NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH
COURT III

2. C.P.(IB)-1216(MB)/2022

CORAM: MS. LAKSHMI GURUNG, MEMBER (J)
SH. CHARANJEET SINGH GULATI, MEMBER (T)

ORDER SHEET OF THE HEARING OF MUMBAI BENCH OF THE NATIONAL COMPANY LAW TRIBUNAL ON **16.04.2024**

NAME OF THE PARTIES: Kalpesh Kini

V/s

Vijay Group Infra LLP

SECTION 7 OF THE IBC, 2016

ORDER

Hearing Through: Virtually and Physical (Hybrid) Mode

C.P.(IB)-1216(MB)/2022

The order was pronounced today. The lead judgement was rendered by Shri Charanjeet Singh Gulati, Member, (T) and the dissenting judgement is rendered by Ms. Lakshmi Gurung, Member, (J). The Members are divided on the following legal points;

a) *Whether in the facts and circumstances of the case a 'default' in payment of debt has occurred?*
b) *Whether in the facts and circumstances of the case, there was a default in making quarterly interest payment?*
c) *Whether in the facts and circumstances of the case, serving advance copy of the petition and notice to the corporate debtor can be treated as demand for repayment of loan?*

The Registry is directed to place the record before the Hon'ble President under section 419(5) of the Companies Act, 2013 for constitution of appropriate 3rd Member for his opinion, so that the order in CP 1216/MB/2022 is rendered in accordance with the opinion of majority.

Sd/-

CHARANJEET SINGH GULATI
Member (Technical)

Sd/-

LAKSHMI GURUNG
Member (Judicial)

---Rajeev---

IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH COURT III

C.P. No. 1216/IBC/MB/2022

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

In the matter of

1. **Kalpesh Umesh Kini,**
   501, Inder Bhavan, Dhanukar Wadi
   Kandivali (West), Mumbai- 400067

2. **Sharada Umesh Kini**
   501, Inder Bhavan, Dhanukar Wadi
   Kandivali (West), Mumbai- 400067

3. **Pallavi Raghuram**
   D-404, Krishna residency, Sunder Nagar,
   Malad (west), Mumbai- 400064

4. **Lokesh Raghuram**
   D-404, Krishna residency, Sunder Nagar,
   Malad (west), Mumbai- 400064

5. **Siddharth Raghuram**
   D-404, Krishna residency, Sunder Nagar,
   Malad (west), Mumbai- 400064

... Financial Creditors/Petitioners

Vs.

Vijay Group Infra LLP
CIN: AAB-9797
205, Marine Chambers,
2nd Floor, 43 New Marine Lines,
Churchgate, Mumbai- 400020

... Corporate Debtor

Order pronounced on: 16.04.2024

Coram:

MS. LAKSHMI GURUNG, HON'BLE MEMBER (J)
SH. CHARANJEET SINGH GULATI, HON'BLE MEMBER (T)

Appearances:

For the Financial Creditor : Adv. Bindu Parekh a/w Akshay

For the Corporate Debtor : Adv. Ankit Pitti

Per: **CHARANJEET SINGH GULATI, MEMBER (TECHNICAL)**

1. This Company petition is filed by *Kalpesh Umesh Kini and others* (hereinafter called as "**Financial Creditors**") seeking to initiate Corporate Insolvency Resolution Process (**CIRP**) against *Vijay Group Infra LLP* (hereinafter called as "**Corporate Debtor**") by invoking the provisions of Section 7 of the Insolvency and bankruptcy code (hereinafter called "**Code**") read with Rule 4 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

2. The Financial Creditors have granted loan facilities to the Corporate Debtor on various occasions. The aggregate amount of the debt as on 30.09.2022 is at Rs. 3,10,72,949/- (Rupees Three Crore Ten Lakhs Seventy-Two Thousand Nine Hundred and Forty-Nine only) which includes the principal amount and interest.

3. While availing the loan from the Financial Creditors, the Corporate Debtor has executed 'Demand Promissory Notes'. The Demand Promissory Notes stipulated to pay the amount on demand together with interest at the rate of 15% per annum in the value received. The Corporate Debtor had also given undated signed

cheques of the equivalent principal amount in favour of the Financial Creditors. The details of the money lent by the Financial Creditors as reflected in the Demand Promissory Notes as also reflected in Exhibit 'f' & 'g' at Page No.37 of the petition are captured as under:

Sr. N.	**Name of the Financial Creditors**	**Nature of Security**	**Loan Amount**	**Date of disbursal**	**Principal outstanding (INR)**
1.	Kalpesh Kini	Unsecured	20,00,000	04.10.2016	65,00,000
			45,00,000	24.01.2017	
2.	Sharda Kini	Unsecured	25,00,000	10.08.2016	44,00,000
			19,00,000	07.11.2016	
3.	Pallavi Raghuram	Unsecured	25,00,000	24.08.2016	25,00,000
4.	Lokesh Raghuram	Unsecured	20,00,000	06.04.2017	20,00,000
5.	Siddharth Raghuram	Unsecured	15,00,000	28.11.2016	15,00,000
Total					**1,69,00,000**

Submissions of The Financial Creditors extracted in brief:

4. It is submitted by the Financial Creditors that the Corporate Debtor continued paying quarterly interest at the rate of 18% per annum despite few promissory note(s) mentioning interest at 15%. The Corporate Debtor continued paying interest for almost 8 quarters from the quarter ending first disbursement and thereafter the payment was stopped. The disbursement by the Financial Creditors and the payment of interest for the first few quarters by

the Corporate Debtor at the rate of 18% is demonstrated by the Financial Creditors through their bank statements.

5. The ledger statements and confirmation of accounts by the Corporate Debtor show that the Corporate Debtor had borrowed unsecured loan from the Financial Creditors and the same is also evidenced from the records of TDS towards the interest paid and reflected in the 26AS. It is submitted that despite mentioning the rate of interest at the rate of 15% in some of the promissory notes, it was understood that Corporate Debtor shall pay quarterly interest at the rate of 18% and that there was *consensus ad idem* between the parties in this regard.

6. It is submitted that the Parties had agreed to quarterly interest payment at a particular rate of interest and even assuming that the interest was not agreed to between the parties, the Corporate Debtor voluntarily and consistently made interest payment for a defined duration during the term and such voluntary and continuous conduct should be deemed intentional and binding on the parties making the payments.

7. The Financial Creditors have also contended that the payment of interest for almost 8 quarters would attract application of doctrine of estoppel by conduct, especially in the context of payment of interest. The underlined premise is rooted in the provisions of Section 115 of Indian Evidence Act which aims to establish the legal consequences of the party's conduct and shall apply to the present facts concerning the interest payment.

8. The Financial Creditors submit that through the repeated and deliberate conduct of the Corporate Debtor of making voluntary

interest payments, the Corporate Debtor shall be estopped from subsequently ascertaining that there was no obligation to pay interest or that payment was made in error. It is contended that once a party undertakes a course of action, such as consistent interest payment, was legally bound by their own conduct and the principal of estoppel by conduct shall have a binding effect on the contractual relationship between the parties.

