NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI

Company Appeal (AT) (Insolvency) No. 2261 of 2024

[Arising out of the Order dated 06.11.2024 passed by the 'Adjudicating Authority' (National Company Law Tribunal, Ahmedabad Bench) in C.P (IB) No. 104 (AHM)/2024]

IN THE MATTER OF:

Edelweiss Asset Reconstruction Company Limited
Acting in its capacity as a Trustee of:
EARC Trust SC 444,
Registered Office address at:
Edelweiss House, Off C.S.T Road,
Kalina Mumbai, Maharashtra 400098
Email: dolly.bharti@edelweissarc.in **...Appellant**

Versus

Takshashila Heights India Pvt. Ltd.
Registered Office address at:
560, Silver Arc 'B', Open Plot,
Near Ashima House, Town Hall,
Madalpur, Ellisbridge Ahmedabad - 380 006

Also at:

Takshashila AIR, Sales Office,
First Floor, Tower B,
Opposite Hotel, Neelkantha Panshikura,
Near Madalpur Underpass,
Behind Town Hall, Ellisbridge,
Ahmedabad - 380 006, Gujarat
Email: info@takshashilaair.com. **...Respondent**

Present:

For Appellant : Mr. Abhijeet Sinha, Sr. Advocate with Mr. Aditya Vashishth and Mr. Anmol Bansal, Advocates (EARCL).

For Respondent : Mr. Saurabh Kalia and Mr. Avik Sarkar, Advocates Mr. Arjun Sheth and Mr. Rajiv Chawla, Advocates for Intervenor.

O R D E R
(Hybrid Mode)

[Per: Arun Baroka, Member (Technical)]

This Appeal has been filed by Edelweiss Asset Reconstruction Company Ltd (EARCL/Appellant), as Trustee of EARC Trust SC 444, assailing the Order dated 06.11.2024 passed by the National Company Law Tribunal, Ahmedabad Bench ("Adjudicating Authority/NCLT") in CP (IB) No. 104 (AHM)/2024, whereby the Appellant's Petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("IBC") seeking initiation of Corporate Insolvency Resolution Process (CIRP) against Takshashila Heights Pvt Ltd (Corporate Debtor) was dismissed. The Petition was filed on account of financial defaults by the Corporate Debtor in respect of two loan facilities sanctioned in 2018, amounting to Rs 70 crores (Rs 40 crores and Rs 30 crores respectively), originally extended by ECL Finance Ltd and subsequently assigned to the Appellant on 09.05.2022. The account was classified as a non-performing asset (NPA) on 30.12.2021. Despite initial restructuring of the outstanding dues in May 2023 and payment of the first instalment, the Corporate Debtor defaulted on the subsequent instalments, leading to revocation of the restructuring arrangement and continuation of enforcement actions, including proceedings under the SARFAESI Act and a pending DRT Application. The Section 7 Petition, filed on 31.01.2024 claiming an outstanding sum of Rs 93.54 crores, was supported by evidence of debt and default. However, the Adjudicating Authority dismissed the Petition holding that the proceedings were aimed at recovery rather than resolution, thus constituting a misuse of IBC provisions, and that initiating CIRP would

prejudice the interests of stakeholders, given the Corporate Debtor's status as a going concern. Relying on the Supreme Court's decision in ***Vidarbha Industries Power Ltd vs Axis Bank Ltd*** **[2022 SCC OnLine SC 841]**, the NCLT exercised discretion to reject the Petition despite debt and default being established.

