. It is alleged by the applicant that the respondent has produced fake loan agreements, and a complaint against the director of the respondent has been filed in the DCP Office, Panchkula.

2. The Affidavit of service dated 03.12.2022 has been filed via diary no. 02548/01. The respondent, in its reply dated 08.02.2023 filed via diary no. 01129/5 wherein it is submitted that the applicant entered into loan agreements dated 23.01.2015 and 13.02.2015, with the respondent. The respondent also stated that disbursal of the loan could be evidenced through interest payments reflecting in the Bank Account Statements, Ledger Account, Form 26AS for three Assessment Years. w.r.t. to the criminal complaint filed by the applicant, the respondent

submitted that a closure report dated 10.02.2023 has been filed by the DCP Office, Panchkula.

3. After hearing both the parties and careful perusal of facts and circumstances, we are of the considered view that the present application is not maintainable at this stage as the closure report dated 10.02.2023 against the company filed by the applicant has preferred to chose the consideration of complaint against the respondent- Utsav Securities Pvt. Ltd., the petitioner in the main CP. Therefore, the applicant is at liberty to avail the legal remedy available to it under the criminal law.

Moreso, closure report dated 10.02.2023 has already been filed by DC Office, Panchkula after investigation. Prima facie the agreements dated 23.01.2015 and 13.02.2015 seem to be genuine relied upon by the petitioner-financial creditor in the rejoinder.

4. Hence, in view of the above, the IA No. 1237/2023 without any expression of opinion on merits is disposed of accordingly.

IA No. 1004/ 2023

5. The present application has been filed by the Applicant, i.e., **Utsav Securities Pvt. Ltd. (Financial Creditor)**, against the Respondent, i.e., **India Circuits Ltd. (Corporate Debtor)**, seeking a preliminary inquiry and initiation of criminal proceedings by making a complaint to the concerned Judicial Magistrate for offences punishable under Sections 193, 199 and 209 of the IPC, 1860, against Mr. Rajneesh Garg, Director and Authorised Signatory of the respondent, on the ground of furnishing false evidence on oath and dishonestly making false claims in the Court.

6. Since, the similar application IA No. 1327/2020 has already been filed by the respondent against the present application, therefore, no separate notice was issued. It is pertinent to note that complaint filed by respondent is already closed by the police. Therefore, the present applicant is also at liberty to initiate criminal proceedings against the respondent in accordance with the law, if advised so.

7. Thus, the present application IA No. 1004/2023 without expression of opinion on merits, is disposed of accordingly.

JUDGMENT in CP (IB) No. 330/Chd/Chd/2019

8. The present petition has been filed by Utsav Securities Private Limited (hereinafter referred to as 'Petitioner/Financial Creditor') through its Director, Mr. Virendra Jain, under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'Code') read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 to initiate the Corporate Insolvency Resolution Process ('CIRP') against **India Circuits limited.** (hereinafter referred to as 'Respondent/Corporate Debtor'). The petition is signed by Director, Mr. Virendra Jain, with the affidavit verifying the contents of the application, appended thereto.

9. The Corporate Debtor is stated to be incorporated on 31.01.2007. The company has its registered address at Sector 7C, Chandigarh-160019. Therefore, the jurisdiction lies with this Bench of the Tribunal. The master data of the corporate debtor is attached as Annexure 1 of the petition.

10. The brief facts of the case are that in February, 2015 the Corporate Debtor approached the Applicant for seeking certain unsecured loans to fulfill its business requirements. The Applicant advanced the loan of RS.9,85,58,918 to the Corporate Debtor. On 31.03.2015, the Corporate Debtor paid a sum of

Rs.2,83,723/- to the Applicant towards part payment of the interest, which was overdue on the said loan. On 31.03.2016, the Corporate Debtor further paid a sum of Rs.34,62,783/- to the Applicant towards part payment of the interest, which was overdue on the said loan. The total interest payment overdue and payable on behalf of the Corporate Debtor is Rs. 21,031,985/-. Further, a written Demand Notice was advanced on 27.04.2019 to the Corporate Debtor for payment of a sum of Rs.11,95,90,903/-. The Corporate Debtor deliberately refused to accept the Demand Notice sent at its registered office address as the same was returned with the comments 'Address Ok But No Such Person'. On 17.05.2019 The Counsel of the Applicant sent the Demand Notice via email to the Applicant at the email address of the Corporate Debtor as updated in the Company Master Data maintained with the ROC. However, no response was elicited from the Corporate Debtor and it has failed to refund the monies advanced by the Applicant alongwith interest within the stipulated window of time.