9. Referring to Section 4 of Negotiable Instruments Act, 1881, it is submitted that the provisions of Section 76(b) of Negotiable Instruments Act when applied to the facts of the present case then the Corporate Debtor shall be deemed to have engaged to pay notwithstanding non-presentment of the instrument and such conduct shall be binding on the Corporate Debtor. In this regard, the Financial Creditors have placed reliance on the decision in the case of ***Jhandu Lall Vs. Wialayati Begam*** in First Appeal No. 19 of 1922 wherein it has been held that presentment of Hundi is not necessary when the debtor/borrower himself commenced payment despite non-presentment. The Financial Creditors have also placed reliance in the case of ***Rohan Das and Anr. Vs. Guranditta Mal, 1991, 45 DLT 403 (DB)*** to buttress the arguments that legal requirement of presentment was not applicable if after maturity and with the knowledge of non-presentment, the maker makes part payment, promises to pay or waives the right to take advantage of any default for the presentment.

10. The Corporate Debtor, as a matter of regular conduct and without any objection, voluntarily continued to make quarterly interest payment, its practice established a clear pattern suggesting that interest was treated as due and payable every quarters even

without the Financial Creditors demanding the payment or presenting the promissory notes (Negotiable Instruments) for payment. As per the established legal principles the due date of interest is typically governed by the terms of agreement between the parties and in the absence of explicit terms, the conduct and behaviour of the parties is crucial to determine the amount due and payable. It is submitted that Corporate Debtor's voluntary and uninterrupted payment of quarterly interest is a clear acknowledgment and acceptance of the obligation to pay interest at regular intervals and there was no requirement or necessity to make the demand under promissory notes.

11. Referring to the case of Hon'ble Supreme Court of India in ***Swiss Ribbons Pvt. Ltd. and Ors. Vs. UOI and Ors. (2019) 4 SCC 17,*** the Financial Creditors contends that no notice is required to be given in the case of under Section 7 of the Code. It is also emphasises that the definition of default encompasses situation where the whole or any part or instalments of the debt, including the interest components, becomes due and payable but remains unpaid by the debtor or the Corporate Debtor as the case may be and non-payment of any quarterly interest instalment within the agreed time frame constitutes event of default.

12. The interest component in the case on hand, surpasses the minimum default amount of Rs. 1 crore thereby affirming the applicability of section 7 of the Code.

13. The Financial Creditors submit that the moment the Corporate Debtor ceased the payment of interest, a default occurred making the date of default for initiating the Insolvency petition and marking the initiation of cause of action. Thereafter, the non-

payment of interest component amounted to a continuous cause of action and the interest component due every quarter, constitutes an individual part of debt. The Financial Creditors further submits that despite payment of interest by the Corporate Debtor for almost 8 quarters, the Corporate Debtor unilaterally ceased payments. Each instance of default on interest serves as a separate cause of action cumulatively contributing to the overall continuous default status.

14. Referring to Paras 27, 28, 29, 30 and 31 of the decision in the case of ***Innoventive Industries Ltd. Vs. ICICI Bank Ltd.*** of the Hon'ble Supreme Court, the Financial Creditors submit that till date the Corporate Debtor has failed to repay the borrowed amount and has constrained the Financial Creditors to file the present petition. Further, the petition has been filed within the period of limitation under the Limitation Act i.e. three years after applying the exemption period allowed by Hon'ble Supreme Court in its sou moto case extending limitation during the covid period and default is in excess of minimum amount stipulated under Section 4(1) of the Code and therefore, the debt and default stands established and petition ought to be admitted.

The Reply of the Corporate Debtor extracted in brief:

15. The above Company Petition filed under Section 7 of the Code against the Corporate Debtor on the basis of 7 promissory notes is not maintainable.

16. The promissory notes given by the Corporate Debtor to the Financial Creditors contained a phrase "*On Demand I/ We promise to pay___or order the sum of rupees ____together with interest at*

___*percent per year for the value received"*. Accordingly, the said sum of money along with interest would become due and payable only when the Financial Creditors demands the said sum of money from the Corporate Debtor and until and unless the said debt has been demanded by the Financial Creditors in accordance with the promissory notes, the debt would not become due and payable. In the present case, the Financial Creditors have never demanded back the money so lent, as there was no communication regarding the demand for payment of debt along with interest from the Financial Creditors.

17. The Interest rate mentioned in the promissory notes is at the rate of 15% per annum. However, the Financial Creditors have intentionally after knowing the above facts chose to mislead the bench by charging interest at the rate 18% per annum. The conduct of the Corporate Debtor of paying the interest amount quarterly was bona fide in nature and pre-payment of any sum of money does not make the whole debt due and payable and/or suggest that the parties agreed to contract contrary to the terms of the demand promissory notes. No condition has been mentioned in the promissory notes as regards the payment of interest on quarterly basis. On the contrary, it is mentioned that interest amount is to be calculated annually and will be paid along with the principal when demanded by the Financial Creditors. The Corporate Debtor submits that since it was having cash surplus, it chose to pre-pay certain amounts to the Financial Creditors in a *bona fide* manner and with good intention.

18. The Financial Creditors did not make any attempt and/or communication with the Corporate Debtor from 2019 onwards,

when according to the Financial Creditors, the Corporate Debtor stopped paying interest to the Financial Creditors. It is inconceivable that Financial Creditors remained silent upon non-receipt of interest. The mere pre-payment of amount towards interest or a principal cannot amount to an agreement between the parties that the amounts were due prior to a demand being raised. In no case or situation, the *bona fide* conduct of the Corporate Debtor to pay the interest amount quarterly, which were not even due and payable, would make the remaining interest amount due and payable, causing default. A particular debt or interest is due and payable, can only be established from the record of the loan and cannot be linked to a *bona fide* act of Corporate Debtor of pre-payment of debt and / or interest.

19. The CIRP of a company under Section 7 of the Code can be initiated only when a default in repayment of sum of money occurred on the part of the Corporate Debtor. As per Section 3(11) and 3(12) of the Code "Default" means non-payment of "debt" when whole or any part of the instalments of the amount or debt has become due and payable and is not paid by the Company and the "debt" means a liability or obligation in respect of a claim which is due and payable from any person and includes a financial debt and operational debt. Bare reading of the Code clearly provides that a default does not occur if the debt has not become due and payable and in the present case since Financial Creditors never demanded the money in accordance with promissory notes, the debt has never become due and payable.

20. The Hon'ble Supreme Court and Hon'ble NCLAT and Coordinate Benches of NCLT in a plethora of judgment have stated that the

proceedings under the Code cannot be utilized as a recovery mechanism to arm twist the Corporate Debtor to extort money and if such proceedings are filed with a sole intention to recover money when such proceedings will be against the spirit of the Code and abuse of the process of the law. Accordingly, the Corporate Debtor submits that the present petition is not maintainable in law and / or facts and ought to be rejected at the threshold.

