IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA

I.A. (IB) No. 2105/KB/2023
In
Company Petition (IB) No. 106/KB/2023

An application under Section 60(5) read with Section 65 of the Insolvency and Bankruptcy Code, 2016 and the relevant regulations under the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

IN THE MATTER OF:

Urban Infraprojects Private Limited

... Financial Creditor.

Versus

EDCL Infrastructure Limited

... Corporate Debtor.

And

IN THE MATTER OF:

EDCL Infrastructure Limited, having registered office at EDCL House, 1A, Elgin Road, Kolkata – 700020.

... Applicant.

Verses

Urban Infraprojects Private Limited, having registered office at Merlin Infinite, Sector V, Block – DN 8th Floor, Unit No. 803, Plot 51, Kolkata – 700091, West Bengal, now shifted to AE-310, 1st Floor, Salt Lake, Sector 1, Kolkata – 700064, West Bengal.

... Respondent.

Date of Pronouncement: February 08, 2024.

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I.A. (IB) No. 2105/KB/2023
In
Company Petition (IB) No. 106/KB/2023

CORAM:
SMT. BIDISHA BANERJEE, HON'BLE MEMBER (JUDICIAL)
SHRI D. ARVIND, HON'BLE MEMBER (TECHNICAL)

Appearances (via Video Conferencing/Physical):

For the Applicant
(EDCL Infrastructure): **Mr. Bikash Ranjan Bhattacharya, Sr. Adv.**
Mr. Swatarup Banerjee, Adv.
Mr. Avishek Guha, Adv.
Mr. Nirmalya Dasgupta, Adv.
Mr. Sariful Haque, Adv.
Ms. Arunika Dutta, Adv.
Mr. Kaustov De Sarkar, Adv.

For the Respondent
(Urban Infraprojects): **Dr. Mamta Binani, Adv. (PCS).**
Mr. Rohit Sharma, Adv.

ORDER

Per: D. Arvind, Member (Technical)

1. The Court assembled through a blended mode.

2. Heard the Learned Senior Counsel Mr. Bikash Ranjan Bhattacharya and Learned Counsel Mr. Swatarup Banerjee for the EDCL Infrastructure Limited (Applicant herein) and Learned Counsel, Dr. Mamta Binani for the Urban Infraprojects Private Limited (Respondent herein).

3. This application has been preferred by **EDCL Infrastructure Limited** (hereinafter referred to as "Applicant/Corporate Debtor/CD") against **Urban Infraprojects Private Limited** (hereinafter referred to as "Respondent/Financial Creditor/FC") under Section 60(5) read with Section 65 of the Insolvency and Bankruptcy Code, 2016 (for brevity "IBC") seeking direction from this Adjudicating Authority that:

a. C.P. (IB) No. 106/KB/2023 (Urban Infraprojects Private Limited vs. EDCL Infrastructure Limited) filed under Section 7 of IBC be dismissed.

b. Cost be imposed upon Urban Infraprojects Private Limited for fraudulent filing of company petition being C.P. (IB) No. 106/KB/2023.

c. Stay on C.P. (IB) No. 106/KB/2023 till disposal of the instant application

d. Ad-interim orders in-terms of prayer above.

Factual conspectus:

4. The Financial Creditor initiated application under Section 7 of IBC seeking admission of the Corporate Debtor into Corporate Insolvency Resolution Process (CIRP) and the same has been numbered as C.P. (IB) 106/KB/2023. The Applicant herein is challenging the said application as not maintainable on following grounds:

4.1. The company petition is defective in nature as it has been addressed to the Registrar NCLT Chennai Bench, whereas this application has been filed before the Bench at Kolkata.

4.2. The company petition has been filed without proper authorisation.

4.3. The petitioner is not a Financial Creditor at all as they have not acted as per the alleged loan agreement.

4.4. The terms of alleged agreement executed on 12th April 2019 is very unilateral and have been violated without consent of the Applicant by the Respondent.