11. It is stated in Part-IV of Form No.1, the total amount claimed to be in default is Rs. 11,95,90,903/- (Rupees Eleven Crores Ninety Five Lakhs Ninety Thousand Nine Hundred and Three Only) coupled with interest @9% compounded annually pendent lite. The additional affidavit is filed vide Dairy No. 01129/11 dated 26.02.2024 clarifying the date of default as 04.05.2019 i.e. after lapse of 7 days from the date of demand notice- 27.04.2019 recalling the entire loan facility extended to the Respondent. Copy of statement of account of financial creditor demonstrating disbursal of unsecured loans to corporate debtor (Annexure-2), Ledger maintained by Financial Creditor (Annexure-4), TDS Form for FY 2014-15,2015-16,2016-17 (Annexure-5), Statement of Accounts of financial creditor from 29.05.2019 onwards till 25.05.2019 demonstrating no payment of

loans and overdue & unpaid interest by the corporate debtor (Annexure-9) are attached with the main petition. Copy of cheque given against part payment made on 31.3.2016 alongwith balance confirmation from India Circuits Limited (Barwala) duly authenticated by their director Mr. Rajneesh Garg (Rs. 34,62,783), cheque given against part payment made on 31.3.2016 alongwith balance confirmation from India Circuits Limited (Panchkula) duly authenticated by their director Mr. Rajneesh Garg (Rs. 9,41,085) and cheque given against part payment made on 31.3.2016 alongwith balance confirmation from Garg Electronics (Unit-III) duly authenticated by their director Mr. Rajneesh Garg (Rs. 17,18,500) are submitted by way of compliance affidavit filed vide Dairy No. 6620 dated 26.11.2019.

12. The notice of this petition was issued to the respondent corporate debtor to show cause as to why this petition be not admitted. An affidavit of service was filed vide Diary Nos. 4496 dated 02.09.2019, 5651 dated 16.10.2019, 6620 dated 26.11.2019. The reply was filed vide Diary No.6902 dated 06.12.2019, wherein it is stated that the present petition is filed under Section 7 of the Code deserves an outright dismissal in the absence of any witten 'financial contract' between the parties for the unsecured loan advanced which is mandatory document required to be filed alongwith the application. Further, there is no agreement between the parties for the alleged loan amount. Section 186(5) and (9) have not been followed. Further, it is submitted that the provisions of Section 179 and Section 189 of the Companies Act, 2013 provides for the power of the Board of the borrower company to borrow monies within certain limits and beyond its powers, it is the general body of shareholders applicable to a company which has the powers to avail such a loan. No such resolution has been produced by the

applicant-Financial Creditor in order to sustain its averments that the sums which were disbursed were repayable on demand.

Similar petition has been filed by the petitioner against '**Sunworld Luxury Suites Pvt. Ltd. before hon'ble National Company Law Tribunal, New Delhi** wherein there was no loan agreement and hon'ble ordered, "*Perusal of the petition along with documents filed before this Tribunal shows that there is no Loan Agreement entered into between the parties and further no written Resolution of the Shareholders or as passed by the Board of the Corporate Debtor for availing the loan has been placed on record. Taking into consideration the provisions of Companies Act, 2013, the petitioner to produce the documents of Loan Agreement and Resolution passed by the Corporate Debtor for availing the loan*".

In absence of agreement, the petitioner cannot be treated as a 'Financial Creditor' as the amount does not amount to 'financial debt' within the meaning of Section 5(8) of IBC, 2016. The applicant cannot claim the amount 'due and payable' and that 'default' has occurred within the meaning of Section 3(12) of the Code. The date of default under Part IV has not been mentioned. The application is filed beyond the period of limitation as the part payment was made on 31.03.2016 and the application has been filed on 04.06.2019. The reliance can be placed on the judgment of the **Hon'ble Apex court in the case of Innoventive Industries Ltd. v. ICICI Bank 2017(205) Comp Cas 57 (SC)**.

Further, the documents attached are not submitted by the affidavit. The petitioner is involved in matters relating to the Prevention of Money Laundering Act, 2002 qua which investigation is pending against the applicant and its directors by the Directorate of Enforcement, Department of Revenue, Ministry of Finance, Government of India wherein, the allegation against the applicant and its directors

are that the applicants have entered into criminal conspiracy for the object of providing accommodation entries to the various beneficiary companies with an aim of converting their unaccounted money through illegitimate transactions by charging commission with the assistance of mediators. Further, even the Income Tax Department also has held the said transactions to be unexplained cash credit under Section 68 of the Income Tax Act in the proceedings initiated by the Department.

13. The rejoinder was filed vide diary No.01129/4 dated 08.09.2022, wherein it is stated that the respondent is misleading by stating that the Petitioner Company of being involved in matters related to the Prevention of Money Laundering Act, 2002 in as much as the said matters are pending investigation, the genesis of which is under challenge and subjudice across various forums. Further, the list of 'High Risk Financial Institutions' as on 31.03.2019 by the Financial Intelligence Unit-India (FIU-IND), on account of noncompliance with PMLA and PML Rules, i.e. non-registration of Principal Officer (PO), does not carry the name of the Financial Creditor as a High-Risk NBFC. The petitioner and corporate debtor entered into loan agreements dated 23.01.2015 and 13.02.2015 stipulating the terms and conditions of the unsecured business loan (attached as Annexure R2 of the rejoinder). Further, the reliance is placed on the judgment passed by the Hon'ble Supreme Court in the case of ***Dena Bank v. C. Shivakumar Reddy, decided on 04.08.2021 in Civil Appeal No. 1650 of 2020***, there is no bar to the amendment of Section 7 IBC petition until final orders. The deduction of TDS on the accrued interest as mentioned in Form 26AS amounts to the admission and crystallisation of debt against the corporate debtor. The reliance is placed on the decision of Hon'ble NCLT, Mumbai bench in the case of ***Corporate Finance & Investment***