OBSERVATION AND FINDINGS

21. Heard the counsels for the parties and perused the records.

22. In the present case, the question which is needed to be answered can be reduced as under:

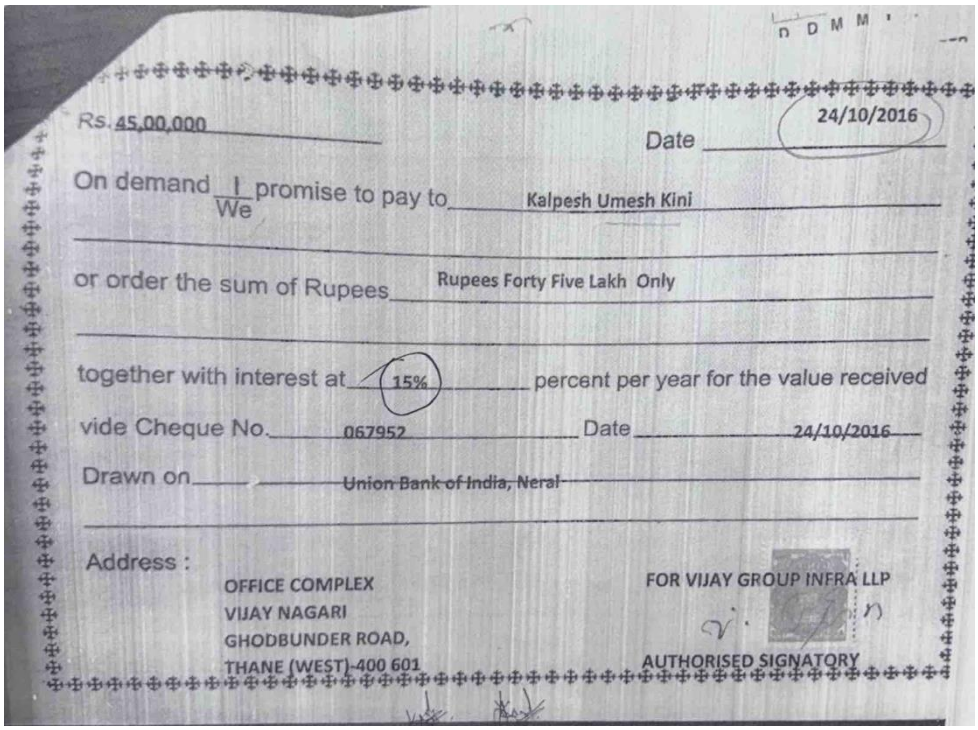
Whether in the facts and circumstances of the case, the debt has become due and consequently whether any default has occurred?

23. As per the facts of the case, it is seen that starting from 10.08.2016 to 06.04.2017, Financial Creditors have given loans of various amounts ranging from Rs. 15 lakhs to 45 lakhs to the Corporate Debtor. There is no dispute as regards factum of loan taken and its acknowledgement in Corporate Debtor's accounts as even the confirmation of accounts for Financial Year 2017-18 issued by the Financial Creditor is filed along with the petition.

24. It is also the fact of the case that for each of the loan transactions 'Demand Promissory Note' were signed by the Corporate Debtor wherein the narration as under is mentioned:

"On Demand I/We promise to pay___or order the sum of rupees ____together with interest at ___percent per year for the value received vide Cheque No.____date___."

For more clarity scanned copy of one of the Demand Promissory Notes is reproduced here in below:



Rs. 45,00,000 Date 24/10/2016

On demand I/We promise to pay to Kalpesh Umesh Kini

or order the sum of Rupees Rupees Forty Five Lakh Only

together with interest at 15% percent per year for the value received

vide Cheque No. 067952 Date 24/10/2016

Drawn on Union Bank of India, Neral

Address : OFFICE COMPLEX VIJAY NAGARI GHODBUNDER ROAD, THANE (WEST)-400 601

FOR VIJAY GROUP INFRA LLP

AUTHORISED SIGNATORY

25. While executing such Demand Promissory Notes by the Corporate Debtor, undated cheques of the equivalent principal amount were given in favour of the Lenders / Financial Creditors. It is undisputed fact that after the receipt of these sums of money as loan, the Corporate Debtor made interest payment up till quarter ending 31.12.2017 in case of First and Second Petitioner and up till 31.03.2018 in case of Third, Fourth and Fifth Petitioners.

26. Though in the List of Dates and Events, on page 3 of the petition, it has been mentioned that date of default in payment of interest

occurred on 01.01.2018 in the case of First and Second Petitioners and on 01.04.2018 in case of Third, Fourth and Fifth Petitioners, however, in Part-IV of the Petition the date of default has been mentioned as 30.09.2022 for which no justification has been given as to how this date of default has been arrived.

27. It is the case of the Financial Creditors that though the loans were given on execution of the Demand Promissory Notes wherein there is no maturity period / maturity date given but the interest as per the rate mentioned in the demand promissory notes was to be paid to the Financial Creditors on quarterly basis as the Financial Creditors had paid interest for the first 7/8 quarters. Therefore, by unilateral stopping of the payment of interest by the Corporate Debtor from 01.01.2018 / 01.04.2018 (as the case may be) the default has occurred. It is accordingly contended that the non-payment or unilateral action of the Corporate Debtor to stop making payments of interest on a quarterly basis has constituted a default and since such default is in excess of the limit laid down in Section 4(1) of the Code and the application filed under Section 7 of the Code being within limitation should be admitted.

28. Per contra, the Corporate Debtor submits that neither there was any demand made on it to make the payment in terms of the Demand Promissory Notes nor there was any communication which could have been considered to be a demand being made for the payment of outstanding amount along with interest to the Financial Creditors and therefore the amount has neither become due nor payable and accordingly, no default has occurred.

29. It is undisputed fact of the case that no formal or informal demand has been made by the Financial Creditors which could establish that Financial Creditors have asked the Corporate Debtor to make the payment of the Principal Amount along with Interest as per the stipulation of the Demand Promissory Notes. Further, all the Financial Creditors/ Petitioners were provided with cheques equivalent to the principal amount/s. The Petitioners could have utilized the same when they concluded that default by Corporate Debtor has occurred i.e. on 01.04.2018 or 01.07.2018 or anytime thereafter, but the Petitioners have chosen not to do so. Therefore, ordinarily it can't be said that a default has occurred.

30. The Financial Creditors, to emphasise their case, have made submissions in regard to consensus Ad-Idem as also estoppel by conduct and irrevocability of conduct.

