NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI
(APPELLATE JURISDICTION)

Company Appeal (AT) (CH) (INS.) No. 89 of 2022
(Under Section 61 of the Insolvency and Bankruptcy Code, 2016)

(Arising out of the `Order' dated 04.02.2022 in IBA/757/2019,
passed by the `Adjudicating Authority',
(`National Company Law Tribunal',
Division Bench – I, Chennai)

In the matter of:

M/s. Precious Energy Holdings Limited BV1
Suite 6, Mill Mall,
Wickhams Cay 1 PO Box No. 3085
Road Town Tortola
British Virgin Islands – 3083 3083
Precious Energy Holdings Limited BV ….. Appellant
(Shareholder-cum-Investor)

v.

1. State Bank of India
Stressed Assets Management Branch
Red Cross Building, 2nd Floor,
No.32, Red Cross Road, Egmore
Chennai – 600008 ….. Respondent No.1

2. Mr. Radhakrishnan Dharmarajan
D3 Block 1, Triumph Apartments
114, Jawaharlal Nehru Salai,
Arumbakkam
Chennai - 600106 ….. Respondent No. 2

Present:

For Appellant : Mr. P. Chidambaram, Senior Advocate
Mr. Anil Bhushan, Senior Advocate
Mr. Dhruba Mukherjee, Senior Advocate
For Dr. R. Maheswari, Advocate

For Respondent No.1 : Mr. E. Om Prakash, Senior Advocate
For Ms. Vidyalakshmi Vipin and
Mr. M.G. Pranava Charan, Advocate

For Respondent No.2 / Interim Resolution Professional : Mr. T. Ravichandran, Advocate

J U D G M E N T
(Virtual Mode)

Justice M. Venugopal, Member (Judicial):

Introduction:

Company Appeal (AT) (CH) (INS.) No. 89 of 2022:

The `Appellant' / `Shareholder-cum-Investor' of the `Corporate Debtor' (`Coastal Energen Private Limited', Chennai – 600006), has preferred the instant Comp. App (AT) (CH) (INS.) No. 89 of 2022, before this `Tribunal', as an `Aggrieved Person', on being dissatisfied with the `impugned order' dated 04.02.2022 in IBA/757/2019, (Filed under Section 7 of the Insolvency and Bankruptcy Code, 2016, read with Rule 4 of the I & B (Application to Adjudicating Authority) Rules, 2016, (`National Company Law Tribunal', Division Bench – I, Chennai).

2. The `Adjudicating Authority', (`National Company Law Tribunal', Division Bench – I, Chennai), while passing the `impugned order' dated 04.02.2022 in IBA/757/2019, among other things, at Paragraphs 13 to 17, had observed the following:

13. ``We have heard the submission made by the Learned Counsel for the parties and perused the records, including the documents placed on file. From the averments made in the Application it is seen that the Corporate Debtor has committed default in repayment of its credit facilities which it had availed from the Financial Creditor by way of various credit facilities sanctioned, granted and disbursed by the Applicant. The record from the Information Utility also posits the same fact, as the same shows as ``Deemed to be Authenticated''. Further, it may be seen that the Financial Creditor has classified the accounts of the Corporate Debtor as NPA on 31.03.2017 and thus under the provisions of IBC, taking into consideration the decision of the Hon'ble Supreme Court in Gaurav Hargovindbhai Dave vs. Asset Reconstruction Company (India) Ltd. & Anr. in Civil Appeal No.4952 of 2019 and B.K. Educational Services Private Limited -Vs- Parag Gupta and Associates; (2018) SCC Online SC 1921, the right to sue across for the Financial Creditor to sue the Corporate Debtor on 31.03.2017, the date on which the account of the Corporate Debtor was declared as NPA and from the records it is evident that the Financial Creditor has filed the present petition on 03.10.2018 which is well within the 3 years period of limitation.

14. Further, we are also satisfied that there is a debt and default on the part of the Corporate Debtor and the Corporate Debtor is unable to repay its dues to the Consortium of Bankers and in the instant case to the Applicant Financial Creditor. It has also been consistently held by the Hon'ble Supreme Court both in Innoventive Industries Ltd. -vs- ICICI Bank and another (2018) 1 SCC 407 as well as Mobilox Innovations Pvt. Ltd. -vs- Kirusa Software Pvt. Ltd. (2018) 1 SCC 353 after going through the Scheme of IBC, 2016, in depth in relation to an Application under Section 7 filed by a Financial Creditor as compared to the one filed under Section 9 by an Operational Creditor, in relation to a Section 7 Application where there is an existence of a `financial debt' and its default in excess of Rs.1,00,000/-, (since increased to Rs.1 Crore w.e.f. from 24.03.2020) this Tribunal is bound to admit the Application and as a consequence trigger the Corporate Insolvency Resolution

Process (CIRP) and in relation to a Section 7 Application defence or set off or counter claim put forth by the Corporate Debtor cannot be considered as a dispute in relation to the Financial debt and default in relation to it. Thus, it is clear that there is a default on the part of the Corporate Debtor for a sum exceeding Rs.1 Lakh. Also, the default arising in the present Application is much prior to the advent of the Covid-19 pandemic and hence the Corporate Debtor cannot seek shelter also under Section 10A of IBC, 2016.

15. During the hearing, the Learned Counsel for the Applicant was asked to clarify the present position of default taking into consideration the payments made by the Corporate Debtor during pendency of the present Application, Learned Counsel for the Applicant stated during hearing on 24.01.2022 that the present default is nearly Rs.1458 Crores. The same was admitted by the Learned Counsel for the Respondent. Learned Counsel for the Respondent vehemently stated during the hearing on 24.01.2022, that there is no default, when questioned, the basis of the same, our attention was drawn towards the payments made by the Respondents during the intervening period by the Corporate Debtor to the Applicant more particularly during the financial year 2020 to date. During the hearing a question was put by the Bench to the Learned Counsel ``whether the account of the Respondent is NPA in the books of the Applicant Bank?''. The Learned Counsel for the Respondent refused to answer and directed the same to be answered by Learned Counsel for the Applicant. Learned Counsel for the Applicant replied that the account of the Respondent is NPA with the Applicant and the amount of default at present is Rs.1458 Crores. Learned Counsel for the Respondent could not oppose this answer.

16. Thus, taking into consideration the facts and circumstances of the case as well as the position of Law, we are of the view that this Application as filed by the Applicant – Financial Creditor is required to be admitted under Section 7 (5) of the IBC, 2016.

17. The Financial Creditor has proposed the name of Mr. Radhakrishnan Dharmarajan, with Registration Number: IBBI / IPA – 001 / IP - P00508 / 2017 – 18 / 10909 (email id:- dharma67@gmail.com), whose Authorization for Assignment (AFA) as per IBBI site is valid till 30.11.2022, as the Interim Resolution Professional (IRP) who has also filed his written consent in Form 2 of the Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rules, 2016. The proposed IRP who is appointed shall take forward the process of Corporate Insolvency Resolution of the Corporate Debtor. The IRP appointed shall take in this regard such other and further steps as are required under the Statute, more specifically in terms of Section 15, 17, 18 of the Code and file his report within 30 days before this Bench. The powers of the Board of Directors of the Corporate Debtor shall stand superseded as a consequence of the initiation of the CIRP in relation to the Corporate Debtor in terms of the provisions of IBC, 2016.''

and `Admitted', the `Application', and declared `Moratorium', etc.

Appellant's Pleas & Decisions:

3. Challenging the `impugned order' dated 04.02.2022 in IBA/757/2019, passed by the `Adjudicating Authority' (`NCLT', Division, Bench – I, Chennai), the Learned Senior Counsel for the `Appellant', submits that the `Appellant' / `Shareholder-cum-Investor', like `Investors' (`OTS Consortium'), had invested `Huge Sums', based on the in-principle `Letter of Intent' for `Settlement' of `Outstanding Debt', issued by the `1st Respondent' on 14.02.2020 and the `OTS Consortium',

conveyed its `Acceptance' to the `Letter of Intent' dated 06.03.2020 and hence, is an `Aggrieved Person'.

4. The Learned Counsel for the Appellant points out that after the `dismissal of the Application', under Section 7 of the I & B Code, 2016, at the request of the `Lender Consortium', the `Petition' of `Re-instatement', Viz. IA/827/2020 in the Closed / Disposed case of IBA/757/2019, is not `maintainable', and this is quite evident from Rule 32 of the NCLT Rules, 2016, which deals as under:

> *32. ``Interlocutory applications.- Every Interlocutory application for stay, direction, condonation of delay, exemption from production of copy of order appealed against or extension of time prayed for in pending matters shall be in prescribed form and the requirements prescribed in that behalf shall be complied with by the applicant, besides filing an affidavit supporting the application.''*

5. The Learned Counsel for the Appellant submits that the `Adjudicating Authority', having given `Liberty', to file a `Petition', for `re-instatement', it should be treated, to be `Liberty', to file a fresh `Application' / `Petition', as per Section 7 of the I & B Code, 2016, for same cause of action.

6. The Learned Counsel for the Appellant brings it to the notice of this `Tribunal', that the `Adjudicating Authority', had failed to take `notice' of the developments that took place, after the `Dismissal' of the

`Application' (filed under Section 7 of the Code as `Withdrawn' on 19.12.2019). As a matter of fact, the `Lender Consortium', has accepted the `Additional Sum' of Rs.1765.34 Crores, out of Rs.3100 Crores. Also that, the `1st Respondent / Bank / Financial Creditor', should have filed a fresh `Application', under Section 7 of the I & B Code, 2016, in Form I, giving the precise amount of `Debt' payable and the `Date of Default', if any, after accepting Rs.1765.34 Crores.

7. The Learned Counsel for the Appellant takes a plea that the `Adjudicating Authority' (`Tribunal'), had failed to take notice that after payment of Rs.1765.34 Crores, out of Rs.3100 Crores, on the date of filing of an `Application' for `re-instatement', there was neither any `Default' nor remained any `Cause of Action', for such `re-instatement'.

8. The Learned Counsel for the Appellant advances an argument that the `Ex-parte Order' of `Re-instatement', dated 05.11.2020, passed by the `Adjudicating Authority, without `Notice', to the `Corporate Debtor', the said `Order', is unsustainable in `Law', being `violative of the rules of natural justice and Section 420 of the Companies Act, 2013'.

9. The Learned Counsel for the Appellant contends that the `Ex-parte Order' dated 05.11.2020, re-instating the `Application', is not a `Speaking Order', and reasons for `Re-instatement', were not discussed.

10. The Learned Counsel for the Appellant forcefully points out that the `Adjudicating Authority', had failed to appreciate the fact that after the payment of Rs.1765.34 Crores by the `OTS Consortium', the remaining amount payable as per `OTS Proposal', is much higher than the `Reserve Price' of Rs.796.25 Crores, at which, the `Lender Consortium', intended to sell the `Debt' of the `Corporate Debtor', to `ARCs' / `NBFCs' / `Financial Institutions'. As such, it is the contention of the `Appellant' that the `rejection' of `OTS', by the `Lender Consortium', is an `Arbitrary', `Unreasonable' and a `Discriminatory' one.

11. According to the Learned Counsel for the Appellant, the reason for the `delay', in `executing', the `One Time Settlement', was because of the `failure', on the part of the `1st Respondent', who failed, to get `consent', from the `Lender Consortium', in time, and this was not noticed by the `Adjudicating Authority, at the time of passing of `impugned order'.

12. The Learned Counsel for the Appellant proceeds to point out that the `Lender Consortium', along with the `1st Respondent / Bank', collectively held `51% Shares', of the `Corporate Debtor', and after the `Issuance of Notice', for `Invocation of Pledge', dated 26.02.2019, 40.38% of the `Equity Shares', of the `Corporate Debtor', were also `invoked', under the `Share Pledge Agreements'.

13. The Learned Counsel for the Appellant submits that because of the fact that the `Lender Consortium', having full control of the `Corporate Debtor', and effectively, holding `51% plus 40.38%' (approx. 91.38%) of the `Paid up Equity Share Capital of the Corporate Debtor', and hence it was not open to them, to press the `Application', under Section 7 of the Code. As a majority Shareholder, for `Default', if any, it could have moved an `Application', under Section 10 of the Code and not under Section 7 of the Code.

14. The Learned Counsel for the Appellant contends that the `initiation' of `Corporate Insolvency Resolution Process', by the `1st Respondent / Bank', during the shadow period i.e., from 25.03.2020 to 25.03.2021, when the restrictions imposed by the Section 10A of the Code, were in force, is bad in `Law'. Added further, taking cognisance of the situation caused by the `Covid-19 Pandemic', the `initiation' of `Corporate Insolvency Resolution Process', was `suspended for a period of one year', by enacting, `Section 10A of the I & B Code, 2016'.

15. The Learned Counsel for the Appellant takes a stand that, it is evident from Paragraph 9 of the `impugned order' dated 04.02.2022, in IBA/757/2019, passed by the `Adjudicating Authority', that it was based on the `Order' in IA/827/2020 dated 05.11.2020. Hence, the `impugned

order’ dated 04.02.2022 in IBA/757/2019, passed by the `Adjudicating Authority’, during the shadow period, under Section 10A of the Code, is liable to be `set aside’.

16. The Learned Counsel for the Appellant submits that an `Application’, under Section 7 of the I & B Code, 2016, is not to be `Admitted’, based on the `existence’ of `Debt’ and `Default’.

17. In this connection, the Learned Counsel for the Appellant points out that the Hon’ble Supreme Court of India in Vidarbha Industries Power Limited v. Axis Bank Limited, reported in (2002) 8 SCC at Page 352, has clarified that `the power to, `admit an Application’, under Section 7 vested with the NCLT, under Sec. 7 (5) (a) is discretionary and not mandatory’. Also that, the Hon’ble Supreme Court had observed that various factors will have to be taken into account, before the `initiation’ of `Corporate Insolvency Resolution Process’, including the `first objective’, to `revive the company’, and not spell its death knell, feasibility of the `Corporate Insolvency Resolution Process’, `Viability’ and the `Financial Health’, of the `Corporate Debtor’.