Services India Private Limited v. M L Mansukhani & Co., CP (IB) 1254/MB/2017 wherein it was held that S. 194A, Income tax Act, 1961 stands for the Tax on Interest other than the Interest on Securities and TDS deducted under the section cannot be towards the distribution of profits and therefore, the conclusion that can be drawn is that a Debtor would have paid the amount to towards the Interest Amount of Loan to a Financial Creditor. Further, reliance is placed on the decision of Hon'ble NCLT, New Delhi bench in the case of **Mrs. Tripat Kaur v. Kalibar Associates Pvt. Ltd. (IB) 51(ND)/2017**.

14. The short written submissions were filed by petitioner-financial creditor vide Dairy No. 01129/7 dated 24.05.2023 reiterating facts mentioned in the rejoinder. The short written submissions were filed by respondent-corporate debtor vide Dairy No. 01129/3 dated 03.06.2022 and 01129/10 dated 07.11.2023 reiterating the facts mentioned in reply.

The petitioner has relied on the judgments in support of the arguments-

- 1) **Hon'ble Supreme Court in Asset Reconstruction Company (India) Limited v. Bishal Jaiswal, Civil Appeal No. 323 Of 2021**, decided on 15.04.21, has upheld the consideration of balance sheets as a valid acknowledgment of debts while setting aside the order of the Hon'ble National Company Law Appellate Tribunal in **V. Padmakumar v. Stressed Assets Stabilisation Fund (SASF) & Anr., Company Appeal (AT) (Insolvency) No. 57 of 2020**. The Apex Court while deciding the said case has categorically observed that an honest admission of the company's liability in a balance sheet, though made in discharge of statutory duty, was nevertheless a conscious and voluntary admission of subsisting liability,

made with the intention to continue the jural relationship of the debtor and the creditor.

- 2) ***Asset Reconstruction Company (India) Limited (supra) in Arrow Engineering Ltd. v. Golden Tobacco Ltd., Company Appeal (AT) (Insolvency) No. 183 of 2021***, decided on 02.12.21 while setting aside the order of the Adjudicating Authority rejecting an application filed under section 7 of the Code, holding that arrangement between parties was in nature of business sharing and there was no 'financial debt' and that the claim of the appellant was barred by limitation, the Hon'ble NCLAT observed to the contrary that on consideration of documents and correspondences, including balance sheets, it was evident that the amount paid to the corporate debtor as advance for marketing/financial requirements of the development project undertaken by the corporate debtor was nothing but a financial debt within the meaning of IBC. Therefore, the Adjudicating Authority committed an error in holding that the appellant was not a financial creditor and rejecting the application filed by the appellant under section 7. The NCLAT further held that where there was an acknowledgment of debt in the balance sheet, there shall be a fresh period of limitation on each acknowledgment, thereby, attracting provisions of section 18 of the Limitation Act, 1963.
- 3) The Hon'ble ***Supreme Court in Dena Bank v. C. Shivakumar Reddy, decided on 04.08.2021 in Civil Appeal No. 1650 of 2020***, categorically observed that there is no bar to amendment of Section 7 IBC petition until final orders.

4) The Petitioner has further placed reliance on the observations made by the **Hon'ble NCLAT in the judgment dated 18.12.2020 in M/s. KVR Industries Private Limited vs M/s. P. P. Bafna Ventures Private Limited, Company Appeal (AT) (Insolvency) No. 626 of 2020**, wherein while setting aside an Order of the Adjudicating Authority, the NCLAT has categorically observed that the Adjudicating Authority has powers to act in terms of Section 340 of Cr. P.C. read with Section 195 of Cr.P.C. It is the humble submission of the Petitioner that any institution's judicial discipline, as well as the reverence and power it bears among the general public, is dependent on its ability to avoid misuse of its process. This would also include the ability to punish a litigant for wrongdoing during the hearings.

The respondent has relied on the following judgments in support of his arguments, relevant extracts are mentioned below-

1) Pawan Kumar v. Utsav Securities Pvt. Ltd. And another CA (AT) (Ins) No 251 of 2020

"12. The only issue arises in this Appeal is whether the transaction in question is a Financial Debt?

13. Certain essential conditions are required to be satisfied by a Financial Creditor seeking to invoke the provisions of CIRP as against the Corporate Company Appeal (AT) (Ins) No. 251 of 2020 Debtor. We have taken into consideration [Section 5\(7\)](#), [Section 5 \(8\)](#) read with [Section 7](#) of IBC. Following essential conditions are required to be satisfied by a Financial Creditor.

(i) There must be disbursement of loan amount.

(ii) Such disbursement should be made for a consideration for time value of money, and

(iii) When the debt (Whole or any part or instalment) become due and payable and is not paid by the Corporate Debtor means committed default.