31. As far as Ad-Idem is concerned, it is important that both parties to the contract agree to each term of the contract unequivocally and clearly. In this case, there is no such meeting of mind between the parties wherein principles of Ad-Idem could be said to be applied in respect of either quarterly payment of interest or due date of entire payment (principal + interest). In this regard, it is useful to make a reference to the decision of Hon'ble Supreme Court in case of ***Rickmers Verwaltung Gmbh Vs. Indian Oil Corporation Ltd. In Civil Appeal No. 5810/1998 dated 19.11.1998, (1999) 1 SCC*** wherein the Hon'ble Apex Court at para 13 have observed as under:

> *"13. In this connection the cardinal principle to remember is that* ***it is the duty of the court to construe correspondence with***

> ***a view to arrive at a conclusion whether there was any meeting of mind between the parties,*** *which could create a binding contract between them but the* ***Court is not empowered to create a contract for the parties by going outside the clear language used in the correspondence****, except insofar as there are some appropriate implications of law to be drawn. Unless from the correspondence it can unequivocally and clearly emerge that the parties were ad idem from that material to infer whether the intention as expressed in the correspondence was to bring into existence a mutually binding contract.* ***The intention of the parties is to be gathered only from the expressions used in the correspondence and the meaning it conveys*** *and in case it shows that there had been meeting of mind between the parties and they had actually reached an agreement, upon all material terms, then and then alone can it be said that a binding contract was capable of being spelt out from the correspondence."*
>
> ***(bold for emphasis)***

In the case on hand the stipulation on the Demand Promissory Notes clearly provide for payment of Principal along with Interest at the rate mentioned there in 'On Demand' and there is no maturity date/period etc. mentioned. Further, undisputedly there being no formal or informal demand made by the Petitioners, therefore, applying the principles enunciated by the Hon'ble Supreme Court as above, it can't be said that payment of loan amount/ interest has become due and that consequent default has occurred.

32. Also, the Hon'ble Supreme Court in the case of ***Karnataka Power Transmission Corporation Limited Vs. JSW Energy Limited*** in Civil Appeal No.8714 OF 2022 have observed that the parties can be said to have entered into a contract or a contract would be said to be concluded only when they are ad-idem on all the essential

terms of the contract. In the case on hand, the concept of ad-idem does not appear to have reached in respect of terms of payment of interest, as there is no stipulation in the demand promissory notes for quarterly payment of interest, still the Corporate Debtor made payments for the first 7/8 quarters and there after stopped, and despite such turn of events, there was no dissenting correspondence and the Petitioners maintained a total silence and did not take any action for the next four and half years before this petition was filed.

33. The Hon'ble Supreme Court in **Ramji Dayawala and Sons (P) Ltd. vs. Invest Import [Civil Appeals No. 2407 & 2408 of 1968]** observed that *the general rule is that an offer is not accepted by mere silence on the part of the offeree. There may, however,* ***be further facts which taken together with the offeree's silence constitute an acceptance****.* Therefore, it can be said that the silence of the Financial Creditors in respect of the non-payment of interest could presumably have made the Corporate Debtor to believe that the said non-payment was accepted since in any case the principal amount along with interest was to be paid on demand as per the promissory notes which is the original contract between the parties. It is also pertinent to mention here that a mere pre-payment of interest amount would not render the contents in the promissory notes invalid. In **Ramji Dayawala** (supra), the Hon'ble Supreme Court referred to **Davies vs. Sweet (1962) 2 WLR 525** wherein it was held as follows:

> *"If there was originally a concluded bargain between the parties, this could only be got rid of by either (a) a mutual agreement to call off the sale, or (b) an agreement for a variation of the terms of the original contract. The mere fact that there have been negotiations which prove to be abortive*

and do not result in an enforceable agreement does not destroy the original contact: see Perry v. Suffielas ltd."

34. In the facts of the present case and as discussed above, it cannot be said that there was a concluded agreement in respect of the quarterly interest payments, and there was no meeting of minds in this regard. Thus, there was no definite and mutual agreement between the parties regarding the quarterly payments of interest and therefore, the principle of *consensus ad idem* is not applicable here.

35. With respect to the Petitioner's contention regarding estoppel by conduct and irrevocability of conduct, it is relevant to see section 115 of the Evidence Act, 1872 that deals with estoppel by conduct:

"When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceedings between himself and such person or his representative, to deny the truth of that thing."

36. The essential ingredients required for the applicability of the doctrine of estoppel by conduct is explained by Hon'ble Supreme Court in **Pratima Chowdhury vs. Kalpana Mukherjee [AIR 2014 SC 1304]** in the following manner:

"35. ***

A perusal of the above provision reveals four salient preconditions before invoking the rule of estoppel.

i) Firstly, one party should make a factual representation to the other party.

ii) Secondly, the other party should accept and rely upon the aforesaid factual representation.

iii) Thirdly, having relied on the aforesaid factual representation, the second party should alter his position.

iv) Fourthly, the instant altering of position, should be such, that it would be iniquitous to require him to revert back to the original position.

Therefore, the doctrine of estoppel would apply only when, based on a representation by the first party, the second party alters his position, in such manner, that it would be unfair to restore the initial position.

***39.** The ingredients of the doctrine of estoppel in the manner expressed above were also projected in H.S. Basavaraj (D) by his LRs. & Anr. Vs. Canara Bank & Ors., (2010) 12 SCC 458, as under: -*

"30. In general words, estoppel is a principle applicable when one person induces another or intentionally causes the other person to believe something to be true and to act upon such belief as to change his/her position. In such a case, the former shall be estopped from going back on the word given. ***The principle of estoppel is, however, only applicable in cases where the other party has changed his position relying upon the representation thereby made."***

(Emphasis provided)

37. Further, as held by the Hon'ble Supreme Court in **Supdt. Of Taxes, Dhubri & Ors vs. Onkarmal Nathmal Trust [Civil Appeals No. 140-43 of 1973],** one of the requirements of an estoppel by conduct is that it should be *unambiguous*.

38. The Hon'ble Delhi High Court in **University of Delhi vs. Ashok Kumar Chopra & Anr [AIR 1968 Delhi 131]** held that *unless all*

the requirements are cumulatively present in a particular case, the principle of estoppel cannot come into operation.

39. In the present case, the Corporate Debtor had just paid some quarterly interests on its free will. The same cannot be practicably construed to be an act whereby the Corporate debtor had intentionally made the Financial Creditors to believe that the payment was to be made infinitely and until the principal amount is demanded. And, even if its conduct has made the Financial Creditor to believe the same, there was no further inducement by the Corporate Debtor to make the Financial Creditor perform a certain act in return. Lastly, the Corporate Debtor is not denying the payment but has merely stated that it was pre-paying on account of surplus funds available with it. Thus, considering the facts, this cannot certainly be construed as a fit case which attracts the principle of estoppel by conduct.

40. Even if we go by the applicability of estoppel, the same cannot be analysed in a prejudicial manner as only against the Corporate Debtor. Such principles would have to be seen and applied for the entire period of around six and half years after the loans were given and before this petition was filed. We are mindful of the fact that the Respondent had paid some quarterly interests and that the last payment was made on 01.01.2018 with respect to Petitioners No. 1 & 2 whereas the last payment of quarterly interest to Petitioners No. 3, 4 and 5 was made on 01.04.2018. No payment of interest whatsoever has been made thereafter by the Corporate debtor for almost four and half years after which the Petitioners have preferred this petition and there has been complete silence on the part of the Petitioners for this entire period.