4.5. Violation of Section 186 of the Companies Act, 2013 by the Financial Creditor and consequently the debt is legally not enforceable.

4.6. Existence of the Arbitration clause in the said agreement and therefore application under Section 7 of IBC is not maintainable.

4.7. Part of the claim is barred by limitation and part of the claim is barred under Section 10A of the Code.

Applicant's submissions:

5. Learned Counsel, Mr. Swatarup Banerjee appearing on behalf of the Applicant (EDCL Infrastructure Limited) submits that the covering letter of the application is addressed to Registrar, NCLT Chennai, whereas the same has been filed before the Bench at Kolkata, such mistake goes to the route of the matter and therefore, the application is not maintainable.

6. He also brought to our attention Form No. NCLT-12 for memorandum of appearance at Page No. 167 of the Application which has been signed by Mr. Rohit Sharma stating that he has been authorised by the Director Mr. Tanmay Agarwal, one of the directors of the Financial Creditor whereas in the board resolution which is annexed at Page No. 168 of the application, one Mr. Ashish Agarwal has signed the authorization. Therefore, the Ld. Counsel contends that the authorization given to Mr. Rohit Sharma is defective and, on this ground, alone, the application filed by the Financial Creditor is not maintainable.

7. He also brought to our attention that alleged agreement that was executed on **April 12, 2019** and the chart of disbursement. First four entries in the chart showing disbursements that was made in March 2019 which is before the date of execution of the agreement. He further submits that as per the agreement a sum of Rs.25 Crore can be given as loan whereas the application filed by the Financial Creditor mentions a sum of Rs. 27.64 Crore (Rupees Twenty-Seven

Crore Sixty-Four Lac only) which is contrary and beyond limits set in the said agreement. Thus, he submits that the Financial Creditor has varied the terms and conditions of the alleged agreement unilaterally without the consent of the Applicant.

8. He further submits that apart from above, as per the agreement the rate of interest is 15% per annum whereas the rate of interest that has been charged by the Financial Creditor is only 9% per annum which is without the consent of the Applicant. He further pointed out that as per the agreement the borrower will have to give 30 days prior information of the need of the funds and the loan amount cannot exceed Rs. 25 Crore whereas no such written request on the part of the Applicant herein for disbursement of amount in excess of Rs. 25 Crore was ever made. Thus, there is a clear violation of the terms and conditions of the agreement on the part of the Respondent in alleging that they have advanced Rs.27 crore which is in excess of the maximum loan amount that can be given as per the agreement and therefore no reliance can be placed on the said agreement.

9. He further points out that Section 186(2) of the Companies Act, 2013, has been violated by the Financial Creditor as authorized and paid-up capital of the company is Rs.10 lakhs whereas the loan given by them is Rs. 27 Crore which is far in excess of the 60% limit prescribed under Section 186 of the Companies Act and hence the debt is void and cannot be legally enforced.

10. To substantiate his argument, he relied on two judgments of the NCLT, New Delhi in the case of the judgments passed in the matter of:

i. ***Jambudwip Exports and Imports Limited vs. UP Bone Mills Private Limited*** passed by the NCLT, New Delhi Bench (Court No-II) in (IB) 447(ND)/2021.

ii. The judgment reported in the manner of ***UKG Sales Private Limited vs. Exotic Buildcon Private Limited*** in (IB)-573/ND/2021 order delivered on June 2, 2022 passed by the National Company Law Tribunal, New Delhi Bench.

11. He further submits that there exists arbitration clause in the agreement and therefore any such disputes should be referred to arbitration and it is not open for the Financial Creditor to file a Section 7 petition under IBC. He relied on the Judgement of the NCLT in ***Indus biotech vs Kotak India (Offshore) Fund*** reported in **2020 SCC Online NCLT 1430** to support his argument.