14. The above all conditions are to be satisfied by the Financial Creditor then Adjudicating Authority may admit the Application under [Section 7](#) of the IBC and initiate the CIRP against the Corporate Debtor. In the present case, it is an admitted fact that financial Creditor transferred Rs. 6.10 Crs. through RTGS between 16.02.2017 to 22.02.2017 to the Corporate Debtor's bank account. This fact is corroborated by the bank entries filed by the Financial Creditor and the Corporate Debtor has not denied that the Corporate Debtor has not received such amount. Thus, we hold that aforesaid amount has been

disbursed by the Financial Creditor to the Corporate Debtor. However, there is no written agreement between the parties to show that the disbursement of such amount is a loan transaction.

15. Now, we have considered whether such amount is disbursed for a consideration for time value of money?

16. According to the Financial Creditor the Corporate Debtor has paid interest Rs. 6,05, 718 on 14.02.2018 after deduction of TDS and this fact is undisputed. Therefore, it is proved that such disbursal has been made for a Company Appeal (AT) (Ins) No. 251 of 2020 consideration for time value of money. However, as per the Corporate Debtor, on the basis of deduction of TDS such inference cannot be drawn.

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21. We have considered the submissions, the Financial Creditor has not furnished any document to show that the transaction in question is a loan transaction. So far as the [section 10](#) of Indian Contract Act and Rule 3 (1) (d) of the Rules is concerned we again refer the [Prayag Polytech](#) (Supra) in which this Tribunal held that:

"7. As regard relying on [Section 10](#) of the Contract Act, 1872, in our view IBC is a complete code in itself. [Section 238](#) of IBC has overriding effect on provisions inconsistent with IBC. The 'Financial contract' is defined in "Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016" Rule 3(1)(d) requires setting out the terms of the financial debt including tenure etc. We find that Appellant has failed to show any record showing financial debt to be there. As such, we are unable to find any fault in the impugned order while rejecting [Section 7](#) application."

22. With the aforesaid, we are of the view that the Financial Contract as per the Rule 3(1) (d) is must between the corporate Debtor and the Financial Creditor for setting out the terms of a Financial Debt including the tenure of the Debt, interest payable and the date of repayment. In the absence of such Financial Contract, the Financial Creditor has failed to satisfy that when the debt and interest become due and payable.

23. Now, we have considered, whether the Corporate Debtor failed to pay (Whole or any part or instalment of the debt) when the debt become due and payable?

24. As we have already discussed that the Financial Creditor has not filed any writing to show that when the debt become due and payable. As per the Financial Creditor the debt in question is payable on demand. From the notice and the Application, it is not clear that on which date the demand was Company Appeal (AT) (Ins) No. 251 of 2020 made and the loan and interest become due and payable. In Para 7 of the notice there is vague allegation that:

"Despite repeated request and reminders, no payments either towards the loan or outstanding/overdue interest has been paid by the borrower. Thus, coercing our client to issue the present demand notice recalling the loan and the overdue interest accruing till 31.03.2019."

25. The [Section 7 \(3\) \(a\)](#) of the IBC, provides that the Financial Creditor shall along with the Application is a required to furnish, a record of default recorded with the information utility or such other record or evidence of default as may be specified. The Financial Creditor has not filed any evidence of default along with the application under [section 7](#) of IBC.

26. With the aforesaid, we are of the view that the Respondent No. 1 (Financial Creditor) failed to establish when the debt become due and payable and the Corporate Debtor has committed default.

27. Apart from the aforesaid, we have considered the other circumstances. Admittedly, there is no agreement of loan and interest and no document is to stipulate the period of repayment even from the demand notice and the Application under [Section 7](#) of the IBC. The terms of the loan agreement and other factors are not clear. The Corporate Debtor Company is having authorized and paid up capital Rs. 1 Lacs whereas the Financial Creditor between 16.02.2017 to 22.02.2017 advanced loan of Rs. 6.10 Cr. From the pleadings it is not clear that at relevant time the Corporate Debtor was need of such huge amount and the Financial Creditor agreed to advance unsecured loan for such a huge amount. It is nowhere disclosed that the Corporate Company Appeal (AT) (Ins) No. 251 of 2020 Debtor is engaged in which business and the loan and finances was required for which business requirements. The Financial Creditor has not filed copy of their balance sheet for relevant years and also balance sheet of the Corporate Debtor Company”.

2) Sanjay Kewalramani vs. Sunil Parmanand Kewalramani and others, 2018

(209) Comp Cas 331,

“3. The questions arise for consideration in this appeal are:

ii. Whether the 2nd and 3rd Respondents are 'Financial Creditors', within the meaning of sub-section (7) read with sub-section (8) of Section 5 of the 'I&B Code'? Company Appeal (AT) (Insolvency) No. 57 of 2018

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6. It was further submitted that in absence of any agreement and written terms and conditions filed with the Form No-1, the 2nd and 3rd Respondents cannot be treated to be a 'Financial Creditors' as mere grant of unsecured loan does not amount to 'Financial Debt' within the meaning of Section 5(8).

7. Referring to Form No-1, it was submitted that unsecured loan of 2nd and 3rd Respondents clearly reflected that there was no term of payment of interest provided therein and the amount cannot be treated to be investment by the Respondents in consideration for the time value of money. It was submitted that Mr. Sunil Parmanand Kewalramani was one of the Directors and 2nd and 3rd Respondents are relatives i.e. father and sister respectively.