41. Thus, even for arguments sake, if it is assumed that there was any understanding between the parties towards quarterly interest payment and that the conduct of the Corporate Debtor in paying the interest for the first around 7/8 quarters has to be seen for the purposes of the contract to be of binding in nature, then the conduct of the Petitioners also needs to be considered. The Petitioners maintained absolute silence for next 18 quarters. Ordinarily, if the interest payments were being defaulted by the Corporate Debtor, then there could be hardly any justifiable reason for the Financial Creditors to remain silent and take no action, not even demand, informally or formally, interest and principal from the Corporate Debtor. The conduct of the Petitioners for the later 18 quarters is more telling in nature and would establish the nature of contract in respect of quarterly payment of interest. Such long silence on the part of the Petitioners would only suggest that there was no understanding for quarterly interest payment even informally and certainly there is none formally.

42. In **University of Delhi** (supra), the Hon'ble Delhi Court observed as follows:

> *"It is significant that it is not merely a positive or active declaration that can be the basis for a plea of estoppel but also an act or omission can constitute such basis. An estoppel may arise from **silence** as well as words."*

43. Similarly, in the case of **Satyapal Anand Vs. State of Madhya Pradesh and Ors** [(AIR 2016 SC 4995, 2016 (10) SCC 767 AIR 217 SC (CIVIL)] it is stated that any novation, recession and alteration of contract, can only be bilaterally and with amicably consent of both the parties. The terms and conditions of contract may be

altered but cannot be done unilaterally unless there exists any provision in contract, or any law or **there is any implied acceptance through silence.**

44. Applying the same in the present case, it can be inferred that the silence of the Financial Creditors for 4 ½ years would have given way to the Corporate Debtor or any other reasonable man to belief that there is no disagreement on part of the Financial Creditors as to the stoppage of interest payments. By applying the principle of estoppel, the silence would have to be construed to have altered the agreement as to the quarterly payment on account of implied acceptance by the petitioners due to long silence of more than four and half years. Further, as already stated above, all the Financial Creditors were provided with cheques equivalent to the principal amount which could have been utilized when they concluded that there has been a default by the Corporate Debtor, but the Financial Creditors did not choose to get the cheques honoured. Thus, it is clear that there is no clarity as to the conducts of the parties in this regard which is essentially required to attract the principle of estoppel by conduct as held in **Supdt. Of Taxes, Dhubri** (supra).

45. In view of the facts and circumstances of the case as discussed above, the submissions of the Petitioners regarding doctrine of estoppel by conduct and irrevocability of conduct is not found to be applicable in this case.

46. In respect of the contention of the Financial Creditors and referring to Section 76(b) of the Negotiable Instruments Act, it is stated that the interest pre-payment by the Corporate Debtor in first few quarters cannot be considered to be falling in the circumstances

that no presentment of instrument for payment was necessary in this case. A partial pre-payment for the first few quarters of the interest by the Corporate Debtor cannot be termed to be at par with agreeing to make the payment of the principal plus interest as per the demand promissory notes executed and signed basis which the transactions have undertaken notwithstanding non-presentment.

47. The Financial Creditor have relied upon certain decisions in the context of Section 76(b) of the Negotiable Instruments Act, 1881 which dealt herein under:

i. In the decision of *1991* SCC Online Del *395: (1991) 45* DLT *403 (*DB) in the matter of Roshan Dass & Others v. Guranditta Mol, it was about the presentment of cheques for payment on a specified date mentioned in the cheque, 31.03.1971, whereas, in the present case, there is no date mentioned in the Demand Promissory Notes and they were payable on demand.

ii. In the decision of Company Appeal (AT) (Insolvency) No. 1198 *of* 2023 in the matter of Pratik Jiyani v. Pirmal Capital & Housing Private Limited, there was a loan agreement in writing which clearly specified the events of default under Clause 8 thereof. Clause 8.1(a) states that default in payment of interest for two consecutive months constituted an 'event of default'. In the said case, there was clear non-

payment of interest for two consecutive months and thus, there was default. The main contention of the Appellant was that notice was mandatorily to be served in case if an event of default has occurred as stipulated in Clause 8.3 of Loan Agreement. However, considering the unambiguity and prima facie event of default on part of the Appellant, the Hon'ble NCLAT held that in such circumstances, the requirement of notice cannot be read to fasten any liability on the Financial Creditor to give notice. The facts of the case are distinguishable and thus can have no applicability in the present case. As in the present case, there is no agreement and/or any clause stipulating event of default.

iii. In the decision of Jhandu Lal & Ors. V. Wilayati Begam & ors. before Hon'ble High Court, Allahabad, it was stated that, the hundi given contained a specified period of repayment, *359* days, but, in the present case, there was no date or period of payment and/or communication by the promisee upon the promisor from the date of promissory note.

48. There is hardly any dispute to the preposition that for section 7 or 9 of IBC the 'Default' as a matter of fact should exist and should be determinable, it can't be assumed. Further, such default is condition precedent for a valid petition under sections 7 of the Code. In the case of **Company Appeal (At) (Ins) No. 882 of 2022** in the case of **Base Realtors Private Limited Vs. Grant Realcon**

Private Limited Hon'ble NCLAT at Para 23 have observed as under:

> "23. ***Thus, in order to maintain the application under Section 7 of the Code the financial creditor has to show the default as a condition precedent……."***
>
> **(Bold for Emphasis)**

In facts of the present case and as discussed above the 'Default' cannot be said to have occurred and thus a condition precedent for maintainability of application under section 7 of the IBC is not fulfilled.

49. It also appears that the Financial Creditors have filed this petition under Section 7 of the Code for recovery of monies lent by them, as the it has been mentioned in submissions that till date the Corporate Debtor has failed to repay the borrowed amount and the Financial Creditors are constrained to file the present petition. The Hon'ble Supreme court and Hon'ble NCLAT in number of decisions have stated that proceedings under the Code would not be utilised as recovery mechanism. The Hon'ble Supreme Court in **Transmission Corporation of Andhra Pradesh Limited v. Equipment Conductors and Cables Limited reported in (2019) 12 SCC 697,** followed its earlier judgment in Mobilox Innovations Private Ltd. (supra) and observed as hereunder: -

> *"In a recent judgment of this Court in Mobilox Innovations Private Limited v. Kirusa Software Private Limited (2018) 1 SCC 353, this Court has categorically laid down that IBC is not intended to be substitute to a recovery forum. It is also laid down that whenever there is existence of real dispute, the IBC provisions cannot be invoked……"*

Also, the Hon'ble Supreme Court in the case of ***M/S S.S. ENGINEERS & ORS. versus HINDUSTAN PETROLEUM CORPORATION LTD in CIVIL APPEAL NO. 4583 OF 2022; July 15, 2022,*** at Para- 31 have observed as under:

> *"31. The NCLT, exercising powers under Section 7 or Section 9 of IBC, is not a debt collection forum. The IBC tackles and/or deals with insolvency and bankruptcy. It is not the object of the IBC that CIRP should be initiated to penalize solvent companies for non-payment of disputed dues claimed by an operational creditor."*

50. In view of the facts and circumstance of the case and the discussion herein above, the question framed at Para 22 of this order is answered in negative. We also are cautious that this Tribunal should not be turned into a debt recovery forum. Thus, viewed from any angle, we hold that the present petition is non-maintainable. Accordingly, the C.P. No**.** 1216/IBC/MB/2022 **is rejected.**

51. Here I would humbly state that Member (Judicial) has arrived at a different conclusion and therefore, her Order is at variance with mine and forms a separate Order.