12. He further submits the disbursements made in 2019 and defaults falling under Section 10A of IBC period are barred by limitation and the bar provided under Section 10A of IBC.

***Respondent's submissions per contra*:**

13. The Learned Counsel, Dr. Mamta Binani appearing on behalf of the Respondent (Financial Creditor) submits that execution of loan agreement dated 12.04.2019 is not disputed. Pursuant to the agreement an amount of Rs. 27 crore was advanced. A total principal sum of Rs. 27,07,00,000 were disbursed to the Corporate Debtor from 12.04.2019 to 06. 04.2022 being the last date of such disbursement. Out of the total disbursement only Rs. 57 Lac was disbursed prior to the execution of the agreement and the remaining disbursements were made subsequent to the execution of the loan agreement. Therefore, even if the payment of Rs. 57 Lac disbursed prior to the execution of the agreement is not considered as "financial debt", even then the balance amount which is more than Rs. 25 Crore disbursed pursuant to the agreement is a "financial debt" and the same cannot be disputed.

14. Since the loan amount exceeds the threshold limit, this application is not maintainable. Company Petition filed initiating CIRP of the Corporate Debtor under section 7 of IBC is maintainable.

15. She further submits that interest rate was fixed at 15 % per annum but based on the receipt of request from the Corporate Debtor, the interest rate was reduced to 9% per annum and same was affirmed and acknowledged by the Corporate Debtor in its letter of confirmation for the period of 01.04.2021 to 03.01.2022 which is annexed at page 112 to the Company Petition.

16. Further, it is submitted that the Corporate Debtor began to default payment of interest and principal and therefore a demand letter was issued on 31.01.2023. Despite the receipt of notice, Corporate Debtor did not initiate making payment to Financial Creditor.

17. She further submits with regard to the arbitration clause in the loan agreement, she places reliance on the judgment of the Hon'ble Supreme Court in the matter of ***Indus Biotech Private Limited vs. Kotak India Venture (Offshore) Fund (earlier known as Kotak India Venture Limited) & Ors***. Reported in **(2020) SCC Online [Para 27 to 30]**, wherein the Hon'ble Apex Court held inter alia that even if any proceedings of arbitration are invoked, this Adjudicating Authority is to consider the application under Section 7 of the Code independently and pass necessary orders pertaining to admission or rejection of the application, consequence of which will befall on the proceedings under The Arbitration and Conciliation Act, 1996.

18. The Learned Counsel further submits with regard to the alleged violation of Section 186 of the Companies Act, 2013, the Financial Creditor would like to place reliance on the judgement of the NCLT, Mumbai Bench, in the matter of ***Pegasus Assets Reconstruction Private Limited vs. Whiz Enterprise Private Limited, in CP No. 530/(IB)-MB-V/2021 order dated 20.04.2023 (Para-16 and 24),*** wherein it was held that the Corporate Debtor was aware of

everything at the time of execution of the agreement and dispute apropos to Section 186 contravention cannot be taken by the Corporate Debtor at the time of being called upon to pay the dues. It was further held that, even otherwise, in the reply affidavit filed on behalf of the Corporate Debtor no such objection regarding contravention of Section 186 of the Companies Act, 2013 has been raised and therefore the said objection was considered as beyond pleadings and was not considered.

19. In the instant case also, the Corporate Debtor has filed a Demurrer application (IA No. 2105/KB/2023), application for referring the parties to arbitration (UNNUMBERED) and its Affidavit-in-Reply to main CP filed by the Financial Creditor and in none of these documents, the Corporate Debtor has made pleadings apropos the contravention of Section 186 of the Companies Act, 2013.

20. Regarding the Section 10A period default the Financial Creditor submits that the debt is running debt and is not specific default against specific debt. It is a continuing default. It cannot be construed that the said default will fall during the Section 10A period. Even assuming that disbursements made prior to the execution of the loan agreement and some disbursements made in 2019 are time barred, the remaining default amount is far in excess of the threshold limit of Rs. One Crore and this application made by the Corporate Debtor is not maintainable.