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12. There is nothing on the record to suggest that 2nd and 3rd Respondents had given the loan in favour of the 'Corporate Debtor' which can be termed to be 'disbursement of an amount for consideration for the time value of money' as required under Section 5(8). Merely grant of loan and admission of taking loan will ipso facto not treat the 2nd and 3rd Respondents as 'Financial Creditors', till they show that it complies with the substantive definition or any one or other clause of Section 5(8).

13. Mere fact that the company paid interest @ 12% per annum, during certain period cannot be the ground to hold that the 'debt' comes within the

meaning of 'Financial Debt' to treat the 2nd and 3rd Respondents as 'Financial Creditors'. As we find that 1st Respondent who signed and filed the application under Section 7 of the 'I&B Code' was not eligible to file the application not being a 'Financial Creditor', as held by the Adjudicating Authority, we hold that the petition at the instance of 2nd and 3rd Respondents were also not maintainable”.

**3) Sh. B. Prashant Hegde vs. State Bank of India and another CA (AT)
(Insolvency) No. 68 of 2019**

“16. Respondent No. 1 has filed its reply to the original appeal CA (AT) (Ins.) No. 68 of 2019 after effecting amendment of [section 7](#) application, which was filed vide Dy. No. 28064 on 13.07.2021. In its reply, Respondent No. 1 has sought leave of this Tribunal to treat the contents of the amendment application under [section 7](#) of the IBC as part and parcel of its counter affidavit in CA (AT) (Ins) No. 68 of 2019 which is granted. Furthermore, Respondent No. 1 has submitted that the cause of action, which is the date of default, would start on 28.5.2014, 30.6.2014, 10.10.2014 and 31.12.2014 when the restricting of debts owed to the four banks failed.

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19. During the currency of the appeal, we heard the arguments of both the parties on 15.7.2021 regarding the amendment in application [u/s 7](#) of IBC, and thereafter allowed Company Appeal(AT) (Ins) No. 68 of 2019 & filing of the amendment in the pleadings in accordance with the order of the Hon“ble Supreme Court in Civil Appeal No. 3765 of 2021”.

4) M/s Utility Powertech Limited vs. M/s Amit Traders RFA No. 515 of 2015

“19. On the issue of TDS deduction, the Trial Court may have erred as the settled position is that deduction of TDS does not constitute an admission of liability. The Trial Court may be wrong in holding that the TDS certificate by itself constitutes an admission of liability. This is not so, inasmuch as the TDS can be deducted even on the expectation of estimated liability. Independently of the TDS certificate, the liability of the Defendant is quite clear. The Supreme Court in Commissioner of Income Tax v. Gujarat Fluoro Chemicals (2012) 13 SCC 731 categorically held that "both advance tax as well as TDS are based on estimation of income by the assessee." The Bombay High Court as well, in S.P. Brothers v. Biren Ramesh Kadakla (2009) 1 Bom CR 453 has held that "the issuance of TDS certificates does not amount to an acknowledgement of defendant within the meaning of Section 25 of the Indian Evidence Act.....The TDS certificate is primarily to acknowledge the deduction of tax at source." The judgement dated 27th November, 2012 in Bigdot Advertising & Communications Pvt. Ltd. v. Union of India [CS(OS) No.226/2000] was dealing with the question of the person who is liable once the TDS certificate is issued. It is not a precedent on the proposition that if a TDS certificate is issued, it amounts to admission of liability. In light of this,

though the deduction of TDS by itself cannot be sufficient to impose liability, but on a totality of facts it is clear that the defendant is liable”.

5) **S.P. Brothers vs. Biran Ramesh Kadakia 2008 (19) RCR (Civil) 351.**

“8. The first and foremost we would like to consider whether suit of the plaintiff is covered under the provisions of Order 37 of the Code, as determination of this question would render other ancillary grounds inconsequential, in the facts and circumstances of the present case. In the plaint instituted by the respondent in appeal, no reference has been made to any written contract. On the contrary, it is averred that a friendly loan was given and the payment was made by a cheque. It is not even pleaded nor is case of the respondent that any written contract was executed between the parties. The entire reliance has been placed upon Exhibits-A to A-3 to the plaint, copies of the TDS certificates issued by the plaintiff from 31st May, 2000 to 26th September, 2003. The suit was instituted in September, 2006. Certainly, an averment has been made in paragraph 13 of the plaint that the suit is within the provisions of Order 37 and no relief falls outside the ambit of the said provision. We may even usefully refer to the notice dated 28th August, 2006 which was served by the respondent upon the appellant. Even in the notice dated 28th August, 2006, no reference was made to any agreement or contract between the parties. The claim was raised in the notice for claiming the interest at the rate of 15 per cent upto 31st March, 2003 (minus TDS paid) and thereafter at the rate of 15 per cent per anum. Objection in regard to maintainability of the suit has been taken by the appellant and argued before the learned single Judge with some emphasis. This contention has been noticed in the impugned judgment. We are unable to find any merit in the contention of the counsel for the respondent that the appellant cannot be permitted to argue this issue because specific objection in that regard was not taken in the application for leave to defend. Firstly, the application for leave to defend does show averment that the suit of the plaintiff is not maintainable and should be dismissed. Secondly, this is a question of law and it is obligatory upon the respondent to show that on the bare reading of the plaint, the suit under the provisions of Order 37 of the Code would be maintainable. The issuance of TDS certificates does not amount to an acknowledgement of defendant within the meaning of [Section 25](#) of the Indian Evidence Act and the Full Bench judgment of this Court in the case of [Jyotsna](#) (supra) puts the matter beyond doubt. The TDS certificate is primarily to acknowledge the deduction of tax at source. The certificate does not refer to any amount of loan or even the rate of interest which is payable on the said principal amount. It does not refer to any contract between the parties and even a transaction. When a written contract is produced before the