18. The Learned Counsel for the Appellant points out that in the present case, the `Corporate Debtor’, had repaid a sum of Rs.1765 Crores and that the `Company’, is a going concern which was admitted vide

Paragraph 19 (2A) in IBA/757/2019, by the `Adjudicating Authority' (`Tribunal') in its `impugned order' dated 04.02.2022.

19. On behalf of the Appellant, it is brought to the notice of this `Tribunal', that until the `Corporate Insolvency Resolution Process', was `Admitted', the `Corporate Debtor', was servicing the `Loan' / `Repaying the Loan', using 30% of the `Income', as a going concern, etc.

20. The Learned Counsel for the Appellant submits that the `Settlement Proposal' of the `Corporate Debtor', under the `One Time Settlement', was in line with the `numerous Settlement', reached in other `Thermal Plants', that are similarly placed:

Sl.No.	*Name of the Borrower*	*Capacity MW*	*EBITA INR Cr.*	*EBITA Multiple*	*Deal Value Cr.*	*Per MW*
1	*Jindal Steel Power (Ind Coal)*	*1,200*	*800*	*3.0*	*2,400*	*2.0*
2	*Simhapuri (Imp Coal)*	*600*	*0*	*0*	*300*	*0.5*
3	*Meenakshi Power (Imp. Coal)*	*900*	*0*	*0*	*1,000*	*1.1*
4	*Coastal Energen (Imp Coal)*	*1,200*	*(-) 200*	*0*	*2,165* 2,691***	*1.9 2.3*

21. The Learned Counsel for the Appellant submits that after filing of an `Application', under Section 7 of the I & B Code, 2016, along with a `Consortium of Investors' (including the `Appellant' - `OTS Consortium'), made an offer of Rs.3000 Crores, as a `One Time

Settlement' on 15.05.2019, inspite of the fact that the sustainable `Debt', was only Rs.2450 Crores. That apart, on 17.05.2019, the `Lender Consortium', acknowledged the `Offer', and called upon `OTS Consortium', to make a `payment of Rs.150 Crores', on or before 15.06.2019. Resting upon the request made by the `Lender Consortium', the `OTS Consortium', made plurality of payments on 16.05.2019, 06.06.2019 and 14.06.2019 cumulatively, amounting to Rs.150 Crores. Also that, it was clarified to the `1st Respondent / Bank', by the `OTS Consortium', that the payments were against the `One Time Settlement'.

22. The Learned Counsel for the Appellant brings it to the notice of this `Tribunal', that the consideration, payable under the `One Time Settlement', was later revised to Rs.3100 Crores and `Additional Equity of 15%', was offered to the `Lender Consortium' (`OTS'). In this connection, it is pointed out on behalf of the Appellant that the `1st Respondent / Bank', had invited `Bids', based on `Swiss Challenge', and the `Respondents', were not happy with the `Bids', received so that they offered `Swiss Challenge', to the `existing Promoters', to give `H1 Bid', (vide `Letter of 1st Respondent / Bank – SARG/INFRA/CEPL/19-20/46 dated 01.06.2019'), addressed to the `Appellant' and Another with a copy marked to the `Corporate Debtor'.

23. The Learned Counsel for the Appellant points out that resting upon the `One Time Settlement', proposed by the `OTS Consortium', the `1st Respondent / Bank', `withdrew' its `Section 7 Application' (Filed under the IBC) and on 14.02.2020, the `Lender Consortium', through `State Bank of India', issued an `In-principle Letter of Intent', in favour of the `Corporate Debtor', and that the `One Time Settlement', offered by the `One Time Settlement Consortium', was supported by the `Members', representing `92.83%' of the `Debt', under the `Agreements'.

24. The Learned Counsel for the Appellant, refers to the Letter dated 06.03.2020, addressed to the `Chief Manager-Infra, State Bank of India, Stressed Asset Resolution Group', on the subject `In-principle Letter of Intent for settlement of Outstanding Debt of Coastal Energen Private Limited (`Company')', by the `Authorised Signatory for Mutiara Energy Holdings, Mauritius and signed by the `Authorised Signatory for Precious Energy Holdings Limited, BVI, with a copy, being marked to the `Corporate Debtor' (`Coastal Energen Private Limited'). The `OTS Consortium, conveyed its `acceptance', to the `Letter of Intent', with some minor and practical modifications, and that the `OTS Consortium', had accepted the `Fundamental' and `Essential' Terms of `Letter of Intent'.

25. The Learned Counsel for the Appellant points out that the `OTS Consortium', during the Calendar Years 2020 and 2021, had made numerous payments to the `One Time Settlement', and at the time of payment, the `OTS Consortium', made it clear that the `Sums', were being remitted towards the `One Time Settlement', and further that the `Amounts', paid under the `One Time Settlement', received by the `Lender Consortium, without any protest or demur and continue to be retained by the `Lender Consortium'.

26. The Learned Counsel for the Appellant submits that the `OTS Consortium', is ready to `Settle' the matter in terms of Section 12A of the Code, for Rs.1,000 Crore plus, which is much higher than the `Reserve Price' of `Rs.796.25 Crores', at which the `Lender Consortium', intended to sell the entire `Debt' of the `Corporate Debtor', to the `ARCs' / `NBFCs' / `Financial Institutions', etc. Further, if they agree to it, it will exhibit the `Bonafide', on the part of the `Lender Consortium', to save the `Corporate Debtor', from `Insolvency', being the `largest Shareholder', of the `Corporate Debtor'.

27. The Learned Counsel for the Appellant contends that when the request for `Withdrawal', was made by the `1st Respondent / Bank', on behalf of the `Lender Consortium', for the `Application', filed under

Section 7 by the `1st Respondent / Bank / Financial Creditor', a `wrong statement', was made, by way of an Affidavit, by the `1st Respondent / Bank', which was recorded by the `Adjudicating Authority' (`Tribunal') in the Order dated 19.12.2019 in IBA/757/2019, wherein, it is observed as under:

> *``It is respectfully submitted that the Corporate Debtor has submitted OTS Proposal to the Consortium led by Financial Creditor which is approved by the `Financial Creditor' and other consortium member banks. The `Proposal' is before `Committees of 15 banks for taking decision and it will take 4 weeks' time to have a final decision in the matter.''*

28. The Learned Counsel for the Appellant comes out with a plea that `No Man can take an advantage of his `own wrong', and that the `1st Respondent / Bank', cannot question the `Validity' of the `One Time Settlement Proposal', by its undermentioned failures:

> *(a) ``Failure to get 100% approval from Consortium of Banks.*
> *(b) Failure to issue `Final Letter of Intent' as per in-principle letter dated 14.02.2020.*
> (c) *Failure to maintain the amounts in a separate Escrow Account.''*

29. The Learned Counsel for the Appellant contends that the `Corporate Debtor', had made payments in respect of `One Time Settlement', in `Good Faith', to an extent of Rs.1765 Crores and had altered its `Financial Position', and therefore, the `Lenders' are

`obligated', to `recognise' the payment, against the `One Time Settlement', and complete the `Settlement'. In this connection, the `Plea', of the `Appellant' is that, `the Doctrine of Promissory Estoppel applies to the `OTS Arrangement', reached among the parties in terms of the `In-principle Letter of Intent' dated 14.02.2020.

30. The Learned Senior Counsel for the Appellant points out that the `1st Respondent / Bank' (`Lead Bank', for the `Lender Consortium'), in respect of the period between the Years 2009 and 2014, had failed to make necessary Funds available for completing the construction of the `Power Plant', and in fact, the `1st Respondent /Bank', had only released a Sum of Rs.325 Crores, which constituted a `minor fraction of the required Sum of Working Capital, for operating the Power Plant' (`INR 1600 Crores').

31. The Learned Counsel for the Appellant while rounding up, prays for setting aside the `impugned order' dated 04.02.2022 in IBA/757/2019, passed by the `National Company Law Tribunal', Division Bench – I, Chennai', and sought for a direction, being issued by this `Tribunal', in `Ordering', the `1st Respondent / Bank', to arrive at a `Resolution Plan' (`One Time Settlement'), by placing the amounts paid

by the `Corporate Debtor', and the `OTS Consortium', amounting to Rs.1765 Crores in a separate Account.

Appellant's Decisions:

32. The Learned Counsel for the Appellant submits that a `Party', cannot be permitted to secure an `Advantage', under an `Instrument' and at the same time, setup a `Plea', disputing the `Validity', of the very same instrument, as per decision in Union of India v. N. Murugesan, reported in (2022) 2 SCC at Page 25, Spl Pgs: 38 to 40, wherein at paragraphs 26, 27, 27.1 to 27.3, wherein it is observed as under:

Approbate and Reprobate:

> *26. ``These phrases are borrowed from the Scots law. They would only mean that no party can be allowed to accept and reject the same thing, and thus one cannot blow hot and cold. The principle behind the doctrine of election is inbuilt in the concept of approbate and reprobate. Once again, it is a principle of equity coming under the contours of common law. Therefore, he who knows that if he objects to an instrument, he will not get the benefit he wants cannot be allowed to do so while enjoying the fruits. One cannot take advantage of one part while rejecting the rest. A person cannot be allowed to have the benefit of an instrument while questioning the same. Such a party either has to affirm or disaffirm the transaction. This principle has to be applied with more vigour as a common law principle, if such a party actually enjoys the one part fully and on near completion of the said enjoyment, thereafter questions the other part. An element of fair play is inbuilt in this principle. It is also a species of estoppel dealing with the conduct of a party. We have already dealt with the provisions of the Contract Act concerning the conduct of a party, and his presumption of*

knowledge while confirming an offer through his acceptance unconditionally.

27. We would like to quote the following judgments for better appreciation and understanding of the said principle:

27.1. Nagubai Ammal v. B. Shama Rao, 1956 SCR 451:

"23. But it is argued by Sri Krishnaswami Ayyangar that as the proceedings in OS. No. 92 of 1938-39 are relied on as barring the plea that the decree and sale in OS. No. 100 of 1919-20 are not collusive, not on the ground of res judicata or estoppel but on the principle that a person cannot both approbate and reprobate, it is immaterial that the present appellants were not parties thereto, and the decision in Verschures Creameries Ltd. v. Hull and Netherlands Steamship Company Ltd. [(1921) 2 KB 608 (CA)], and in particular, the observations of Scrutton, LJ, at page 611 were quoted in support of this position. There, the facts were that an agent delivered goods to the customer contrary to the instructions of the principal, who thereafter filed a suit against the purchaser for price of goods and obtained a decree.

Not having obtained satisfaction, the principal next filed a suit against the agent for damages on the ground of negligence and breach of duty. It was held that such an action was barred. The ground of the decision is that when on the same facts, a person has the right to claim one of two reliefs and with full knowledge he elects to claim one and obtains it, it is not open to him thereafter to go back on his election and claim the alternative relief. The principle was thus stated by Bankes, L.J.: (Verschures Creameries Ltd. case, (1921) 2 KB 608 (CA).

> *"... Having elected to treat the delivery to him as an authorised delivery they cannot treat the same act as a misdelivery. To do so would be to approbate and reprobate the same act".*

The observations of Scrutton, LJ on which the appellants rely are as follows: (Verschures Creameries Ltd. case, KB pp. 611-612)

"... A plaintiff is not permitted to 'approbate and reprobate'. The phrase is apparently borrowed from the Scotch law, where it is used to express the principle embodied in our doctrine of election — namely, that no party can accept and reject the same instrument: Ker v. Wauchope [(1819) 1 Bligh PC 1, at pg 21] : Douglas-Menzies v. Umphelby [(1908) AC 224, at p. 232 (PC] . The doctrine of election is not however confined to instruments. A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage. That is to approbate and reprobate the transaction".

It is clear from the above observations that the maxim that a person cannot 'approbate and reprobate' is only one application of the doctrine of election, and that its operation must be confined to reliefs claimed in respect of the same transaction and to the persons who are parties thereto. The law is thus stated in Halsbury's Laws of England, Vol. XIII, p. 464, para 512:

"On the principle that a person may not approbate and reprobate, a species of estoppel has arisen which seems to be intermediate between estoppel by record and estoppel in pais, and may conveniently be referred to here. Thus a party cannot, after taking advantage under an order (e.g. payment of costs), be heard to say that it is invalid and ask to set it aside, or to set up to the prejudice of persons who have relied upon it a case inconsistent with that upon which it was founded; nor will he be allowed to go behind an order made in ignorance of the true facts to the prejudice of third parties who have acted on it".

27.2. State of Punjab v. Dhanjit Singh Sandhu, (2014) 15 SCC 144 (SCC pp. 153-54, paras 22-23 & 25-26)

"22. The doctrine of "approbate and reprobate" is only a species of estoppel, it implies only to the conduct of parties. As in

the case of estoppel it cannot operate against the provisions of a statute. (Vide CIT v. MR. P. Firm Muar, AIR 1965 SC 1216).

23. It is settled proposition of law that once an order has been passed, it is complied with, accepted by the other party and derived the benefit out of it, he cannot challenge it on any ground. (Vide Maharashtra SRTC v. Balwant Regular Motor Service, AIR 1969 SC 329). In R.N. Gosain v. Yashpal Dhir [R.N. Gosain v. Yashpal Dhir, (1992) 4 SCC 683] this Court has observed as under: (R.N. Gosain case, SCC pp. 687-88, para 10)

> *"10. Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that 'a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage'."*

25. The Supreme Court in Rajasthan State Industrial Development and Investment Corpn. v. Diamond and Gem Development Corpn. Ltd. [Rajasthan State Industrial Development and Investment Corpn. v. Diamond and Gem Development Corpn. Ltd., (2013) 5 SCC 470 : (2013) 3 SCC (Civ) 153] , made an observation that a party cannot be permitted to "blow hot and cold", "fast and loose" or "approbate and reprobate". Where one knowingly accepts the benefits of a contract or conveyance or an order, is estopped to deny the validity or binding effect on him of such contract or conveyance or order. This rule is applied to do equity, however, it must not be applied in a manner as to violate the principles of right and good conscience.