Analysis and Findings:

21. The first ground taken by the Corporate Debtor is that covering letter of the application has been addressed to the Registrar NCLT Chennai whereas the application has been filed before the Bench at Kolkata. It is not the case of the Corporate Debtor that Kolkata Bench has no jurisdiction over this matter. When that being the case, clerical error in the covering letter cannot make the application defective in our view and therefore this ground is not tenable.

22. The second ground taken by the Corporate Debtor is that the petition has been filed without proper authorization. He relies on Form NCLT-12 in which one Mr. Rohit Sharma has signed by stating that he has been authorized by one of the directors of the Financial Creditor, namely Mr. Tanmoy Agarwal. However, the minutes of the board meeting which resolved authorizing Mr. Rohit Sharma to make application before NCLT is signed by one Mr. Ashish Agarwal.

23. We see that the minutes of the board resolution contains in the last para as under

> **"***Mr. Tanmay Agarwal, Director of the Company, be and is hereby authorised to propose and engage insolvency professionals, advisors, consultants, lawyers, advocates and solicitors etc. on such terms as may be deemed fit from time to time in connection with the proposed CIRP and obtain any*

*advisory/consultation in regard to the above for Urban Infraprojects Private Limited.***"**

Therefore, we are of the view that the application has been filed with proper authorization and consequently, we reject this ground placed by the Corporate Debtor.

24. The next ground on which the Corporate Debtor seeks is that the Financial Creditor has not acted as per the agreement that was executed on April 12, 2019. We find that there is not dispute on the execution of this Loan agreement. We have perused the said agreement made between the parties. The Clause 7 of the agreement provides that total cumulative loan amount to be disbursed by Urban Infraprojects Private Limited (Financial Creditor) to EDCL Infrastructure Limited (Corporate Debtor) under this agreement will not exceed Rs. 25 Crore at any point in time. Clause 8 of the agreement provides payment of simple interest calculated at 15% per annum. The clause also provides that the interest rate will remain fixed unless otherwise agreed by both the parties in writing for revision.

25. Modification/alteration of the agreement can be made in writing under signature of respective representatives as per clause 18 of the agreement. When agreement is read as a whole, we can only infer that the loans advanced against payment of interest clearly meets the criteria to be a "financial debt" within the definition of

Section 5 (8) of IBC. In fact, we infer that the transaction in question qualifies as "financial debt" in term of Section 5(8) (a) of IBC.

26. Learned Counsel for the Corporate Debtor argued that the terms and conditions of this agreement has been varied and therefore this agreement should not be relied. He submits that instead of 15% interest as contained in the agreement the Financial Creditor has charged only 9%. The Financial Creditor, as per the agreement cannot advance any credit facility beyond Rs. 25 crores whereas in this case, the Financial Creditor is claiming to have lent Rs. 27 Crore out of which nearly Rs. 57 Lakh was disbursed prior to the execution of the agreement. In view of such variations and violations, he submits that the loan agreement should not be relied and the disbursements should not be treated as "Financial Debt".

27. We find that variations to the agreement, claimed by the Corporate Debtor are in his favour. Instead of 15% per annum the Financial Creditor has charged only 9% per annum as admitted by the Corporate Debtor. Though as per the agreement only Rs.25 crores can be disbursed the Financial Creditor has disbursed Rs. 27 Crore. Therefore, whether such changes were made in writing and executed by both the parties or not as long as such changes are in favour of the Corporate Debtor, we are of the view that the same cannot be taken as a ground by the corporate debtor for ignoring the executed agreement between the parties.

28. If the Corporate Debtor was aggrieved with the reduction in rate of Interest, nothing prevented him from paying the agreed rate of Interest at 15%. In same way, if he is aggrieved with excess disbursement of Rs. 2 Crore (Rs. 27 Crore disbursement as against the maximum limit of Rs. 25 Crore) he could have returned it immediately. Thus, the arguments made with reference to variations in the agreement are frivolous and we reject the same.