Court, its contents are the best evidence. The bare reading of Order 37 Rule 2 shows that these provisions have a restricted application and the order applies only to the class of suits specifically mentioned in the rule. A suit based upon bill of exchange, hundi, promissory note to recover a debt or liquidated demand payable by the plaintiff to the defendant with or without interest but arising from a written contract, or an enactment, or a guarantee where the claim against the principal is in respect of a debt or liquidated demand only. We are unable to accept the contentions raised on behalf of the respondent that issuance of certificate for tax deduction at source would be a document which will fall in any of the clauses stated under Order 37 Rule 2. As already noticed, a written contract between the parties has neither been pleaded nor any document to that effect placed on record. It is not a debt due on an enactment as understood in legal parlance or a guarantee. Admittedly, the loan was advanced as a friendly loan to which serious dispute has been raised. The dispute raised by the defendant relates to questions of law as well as facts”.

15. We have heard the learned counsel for the petitioner as well as respondent and have also perused the record carefully.

16. Section 7(5)(a) of the Code is as follows:-

“5) Where the Adjudicating Authority is satisfied that—

(a) a default has occurred and the application under sub-section (2) is complete, and there are no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application.”

17. The first issue for consideration is whether the present application is filed within limitation. The additional affidavit is filed vide Dairy No. 01129/11 dated 26.02.2024 clarifying the date of default as 04.05.2019 i.e. after lapse of 7 days from the date of demand notice- 27.04.2019 recalling the entire loan facility extended to the Respondent. The petitioner has relied on the decisions passed by the **Hon’ble, Principal Bench, New Delhi in CP (IB) No.130/ (PB)/2023 - State Bank of India Vs. Raebareilly Allahabad Highway Private Limited**, where on similar facts and circumstances, it was contended by the Respondent / Corporate

Debtor that the "date of default has not been mentioned in the application by the FC and thus the Section 7 application is liable to be dismissed".

While answering in the negative to this particular contention raised by the Respondent, the Hon'ble Principal Bench has clarified the aspect of date of default vis à vis Section 7 of the Code. Relevant portion of the said Order is reproduced hereinbelow, which has direct bearing on the present case

18. In Part IV of the Form-1 as extracted above, the FC mentions the Date of NPA as the Date of Default. However, the CD on the other hand submits that the FC has not mentioned the Date of Default and thus the Section 7 application is liable to be dismissed.

*19. The question which arises before us is whether the date of NPA can be considered as Date of Default. In this backdrop, it is relevant to understand that the adjudicating authority under the present legislation has a very limited role to play while admitting or rejecting an application filed under section 7 of The Code. One of the important factor to be considered in an application under section 7 is the existence of debt and thereby 'non payment of debt' i.e. default (**Babulal Vardharji Gurjar v. Veer Gurjar Aluminum Industries (P) Ltd., (2020) 15 SCC 1**). This is also evident from the bare language mentioned under Section 6 and 7 of The Code.*

*20. As has been settled by the Hon 'ble Supreme Court in catena of judgments that the Limitation Act, 1963 is applicable to the proceedings under the Code, 2016 (**B.K. Educational Services (P) Ltd. v. Parag Gupta & Associates, (2019) 11 SCC 633**). The basic idea behind the application of the Limitation Act, 1963 is not to give life to time barred debts (**Babulal Vardharji Gurjar v. Veer Gurjar Aluminium Industries (P) Ltd., (2020) 15 SCC 1**).*

The mentioning of Date of Default in the Form-1 under Part IV is only for the purposes of reckoning of the Limitation Period within which a Financial Creditor has to exercise his rights, so that a financial creditor does not sleep over his right. Section 238 A of the Code provides for the provision of the Limitation Act, 1963 to apply to proceedings before the Adjudicating Authority.

*Accordingly, the time period for filing the application us 7 of the Code is governed by Article 137 of the Schedule to the Limitation Act, 1963 which provides for exercising the right within period of 3 years, from the date when the right to apply accrues. Hence, the Financial Creditor has to file the application within 3 years from the date when the right to apply accrue i.e. the date of default (**Dena Bank v. C. Shivakumar Reddy, (2021) 10 SCC 330**).*

Relevant paragraphs are extracted below:

*"99. There can be no dispute with the proposition that the period of limitation for making an application under Section 7 or 9 IBC is three years from the date of accrual of the right to sue, that is, the date of default. In **Gaurav Hargovindbhai Dave v. Asset Reconstruction Co. (India) Ltd. [Gaurav***

Hargovindbhai Dave v. Asset Reconstruction Co. (India) Ltd., (2019) 10 SCC 572 : (2020) 1 SCC (Civ) 1] authored by Nariman, J. this Court held: (SCC p. 574, para 6)

"6. ... The present case being "an application " which is filed under Section 7, would fall only within the residuary Article 137."