26. It is evident that the doctrine of election is based on the rule of estoppel, the principle that one cannot approbate and reprobate is inherent in it. The doctrine of estoppel by election is one among the species of estoppel in pais (or equitable estoppel), which is a rule of equity. By this law, a person may be precluded,

by way of his actions, or conduct, or silence when he has to speak, from asserting a right which he would have otherwise had."

27.3. Rajasthan State Industrial Development & Investment Corpn. v. Diamond & Gem Development Corpn. Ltd., (2013) 5 SCC 470: (SCC pp. 480-81, paras 15-16)

"I. Approbate and reprobate

15. A party cannot be permitted to "blow hot-blow cold", "fast and loose" or "approbate and reprobate". Where one knowingly accepts the benefits of a contract, or conveyance, or of an order, he is estopped from denying the validity of, or the binding effect of such contract, or conveyance, or order upon himself. This rule is applied to ensure equity, however, it must not be applied in such a manner so as to violate the principles of what is right and of good conscience. [Vide Nagubai Ammal v. B. Shama Rao [AIR 1956 SC 593] , CIT v. V. MR. P. Firm Muar [AIR 1965 SC 1216], Ramesh Chandra Sankla v. Vikram Cement [(2008) 14 SCC 58], Pradeep Oil Corpn. v. MCD [(2011) 5 SCC 270], Cauvery Coffee Traders v. Hornor Resources (International) Co. Ltd. [(2011) 10 SCC 420] and V. Chandrasekaran v. Administrative Officer [(2012) 12 SCC 133]

16. Thus, it is evident that the doctrine of election is based on the rule of estoppel—the principle that one cannot approbate and reprobate is inherent in it. The doctrine of estoppel by election is one among the species of estoppel in pais (or equitable estoppel), which is a rule of equity. By this law, a person may be precluded, by way of his actions, or conduct, or silence when it is his duty to speak, from asserting a right which he would have otherwise had."

33. The Learned Counsel for the Appellant raises an argument that the sums, under the `One Time Settlement', were paid by `numerous entities', which had no `privity', with the `1st Respondent/Bank', with the `One

Time Settlement', and hence, the amounts paid by the `OTS Consortium', pursuant the `OTS', was not to be adjusted, against the dues under the `Agreements'.

34. The Learned Counsel for the Appellant points out that when a `Debtor', makes a payment, he has a `Right' to have it appropriated in such manner, as he decides, if the `Creditor', accepts the payment, he is bound to make the `appropriation', in accordance with the directions of the `Debtor', as per decision of the Hon'ble Supreme Court of India in Gurpreet Singh v. Union of India, reported in (2006) 8 SCC 457 at Spl. Pg.; 467, wherein at Paragraphs 11 and 12, it is observed as under:

> *11. ``The relevant provisions governing contractual dealings are found in Sections 59 to 61 of the Indian Contract Act. According to Pollock & Mulla, Indian Contract Act, 12th Edition, the underlying principle is that when several debts are due and owing to one person, any payment made by the debtor either with an express intimation or under circumstances from which an intimation may be implied must be applied to the discharge of the debt in the manner intimated or which can be implied from the circumstances. Mulla proceeds to observe:*
>
> > *"In England, 'it has been considered a general rule since Clayton case that when a debtor makes a payment he may appropriate it to any debt he pleases, and the creditor must apply it accordingly'. Where several distinct debts are owing by a debtor to his creditor, the debtor has the right when he makes a payment to appropriate the money to any of the debts that he pleases, and the creditor is bound, if he takes the money, to apply it in the manner directed by the debtor. If the debtor does not make any appropriation at the time when*

he makes the payment, the right of appropriation devolves on the creditor."

12. The rule of appropriation as applied in India was summed up by T.L. Venkatarama Aiyar. J. (as he then was) in the Full Bench decision of the Madras High Court in Garimella Suryanarayana vs. Gada Venkataramana Rao (AIR 1953 Mad. 458). His Lordship stated: (AIR pp. 459 -60, para 5)

5. "The principles governing appropriation of payments made by a debtor are under the general law well settled. When a debtor makes a payment, he has a right to have it appropriated in such manner as he decides and if the creditor accepts the payment, he is bound to make the appropriation in accordance with the directions of the debtor. This is what is known in England as the rule in 'Clayton case' (1816) 1 Mer.572: 35E.R. 781, and it is embodied in Section 59, Contract Act. But when the debtor has not himself made any appropriation, the right devolves on the creditor who can exercise it at any time, vide 'Cory Bros. & Co. vs. Owners of the Turkish Steamship 'Mecca', (1897) A.C. 286; and even at the time of the trial : Vide 'Seymour v. Pickett', (1905) 1 KB 715. That is Section 60, Contract Act. It is only when there is no appropriation either by the debtor or the creditor that the Court appropriates the payments as provided in Section 61, Contract Act."

35. The Learned Counsel for the Appellant urges that the `1st Respondent / Bank', has not adduced any evidence, to disprove the documentary evidence, presented by the `Appellant', and that the `acceptance and receipt of the payments', made by the `OTS Consortium', along with the communications brought on record, by the `Appellant', were not specifically denied by the `1st Respondent / Bank',

and hence it is to be treated as one admitted by the `1st Respondent / Bank'.

36. The Learned Counsel for the Appellant adverts to the decision of the Hon'ble Supreme Court of India in Venkataramana Hebbar v. M. Rajagopal Hebbar & Ors., (2007) 6 SCC at Page 401; Spl Pg: 406, wherein at Paragraphs 12 and 13, it is observed as under:

12. ``The contract between the parties, moreover was a contingent contract. It was to have its effect only on payment of the said sum of Rs. 15,000/- to the plaintiff and the other respondents by Defendants 1 to 3. It has been noticed hereinbefore by us that as of fact, it was found that no such payment had been made. Even there had been no denial of the assertions made by the appellant in their written statement in that behalf. The said averments would, therefore, be deemed to be admitted. Order 8 Rule 3 and Order 8 Rule 5 of the Civil Procedure Code read thus:-

> *``3. Denial to be specific.- It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages.*
>
> *5. Specific denial.- (1) Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability.*
>
> *Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission.*
>
> *(2) Where the defendant has not filed a pleading, it shall be lawful for the Court to pronounce judgment on the basis of the facts contained in the plaint, except as against a person under a disability, but the Court may, in its discretion, require any such fact to be proved.*

(3) In exercising its discretion under the proviso to sub-rule (1) or under sub-rule (2), the Court shall have due regard to the fact whether the defendant could have, or has, engaged a pleader.

(4) Whenever a judgment is pronounced under this rule, a decree shall be drawn up in accordance with such judgment and such decree shall bear the date on which the judgment was pronounced."

13. Thus, if a plea which was relevant for the purpose of maintaining a suit had not been specifically traversed, the Court was entitled to draw an inference that the same had been admitted. A fact admitted in terms of Section 58 of the Evidence Act need not be proved.''

37. The Learned Counsel for the Appellant points out that I & B Code, 2016, is a `Beneficial Legislation', designed to `enable', the `Corporate Debtor', to get back on its `feet', as per decision of the Hon'ble Supreme Court of India, in Innoventive Industries Ltd. v. ICICI Bank, reported in (2018) 1 SCC at Page 407 (vide Paragraph 12).

38. The Learned Counsel for the Appellant, refers to the decision of Hon'ble Supreme Court of India in Dena Bank v. C. Shivakumar Reddy, reported in (2021) 10 SCC at Page 330 at Spl Pgs. 370-374, wherein at Paragraphs 77 to 87, it is observed as under:

77. The IBC is not just another statute for recovery of debts. Nor is it a statute which merely prescribes the modalities of liquidation of a Corporate body, unable to pay its debts. It is essentially a statute which works towards the revival of a Corporate body, unable to pay its debts, by appointment of a Resolution Professional.

78. In Innoventive Industries Ltd vs. ICICI Bank (2018) 1 SCC 407; this Court, speaking through Nariman, J. extracted excerpts from the Report of the Bankruptcy Law Reforms Committee of November, 2015 some of which are reproduced hereinbelow: (SCC pp. 425-26, para 16)

16. …`… When a firm (referred to as the corporate debtor in the draft law) defaults, the question arises about what is to be done. Many possibilities can be envisioned. One possibility is to take the firm into liquidation. Another possibility is to negotiate a debt restructuring, where the creditors accept a reduction of debt on an NPV basis, and hope that the negotiated value exceeds the liquidation value. Another possibility is to sell the firm as a going concern and use the proceeds to pay creditors. Many hybrid structures of these broad categories can be envisioned.

Speed is of essence

Speed is of essence for the working of the Bankruptcy Code, for two reasons. First, while the "calm period" can help keep an organisation afloat, without the full clarity of ownership and control, significant decisions cannot be made. Without effective leadership, the firm will tend to atrophy and fail. The longer the delay, the more likely it is that liquidation will be the only answer. Second, the liquidation value tends to go down with time as many assets suffer from a high economic rate of depreciation.

From the viewpoint of creditors, a good realisation can generally be obtained if the firm is sold as a going concern. Hence, when delays induce liquidation, there is value destruction. Further, even in liquidation, the realisation is lower when there are delays. Hence, delays cause value destruction. Thus, achieving a high recovery rate is primarily about identifying and combating the sources of delay.

Control of a company is not divine right.—When a firm defaults on its debt, control of the company should shift to the creditors. In the absence of swift and decisive mechanisms for achieving this, management teams and shareholders retain control after default. Bankruptcy law must address this. Objectives…"

(emphasis in original)

79. In Innoventive Industries Ltd vs. ICICI Bank (supra) this Court noted the objectives set by the Bankruptcy Law Reforms Committee in recommending the IBC: (SCC pp. 426-28, para 16)

``16. ...`... The Committee set the following as objectives desired from implementing a new Code to resolve insolvency and bankruptcy:

(1) Low time to resolution.

(2) Low loss in recovery.

(3) Higher levels of debt financing across a wide variety of debt instruments.

Principles driving the design

The Committee chose the following principles to design the new insolvency and bankruptcy resolution framework:

I. The Code will facilitate the assessment of viability of the enterprise at a very early stage.

(1) The law must explicitly state that the viability of the enterprise is a matter of business, and that matters of business can only be negotiated between creditors and debtor. While viability is assessed as a negotiation between creditors and debtor, the final decision has to be an agreement among creditors who are the financiers willing to bear the loss in the insolvency.

(2) The legislature and the courts must control the process of resolution, but not be burdened to make business decisions.

(3) The law must set up a calm period for insolvency resolution where the debtor can negotiate in the assessment of viability without fear of debt recovery enforcement by creditors.

(4) The law must appoint a resolution professional as the manager of the resolution period, so that the creditors can negotiate the assessment of viability with the confidence that the debtors will not take any action to erode the value of the enterprise. The professional will have the power and responsibility to monitor and manage the operations and assets of the enterprise. The

professional will manage the resolution process of negotiation to ensure balance of power between the creditors and debtor, and protect the rights of all creditors. The professional will ensure the reduction of asymmetry of information between creditors and debtor in the resolution process.

II. The Code will enable symmetry of information between creditors and debtors.

(5) The law must ensure that information that is essential for the insolvency and the bankruptcy resolution process is created and available when it is required.

(6) The law must ensure that access to this information is made available to all creditors to the enterprise, either directly or through the regulated professional.

(7) The law must enable access to this information to third parties who can participate in the resolution process, through the regulated professional.

III. The Code will ensure a time-bound process to better preserve economic value.

(8) The law must ensure that time value of money is preserved, and that delaying tactics in these negotiations will not extend the time set for negotiations at the start.

IV. The Code will ensure a collective process.

(9) The law must ensure that all key stakeholders will participate to collectively assess viability. The law must ensure that all creditors who have the capability and the willingness to restructure their liabilities must be part of the negotiation process. The liabilities of all creditors who are not part of the negotiation process must also be met in any negotiated solution.

V. The Code will respect the rights of all creditors equally.

(10) The law must be impartial to the type of creditor in counting their weight in the vote on the final solution in resolving insolvency.

VI. The Code must ensure that, when the negotiations fail to establish viability, the outcome of bankruptcy must be binding.

(11) The law must order the liquidation of an enterprise which has been found unviable. This outcome of the negotiations should be protected against all appeals other than for very exceptional cases.

VII. The Code must ensure clarity of priority, and that the rights of all stakeholders are upheld in resolving bankruptcy.

(12) The law must clearly lay out the priority of distributions in bankruptcy to all stakeholders. The priority must be designed so as to incentivise all stakeholders to participate in the cycle of building enterprises with confidence.

(13) While the law must incentivise collective action in resolving bankruptcy, there must be a greater flexibility to allow individual action in resolution and recovery during bankruptcy compared with the phase of insolvency resolution."

[Emphasis in Original]

80. As observed by this Court, speaking through Nariman, J in P. Mohanraj v. Shah Bros. Ispat (P) Limited (2021) 6 SCC 258: (SCC p. 287, paras 15-16)

"15. A cursory look at Section 14(1) makes it clear that subject to the exceptions contained in sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall mandatorily, by order, declare a moratorium to prohibit what follows in clauses (a) to (d). Importantly, under sub-section (4), this order of moratorium does not continue indefinitely, but has effect only from the date of the order declaring moratorium till the completion of the corporate insolvency resolution process which is time-bound, either culminating in the order of the Adjudicating Authority approving a resolution plan or in liquidation.