29. The argument made with reference to violation of Section 186 of the Companies Act, 2013 by the Financial Creditor, the Corporate Debtor has placed reliance on the judgments rendered by the NCLT New Delhi Bench in the cases of ***UKG Steels Pvt. Ltd. Vs. Exotic Buildcon Pvt. Ltd.*** in **(IB) 573/ND/2021** and ***Jambudwip*** in **(IB) 447/ND/2021**. In both these cases the Tribunal have held that any loan given in contravention of Section 186 of the Companies Act, 2013 is not legally enforceable debt and consequently the Tribunal dismissed the applications filed under Section 7 of IBC by the Financial Creditors therein.

30. The Learned Counsel for the Financial Creditor relies on the judgment of NCLT Mumbai in the matter of ***Pegasus ARC Vs Whiz Enterprise Private limited*** in **CP No. 530/(IB)-MB-V/2021** order dated rendered on April 20, 2023, wherein it was held that when the corporate debtor executed agreement and was aware of everything, he cannot turn back and allege contravention of

Section 186 of the Companies Act by the lender to evade payment, when he is called upon to pay the dues.

31. It may be relevant to rely on the judgment rendered by the Hon'ble NCLAT on the case of ***Sarveshwar Creations Pvt. Ltd vs. Union Bank of India***, order dated **November 23, 2022** reported in **2022 SCC OnLine NCLAT 4632** wherein contravention of Section 185 of Companies Act, 2013 was dealt. Section 185 of the Companies Act, 2013, deals with loan to directors, while Section 186 deals with loans/ investment in other body corporates. Both Section provides for the Special Resolutions in case loans are in variance with the provisions made in such sections of the Companies Act, 2013. At this juncture, we would refer the relevant paragraphs of the judgment as under:

> **"***l. As far as the issue of contravention of provision of Section 185 of the Act prevailing as on that date (pre -07.05.2018 amendment to the Act) is concerned, it is very much clear that this is the provision which the company has to comply internally and if they fail to comply the necessary punishment is available in the same section i.e. Section 185, both monetary penalty and /or imprisonment. As far as bank is concerned, they have been provided time to time the Board Resolution showing the approval of the Board. Hence, if there is any irregularity then for that the Members of the Board are responsible. If the official of the bank have committed some irregularity, then it is the Bank who has to prosecute these*

officers against the provisions laid down under the law applicable to them. Bank is required to investigate internally. However, as far as the public fund with the public sector bank is concerned, the "Doctrine of Indoor Management" will be wholly and exclusively applicable.**"**

(Emphasis Added)

32. Section 186 of the Companies Act, 2013, deals with loan and investment by a company. As per Section 186 (2) of the Companies Act, no company shall directly or indirectly can give any loan to any person or other body corporate exceeding 60% of paid-up share capital free reserves and security premium account or 100% of its free reserves and securities premium account. In case such loan amount exceeds the overall limit provided in Section 186 (2) of the Act, 2013 then the same can be given provided it is - approved by a Special Resolution passed in the General meeting.

33. In the case in hand the Financial Creditor's paid-up capital is Rs. 10 Lac only. Thus, the loan given by the Financial Creditor is far in excess of the threshold limit. The Financial Creditor has not placed copy of any special resolution passed at general meeting approving such huge sum of loan to the Corporate Debtor far in excess of the limits prescribed under the said section.

34. Before considering this argument, we need to examine, whether such a pleading was made ever made by the Corporate Debtor in

the reply affidavit filed in response to the petition filed under Section 7 of IBC by the Financial Creditor or in the current application filed by the Corporate Debtor challenging the maintainability of the Section 7 of IBC petition filed by Financial Creditor.