Sd/-

Charanjeet Singh Gulati
Member (Technical)

IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH
COURT III
C.P. No. 1216/IBC/MB/2022

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

In the matter of

1. **Kalpesh Umesh Kini,**
   501, Inder Bhavan, Dhanukar Wadi
   Kandivali (West), Mumbai- 400067

2. **Sharada Umesh Kini**
   501, Inder Bhavan, Dhanukar Wadi
   Kandivali (West), Mumbai- 400067

3. **Pallavi Raghuram**
   D-404, Krishna residency, Sunder Nagar,
   Malad (west), Mumbai- 400064

4. **Lokesh Raghuram**
   D-404, Krishna residency, Sunder Nagar,
   Malad (west), Mumbai- 400064

5. **Siddharth Raghuram**
   D-404, Krishna residency, Sunder Nagar,
   Malad (west), Mumbai- 400064

... Financial Creditors/Petitioners

Vs.

Vijay Group Infra LLP
CIN: AAB-9797
205, Marine Chambers,
2nd Floor, 43 New Marine Lines,
Churchgate, Mumbai- 400020

...Corporate Debtor

Order pronounced on: 16.04.2024

Coram:

MS. LAKSHMI GURUNG, HON'BLE MEMBER (J)
SH. CHARANJEET SINGH GULATI, HON'BLE MEMBER (T)

Appearances:

For the Financial Creditor : Adv. Bindu Parekh a/w Akshay

For the Corporate Debtor : Adv. Ankit Pitti

***Per:* MS. LAKSHMI GURUNG, MEMBER (JUDICIAL)**

1. As the full details of the case have been elaborately covered in the judgment of my Ld. Brother, facts are not being repeated except where necessary and relevant.

2. The present petition under section 7 of the Insolvency and Bankruptcy Code, 2016 (**IBC**) has been filed by 5 (five) Petitioners jointly (referred to as **Petitioners/Financial Creditors**) who have given loan to the Corporate Debtor to be repaid by the Corporate Debtor on demand with interest. The Financial Creditors have annexed their bank statements to evidence the disbursement of the loan to the Corporate Debtor. Particulars of the debt, as borne out from the bank statements and as mentioned in the petition, are as follows:-

S. N.	Name of Financial Creditors	Date of payment to Corporate Debtor	Principal Amount (Rs.)
1.	Kalpesh Umesh Kini	04.10.2016	20,00,000.00

		24.01.2017	45,00,000.00
2.	Sharda Kini	10.08.2016	25,00,000.00
		07.11.2016	19,00,000.00
3.	Pallavi Raghuram	24.08.2016	25,00,000.00
4.	Lokesh Raghuram	06.04.2017	20,00,000.00
5.	Siddharth Raghuram	28.11.2016	15,00,000.00
	Total		**1,69,00,000.00**

3. In consideration of the above loan, the Corporate Debtor promised to repay the loan by executing Demand Promissory Notes for equivalent amounts in favour of the Financial Creditors, which are annexed to the petition. The Corporate Debtor has also issued cheques for repayment of loan of equivalent amount respectively in favour of the Financial Creditors with blank date. The copies of the cheques are annexed to the petition. The Corporate Debtor has not denied:

   a. The receipt of the loan from Financial Creditors;

   b. Factum of the execution of Demand Promissory Notes in favour of the Financial Creditors;

   c. Issue of cheques by it in favour of Financial Creditors.

4. It is further submitted by Financial Creditors that Corporate Debtor has been acknowledging the loan payable to the Financial Creditors, in their annual financial statements submitted to the

Registrar of Companies (ROC) in LLP Form No. 8. The Financial Creditors have annexed the LLP Form No. 8 *inter alia* for financial years 2017-18 which shows the Unsecured Loans of the Corporate Debtor as on 31.03.2018.

5. The Financial Creditors have also annexed the ledger accounts of Financial Creditors in the books of accounts of the Corporate Debtor, and duly signed "Confirmation of Accounts" Certificates issued by Corporate Debtor as on 01.04.2018. It is the case of the Financial Creditors that the Corporate Debtor has been continuously making quarterly interest payments @ 18% p.a. which are reflected in books of accounts of the Corporate Debtor and in the Confirmation of Accounts Certificates. The Corporate Debtor has not denied the "Confirmation of Accounts" Certificates issued by it or the ledger accounts from books of accounts of Corporate Debtor produced by the Financial Creditors. Thus there is no dispute that the Corporate Debtor availed financial debt from the Financial Creditors.

6. It is strange to note that while the present C.P. No. 1216 of 2022 was filed in the year 2022 but the Reply was e-filed as late as, on 06.01.2024. Be that as it may, it is pertinent to note that the Corporate Debtor has also not disputed the loan amount and the interest amount calculated by the Financial Creditors till 30.09.2022.

7. The primary defence taken in reply against admission of the present petition under section 7 petition is that the debt along with interest was payable on demand and since there was no demand made by Corporate Debtor, therefore debt including

interest has not become due and payable and hence there is no default by Corporate Debtor. Additionally, it is stated that filing of the present petition is intended to employ the provisions of the Code as a means of recovery.

8. This argument, at first blush seems impressive. However, at deeper analysis of facts and Corporate Debtor's own conduct negate this argument. We first analyse whether the interest on the debt was due and payable and consequently default in interest payment.

9. As the facts involved are similar in the cases of all the Financial Creditors, except dates, we are referring to the case of the First Petitioner for convenience. The Corporate Debtor has issued "Confirmation of Accounts" Certificate on 01.04.2018 duly signed by the Corporate Debtor which is annexed to the petition. This Certificate is reproduced below:-

KS 69

: Kalpesh Umesh Kini

From: Vijay Group Infra LLP
205, Marine Chambers,
43, New Marine Lines,
Mumbai – 400020

Date : 1-Apr-2018

Dear Sir/Madam,

Sub: Confirmation of Accounts
1-Apr-2017 to 31-Mar-2018

Given below is the details of your Accounts as standing in my/our Books of Accounts for the above mentioned period.

Kindly return 3 copies stating your I.T. Permanent A/c No., duly signed and sealed, in confirmation of the same. Please note that if no reply is received from you within a fortnight, it will be assumed that you have accepted the balance shown below.