16. The two exceptions to Section 14(1) are contained in sub-sections (2) and (3) of Section 14. Under sub-section (2), the supply of essential goods or services to the corporate debtor during this period cannot be terminated or suspended or even interrupted, as otherwise the corporate debtor would be brought to its knees and would not able to function as a going concern during this period."

81. In Swiss Ribbons Private Limited v. Union of India (2019) 4 SCC 17, authored by Nariman, J. this Court observed: (SCC p. 55, para 28)

"28. It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors. The interests of the corporate debtor have, therefore, been bifurcated and separated from that of its promoters/those who are in management. Thus, the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests. The moratorium imposed by Section 14 is in the interest of the corporate debtor itself, thereby preserving the assets of the corporate debtor during the resolution process. The timelines within which the resolution process is to take place again protects the corporate debtor's assets from further dilution, and also protects all its creditors and workers by seeing that the resolution process goes through as fast as possible so that another management can, through its entrepreneurial skills, resuscitate the corporate debtor to achieve all these ends."

82. IBC has overriding effect over other laws. Section 238 of the IBC provides that the provisions of the IBC shall have effect, notwithstanding anything inconsistent therewith contained in any other law, for the time being in force, or any other instrument, having effect by virtue of such law.

83. Unlike coercive recovery litigation, the Corporate Insolvency Resolution Process under the IBC is not adversarial to the interests of the Corporate Debtor, as observed by this Court in Swiss Ribbons Private Limited v. Union of India [(2019) 4 SCC 17].

84. On the other hand, the IBC is a beneficial legislation for equal treatment of all creditors of the Corporate Debtor, as also the protection of the livelihoods of its employees/workers, by revival of the Corporate Debtor through the entrepreneurial skills of persons other than those in its management, who failed to clear the dues of the Corporate Debtor to its creditors. It only segregates the interests of the Corporate Debtor from those of its promoters/persons in management.

85. Relegation of creditors to the remedy of Coercive litigation against the Corporate Debtors could be detrimental to the interests of the Corporate Debtor and its creditors alike. While multiple coercive proceedings against a Corporate Debtor in different forums could impede its commercial/business activities, deplete its cash reserves, dissipate its assets, moveable and immoveable and precipitate its commercial death, such proceedings might not be economically viable for the creditors as well, because of the length of time consumed in the litigations, the expenses of litigation, and the uncertainties of realisation of claims even after ultimate success in the litigation.

86. It is, therefore, imperative that the provisions of the IBC and the Rules and Regulations framed thereunder be construed liberally, in a purposive manner to further the objects of enactment of the statute, and not be given a narrow, pedantic interpretation which defeats the purposes of the Act.

87. In construing and/or interpreting any statutory provision one must look into the legislative intent of the statute. The intention of the statute has to be found in the words used by the legislature itself. In case of doubt it is always safe to look into the object and purpose of the statute or the reason and spirit behind it. Each word, phrase or sentence has to be construed in the light of the general purpose of the Act itself, as observed by Mukherjea J., in Poppatlal Shah v. State of Madras [AIR 1953 SC 274] and a plethora of other judgments of this Court. To quote

Krishna Iyer J., the interpretative effort "must be illumined by the goal, though guided by the words.''

39. The Learned Counsel for the Appellant cites the Judgment of the Hon'ble Supreme Court of India in Swiss Ribbons (P) Limited & Anr. v. Union of India & Ors. (vide Writ Petition (Civil) No. 99 of 2018 dated 25.01.2019, reported in India Kanoon at Pages 18 & 19, wherein at Paragraph 12, it is observed as under:

> *12. ``It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation.*
>
> *The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors. The interests of the corporate debtor have, therefore, been bifurcated and separated from that of its promoters / those who are in management. Thus, the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests. The moratorium imposed by Section 14 is in the interest of the corporate debtor itself, thereby preserving the assets of the corporate debtor during the resolution process. The timelines within which the resolution process is to take place again protects the corporate debtor's assets from further dilution, and also protects all its creditors and workers by seeing that the resolution process goes through as fast as possible so that another management can, through its entrepreneurial skills, resuscitate the corporate debtor to achieve all these ends.''*

40. The Learned Counsel for the Appellant, in support of his contentions that the `1st Respondent / Bank', being an `instrumentality of

the State', is required to, `act in a `Fair' and `Non-Arbitrary Manner', is legally bound to, `act in a Fair and Reasonable manner, and demonstrate `Good Faith', in its `operations', as a `Lender', refers to the Judgment of the Hon'ble Supreme Court of India in Mardia Chemicals Ltd. v. Union of India, reported in (2004) 4 SCC at Page 311; Spl Pg.: 358, wherein at Paragraph 71, it is observed as under:

> *71. ``Arguments have been advanced as to how far principles of lender's liability are applicable. Whatever be the position, however, it cannot be denied that the financial institutions namely, the lenders owe a duty to act fairly and in good faith. There has to be a fair dealing between the parties and the financing companies/institutions are not free to ignore performance of their part of the obligation as a party to the contract. They cannot be free from it. Irrespective of the fact as to whatever may have been held in decisions of some American courts, in view of the facts and circumstances and the terms of the contract and other details relating to those matters, that may or may not strictly apply, nonetheless even in absence of any such decisions or legislation, it is incumbent upon such financial institutions to act fairly and in good faith complying with their part of obligations under the contract. This is also the basic principle of the concept of lender's liability. It cannot be a one-sided affair shutting out all possible and reasonable remedies to the other party, namely borrowers and assume all drastic powers for speedier recovery of NPAs. Possessing more drastic powers calls for exercise of higher degree of good faith and fair play. The borrowers cannot be left remediless in case they have been wronged against or subjected to unfair treatment violating the terms and conditions of the contract. They can always plead in defence deficiencies on the part of the banks and financial institutions.''*

41. The Learned Counsel for the Appellant cites the Judgment of the Hon'ble Supreme Court of India in Vidarbha Industries Power Ltd. v. Axis Bank Limited, (vide Civil Appeal No. 4633 of 2021 dated 12.07.2022), reported in (2022) 8 SCC Online SC 841 at Page 352; Spl Pgs.: 373-376, wherein at Paragraphs 65 to 69 and 75 to 78, it is observed as under:

> *65. ``It is well settled that the first and foremost principle of interpretation of a statute is the rule of literal interpretation, as held by this Court in Lalita Kumari v. State of Uttar Pradesh. If Section 7(5)(a) IBC is construed literally the provision must be held to confer a discretion on the Adjudicating Authority (NCLT).*
>
> *66. In Hiralal Rattanlal v. State of Uttar Pradesh, this Court held:- (SCC P. 224, Para 224)*
>
> *"22. ... In construing a statutory provision, the first and the foremost rule of construction is the literary construction. All that we have to see at the very outset is what does that provision say? If the provision is unambiguous and if from that provision, the legislative intent is clear, we need not call into aid the other rules of construction of statutes. The other rules of construction of statutes are called into aid only when the legislative intention is not clear."*
>
> *67. In B. Premanand v. Mohan Koikal, this Court held:- [Sec P. 270, Para 9]*
>
> *"9. It may be mentioned in this connection that the first and foremost principle of interpretation of a statute in every system of interpretation is the literal rule of interpretation. The other rules of interpretation e.g. the mischief rule, purposive interpretation, etc. can only be resorted to when the plain words of a statute are ambiguous or lead to no intelligible results or if read literally would nullify the very object of the statute. Where the words of a*

statute are absolutely clear and unambiguous, recourse cannot be had to the principles of interpretation other than the literal rule, vide Swedish Match AB v. SEBI [(2004) 11 SCC 641]."

68. In Lalita Kumari v. State of Uttar Pradesh (supra), this Court construed the use of the word "shall" in section 154 (1) of the Code of Criminal Procedure, 1973 and held that Section 154(1) postulates the mandatory registration of an FIR on receipt of information of a cognizable offence. If, however, the information given does not disclose a cognizance offence, a preliminary enquiry may be ordered, and if the enquiry discloses the commission of a cognizable offence, the FIR must be registered.

69. As argued by Mr. Gupta, had it been the legislative intent that Section 7(5)(a) of the IBC should be a mandatory provision, 6 (2011) 4 SCC 266 Legislature would have used the word 'shall' and not the word 'may'. There is no ambiguity in Section 7(5)(a) of IBC. Purposive interpretation can only be resorted to when the plain words of a statute are ambiguous or if construed literally, the provision would nullify the object of the statute or otherwise lead to an absurd result. In this case, there is no cogent reason to depart from the rule of literal construction.

75. Significantly, the legislature has in its wisdom used the word 'may' in Section 7(5)(a) IBC in respect of an application for CIRP initiated by a financial creditor against a Corporate Debtor but has used the expression 'shall' in the otherwise almost identical provision of Section 9(5) of the IBC relating to the initiation of CIRP by an Operational Creditor.

76. The fact that legislature used `may' in Section 7(5)(a) IBC but a different word, that is, 'shall' in the otherwise almost identical provision of Section 9(5)(a) shows that 'may' and 'shall' in the two provisions are intended to convey a different meaning. It is apparent that legislature intended Section 9(5)(a) IBC to be mandatory and Section 7(5)(a) IBC to be discretionary. An application of an Operational Creditor for initiation of CIRP under Section 9(2) IBC is mandatorily required to be admitted if the

application is complete in all respects and in compliance of the requisites of the IBC and the rules and regulations thereunder, there is no payment of the unpaid operational debt, if notices for payment or the invoice has been delivered to the Corporate Debtor by the Operational Creditor and no notice of dispute has been received by the Operational Creditor. The IBC does not countenance dishonesty or deliberate failure to repay the dues of an operational creditor.

77. On the other hand, in the case of an application by a Financial Creditor who might even initiate proceedings in a representative capacity on behalf of all financial creditors, the Adjudicating Authority might examine the expedience of initiation of CIRP, taking into account all relevant facts and circumstances, including the overall financial health and viability of the Corporate Debtor. The Adjudicating Authority may in its discretion not admit the application of a Financial Creditor.

78. The legislature has consciously differentiated between Financial Creditors and Operational Creditors, as there is an innate difference between Financial Creditors, in the business of investment and financing, and Operational Creditors in the business of supply of goods and services. Financial credit is usually secured and of much longer duration. Such credits, which are often long term credits, on which the operation of the Corporate Debtor depends, cannot be equated to operational debts which are usually unsecured, of a shorter duration and of lesser amount. The financial strength and nature of business of a Financial Creditor cannot be compared with that of an Operational Creditor, engaged in supply of goods and services. The impact of the non-payment of admitted dues could be far more serious on an Operational Creditor than on a financial creditor.''

42. The Learned Counsel for the Appellant refers to the Judgment of the Hon'ble Supreme Court of India in Haryana Financial Corporation v.

Jagdamba Oil Mills & Anr., (vide Civil Appeal No. 607 of 2022 dated 28.01.2002), reported in India Kanoon, wherein, it is observed as under:

> *``The Corporation as an instrumentality of the State deals with public money. There can be no doubt that the approach has to be public oriented. It can operate effectively if there is regular realization of the instalments. While the Corporation is expected to act fairly in the matter of disbursement of the loans, there is corresponding duty cast upon the borrowers to repay the instalments in time, unless prevented by unsurmountable difficulties. Regular payment is the rule and non-payment due to extenuating circumstances is the exception. If the repayments are not received as per the scheduled time frame, it will disturb the equilibrium of the financial arrangements of the Corporations. They do not have at their disposal unlimited funds. They have to cater to the needs of the intended borrowers with the available finance. Non-payment of the instalment by a defaulter may stand on the way of a deserving borrower getting financial assistance.*
>
> *The obligation to act fairly on the part of the administrative authorities was evolved to ensure the rule of law and to prevent failure of justice. This doctrine is complementary to the principles of natural justice which the quasi-judicial authorities are bound to observe. It is true that the distinction between a quasi-judicial and the administrative action has become thin, as pointed out by this Court as far back as 1970 in A.K. Kraipak V. Union of India [1969 (2) SCC 262]. Even so the extent of judicial scrutiny/judicial review in the case of administrative action cannot be larger than in the case of quasi-judicial action. If the High Court cannot sit as an appellate authority over the decisions and orders of quasi-judicial authorities, it follows equally that it cannot do so in the case of administrative authorities. In the matter of administrative action, it is well known, more than one choice is available to the administrative authorities; they have a certain amount of discretion available to them. They have "a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be*

preferred". [As per Lord Diplock in Secretary of State for Education and Science v. Metropolitan Borough Counsel of Tameside (1977 AC 1014)]. The Court cannot substitute its judgment for the judgment of administrative authorities in such cases. Only when the action of the administrative authority is so unfair or unreasonable that no reasonable person would have taken that action, can the Court intervene. To quote the classic passage from the judgment of Lord Greene M.R. in Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1947 (2) ALL ER 680]:

> *"It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with the discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority.*
>
> *While this is not the occasion to examine the content and contours of the doctrine of fairness, it is enough to reiterate for the purpose of this case that the power of the Courts while reviewing the administrative action is not that of an appellate court.''*

43. The Learned Counsel for the Appellant refers to the Judgment of the Hon'ble Supreme Court of India in Monarch Infrastructure (P) Ltd. v.