The present petition is filed vide Diary No. 2805 dated 04.06.2019 and was refiled vide Dairy No. 3026 dated 14.06.2019. Thus, it can be safely said that the present petition is well within the period of limitation of three years.

18. The contention of the respondent-corporate debtor that there is absence of written 'financial contract' between the parties for the unsecured loan advanced which is a mandatory document required to be filed alongwith the application. Further, there is no agreement between the parties for the alleged loan amount is untenable in law as the the rejoinder is also the part of the main pleading wherein the petitioner has placed on record the loan agreements between the petitioner and corporate debtor dated 23.01.2015 and 13.02.2015 stipulating the terms and conditions of the unsecured business loan (attached as Annexure R2 of the rejoinder) which clearly shows that there was an agreement between the parties for the loan transaction.

Further, the judgments relied upon by the respondent including ***Pawan Kumar (supra)***, ***Sanjay Kewalramani (supra)***, ***Sh. B. Prashant Hegde (supra)***, ***M/s Utility Powertech Limited (supra)*** and ***S.P. Brothers (supra)*** are not much convincing as the facts of these cases are different from the facts of the present case and the judgments relied upon by the petitioner including- ***Asset Reconstruction Company (India) Limited (supra)***, ***Arrow Engineering (supra)***, ***V. Padmakumar (supra)***, ***Dena Bank (supra)***, ***M/s. KVR Industries Private Limited (supra)*** clearly supports the plea of the petitioner that there is presence of

the loan agreement, the balance sheets can be considered as a valid document and hence, the petitioner falls within the definition of 'Financial Creditor'.

19. Another issue for consideration is whether there is a default in payment or not. It is observed from the record that in the present case, the debt is evidenced by statement of account of financial creditor demonstrating disbursement of unsecured loans to corporate debtor (Annexure-2), Ledger maintained by Financial Creditor (Annexure-4), TDS Form for FY 2014-15,2015-16,2016-17 (Annexure-5), Statement of Accounts of financial creditor from 29.05.2019 onwards till 25.05.2019 demonstrating no payment of loans and overdue & unpaid interest by the corporate debtor (Annexure-9) are attached with the main petition, cheque given against part payment made on 31.3.2016 alongwith balance confirmation from India Circuits Limited (Barwala) duly authenticated by their director Mr. Rajneesh Garg (Rs. 34,62,783), cheque given against part payment made on 31.3.2016 alongwith balance confirmation from India Circuits Limited (Panchkula) duly authenticated by their director Mr. Rajneesh Garg (Rs. 9,41,085) and cheque given against part payment made on 31.3.2016 alongwith balance confirmation from Garg Electronics (Unit-III) duly authenticated by their director Mr. Rajneesh Garg (Rs. 17,18,500) are submitted by way of compliance affidavit filed vide Dairy No. 6620 dated 26.11.2019. As per the financial records, it is evident that an amount of Rs. 11,95,90,903/- (Rupees Eleven Crores Ninety Five Lakhs Ninety Thousand Nine Hundred and Three Only) is still pending which amounts to default when the corporate debtor avoided the payment of outstanding amount despite repeated requests by the petitioner-financial creditor.

20. The application filed in the prescribed Form No.1 is found to be complete. Another condition is that there are no disciplinary proceedings pending against

the proposed Resolution Professional. In the present case, in Part III of Form 1, Ms. Karuna Sharma, has been proposed as Interim Resolution Professional (IRP). The Law Research Associate of this Adjudicating Authority has checked the credentials of Ms. Karuna Sharma, her AFA Certification is valid up to 24.10.24 and there is nothing adverse against her. In view of the above, we appoint Ms. Karuna Sharma, Registration No. IBBI/IPA-002/IP-N00340/2017-18/10944, Email: sharma.karuna@gmail.com, Mobile No.9871145777, the Interim Resolution Professional with the following directions:-

- i.) The term of appointment of Ms. Karuna Sharma shall be in accordance with the provisions of Section 16(5) of the Code;
- ii.) In terms of Section 17 of the Code, from the date of this appointment, the powers of the Board of Directors shall stand suspended and the management of the affairs shall vest with the Interim Resolution Professional and the officers and the managers of the Corporate Debtor shall report to the Interim Resolution Professional, who shall be enjoined to exercise all the powers as are vested with Interim Resolution Professional and strictly perform all the duties as are enjoined on the Interim Resolution Professional under Section 18 and other relevant provisions of the Code, including taking control and custody of the assets over which the Corporate Debtor has ownership rights recorded in the balance sheet of the Corporate Debtor, etc. as provided in Section 18 (1) (f) of the Code. The Interim Resolution Professional is directed to prepare a complete list of the inventory of assets of the Corporate Debtor;