2. Brief chronology of the events is as follows:

Date	Events
19.07.2018	Pursuant to the request made by the Corporate Debtor, the Original Lender ECL Finance Ltd sanctioned to the Corporate Debtor, term loan of Rs 40,00,00,000/- (TL Facility I).
19.07.2018	Further, pursuant to another request made by the Corporate Debtor, the Original Lender sanctioned to the Corporate Debtor, term loan of Rs 230,00,00,000/- (TL Facility-II).
25.07.2018	Corporate Debtor and Mr Kamleshbhai Gondalia executed an unattested deed of hypothecation in favour of the Original Lender.
25.07.2018	With a view to secure the TL Facility, Mr Kamlesh Gondalia, Mrs Deeptiben Gondalia and Mr Parthil Gondalia furnished personal guarantee by executing a Guarantee Agreement.
25.07.2018	With respect to the TL Facility, the Corporate Debtor executed a promissory note in favour of the Original Lender.
25.07.2018	With respect to the TL Facility, the directors of the Corporate Debtor company executed an undertaking from directors.
25.07.2018	With respect to the TL Facility-I, the Corporate Debtor executed an undertaking-cum-indemnity to pay differential stamp duty.
26.09.2018	With respect to the TL Facility-II, the Corporate Debtor executed a Loan Agreement in favour of the Original Lender, on the terms and conditions contained therein (Loan Agreement-II).
26.09.2018	With a view to secure the TL Facility-II, Mr Kamlesh Gondalia, Mrs Deeptiben Gondalia and Mr Parthil Gondalia furnished personal guarantee by executing a Guarantee Agreement in favour of the Original Lender.
26.09.2018	With respect to the TL Facility-Il, the Corporate Debtor executed a promissory note in favour of the Original Lender.

26.09.2018	With respect to the TL Facility-II, the promotors of the Corporate Debtor company executed a promoters' undertaking for non-disposal and cost overrun-cum-indemnity.
26.09.2018	With respect to the TL Facility-II, the Corporate Debtor executed an undertaking-cum-indemnity to pay differential stamp duty.
02.11.2018	In consideration of the Original Lender having lent and advanced and/or agreed to lend and advance the loan to the Corporate Debtor, the Corporate Debtor and Mr Kamleshbhai Gondalia executed an unattested deed of hypothecation.
04.09.2020	With respect to the TL-I Facility and TL-II Facility, the Corporate Debtor, Takshashila Developers Pvt Ltd, and the erstwhile Neelkamal Realtors and Complex Pvt Ltd executed an indenture of mortgage in favour of the Original Lender.
07.09.2020	An escrow agreement came to be executed amongst the Corporate Debtor, the erstwhile Neelkamal Realtors and Complex Pvt Ltd, Axis Bank Ltd and the Original Lender.
30.09.2021	The Corporate Debtor made last payment in the TL-I Facility and TL-II Facility account.
30.12.2021	In view of the persistent defaults committed by the Corporate Debtor in repayment of principal debt and interest thereon, the Financial Creditor classified the account of the Corporate Debtor as non-performing asset (NPA).
09.05.2022	An assignment agreement came to be executed between the Original Lender and the Financial Creditor.
31.05.2022	The Financial Creditor issued recall and invocation of guarantee notice upon the Corporate Debtor and Personal Guarantors thereby demanding the payment of the entire outstanding dues, being an amount of Rs 53,03,18,487/- as on 31.05.2022.
21.07.2023	The Appellant issued a statutory demand notice under Section 13 (2) of the SARFAESI Act, 2002, therein demanding a sum of Rs 57,24,96,064/- as on 30.06.2022.
23.05.2023	The Appellant and Corporate Debtor entered into a restructuring exercise I OTS for the debt owed by the Corporate Debtor and Raghav Conpro LLP as per terms of letter dated 23.05.2023.
29.12.2023	The Corporate Debtor defaulted on the restructuring instalments and in view of the same, the Financial Creditor issued a revocation notice, revoking the restructuring.

20.02.2024	Appellant filed the subject Petition under Section 7 of the IBC bearing CP (IB) No. 104 (AHM)/2024 on 20.02.2024 before the Adjudicating Authority, Ahmedabad Bench.
10.04.2024	During the pendency of the Section 7 Petition, Appellant in its capacity of a Secured Creditor, issued a notice of sale under Rule 8 (6) read with Rule 9 (1) of the Security Interest (Enforcement) Rules, 2002, to the Corporate Debtor.
06.11.2024	Impugned Order passed by the Adjudicating Authority, dismissing the Section 7 Petition.