Ulhas Nagar, Municipal Corporation (vide Civil Appeal No. 3288 of 2000 dated 08.05.2000), reported in India Kanoon, wherein, it is observed as under:

> *``Shri Shanti Bhushan and Dr. Rajiv Dhawan, for the appellant, pointed out that the sanctity of the tender process must be maintained and principles in relation to award of contract should be settled instead of merely making an order which is expedient in the circumstances of the case. Both of them submitted that in the new tender process Clauses 6(a) and 6(b) have been altogether deleted which is only to favour M/s. Monarch Infrastructure (P) Ltd. and, therefore, we should not encourage such activity in these matters. There have been several decisions rendered by this Court on the question of tender process, the award of contract and evolved several principles in regard to the same. Ultimately what prevails with the courts in these matters is that while public interest is paramount there should be no arbitrariness in the matter of award of contract and all participants in the tender process should be treated alike. We may sum up the legal position thus:*
>
> *(i) The Government is free to enter into any contract with citizens but the court may interfere where it acts arbitrarily or contrary to public interest;*
>
> *(ii) The Government cannot arbitrarily choose any person it likes for entering into such a relationship or to discriminate between persons similarly situate:*
>
> *(iii) It is open to the Government to reject even the highest bid at a tender where such rejection is not arbitrary or unreasonable or such rejection is in public interest for valid and good reasons.*
> *Broadly stated, the courts would not interfere with the matter of administrative action or changes made therein unless the Government's action is arbitrary or discriminatory or the policy adopted has no nexus with the object it seeks to achieve or is mala fide.''*

44. The Learned Counsel for the Appellant refers to the Order of this `Tribunal', dated 19.09.2022 in Comp. App (AT) (INS) No. 1005 of 2022, between Reliance Commercial Finance Limited v. Darode Jog Builder Pvt. Ltd., wherein the `Corporate Debtor' expressed its willingness to settle the matter, and repay the entire `Debt Sum', totalling Rs.15.79 Crores, and the `Adjudicating Authority' (`Tribunal'), permitted the `Corporate Debtor', to make the payments, within 45 days.

45. It is brought to the notice of this `Tribunal', by the `Appellant' side, that the `Financial Creditor', while challenging the `Order' of the `Adjudicating Authority', in `Appeal', took a ground that the `Adjudicating Authority', was only concerned, whether any `Debt' existed, and whether there was a `Default', in payment, and this `Appellate Tribunal', by placing reliance on the `Judgment' of the `Supreme Court of India', in Vidarbha Industries Power Limited v. Axis Bank, 2022 SCC Online SC 841, observed that the `Adjudicating Authority' / `Tribunal', while determining an `Application', under Section 7 of the I & B Code, 2016, is required to `apply' its mind, to the various factors, including `feasibility' of the `Corporate Insolvency Resolution Process', etc.

46. The Learned Counsel for the Appellant refers to the `Order' of this `Tribunal' dated 15.11.2022, in Shaikh Mohammad Tariq v. Aegis Forging Limited (vide Comp. App (AT) (INS) No. 1342 of 2022, wherein the `Financial Creditor', proceeded with the initiation of `Corporate Insolvency Resolution Process', under Section 7 of the I & B Code, 2016, despite pursuing `Execution of an Arbitral Award', the `Tribunal', had held that `Admission of an Application', under Section 7, is not `obligatory', merely on the `existence of a `Debt' and Default', and dismissed the `Appeal'.

47. The Learned Counsel for the Appellant refers to the `Order' of the `Adjudicating Authority' (`Tribunal') dated 18.11.2022 in CP (IB) 4541 (MB) / 2019, between Canara Bank v. GTL Infrastructure, wherein, the `Corporate Debtor's Account', was marked as `Non Performing Asset', and there was an `Admitted Acknowledgement of Debt', and it was pleaded on behalf of the `Corporate Debtor' that several `Resolution Plans', were submitted to `restructure the Debt', but of no avail.

48. Also that a `technical plea', was taken by the `Corporate Debtor', that the `Authorised Representative' of the `Applicant', was authorised vide `Board Resolution' in 1999, while the I & B Code, 2016, came into existence in 2016. However, a reliance was placed, among other things,

on the decision of the Hon'ble Supreme Court of India in Vidarbha Industries case. The `Adjudicating Authority' (`Tribunal'), after taking into account that the `Corporate Debtor', had repaid a sum of Rs.16,915 Crores and it was a healthy viable concern, made an observation that the existence of a `Debt and Default', were not the `sole criteria, while `Adjudicating', an `Application', under Section 7 and viability and the overall financial health of the `Corporate Debtor', was also taken into consideration and dismissed the `Petition'.

1st Respondent / Bank's Submissions:

49. The Learned Senior Counsel for the `1st Respondent / Bank', contends that the `Appellant', is not a `Party', to the Proceedings, before the `Adjudicating Authority' (`Tribunal'), and in fact, the instant `Appeal', preferred by the `Appellant', is not `maintainable', either in `Law' or in `Facts', and further that the `Appellant', has no `Locus', to `prefer', the present `Appeal', before this `Tribunal'.

50. Added further, the Learned Counsel for the `1st Respondent /Bank' points out that the `Appellant', as an `Investor', has promoted the `Corporate Debtor', and further he has not satisfied as to how, he is an `Aggrieved Party', to file the instant `Appeal'.

51. The Learned Counsel for the 1st Respondent / Bank cites the Order of this Tribunal in the matter of Amod Amladi v. M/s. Sayali Rane & Anr., in Comp. AT INS No. 295 of 2017 dated 30.11.2017, reported in (2017) SCC Online NCLAT 430, wherein, at Paragraphs 4 to 7, it is observed as under:

> *4. ``Heard learned counsel for the Appellant. Admittedly, the Appellant is an Investor therefore, the Appellant cannot claim to be an 'aggrieved person' for preferring appeal against the order dated 2nd May, 2017 passed by Adjudicating Authority whereby the application under Section 9 of the 'I&B Code' was admitted. In fact, the Appellant being an investor is entitled to file its claim before the 'Insolvency Resolution Professional'.*
>
> *5. Further, as the order dated 2nd May, 2017 is not under challenge in this appeal this Appellate Tribunal cannot express any opinion with regard to the order of admission dated 2nd May, 2017. If the said order dated 2nd May, 2017 is allowed to be challenged, the appeal will be barred by limitation under sub-section (2) of Section 61 of the 'I&B Code'.*
>
> *6. In absence of any power of review or recall vested with the Adjudicating Authority, we hold that the Adjudicating Authority rightly refused to recall the order of admission dated 2nd May, 2017.*
>
> *7. For the reasons aforesaid, no relief can be granted. In absence of any merit the appeal is dismissed. However, the impugned order dated 3rd October, 2017 passed by the Adjudicating Authority, Mumbai and the order of this Adjudicating Authority will not come in the way of Appellant Investor to file its claim before the 'Insolvency Resolution Professional'.''*

52. The Learned Counsel for the `1st Respondent / Bank' points out that the `OTS Proposal', had failed and there was no `OTS Proposal', when the `Corporate Insolvency Resolution Process', was initiated. Admittedly, there is a `Debt' and `Default' and the only allegation made on behalf of the `Appellant' is that, `OTS', was not `entertained', by the `1st Respondent / Bank / Financial Creditor'.

53. It is represented on behalf of the `1st Respondent / Bank' that `OTS', in itself, is an `Admission', and cannot be a reason for dismissing an `Application' / `Petition', filed under Section 7 of the `I & B Code, 2016, where the `Debt' and `Default' is proved, and that the `Debt', is more than Rupees One Lakh, since the `Petition', was filed by the `1st Respondent / Bank', prior to the `increase in threshold Limit'.

54. The Learned Counsel for the 1st Respondent / Bank refers to the decision of the Hon'ble Supreme Court of India in Dena Bank v. C. Shivakumar Reddy (2021) SCC Online SC 543, wherein it was clarified that even an `OTS', of a live claim would also construe an `Acknowledgement of Debt', to attract Section 18 of the Limitation Act, 1963.

55. The Learned Counsel for the 1st Respondent / Bank refers to the decision of the Hon'ble Supreme Court of India in E S Krishnamurthy &

Ors. v. M/s. Bharathi Hi Tech Builders Pvt. Ltd., (vide Civil Appeal No. 3325 of 2020 dated 14.12.2021), reported in India Kanoon, wherein, at Paragraph 50, it is observed as under:

> *50. ``Hence, once the requirements of the IBC have been fulfilled, the Adjudicating Authority and the Appellate Authority are duty bound to abide by the discipline of the statutory provisions. It needs no emphasis that neither the Adjudicating Authority nor the Appellate Authority have an uncharted jurisdiction in equity. The jurisdiction arises within and as a product of a statutory framework.''*

56. The Learned Counsel for the 1st Respondent / Bank adverts to the Judgment of this `Tribunal', (vide Comp. App (AT) (INS.) No. 99 of 2020 dated 16.07.2020) in Monotrone Leasing Private Limited v. PM Cold Storage Pvt. Ltd., reported in India Kanoon, wherein at Paragraphs 19, it is observed as under:

> *19. ``It is relevant to note that Hon'ble the Supreme Court of India in case of Innoventive Industries Ltd. v. ICICI Bank, (2018) 1 SCC 407, has laid down the guiding principles to admit or reject an application filed under Section 7 of the IBC.*
>
> *In the above case, Hon'ble the Supreme Court has held that;*
>
> *"27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. For the meaning of "debt", we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a "claim" and for the*

meaning of "claim", we have to go back to Section 3(6) which defines "claim" to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational Creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational Company Appeal (AT) (Insolvency) No. 99 of 2020 13 of 24 debt under Section 5(21) means a claim in respect of provision of goods or services.

28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the Explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor -- it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the Application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in Part III, particulars of the financial debt in Part IV and documents, records and evidence of default in Part V. Under Rule 4(3), the applicant is to dispatch a copy of the Application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial Creditor, is important. This it

must do within 14 days of the receipt of the Application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not Company Appeal (AT) (Insolvency) No. 99 of 2020 14 of 24 due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the Application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial Creditor and corporate debtor within 7 days of admission or rejection of such Application, as the case may be.

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

In the above case, Hon'ble the Supreme Court of India has held that, to admit an application filed under Section 7 of IBC, the Adjudicating Authority is to be satisfied that a default has occurred; that the Corporate Debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the Company Appeal (AT) (Insolvency) No. 99 of 2020 15 of 24 Adjudicating Authority is satisfied that a default has occurred, the Application must be admitted unless it is incomplete.''

57. The Learned Counsel for the 1st Respondent / Bank adverts to the Judgment of the Hon'ble Supreme Court in Mobilox Innovations (P) Ltd. v. Kirusa Software (P) Ltd. (vide Civil Appeal No. 9405 of 2017 dated 21.09.2017, reported in India Kanoon, wherein at Paragraph 19, it is observed as under:

> *19. ``The financial creditor can file an application before the National Company Law Tribunal along with proof of default and the name of a resolution professional proposed to act as the interim resolution professional in respect of the corporate debtor. The requirement to provide proof of default ensures that financial creditors do not file frivolous applications or applications which prematurely put the corporate debtor into insolvency resolution proceedings for extraneous considerations. The Adjudicating Authority / Tribunal can, within fourteen days from the date of receipt of the application, ascertain the existence of a default from the records of a regulated information utility. A default may also be proved in such manner as may be specified by the Insolvency and Bankruptcy Board of India. Once the adjudicating authority/Tribunal is satisfied as to the existence of the default and has ensured that the application is complete and no disciplinary proceedings are pending against the proposed resolution professional, it shall admit the application. The adjudicating authority/Tribunal is not required to look into any other criteria for admission of the application. It is important that parties are not allowed to abuse the legal process by using delaying tactics at the admissions stage.''*

58. The Learned Counsel for the 1st Respondent / Bank points out the ingredients of I & B Code, 2016, `Suspension of initiation of Corporate Insolvency Resolution Process', are not applicable to the facts of the present case, and in this connection, refers to the Judgment of the Hon'ble

Supreme Court of India, in the matter of Mr. Ramesh Kymal v. M/s. Siemens Gamesa Renewable Power Pvt. Ltd. (vide Civil Appeal No. 4050 of 2020 dated 09.02.2021), reported in India Kanoon, wherein at Paragraph 23, it is observed as under:

> *23. ``Adopting the construction which has been suggested by the appellant would defeat the object and intent underlying the insertion of Section 10A. The onset of the Covid-19 pandemic is a cataclysmic event which has serious repercussions on the financial health of corporate enterprises. The Ordinance and the Amending Act enacted by Parliament, adopt 25 March 2020 as the cut-off date. The proviso to Section 10A stipulates that "no application shall ever be filed" for the initiation of the CIRP "for the said default occurring during the said period". The expression "shall ever be filed" is a clear indicator that the intent of the legislature is to bar the institution of any application for the commencement of the CIRP in respect of a default which has occurred on or after 25 March 2020 for a period of six months, extendable up to one year as notified. The explanation which has been introduced to remove doubts places the matter beyond doubt by clarifying that the statutory provision shall not apply to any default before 25 March 2020. The substantive part of Section 10A is to be construed harmoniously with the first proviso and the explanation. Reading the provisions together, it is evident that Parliament intended to impose a bar on the filing of applications for the commencement of the CIRP in respect of a corporate debtor for a default occurring on or after 25 March 2020; the embargo remaining in force for a period of six months, extendable to one year. Acceptance of the submission of the appellant would defeat the very purpose and object underlying the insertion of Section 10A. For, it would leave a whole class of corporate debtors where the default has occurred on or after 25 March 2020 outside the pale of protection because the application was filed before 5 June 2020.''*

59. The Learned Counsel for the 1st Respondent / Bank relies on the Judgment of this `Tribunal', dated 14.08.2018, in Axis Bank Ltd. v. Edu Smart Services Private Limited (vide Comp. App (AT) (INS.) No. 302 of 2017), wherein. it was held as under:

> *``a claim can be (i) a right to payment whether disputed, undisputed, secured or unsecured or (ii) a right to payment arising from a breach of contract irrespective of whether the same is matured, unmatured, disputed or undisputed. Existence of `default' has nothing to do with admission of insolvency proceeding under IBC. However, default has nothing to do with acceptance of claim after admission of insolvency proceeding. Any person who has right to claim payment, under the IBC, is supposed to file the claim, whether matured or immature. The question as to whether there is a default or not is not relevant.''*

60. The Learned Counsel for the 1st Respondent / Bank refers to the Judgment of this Tribunal, in Anantha Charan Nayak v. State Bank of India & Ors., (vide Comp. App (AT) (INS.) No. 870 of 2021 dated 10.11.2021), wherein at Paragraphs 7 to 11, it is observed as under:

> *7. ``The Learned Counsel for Appellant has stated that the Appellant had intimated its desire to settle the matter by offering a one-time settlement (OTS) to the financial creditor. Pending decision on the OTS, the Adjudicating Authority has passed the Impugned Order to the detriment of the Corporate Debtor. He has also argued that vide order dated 26.7.2021, the petitioner State Bank of India was granted seven days' time to file an affidavit for deletion of the names of personal guarantors from the section 7 application. Such an affidavit was not filed and thus requirements under section 7 of IBC were not complied with strictly. He has argued that in such a situation, and as laid down by the Hon'ble*

Apex Court in the matter of Innoventive Industries Ltd. v. ICICI Bank [MANU/SC/1063/2017], the order for admission of section 7 application should not have been given.