35. The Hon'ble Apex Court in ***Union of India vs Ibrahim Uddin*** reported in **(2012) 8 SCC 148**, has held that no relief can be granted based on grounds outside the pleadings of the parties. No party can be permitted to travel beyond its pleading. In other words, it is not a matter of right that an argument made outside the pleadings should be considered. In this context we would refer the judgment rendered by the Hon'ble Apex Court in ***Ram Sarup Gupta (Dead) by Lrs. vs. Bishun Narain Inter College and Ors.*** reported in **(1987) 2 SCC 555** that:

> "*6. The question which falls for consideration is whether the respondents in their written statement have raised the necessary pleading that the license was irrevocable as contemplated by Section 60(b) of the Act and, if so, is there any evidence on record to support that plea. It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered.* ***It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in***

support of the case set up by it*. The object and purpose of pleading is to enable the adversary party to know the case it has to meet.*"

(Emphasis Added)

36. Further, the Hon'ble Apex Court in ***Bachhaj Nahar v. Nilima Mandal***, reported in **(2008) 17 SCC 491** held that a case not specifically pleaded can be considered by the court unless the pleadings in substance contain the necessary averments to make out a particular case and issue has been framed on the point. **In absence of pleadings, the court cannot make out a case not pleaded, suo motu**. The relevant para of the judgment is reproduced in verbatim:

"*12. It is thus clear that a case not specifically pleaded can be considered by the court only where the pleadings in substance, though not in specific terms, contains the necessary averments to make out a particular case and the issues framed also generally cover the question involved and the parties proceed on the basis that such case was at issue and had led evidence thereon. As the very requirements indicate, this should be only in exceptional cases where the court is fully satisfied that the pleadings and issues generally cover the case subsequently put forward and that the parties being conscious of the issue, had led evidence on such issue. But where the court is not satisfied that such case was at*

issue, the question of resorting to the exception to the general rule does not arise. The principles laid down in ***Bhagwati Prasad*** *and* ***Ram Sarup Gupta (supra)*** *referred to above and several other decisions of this Court following the same cannot be construed as diluting the well settled principle that without pleadings and issues, evidence cannot be considered to make out a new case which is not pleaded. Another aspect to be noticed, is that the court can consider such a case not specifically pleaded, only when one of the parties raises the same at the stage of arguments by contending that the pleadings and issues are sufficient to make out a particular case and that the parties proceeded on that basis and had led evidence on that case.* ***Where neither party puts forth such a contention, the court cannot obviously make out such a case not pleaded, suo moto****."*

(Emphasis Added)

37. In the given facts, we are of the view that the Corporate Debtor who is beneficiary of the violation committed by the Financial Creditor, cannot be aggrieved and consequently cannot challenge such violation. In the case in hand, the Financial Creditor could not have advanced loan in breach of Section 186(2) of the Companies Act, 2013 to the Corporate Debtor and yet the Corporate Debtor who took loans from the Financial Creditor cannot be aggrieved to challenge such disbursements to him.

38. Section 186(2) of the Companies Act, 2013, is a protection mechanism to the shareholders/ stakeholders of the Company (Financial Creditor in this case) so that the persons who are managing the company cannot and should not give loan in excess of limits prescribed which would be in excess of their capacity and could land the company in deep trouble should there be a default of the loan lent. That is why Section 182 of the Companies Act, 2013, provides that in case the company wishes to give loan in excess of the limits prescribed, the same can be done only with the approval of shareholders by passing special resolution.

39. Therefore, aggrieved party in such violation under Section 186(2) of the Companies Act, 2013, would be the shareholder/ stakeholders of the Financial Creditor and Regulators. It is not open for the Corporate Debtor to take shelter under such violations and refuse to repay money borrowed.