Date	Particulars	Debit Amount	Date	Particulars		Credit Amount
13-Apr-2017	Bank	2,59,644.00	1-Apr-2017	Opening Balance		67,59,644.00
19-Feb-2018	Bank	2,62,529.00	19-Feb-2018	(as per details)		2,62,529.00
				Interest on Unsecured Loan	2,91,699.00 Dr	
				T.D.S. Interest	29,170.00 Cr	
			31-Mar-2018	(as per details)		2,65,414.00
				Interest on Unsecured Loan	2,94,904.00 Dr	
				T.D.S. Interest	29,490.00 Cr	
			31-Mar-2018	(as per details)		5,25,057.00
				Interest on Unsecured Loan	5,83,397.00 Dr	
				T.D.S. Interest	58,340.00 Cr	
	Closing Balance	5,22,173.00				78,12,644.
		72,90,471.00				
		78,12,644.00				78,12,644.

I/We hereby confirm the above

Yours faithfully,

VRAJLAL TALAKSHI GALA

Our I.T. PAN No. : AAFCR90

TRUE COPY

I.T. PAN No. : AFOPK4845A

10. The above Certificate shows an opening balance of Rs. 67,59,644.00 on credit side on 01.04.2017, which includes principal loan amount of Rs. 65,00,000.00 and interest amount of Rs.2,59,644.00. There is interest payment of Rs. 2,59,644.00 on 13.04.2017 on debit side. After this interest payment, the principal amount of loan of Rs. 65,00,000.00 is the balance in the ledger. Then there is interest payable entry of Rs. 2,62,529.00 (interest Rs. 2,91,699.00 – TDS on interest 29,170.00) on 19.02.2018 on credit side and a corresponding bank payment entry on 19.02.2018 on debit side for Rs. 2,62,529.00. There are further two entries on 31.03.2018 on credit side towards net interest payable of Rs.2,65,414.00 (interest 2,91,699-29,170) and Rs. 5,25,057.00 (5,83,397.00-58,340.00). Similar "Confirmation of Accounts" Certificates have been annexed in the case of other Petitioners also.

11. The above "Confirmation of Accounts" Certificate is clear admission and acknowledgement by Corporate Debtor, of the fact that an amount of Rs. 65,00,000.00 along with an interest of Rs. 7,90,471.00, total aggregating to Rs. 72,90,471.00 is payable to the First Petitioner as on 31.03.2018. This Certificate contains the Income Tax PAN Nos of the Corporate Debtor as well as the Financial Creditor. The purpose of issue of "Confirmation of Accounts" Certificate is generally for submission to the Income Tax Authorities to show genuineness of the loan obtained. The said Certificate also shows payment of interest on the said loan. The Corporate Debtor has not denied the issue of the Confirmation of Accounts Certificate.

12. Ledger Account of the First Petitioner appearing in the books of accounts of the Corporate Debtor annexed to the Petition for the period from 01.04.2016 to 31.03.2017 shows that there are quarterly entries towards interest paid by Corporate Debtor to the First Petitioner for quarters ending on September 2016, December 2016 and March 2016 clearly stating "Interest on Unsecured Loan" and T.D.S. Interest.

13. In the reply, the Corporate Debtor has taken a stand that the interest payment was made as advance payments of interest. It is settled principle of law that the intension of the parties can be gathered from their conduct and surrounding circumstances. In a commercial world where loans are taken on interest, it is unconceivable and beyond human probability to make regular quarterly interest payments for eight quarters, if the parties had not agreed for quarterly payment of interest. Considering the above undisputed factum of regular payment of quarterly interest by the Corporate Debtor till 01.04.2018 i.e. Corporate Debtor's own conduct, there is no iota of doubt that the Corporate Debtor had agreed to make quarterly payments of interest to the Financial Creditors and did make the payments for few quarters. The Corporate Debtor continued to discharge its liability for almost 8 quarters and then stopped payment of quarterly interest. It is therefore held that upon failing to pay the interest, the Corporate Debtor has committed default.

14. The question that arises is whether non-payment of agreed interest would amount to default under the provisions of Insolvency and Bankruptcy Code, 2016. Quick reference to

section 3(12) of Insolvency and Bankruptcy Code (IBC/Code) would be helpful:

> Section 3(12) of Insolvency and Bankruptcy Code, 2016 defines "default" as follows:
>
> ***3(12) "default"*** *means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be."*

15. In other words, default within the meaning of Section 3(12) of IBC occurs even if part of the debt has become due and payable but remains unpaid. It is no more *res integra* that interest payable on principal amount is part of the debt. Therefore, it essentially means that if interest remains unpaid, default has occurred in terms of section 3(12) of IBC.

16. The Petitioners have mentioned in the List of Dates and Events, on page 3 of the Petition, that date of default occurred on 01.01.2018 in the case of First and second Petitioners and on 01.04.2018 in the case of Third, fourth and fifth Petitioners. It is further mentioned that considering the exclusion period granted by the Hon'ble Supreme Court due to outbreak of covid-19 pandemic, the Petition has been filed within limitation period from the first default. It is the case of the Financial Creditors that default in interest payment is continuing till filing of the petition.

17. As per Part IV of the Petition, date of default has been mentioned as 30.09.2022 on which date the default amount has been

mentioned as Rs. 3,10,72,949.00 details of which are Principal Amount of Rs. 1,69,00,000.00 and interest amount of Rs. 1,41,72,949.00. The first default in payment of interest occurred on 01.01.2018 in the case of First and second Petitioners and on 01.04.2018 in the case of Third, fourth and fifth Petitioners. This date is relevant for the purpose of limitation. However, default in interest payment continued as held by Hon'ble NCLAT. The default in interest payment as on 30.09.2022 is of Rs. 1,41,72,949.00 which is above the threshold limit under section 4 of the IBC. Now the question is, were the Financial Creditors required to rush to the Tribunal with section 7 petition for first default in the payment of interest and are they precluded from filing section 7 petition at later date for continued default of interest payment.

18. In the case of ***Koncentric Investments Ltd. & Anr vs. Standard Chartered Bank & Anr,*** Company Appeal (AT) (Insolvency) No. 911/2021 decided on 27.01.2022, Hon'ble NCLAT has held that non-payment of interest is non-payment of part of debt since interest was also part of debt. The Hon'ble NCLAT further held as follows:-

> *"We thus agree with the submissions of Learned Sr. Counsel for the Appellant that there was default when interest was not paid on 30th June, 2015. Now question is as to when a Financial Creditor has not filed the Application on first default i.e. payment of interest whether he is precluded to file Application for subsequent defaults i.e. when default is committed for an instalment or for whole debt when it becomes due.*

> *"The Application under* Section 7 *of the Code can be filed when a default has occurred. Thus, Application could have been filed by Financial Creditor on default of payment of interest on 30th June, 2018 but the mere fact that Financial Creditor did not choose to file Section 7 Application on committing of default with interest whether the Financial Creditor is precluded to file an Application when first instalment was due or when whole amount was due is the question to be answered."*

19. Thereafter, Hon'ble NCLAT concluded that the Financial Creditor is not precluded from filing application under section 7 subsequent to the first default as long as the application is within limitation period.