8. From perusal of the Impugned Order dated 26.8.2021 (attached at pp.54-88 in Appeal Paperbook) it is clear that in response to the section 7 application, the Managing Director of Corporate Debtor representing Respondent Nos. 1 to 5 filed reply which was considered by the Adjudicating Authority. It is also mentioned in the Impugned Order, paragraph 12 (attached at pgs. 77-78 of the Appeal Paperbook) that Mr. Tushar Ravi, Chief Manager, State Bank of India, Khanapara Branch filed an affidavit dated 4.8.2021 in which he stated that due to inadvertence names of the personal guarantors were inserted as Respondent Nos. 2 to 7 and the names of Respondent Nos. 2 to 7 be deleted from the instant application. Therefore, we do not agree with the contention of the Appellant that the petitioner (financial creditor-State Bank of India) did not comply with the order given by the Adjudicating Authority on 26.7.2021, which was regarding filing of affidavit to delete names of personal guarantors from the section 7 application. (attached at p. 149 of Appeal Paperbook).

9. The other contention of the Learned Counsel of the Appellant is that the Appellant had submitted an OTS proposal to the financial creditor (State Bank of India), which was pending decision, and hence the Adjudicating Authority should not have passed admission order on section 7 application. The acceptance of the settlement proposal by the financial creditor is a matter entirely in the ambit of the financial creditor (SBI) and we do not think that the proceedings before the Adjudicating Authority should have been held up and delayed, waiting for a response by the State Bank of India. IBC does not provide for keeping the proceedings in abeyance and the application for admission has to be decided in a stipulated timeframe. If a settlement would have been reached, the Appellant would have had recourse to Section 12A of the IBC. We, therefore, do not find this contention of the Appellant sustainable.

10. The Innoventive Industries judgment (supra) of the Hon'ble Supreme Court does not put any bar on the admission of an application under section 7 if the defects as pointed out to the petitioner have been cured.

11. On the basis of the above discussion, we are of very clear view that the Impugned Order does not require any intervention. The appeal is, therefore, dismissed at the stage of admission. No order as to the cost.''

61. The Learned Counsel for the 1st Respondent /Bank contends that the `Promoters had not paid any Sum, under the `One Time Settlement', and they had arranged Rs.150 Crores, from three different Companies / Individuals, and the Sum is parked in a `No Lien Account', with the `Respondent'. Also that, the `Amount', was not distributed to or appropriated by the `Lenders'. Hence, the `part payment paid', as per `OTS', is `denied', by the `Bank', that they were not able to arrange the required funds, inspite of `multiple opportunities'.

62. According to the 1st Respondent / Bank, even if it is assumed without `admitting' the `OTS Proposal', was considered and `part', was payment and there is a `Default', in the `One Time Settlement', as well. Also that, the allegation that only `Part' of `Payment' only, is pending itself, is an `Admission' of `Default', and that the `Financial Creditor', has every right, under Section 7 of the I & B Code, 2016, to proceed against the `Corporate Debtor'.

63. The Learned Counsel for the 1st Respondent / Bank submits that the `1st Respondent / Bank' holds only 18.54% (Equity), and that the `Lender' jointly holds 51% of the `Equity Shares of the Corporate Debtor'.

64. The Learned Counsel for the 1st Respondent / Bank points out that the present `proceedings', were initiated against the `Corporate Debtor, for the `Default', in repayment of `Financial Debt' of Rs.2923,62,42,864/-, due, payable as on 06.09.2018 with further interest and charges.

65. The Learned Counsel for the 1st Respondent / Bank brings it to the notice of this `Tribunal', that the `allegation', raised by the `Appellant', that the `Corporate Debtor', had committed to utilise 60% of its `pending dues', from `TANGEDCO', towards `OTS', and that they had requested for utilising 50% of the `pending dues', is `misleading', and the same was `denied', by the `Bank', and was categorically informed that the same are already `charged' to the `Lenders', and ought not to be made `part' of the `OTS Funding', and these `facts', were `suppressed', by the `Appellant'. In any event, it is projected on the 1st Respondent / Bank, that there is an `admission of debt and default'. Hence, the `Appeal', is bad in `Law' and on `Facts'.

66. The Learned Counsel for the 1st Respondent / Bank points out that the `1st Respondent / Bank / Financial Creditor', has `Second Charge' on the `Securities', along with the `Consortium Subordinate Lenders', Viz. Jammu and Kashmir Bank, e-State Bank of Mysore, State Bank of India, e-State Bank of Patiala, UCO Bank for the Subordinate Loan in terms of the Amended and Restated Subordinate Loan Agreement dated 05.07.2016.

67. The Learned Counsel for the 1st Respondent / Bank points out that the `Bank', has `charge', in respect of `Securities', under the `Working Facility Agreement' dated 18.12.2015 along with other `Consortium Lenders', Viz. Bank of India, Indian Overseas Bank, Jammu and Kashmir Bank, Punjab National Bank, State Bank of India, e-State Bank of Mysore, e-State Bank of Patiala, Andhra Bank, Canara Bank, Central Bank of India, Corporation Bank, Indian Bank, e-State Bank of Hyderabad, Tamilnadu Mercantile Bank.

68. The Learned Counsel for the 1st Respondent / Bank, adverts to the decision of Hon'ble Supreme Court of India in Bijnor Urban Co-operative Bank Limited v. Meenal Agarwal, AIR 2022 SC 56, wherein at Paragraphs 9 and 11, it is observed as under:

> *9. ``Even otherwise, as observed hereinabove, no borrower can, as a matter of right, pray for grant of benefit of One Time Settlement*

Scheme. In a given case, it may happen that a person would borrow a huge amount, for example Rs. 100 crores. After availing the loan, he may deliberately not pay any amount towards installments, though able to make the payment. He would wait for the OTS Scheme and then pray for grant of benefit under the OTS Scheme under which, always a lesser amount than the amount due and payable under the loan account will have to be paid. This, despite there being all possibility for recovery of the entire loan amount which can be realised by selling the mortgaged/secured properties. If it is held that the borrower can still, as a matter of right, pray for benefit under the OTS Scheme, in that case, it would be giving a premium to a dishonest borrower, who, despite the fact that he is able to make the payment and the fact that the bank is able to recover the entire loan amount even by selling the mortgaged/secured properties, either from the borrower and/or guarantor. This is because under the OTS Scheme a debtor has to pay a lesser amount than the actual amount due and payable under the loan account. Such cannot be the intention of the bank while offering OTS Scheme and that cannot be purpose of the Scheme which may encourage such a dishonesty.

11. The sum and substance of the aforesaid discussion would be that no writ of mandamus can be issued by the High Court in exercise of powers under Article 226 of the Constitution of India, directing a financial institution/bank to positively grant the benefit of OTS to a borrower. The grant of benefit under the OTS is always subject to the eligibility criteria mentioned under the OTS Scheme and the guidelines issued from time to time. If the bank/financial institution is of the opinion that the loanee has the capacity to make the payment and/or that the bank/financial institution is able to recover the entire loan amount even by auctioning the mortgaged property/secured property, either from the loanee and/or guarantor, the bank would be justified in refusing to grant the benefit under the OTS Scheme. Ultimately, such a decision should be left to the commercial wisdom of the bank whose amount is involved and it is always to be presumed that the financial institution/bank shall take a prudent decision whether to grant the benefit or not under the OTS Scheme, having regard to the public interest involved and having regard to the factors which are narrated hereinabove.''

69. The Learned Counsel for the 1st Respondent / Bank refers to the decision of the Hon'ble Supreme Court of India, in the matter of State Bank of India v. Arvindra Electronics Pvt. Ltd. (vide Civil Appeal No. 6954 of 2022 dated 04.11.2022), reported in MANU/SC/1429/2022, wherein at Paragraph 6.7, 7,7.1 and 8, it is observed as under

> *6.7 It is required to be noted that under the OTS Scheme which was originally sanctioned in the year 2017 the borrower was required to pay Rs.10,53,75,069.74 against the outstanding of Rs.13,99,89,273.99. Therefore, under the original sanctioned OTS Scheme the borrower was getting the substantial relief of approximately 3 crores. The Bank agreed and accepted the OTS offer on the terms and conditions mentioned in the letter dated 21.11.2017. In the sanctioned letter dated 21.11.2017 it was specifically mentioned in Clause (iv) that the entire payment under the OTS Scheme was to be made by 21.05.2018, otherwise OTS would be rendered infructuous. Therefore, borrowers were bound to make the payment as per the sanctioned OTS Scheme. Therefore, the High Court ought not to have granted further extension de hors the sanctioned OTS Scheme while exercising the powers under Article 226 of the Constitution of India.*
>
> *7. The submissions on behalf of the borrower that in case of some other borrowers the time was extended is concerned, the same is neither here nor there. The Bank mutually can agree to extend the time which is permissible under Section 62 of the Indian Contract Act. The borrower as a matter of right cannot claim that though it has not made the payment as per the sanctioned OTS Scheme still it be granted further extension as a matter of right. There cannot be any negative discrimination claimed. The borrower has to establish any right in their favour to claim the extension as a matter of right.*
>
> *7.1 Now so far as the reliance placed upon the decision of Punjab and Haryana High Court in the case of Anu Bhalla (supra) is concerned, in view of the direct decision of this Court in the case of*

Bijnor Urban Cooperative Bank Limited (supra), the decision of this Court would be binding on the High Court.

8. In view of the above and for the reason stated above, the impugned judgment and order passed by the High Court granting further time to the respondent – borrower to make the balance payment under the OTS Scheme in exercise of powers under Article 226 of the Constitution of India is unsustainable and the same deserves to be quashed and set aside and is accordingly quashed and set aside. Consequently, the original writ petition filed by the respondent – borrower stands dismissed.''

70. The Learned Counsel for the 1st Respondent / Bank cites the decision of this `Tribunal', in Sree Bhadra Parks and Resorts Limited, represented by its Managing Director Mr. K.N. Namboothiripad v. Ramani Resorts and Hotels Pvt. Ltd., (vide Comp. App (AT) (CH) (INS.) No. 95 of 2021 dated 06.09.2021), reported in (2021) SCC Online NCLAT 3653, wherein at Paragraphs 66 to 72, it is observed as under:

66. As far as the present case is concerned, the 'actuality of debt' was proven by virtue of the concerned terms which formed part of the order of the 'Adjudicating Authority' dated 24.09.2020. When a 'Settlement' was arrived at between the parties, it is the pre-module duty of the 'Corporate Debtor' to effect payments proposed by virtue of the 'Settlement' after committing 'default', the 'Appellant' cannot take altogether different stand, especially when the tenor and spirit of 'Share Purchase Agreement' was not adhered to. To put it precisely, when the 'Appellant' had promised to repay the advanced sum paid by the 'Respondent'/'Applicant' to it, then there is not only a violation of the 'Share Purchase Agreement' dated 21.11.2012 but also the non-payment of amounts comes squarely under definition of Section 5(8) of the I&B Code pertaining to 'Financial Debt'.

67. In the present case, the 'Adjudicating Authority' in the 'Impugned Order' dated 30.03.2021 in IBA/13/KOB/2020 had clearly at paragraph 6 had observed as under:

> *'the Corporate Debtor did not come forward to make the payment as per the consent terms in the settlement which was due as on 30.11.2020 and that they sought time to make payment for several times. But without making payments they proceeded to sell the assets of the Corporate Debtor, which is a clear case of fraud and cheating' and ultimately passed an order allowing IA/02/KOB/2021 and restored IBA/13/KOB/2020 to its file.*

68. Besides the above, the 'Adjudicating Authority' at paragraph 6(5) of the 'Impugned Order' dated 30.03.2021 in IBA/13/KOB/2020 had among other things observed that......... 'The question is only the date of removal of disqualification, which have no much relevance in this matter, as the question here is only whether the Corporate Debtor has complied with the conditions stipulated in the settlement agreement produced before this Tribunal. It is true that the IBA has been disposed of on the basis of settlement arrived between the parties stating that they have settled the matter stating that on 26.08.2020 settlement has been arrived for a total sum of Rs.2,25,00,000/- (Rupees two crores twenty five lakhs only) as full and final settlement of the entire claim between the Corporate Debtor M/s. Sree Bhadra Parks and Resorts Limited on the terms mentioned in the settlement agreement. When a settlement has been arrived between the parties, it is duty bound by the Corporate Debtor to make good the payments proposed in that settlement. They cannot go back making various allegations including maintainability of the IBA after making default in the payment agreed to between the parties. The contention regarding the application is not maintainable as the order stipulates for filing a fresh application cannot be accepted because merely on technicalities the Corporate Debtor cannot wash away their hands from complying with the conditions stipulated in the final order

passed by this 'Tribunal. Hence, the application IA/02/KOB/2021 is to be allowed."