40. In this regard, we rely on the decision of the Hon'ble Supreme Court of India in the case of ***Adi Pherozshah Gandhi vs H.M Seevai*** reported in **1970 (2) SCC 484**, wherein the Hon'ble Apex Court has held that grievance must be legal grievance; the applicant must not come merely saying *"I do not like this thing to be done, it must be shown that it tends to his injury or to his damage, in the legal sense of the word."* **(Emphasis Added)**

41. Further, the Learned Counsel for the Applicant has asserted that there exists arbitration clause in the agreement and therefore any such disputes should be referred to arbitration and it is not open for the Financial Creditor to file an application under Section 7 of the IBC. In this context, we would rely upon the judgment passed by the Hon'ble Apex Court in ***Indus Biotech Private Limited vs. Kotak India Venture (Offshore) Fund and Ors.*** reported in **(2021) 6 SCC 436** at para 27 that:

> "*As noted, the issue which is posed for our consideration is arising in a petition filed Under Section 7 of IB Code, before it is admitted and therefore not yet an action in rem. In such application, the course to be adopted by the Adjudicating Authority if an application Under Section 8 of the Act, 1996 is filed seeking reference to arbitration is what requires consideration.* ***The position of law that the IB Code shall override all other laws as provided Under Section 238 of the IB Code needs no elaboration****.* ***In that view, notwithstanding the fact that the alleged corporate debtor filed an application Under Section 8 of the Act, 1996, the independent consideration of the same dehors the application filed Under Section 7 of IB Code and materials produced therewith will not arise****.* ***The Adjudicating Authority is duty bound to advert to the material available before him as made available along with the application Under Section 7 of IB Code by the***

financial creditor to indicate default along with the version of the corporate debtor. *This is for the reason that, keeping in perspective the scope of the proceedings under the IB Code and there being a timeline for the consideration to be made by the Adjudicating Authority, the process cannot be defeated by a corporate debtor by raising moonshine defence only to delay the process. In that view, even if an application Under Section 8 of the Act, 1996 is filed, the Adjudicating Authority has a duty to advert to contentions put forth on the application filed Under Section 7 of IB Code, examine the material placed before it by the financial creditor and record a satisfaction as to whether there is default or not. While doing so the contention put forth by the corporate debtor shall also be noted to determine as to whether there is substance in the defence and to arrive at the conclusion whether there is default. If the irresistible conclusion by the Adjudicating Authority is that there is default and the debt is payable, the bogey of arbitration to delay the process would not arise despite the position that the agreement between the parties indisputably contains an arbitration clause*."

(Emphasis Added)

42. Thus, we are of the view that the Learned Counsel Dr. Binani appearing on behalf of the Respondent is right in her submissions that apropos to the arbitration clause in the Loan Agreement, even if any proceedings of arbitration is invoked, the Adjudicating

Authority is to consider the application under Section 7 of the IBC independently and pass necessary order pertaining to admission or rejection of the application, consequence of which will befall on the proceedings under the Arbitration and Conciliation Act, 1996. It is further submitted that in the instant case, the proceedings under Section 7 of the IBC have been initiated by the Financial Creditor and no proceedings has been initiated by the Respondent herein in terms of the Arbitration and Conciliation Act, 1996. We are of the considered opinion that even if any proceedings initiated by the Respondent or any other party under the Arbitration and Conciliation Act, 1996, that would be treated as a separate and independent proceeding and no proceedings will vitiate or influence each other.

43. In view of above, we are not inclined to accept the arguments and/or objections raised by the Learned Counsel, Mr. Banerjee appearing on behalf of the Applicant which are outside and beyond the pleadings made and accordingly reject the same.

44. We therefore, **dismiss** this application, being **I.A. (IB) 2105/KB/2023** as not maintainable.

45. No costs.

46. Certified copies of the order, if applied for with the Registry of this Adjudicating Authority, be supplied to the parties upon compliance with all requisite formalities.

D. Arvind
Member (Technical)

Bidisha Banerjee
Member (Judicial)

This order is signed on the 08th Day of February, 2024.

Bose, R. K. [LRA]/ SG [Steno]