20. Further, in the case of ***Beetel Teletech Ltd. vs. Arcelia IT Services Pvt. Ltd. 2023 SCC Online NCLAT 642,*** the Hon'ble NCLAT has referred to its earlier judgment in ***Narayan Mangal v. Vatsalya Builders & Developers Pvt. Ltd.*** wherein it was held that:-

> *"If the default is committed prior to Section 10A period and default continues there is no prohibition in initiating proceedings under Section 7 and we are not persuaded to accept the submission of the counsel for the respondent that the liability of interest which accrued during Section 10A period should be ignored or should not be computed in the amount while finding the threshold. Liability to pay interest which default committed prior to Section 10A period* ***continues*** *and is not obliviated by Section 10A."*

(Emphasis Provided)

21. Therefore, the legal principle that emerges from above discussions, is the liability to pay interest continues even after the first date of default. Applying the above principle to the facts of the present case, we find that though the first default occurred on 01.01.2018 in the case of First and Second Petitioner and on 01.04.2018 in the case of Third, Fourth and Fifth Petitioners, default in interest payment continued till the filing of the present Petition under section 7 of IBC. The instant Petition was served upon the Corporate Debtor on 06.10.2022 by way of advance service and Corporate Debtor was put to notice of the default amounts of the Principal as well as the interest as claimed in the Petition.

22. In the present case, the Petition has been filed on 06.10.2022 with date of default as 30.09.2022. The amount of interest payable as on 30.09.2022 comes out to Rs. 1,41,72,949/- which is above the threshold limit of Rs. 1.00 crores. No dispute has been raised by the Corporate Debtor about the calculation of interest payment.

23. However, before parting with this judgment, I would like to touch upon another aspect of the present case, as contended by the Corporate Debtor, that loan amount availed by the Corporate Debtor was due and payable only on demand by the Financial Creditors and since there was no demand, no default has been committed.

24. According to Section 4 of the Negotiable Instruments Act, 1881, a "Promissory Note" is defined as *an instrument in writing (not being*

a bank-note or a currency-note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument.

25. Section 32 of the Negotiable Instruments Act, 1881 provides for the liability of the maker of a promissory note. The section reads as follows:

> ***"32. Liability of maker of note and acceptor of bill***.— *In the absence of a contract to the contrary, the maker of a promissory note and the acceptor before maturity of a bill of exchange are bound to pay the amount thereof at maturity according to the apparent tenor of the note or acceptance respectively, and the acceptor of a bill of exchange at or after maturity is bound to pay the amount thereof to the holder on demand. In default of such payment as aforesaid, such maker or acceptor is bound to compensate any party to the note or bill for any loss or damage sustained by him and caused by such default."*

26. Execution of a demand promissory note signifies that as and when the amount mentioned in the promissory note is demanded, the same shall be paid forthwith. In the present case, this Petition was served on the Respondent Corporate Debtor on 06.10.2022 and serving of the Petition itself signifies that according to the Financial Creditor has not repaid the loan amount. Further, besides advance serving of copy of Petition, Court notice was also issued vide order dated 24.11.2022 with directions to file reply within 2 weeks. As already mentioned above, the Corporate Debtor has filed reply on 06.01.2024 i.e. after 58 weeks.

27. We note that the Corporate Debtor has also submitted in its reply that the present petition has been filed for recovery of monies lent by the Financial Creditors because it is clearly mentioned that Corporate Debtor has failed to repay the borrowed amount and the Financial creditors are constrained to file the present petition. In other words, the demand by the Financial Creditors is writ large. The instant Petition was served upon the Corporate Debtor on 06.10.2022 by way of advance service and Corporate Debtor was put to notice of the default. If not earlier, at least upon receipt of the petition, there was demand of loan by the Financial Creditors and the Corporate Debtor has also understood that the filing of the present petition is for recovery of the monies lent.

28. I draw strength from the analogy of cases under section 106 of the Transfer of Property Act, wherein issue of notice on the tenant is sine qua non for filing eviction suit. However, it is settled legal principle that filing of an eviction suit itself is a notice to quit, on the tenant. The Hon'ble Supreme Court in **M/s Nopany Investments (P) Ltd vs. Santokh Singh (HUF) [AIR 2008 SC 673]** held as follows:

> *"**12**. … In any view of the matter, it is well settled that **filing of an eviction suit under the general law itself is a notice to quit on the tenant**. Therefore, we have no hesitation to hold that **no notice to quit was necessary under Section 106 of the Transfer of Property Act in order to enable the respondent to get a decree of eviction against the appellant.**"*
>
> ***(Emphasis Provided)***

29. Applying the same legal principles in the present case, it can be inferred that even if no formal demand of loan is made on Corporate Debtor but serving of the advance petition itself was a demand on the Corporate Debtor to either make the payment of the loan amount or be admitted for insolvency proceedings. The Company Master Data of the Corporate Debtor is annexed to the petition. It is noted that the registered email id of the Corporate Debtor is citispace2009@gmail.com. The Copy of the petition has been served on the registered email id of the Corporate Debtor on 06.10.2022. Despite being put on notice for repayment of the loan along with interest as on 30.09.2022, the Corporate Debtor failed to make the payment of the loan amount, itself signifies that Corporate Debtor has committed default in repayment of financial debt.

30. We are conscious of the fact that the Adjudicating Authority has to determine under section 7 petition whether there is financial debt and whether there is default. In the present case, the existence of financial debt is undisputed. The provisions of Code provide that if the application is incomplete or defective then the Financial Creditors can cure a defect which is of curable nature. Accordingly, even if on the date of filing of the petition, there was no formal demand of loan, but by issue of advance copy of the petition to the Corporate Debtor and notice of the instant petition to the Corporate Debtor followed by the period of two years granted to the Corporate Debtor to file reply, it can be sufficiently held that demand has been made on the Corporate Debtor. Therefore, in my considered view, there is demand made on the Corporate Debtor by the Financial Creditors. However, instead of

filing reply within 14 days, the Corporate Debtor has taken more than two years to file reply but has not made the loan repayment.

31. In view of the above discussions, looking from whichever angle, I respectfully disagree with the judgment authored by Ld. Brother Member (T) and hold that the Financial Creditors have established the debt and default.

32. Further, the Petition is within limitation after considering the exclusion period granted by Hon'ble Supreme Court. Hence, this is a fit case for admission and accordingly the Company Petition bearing no. 1216 of 2022 is **admitted**.

33. In view of the split judgement, this matter needs to be placed before the Hon'ble President under Section 419(5) of the Companies Act, 2013 for constitution of a Third Member Bench.

Sd/-

Lakshmi Gurung
Member (Judicial)