69. In the instant case, it is quite clear that the order dated 25.08.2020 in IBA/13/KOB/2020 admitting the application under Section 7 of the Code, filed by the 'Respondent'/'Applicant' has not been assailed by the 'Appellant'. In fact, in the 'Impugned Order' dated 30.03.2021 passed by the 'Adjudicating Authority' in IBA/13/KOB/2020 whereby and whereunder the application filed by the 'Respondent'/'Applicant' was admitted, the said 'Adjudicating Authority' came to the conclusion that the 'Respondent'/'Applicant' had proved the existence of a 'debt' as well as existence of 'default' and had discussed in detail about the same in the order dated 25.08.2020, which speaks for itself.

70. That apart, the 'Adjudicating Authority' in the 'Impugned Order' dated 30.03.2021 had opined that 'the present application has been settled after Admission before making the public announcement as per Regulation 6 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. The I&B Code does not bar the 'Tribunal' to admit the matter which was settled after Admission.

71. Be that as it may, considering the entire conspectus of the facts and circumstances of the case, taking into account of the fact that when the 'Respondent'/'Applicant' paid an advance of Rs.1,00,00,000/-on 21.11.2012 and because of the numerous encumbrances found out later, in regard to the properties and assets of the 'Corporate Debtor' which culminated into an 'Addendum' dated 27.11.2012 being entered into between the parties to the 'Agreement', in and by which the 'Corporate Debtor' had instructed the 'Respondent'/'Applicant' to pay the part consideration to its other 'Creditors' directly as made mention of in the 'Agreement' and in view of the fact that the 'instant debt' arises out of the 'Share Purchase Agreement' dated 21.11.2012, coupled with an 'Addendum' to the said 'Agreement' dated 27.11.2012, the said sum is a 'debt' disbursed against the consideration for

'Advance Payment' in terms of the 'Agreement' and further that in the present 'Appeal' before this 'Tribunal', it is brought forth that the 'Appellant' had promised to repay/refund the amount paid by the 'Respondent'/'Applicant' together with interest, and therefore, this 'Tribunal' comes to an inevitable and inescapable cocksure conclusion that the aforesaid promise comes squarely within the ambit of definition of 'Financial Debt' and that the 'Respondent'/'Applicant' is without any haziness is a 'Financial Creditor' in the eye of Law.

72. Suffice it for this 'Tribunal' to pertinently point out that the 'Appellant'/'Corporate Debtor' had not adhered to its 'commitment' in respect of 'Share Purchase Agreement' dated 21.11.2012 and had not paid the amount admittedly, especially in the teeth of the fact that the 'debt' due arises out of the said 'Share Purchase Agreement'. Viewed in that perspective, the 'Impugned Order' dated 30.03.2021 passed by the 'Adjudicating Authority' (National Company Law Tribunal, Kochi Bench, Kerala) in admitting the Application IBA/13/KOB/2020 does not suffer from any material irregularity or patent illegality in the eye of law. Consequently, the 'Appeal' fails.''

71. The Learned Counsel for the 1st Respondent / Bank refers to the decision of this Tribunal, in Tejas Khandhar v. Bank of Baroda [vide Comp. App (AT) (INS.) No. 371 of 2020 dated 12.07.2022), reported in MANU/NL/0439/2022, wherein at paragraphs 11 to 14, it is observed as under:

11. ``A brief perusal of I.A. 455 of 2021 shows that the documents required to be taken on record include the copy of the OTS, the copy of the I.A. 1155/2016 filed before the DRT Pune and other letters dated 18.03.2019 addressed to by the 'Corporate Debtor' to the Bank. The main document in these additional documents is the terms of OTS which is not disputed therefore, we are of the

considered view that no prejudice would be caused if the said OTS document is taken on record. The other documents relied upon by the Bank is pursuant to the OTS and also a copy of I.A. 1155/2016 which is a public document and we see no substantial reasons not to take these documents on record as they are relevant to the facts of the case.

12. It is seen from the record that the date of default has been mentioned as 13.09.2013, which stood revived with the OTS proposal dated 01.08.2016 filed vide I.A. 1155/2016 before the DRT Pune, well within the three year period. Subsequently, another settlement proposal dated 07.03.2018 was accepted by the Bank on 27.03.2018, wherein a timeline was provided for the payment of the balance amount. We are of the considered view that the OTS proposal dated 01.08.2016 filed vide I.A. 1155/2016 falls within the ambit of 'acknowledgement of debt' as defined under Section 18 of the Limitation Act, 1963, which is further fructified by the admitted OTS dated 27.03.2018 again within three years of the previous proposal where the 'debt' is acknowledged to be 'due and payable'. Therefore, we are of the view that the ratio of the Hon'ble Supreme Court in 'Dena Bank (now Bank of Baroda)' Vs. 'C. Shivkumar Reddy and Anr.', MANU/SC/0502/2021, 10 SCC 330, is squarely applicable to the facts of this case as there is a jural relationship between the 'Corporate Debtor' and the Respondent Bank and there is an 'acknowledgement of debt' vide the OTS dated 27.03.2018, which falls within the ambit of Section 18 of the Limitation Act, 1963.

13. The Resolution Professional filed the Status Report stating that on 11.08.2020 a third CoC Meeting was held whereby it was taken into consideration that the 180 days CIRP period was coming to an end and having deliberated upon this issue, it was suggested that the RP should apply for liquidation under Section 33 of the Code. On 05.09.2020 an Application for initiation of the 'liquidation of Corporate Debtor' was filed and is pending before the Adjudicating Authority.

14. Keeping in view the aforenoted ratio laid down by the Hon'ble Apex Court in 'Dena Bank (now Bank of Baroda)' (Supra), this Tribunal is of the considered view that the OTS proposal dated 01.08.2016 and the subsequent one on 27.03.2018 falls within the definition of the ambit of 'acknowledgement of debt' as envisaged under Section 18 of the Limitation Act, 1963 and is therefore squarely covered by the aforenoted Judgement.''

2nd Respondent / IRP's Contentions:

72. When the `Interim Resolution Professional', took over, he found that due to insufficient `Cash Flows', the `Corporate Debtor', is unable to procure `Coal', major `Raw Material', for generating `Power and Supply' under `Power Purchase Agreement'. In fact, the `Insolvency Resolution Professional', had arranged for an immediate `Coal', from available `Cash Flow' and operated the `Plan' within five days in February 2022. In terms of the conditions of `Power Purchase Agreement', the same would get terminated, if there is non-supply for a continuous period of two months or failure to achieve standardising availability for 12 consecutive or non-consecutive months, within any continuous period of 36 months.

73. According to the 2nd Respondent / IRP, the `Corporate Debtor', operates the `Thermal Power Plant', based on `Imported Coal', and because of the `continuous rise' in `Coal Prices', since the Commencement of the year 2022, due to the Global Factors, the `Corporate Debtor was unable to procure `Coal' for supplying power to

the `State Government', under `Power Purchase Agreement'. Therefore, the Corporate Debtor starting selling the electricity at `Energy Exchange', in the month of April 2022 at much higher rate than agreed under `Power Purchase Agreement', and ensured the `Plant' remains operational. As of date, out of two Units, only Unit II is operational, whereas Unit No.1 is shut down, due to turbine failure, for which, appropriate steps are being carried out to rectify the same.

74. Moreover, in the meanwhile, `Interim Resolution Professional', also contacted the `TANGEDCO', and has been making efforts on regular basis, to recover the `Outstanding Dues', to meet the `Cash Flow' requirement of the `Corporate Debtor' and run the `Plant'.

75. It is represented on the side of the 2nd Respondent / IRP that the `Ministry of Power', in exercise of power, vested upon them, as per Section 11 of the Electricity Act, 2003, as directed all imported Power Plants to operate and generate at their full capacity, including those under `Insolvency Process', and further that the `Power Plants', shall be allowed pass through of High Coal Cost (not allowed, as per the existing Power Purchase Agreement), incurred by them.

76. Moreover, a `Committee', constituted by `Ministry of Power', has also issued `Bench Mark Rate', for `Companies', including `Corporate

Debtor', though the same is low, as compared to `Actual Cost', incurred by the Corporate Debtor, thereby resulting in loss.

77. In reality, the Corporate Debtor, had wrote to the `Ministry of Power', and the `TANGEDCO', to reconsider the `Bench Mark Rate', and is also in the process of filing an `Appropriate Petition', before the `Central Electricity Regulatory Commission' for `Revision', in `Bench Mark Rates'.

78. On behalf of the 2nd Respondent / IRP that it is brought to the notice of this `Tribunal' that `Central Transmission Utility of India Ltd.' (earlier known as Power Grid Corporation India Ltd.) invoked a bank Guarantee given by the Corporate Debtor amounting to Rs.55,00,00,000/- (Rupees Fifty Five Crore Only). IRP filed the appropriate petition before Appellate Tribunal for Electricity (`APTEL') and got the stay on such invocation and saved Rs.55 Crore of Corporate Debtor, and an Application was also filed before the NCLT for `violation' of `moratorium', under Section 14 of the Code.

79. Continuing further, it is pointed out on behalf of the 2nd Respondent / IRP that the Corporate Debtor had received the copy of the Provisional Attachment Order No. 07 / 2022 dated 12.04.2022, issued by the `Enforcement Directorate', under Section 5 of the `Prevention of Money

Laundering Act, 2002' (PMLA, 2002), relating to the Assets of the Corporate Debtor. In fact, a `Reply', was sent to the `Enforcement Directorate's Office, against the issuance of `Provisional Attachment Order'.

I & B Code, 2016:

80. Section 3 (6) of the I & B Code, 2016, defines `claim' meaning;

(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;

(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;

Section 3 (8) of the Code, defines `corporate debtor' meaning, a corporate person who owes a debt, to any person;

Section 3 (10) of the Code, defines `creditor' meaning, any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder;

Section 3 (11) of the Code, defines `debt' meaning, a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;

Section 3 (12) of the Code, defines `default' meaning, 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.

Section 5 (7) of the Code, deals with `financial creditor' meaning, any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;

Section 5 (8) of the Code, provides for `financial debt' meaning, a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes-

(a) money borrowed against the payment of interest;

(b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent; etc.

Adjudicating Authority:

81. An `Adjudicating Authority' (`National Company Law Tribunal'), in respect of an `Application', preferred under Section 7 of the I & B Code, 2016, has to determine the same, on its own `individual merits', by taking into `account of the available materials on record'. Undoubtedly, the `Existence of Default', is to be looked into by an `Adjudicating Authority'. It cannot be gainsaid, that whether, there is `Debt' and `Default', can be looked into by an `Adjudicating Authority', only, if a

`Corporate Debtor', disputes the `Debt' or takes a `Plea', that there is no `Default', although, there is `Debt'.

82. An `Adjudicating Authority' (`Tribunal') and an `Appellate Tribunal', are not to act as `Courts of Equity'.

83. A `Debt', may take within its fold a `Disputed Claim', is not `Due'. A `Corporate Debtor', is permitted in `Law', to point out that a `Default', had not `occurred'. More importantly, a `Debt', may not be `Due', if it is not `payable' in `Fact' or `Law'.

84. Even, if the `Debt' is `controverted' / `repudiated' / `disputed', if the `Amount', is more than `Rupees One Lakh' under Section 4 of the I & B Code, 2016, (now `Rupees One Crore'), an `Application', under Section 7, filed by a `Person', is `Ex-facie Maintainable in Law', as opined by this `Tribunal'. Also that, an `Adjudicating Authority', has no duty to `decide' the `Sum of Default'. An `Adjudicating Authority' (`Tribunal'), is not to `decide' the `Contract', between the `Parties', like that of a `Civil Court', as opined by this `Tribunal'. An `Application', under Section 7 of the I & B Code, 2016, is only `maintainable', by a `Financial Creditor'.

85. For an `Admission' of an `Application', under Section 7 of the I & B Code, 2016, the reasons projected by the concerned `Party', in regard to

his `inability' / `incapacity', to `pay' its `Debt', are not to be delved into by an `Adjudicating Authority', because of the fact that the `proceedings', under I & B Code, 2016, are `summary in character', and not to be decided like a regular `Suit', by a Civil Court'. Furthermore, an `Application' / `Petition', has to be `disposed of', within the parameters of the Section 7 of the I & B Code, 2016.

Exercise of Discretion:

86. The aspect of `Discretion', is to be `exercised', by a `Person' / `Authority', only in a `Legal' manner, so to say, the same ought to be governed by a `Rule', as per `Justice', and not in a `Whimsical' fashion. If there is a `failure' or `miscarriage', while exercising the same, there is no `embargo', upon the `Competent Authority' / `Appropriate Authority' / `Superior Forum', to `review' the same.

Discussions:

87. Before the `Adjudicating Authority', (`National Company Law Tribunal', Division Bench – I, Chennai), the `1st Respondent / Bank', had filed IBA/757/2019 on 03.10.2018 (Filed under Section 7 of the Insolvency and Bankruptcy Code, 2016, read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, (`National Company Law Tribunal', Division

Bench – I, Chennai), against the `Corporate Debtor' (`Coastal Energen Private Limited'), mentioning under `Part IV' (`Particulars of Financial Debt'), wherein, the `Total Amount', disbursed by the `1st Respondent / Bank / Financial Creditor' as on 10.09.2018, was mentioned as Rs.3131.40 Crores. The amount in default as on 06.09.2018 was mentioned as Rs. 2923,62,42,864.46.

88. According to the 1st Respondent / Bank, the `Corporate Debtor' was liable, to pay `Contractual Interest Rate', as per the `Terms of the Loan Agreement'. In fact, the `Accounts', were classified as `Non Performing Asset', as on 31.03.2017.

89. According to the `1st Respondent / Bank / Financial Creditor', the `Principle Outstanding Sum' is Rs.2442,83,68,006.34, the `Regular Interest Sum' due is Rs. 440,90,26,287.15, the `Penal Interest' is Rs. 48,95,59,623.13 and the `Total Outstanding Amount', as on 06.09.2018 is Rs.2932,69,53,916.62.