- iii.) The Interim Resolution Professional shall strictly act in accordance with the Code, all the rules framed thereunder by the Board or the Central Government, and in accordance with the Code of Conduct governing his profession and as an Insolvency Professional with high standards of ethics and morals;
- iv.) The Interim Resolution Professional shall cause a public announcement within three days as contemplated under Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 of the initiation of the Corporate Insolvency Resolution Process in terms of Section 13 (1) (b) of the Code read with Section 15 calling for the submission of claims against Corporate Debtor;
- v.) It is hereby directed that the Corporate Debtor, its Directors, personnel, and the persons associated with the management shall extend all cooperation to the Interim Resolution Professional in managing the affairs of the Corporate Debtor as a going concern and extend all cooperation in accessing books and records as well as assets of the Corporate Debtor;
- vi.) The Suspended Board Of Directors is directed to give complete access to the Books of Accounts of the corporate debtor maintained under section 128 of the Companies Act. In case the books are maintained in the electronic mode, the Suspended Board of Directors are to share with the Resolution Professional all the information regarding Maintaining the Backup and regarding Service Provider

kept under Rule 3(5) and Rule 3(6) of the Companies Accounts Rules, 2014 respectively as effective from 11.08.2022, especially the name of the service provider, the internet protocol of the Service Provider and its location, and also address of the location of the Books of Accounts maintained in the cloud. In case accounting software for maintaining the books of accounts is used by the corporate debtor, then IRP/RP is to check that the audit trail in the same is not disabled as required under the notification dated 24.03.2021 of the Ministry of Corporate Affairs. The statutory auditor is directed to share with the Resolution Professional the audit documentation and the audit trails, which they are mandated to retain pursuant to SA-230 (Audit Documentation) prescribed by the Auditing and Assurance Standards Board ICAI. The IRP/Resolution Professional is directed to take possession of the Books of Account in physical form or the computer systems storing the electronic records at the earliest. In case of any non-cooperation by the Suspended Board of Directors or the statutory auditors, he may take the help of the police authorities to enforce this order. The concerned police authorities are directed to extend help to the IRP/RP in implementing this order. For retrieval of relevant information from the systems of the corporate debtor, the IRP/RP may take the assistance of Digital Forensic Experts empanelled with this Bench for this purpose. The Suspended Board of Directors is also directed to hand over all user IDs and passwords relating to the corporate debtor, particularly for government portals, for various compliances. The Interim Resolution

Professional is also directed to make a specific mention of non-compliance, if any, in this regard in his status report filed before this Adjudicating Authority immediately after a month of the initiation of the CIRP.

- vii.) The Resolution Professional is directed to approach the Government Departments, Banks, Corporate Bodies and other entities with request for information/documents available with those authorities/institutions/others pertaining to the corporate debtor which would be relevant in the CIR proceedings. The Government Departments, Banks, Corporate Bodies and other entities are directed to render the necessary information and cooperation to the Resolution Professional to enable him to conduct the CIR Proceedings as per law.
- viii.) The Interim Resolution Professional shall after collation of all the claims received against the Corporate Debtor and the determination of the operational position of the Corporate Debtor constitute a Committee of Creditors and shall file a report, certifying the constitution of the Committee to this Tribunal on or before the expiry of thirty days from the date of his appointment, and shall convene the first meeting of the Committee within seven days of filing the report of the constitution of the Committee; and
- ix.) The Interim Resolution Professional is directed to send a regular progress report to this Tribunal every fortnight.

21. In the given facts and circumstances, the present petition being complete and having established the default in payment of the Financial Debt for the default amount being above the threshold limit, the petition is admitted in terms of Section 7(5) of the IBC and accordingly, also direct moratorium in terms of sub-section (1) of Section 14 of the code to take effect as below:

- a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree, or order in any court of law, tribunal, arbitration panel, or other authority;
- b) transferring, encumbering, alienating, or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
- c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Operational Assets and Enforcement of Security Interest Act, 2002; and
- d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.
- e) It is further directed that the supply of essential goods or services to the corporate debtor as may be specified, shall not be terminated or suspended or interrupted during the moratorium period. The provisions of Section 14(3) shall, however, not apply to such transactions as may be notified by the Central Government in consultation with any operational sector regulator and to a surety in a contract of guarantee to a corporate debtor.
- f) The order of moratorium shall have effect from the date of this order till completion of the corporate insolvency resolution process or until this

Bench approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of the corporate debtor under Section 33 as the case may be.

22. We direct the Financial Creditor to deposit a sum of ₹2,00,000/- (Rupees Two Lakhs Only) with the Interim Resolution Professional, to meet out the expense to perform the functions assigned to him in accordance with Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The amount, however, is subject to adjustment by the Committee of Creditors as accounted for by the Interim Resolution Professional on the conclusion of CIRP.

23. A copy of the order shall be communicated to both parties. The learned counsel for the petitioner shall deliver a copy of this order to the Interim Resolution Professional forthwith. The Registry is also directed to send a copy of this order to the Interim Resolution Professional at his e-mail address forthwith.

24. The petition is admitted accordingly.

Sd/-

(Subrata Kumar Dash)
Member (Technical)

April 16, 2024

PKA/TBG

Sd/-

(Harnam Singh Thakur)
Member (Judicial)