90. Furthermore, in the Section 7 Application, the `1st Respondent / Bank / Financial Creditor', under `Part V' (`Particulars of Financial Debt' - `Documents', `Records' and `Evidence of Default'), it is observed as under:-

``Securities were held by the Financial Creditor jointly with other Consortium Lenders. Financial Creditors has charge on such Securities as per the Loan Agreements. Details of such Securities held by the Financial Creditor are described in Schedule – A hereto.

The estimated value of the properties and assets in which the security interest created jointly in favour of the Financial Creditor and other members of the Consortium were approximately Rs.8,055 Crores.''

91. The `2nd Respondent' / `Corporate Debtor', before the `Adjudicating Authority', in its `Reply' to IBA/757/2019, filed by the `1st Respondent / Bank / Financial Creditor', had inter alia mentioned that as per the `Joint Lender Agreement' dated 05.07.2016, in and by which, the `1st Respondent / Bank', was appointed as a `Lead Banker', and further that the `Promoter' of the `Corporate Debtor', had submitted a `One Time Settlement Offer', for a sum of Rs.3,000 Crores, in respect of the `Dues' to the `1st Respondent / Bank', and that based on the `Advisory', from the `Consortium of Banks', an initial payment of Rs.150 Crores, being the 5% of the `Total OTS Amount', was remitted on 15.06.2019, by the `Promoter' of the `Respondent'.

92. According to the Appellant, the `Corporate Debtor' on 16.05.2019, had made an upfront payment of Rs.30 Crores to the `1st Respondent / Bank' on 16.05.2019 and on 16.06.2019, the `Corporate Debtor', had made an upfront of Rs.70 Crores to the `1st Respondent / Bank'. Also that,

on 14.06.2019, the `Corporate Debtor', had made an upfront payment of Rs.50 Crores to the `1st Respondent / Bank'.

93. It comes to be known that on 01.10.2019, an enhance `OTS Offer' of Rs.3100 Crores with an `Equity' of 15% for the `Consortium', was submitted by the `Promoter Group', on 01.10.2019.

94. Besides this, the `1st Respondent / Bank / Financial Creditor', had filed a `Memo', before the `Adjudicating Authority', praying for a `Liberty', to `revive' the `Application' / `Petition' (`if the `OTS Proposal' failed and the same was `allowed').

95. On behalf of the `1st Respondent / Bank', it is pointed out before this `Tribunal', that after the `dismissal' of the `Application', filed under Section 7 by the `Bank', at the request of the `Lender Consortium', the IA/827/2020 in IBA/757/2019 for restoration of the main IBA/757/2019, was filed before the `Adjudicating Authority' (`National Company Law Tribunal', Division Bench – I, Chennai), and the IBA/757/2019 was `Restored', by the `Adjudicating Authority', on 28.12.2020 for further consideration, on account of the `Default', in payment of the `Sum', under the `One Time Settlement'.

96. In this connection, this `Tribunal', on going through the Order dated 05.11.2020, passed by the `Adjudicating Authority' (`National

Company Law Tribunal', Division Bench, Court I – Chennai) in IA/827/2020 in IBA/757/2019 (Filed under Section 60 (5) of the I & B Code, 2016), is of the earnest opinion that the `Adjudicating Authority', in Paragraph 2 (vide Page No. 627 – Volume V of the Appellant's Appeal Paperbook), had clearly observed the following:

> *``Vide Order dated 19.12.2019, this Adjudicating Authority had dismissed the Petition (IBA/757/2019) with the liberty to reinstate this Petition in case the Respondent fails to honour the commitment.''*

97. In view of the crystalline fact that a `Liberty', was granted by the `Adjudicating Authority' (`Tribunal') as mentioned in Supra, in its Order dated 05.11.2020, obviously based on the `Memo', filed by the `1st Respondent / Bank' to `resurrect' / `revive' the IBA/757/2019, to its file, in the event of failure of `OTS Proposal', the `Appellant' at this distant point of time, cannot have a grievance to say that the `Order', passed on 05.11.2020, was an `Ex-parte' one, because of the latent and patent fact that as per Rule 11 of the NCLT Rules, 2016, under the caption `Inherent Powers', the `Adjudicating Authority' (`Tribunal'), has an `inbuilt power', is empowered, to pass necessary orders or issue such directions, to meet the `ends of Justice' or to `prevent', an `abuse of process', as the case may be. Viewed in that perspective and also keeping in mind the `primordial fact' that because of the `Default', in payment of the amount,

under the `One Time Settlement', the act of the `1st Respondent / Bank', in filing IA/827/2020 in IBA/757/2019 and the `Logical Corollary Order', passed by the `Adjudicating Authority' (`Tribunal') in `allowing' the said `Application', and the `Order of Restoration', by no stretch of imagination, cannot be found `fault with', in the considered opinion of this `Tribunal', and hence, the `Plea' of the `Appellant', that there is / was a negation of `Rules of Natural Justice', has no legs to stand and the same is not `acceded to', by this `Tribunal'.

98. Dealing with the `Plea' of the `Appellant' that the initiation of `Corporate Insolvency Resolution Process', by the `1st Respondent / Bank', in regard to the `shadow period', i.e., 25.03.2020 to 25.03.2021, when the restrictions imposed, by the ingredients of Section 10A of the I & B Code, 2016, were in force, is `bad in Law', this `Tribunal, relevantly points out that the `Parliament', had intended to `impose a prohibition, as regards the projecting of the `Applications' / `Petitions', for the start of `Corporate Insolvency Resolution Process', in respect of a `Corporate Debtor', for a `Default', taking place on or after 25.03.2020 and the `embargo' was for a period of six months, extendable for a year'. As a matter of fact, the words, `shall ever be filed', is a clear pointer that the `Statutory Provision', ought not to be `applicable', in respect of any `Default', `prior to 25.03.2020', as opined by this `Tribunal'.

99. In any event, the `Appellant' cannot fall back upon the ingredients of Section 10A of the I & B Code, 2016, because of the fact that the `Date of Default' (`Non Performing Asset'), in the instant case on hand, was on 31.03.2017. In this connection, it is not out of place to this `Tribunal', to make a pertinent mention that the `1st Respondent / Bank' (`Financial Creditor'), filed under `Section 7 Application', under the I & B Code, 2016, before the `Adjudicating Authority', on 03.10.2018. As such, the `contra plea', taken on behalf of the `Appellant', is `unworthy of acceptance'.

100. In so far as the contention of the `Appellant' that in all the exchanges / communications, the `OTS Consortium', consistently and unequivocally communicated that the `Sums', were being remitted as per the `Terms' of the `OTS', and further that a `Debtor', while making a `Payment', has a `Right', to have it `appropriated', in the way he determines, and if the `Creditor' accepts the `payment', he / it, is required to make the `appropriation', in tune with the `directions' of the `Debtor', it is significantly pointed out by this `Tribunal', that the `payments' received by the `1st Respondent / Bank', were not as an integral part of the `OTS Proposal', but were charge on the `Security', and indeed, the `2nd Respondent / Corporate Debtor', had agreed to the `Agreements Terms', and obtained the `Credit Facilities', and in fact, the `Receivables' of the

`Borrower' are only charge of the `Financial Creditors', in the teeth of: (i). `Third Amended And Restated Common Loan Agreement dated 05.07.2016, Article VI Security (Clause 6.1 - Security for Senior Facility; Clause 9.2, under the caption `Consequences of Default'), executed by the `Corporate Debtor' (`Coastal Energen Private Limited'), to and in favour of the `Consortium Lenders', (ii) The `Working Capital Facility Agreement' dated 23.02.2017, executed between the `Corporate Debtor' (`Coastal Energen Private Limited') and the `1st Respondent / State Bank of India' (vide Clause 9.3, provides for `Conversion of Debt to Equity' (`Conversion Right'). Viewed from the aforesaid perspectives, the `contra plea' of the `Appellant', is not accepted by this `Tribunal'.

101. To be noted, that the principle of `Waiver' or `Approbation and Reprobation', lies at the `root of conduct', `productive of change of activation', and this principle, is akin to the `Rule' of `Constructive Res judicata', as per `Explanation IV' of `Section 11 of the Civil Procedure Code'.

102. In regard to the plea of the `Appellant' that the `1st Respondent / Bank', is retaining the amounts paid by the `OTS Consortium', under the `OTS' and `contest' the `binding nature' of the `OTS' and its `validity', and hence, the `1st Respondent / Bank', is not to be `allowed', to

`Approbate' and `Reprobate', this `Tribunal', points out that, in the instant case, the `2nd Respondent / Corporate Debtor', had knowingly accepted the `benefits' of the `contracts' / `agreements', by `securing the necessary facilities' and hence, it is `estopped' from `repudiating' / `denying', the `liability', or `validity', or `binding effect' of `contract', upon it. Therefore, the `converse plea', taken on behalf of the `Appellant', is `negative', by this `Tribunal'.

103. One cannot remain in oblivion as to the vital fact that the `Promoters', had not `paid' any `Sum', as per `OTS', but, they had arranged a Sum of Rs.150 Crore from three different `Companies' / `Persons', and the said `Sum', is kept in a `No Lien Account', with the `1st Respondent / Bank', and in reality, the said `Sum', was not `Appropriated' or `Disbursed' / `Distributed', by the `Lenders'.

104. According to the `1st Respondent /Bank', in the present case, the candid fact is that the `Promoters', were not in a position to arrange for the `required funds', inspite of the `pluralities of opportunities', provided to them, and further, in lieu of the `OTS Proposal', being not fructified and hence, the `1st Respondent / Bank', was `perforced' to initiate the `Corporate Insolvency Resolution Process', against the `2nd Respondent / Corporate Debtor', and in the present case, the `Debt', is `more than

Rupees One Lakh', as per the I & B Code, 2016 (`prior to the increase of threshold limit of Rupees One Crore – vide Section 4 of the Code'), and it cannot be brushed aside that the `Application', under Section 7 of the I & B Code, 2016, was filed by the `1st Respondent / Bank', prior to the raising of the threshold limit.

105. It is to be remembered that an `Application', under Section 7 of the I & B Code, 2016, can be preferred by a `Financial Creditor, on the basis of `Debt' and `Default'. Even the `non-payment of Debt', even in `entirety' or in `part' or `instalment' of the `Sum' of `Debt', by a `Debtor' / `Person', will clothe a `Right', on a `Financial Creditor', to prefer an `Application', when the `Debt', become `due and payable', either in `Law' or in `Fact'. No wonder, the `Plea' of the `Appellant' that only a `portion' / `part payment' only, remains to be `paid', by the `2nd Respondent / Corporate Debtor', is a `candid tacit admission' of `Default', and this is a clear adverse circumstance in favour of the `Appellant'.

<u>OTS – An Acknowledgement of Debt:</u>

106. In the present case, this `Tribunal', points out that the `OTS' is a clear cut admission of the `Corporate Debtor' (between the `Parties'), and

it is an `Acknowledgement' of `Debt', in terms of the ingredients of Section 18 of the Limitation Act, 1963.

Appellant's Locus Standi:

107. The Appellant who has preferred the instant Comp. App (AT) (CH) (INS.) No. 89 of 2022, is the `Promoter' of the `2nd Respondent / Corporate Debtor', and in as much as he is an `Investor', is not an `Aggrieved Person', to prefer the instant `Appeal', before this `Tribunal', notwithstanding the fact that Section 61 (1) of the I & B Code, 2016, `employs' the words, `any person aggrieved by the order of the Adjudicating Authority', under this `Part' (Chapter VI) of the I & B Code, 2016, may prefer an `Appeal', in respect of the `Order', passed by the `Adjudicating Authority', as opined by this `Tribunal'. Hence, the instant `Appeal', filed by the `Appellant', before this `Tribunal', is not `per se maintainable', and answered accordingly.

108. As far as the instant case is concerned, on a careful consideration of the divergent contentions advanced on either side, in the teeth of detailed discussions made by this `Tribunal', in the instant `Appeal', looking into the facts and circumstances of the case in a `Holistic' and in an `Integral Manner', and on going through the `impugned order' dated 04.02.2022, in IBA/757/2019, passed by the `Adjudicating Authority' (`National

Company Law Tribunal', Division Bench – I, Chennai), this `Tribunal', comes to a consequent conclusion that there is an `abundance of Materials', in regard to an `Existence' of `Debt', due and payable in `Fact' and in `Law', and `Default' was committed by the `2nd Respondent / Corporate Debtor', and the `Default' took place, well before the `Covid-19 Pandemic', and that the `Application', filed by the `1st Respondent / Bank / Financial Creditor', is complete in all respects. Looking at from any point of view, the `impugned order' dated 04.02.2022 in IBA/757/2019, passed by the `Adjudicating Authority' (`National Company Law Tribunal', Division Bench – I, Chennai), exercising its `subjective judicial discretion', in `admitting' the `Application' (Filed under Section 7 of the Insolvency and Bankruptcy Code, 2016, read with Rule 4 of the I & B (Application to Adjudicating Authority) Rules, 2016), by the `1st Respondent / Bank / Financial Creditor' with `Moratorium', is free from any `Legal Infirmities'. Resultantly, the instant `Appeal', sans merits.

Disposition:

In fine, the instant Comp. App (AT) (CH) (INS.) No. 89 of 2022 is dismissed. No costs.

The `interim order', granted by this `Tribunal', on 11.03.2022, shall stand vacated.

The connected pending IA No. 198 of 2022 (`For Leave to Appeal'), IA No. 197 of 2022 (`For Stay'), IA No. 250 of 2022 (`For Clarification'), IA No. 251 of 2022 and IA No. 709 of 2022 (`For Urgent Application') are closed.

[Justice M. Venugopal]
Member (Judicial)

[Naresh Salecha]
Member (Technical)

06/01/2023

SR / TM