Submissions of the Appellant/Financial Creditor

3. The Financial Creditor has filed the captioned Company Petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("Code") for initiation of Corporate Insolvency Resolution Process against the Corporate Debtor. The Financial Creditor claims that ECL Finance Ltd (Original Lender) had, vide (i) the Sanction Letter dated July 19, 2018 sanctioned Term Loan of Rs 40,00,00,000/- and (ii) the Sanction Letter July 29, 2018 sanctioned Term Loan of Rs 30,00,00,000/-, to the Corporate Debtor on the terms and conditions mentioned therein. The Corporate Debtor has executed various loan facilities and security documents on different dates, as stated in the captioned Company Petition. The Corporate Debtor has created security interest over its movable properties by the means of hypothecation and over its immovable properties by the means of mortgage and hence the Applicant Financial Creditor is a secured Creditor. Subsequently, the Original Lender assigned all its rights, title and interest in the Financing Documents and all collateral and underlying security interests and/or pledges and/or guarantees, in favour of the Applicant Financial Creditor vide an Assignment Agreement dated May 09, 2022.

4. The Corporate Debtor had started committing defaults in repayment of the loan accounts and made last payment towards its loan obligations on September 30, 2021. In view of the persistent defaults committed by the Corporate Debtor in repayment of principal debt and interest thereon, the Financial Creditor classified the account of the Corporate Debtor as non-performing asset (NPA) on December 30, 2021. Thereupon, the Financial Creditor issued recall notice dated May 31, 2022, upon the Corporate Debtor demanding the outstanding dues stated therein. The Corporate Debtor failed and neglected to comply with the requisitions made in the aforesaid notice.

5. The Financial Creditor had, vide its letter dated May 23, 2023 (Annexure L to the captioned Petition), agreed to restructure the dues of the Corporate Debtor. However, the Corporate Debtor failed to make repayments to the Financial Creditor in terms of the amortisation schedule provided in the aforementioned Restructuring Letter. As stated in the captioned Petition, the Corporate Debtor has only made part payment of Rs 0.86 crores towards the second instalment of Rs 3 crores due on September 30, 2023, and has also defaulted upon the third instalment of Rs 3 crores due in December 2023. Therefore, the Corporate Debtor defaulted on the terms and conditions of the restructuring agreement and the Financial Creditor issued a Revocation Notice dated December 29, 2023, upon the Corporate Debtor.

6. As on January 31, 2024, the sum of Rs 93,54,87,965/- stood due and outstanding to the Financial Creditor and payable by the Corporate Debtor. The Financial Creditor has submitted the Record of Default of the Corporate

Debtor to and National E-Governance Services, which has marked the debt of the Corporate Debtor to be 'Deemed to be Authenticated'.

7. The Corporate Debtor has, in its Reply, not raised any substantial averment in its defence against the initiation of CIRP of the Corporate Debtor. In fact, the Corporate Debtor has admitted to availing the aforementioned credit facilities from the Original Lender; the restructuring of outstanding dues done by the Applicant Financial Creditor as well as the defaults committed by the Corporate Debtor in terms of the repayment of the credit facilities as per the amortisation schedule provided in the aforementioned Restructuring Letter. The Corporate Debtor has, in its Reply, also admitted to being in debt and default to other Financial Creditors apart from the Applicant.

8. Despite the claims of the Respondent Corporate Debtor of being a viable unit with great commercial prospects, as alleged, the Corporate Debtor has made no attempts to make payments towards their outstanding dues and the averments made with respect to the Corporate Debtor being a going concern or a viable entity do not absolve the Corporate Debtor from its liabilities to repay the outstanding dues of the Applicant Financial Creditor. The Financial Creditor has facilitated the survival of the Corporate Debtor and also supported the attempts of revival of the Corporate Debtor. The same is evident from the fact that the Financial Creditor had acceded to the request of settlement and restructuring of the outstanding dues of the Corporate Debtor. Despite indulgence being shown by the Financial Creditor to extend their

support to the Corporate Debtor, the Corporate Debtor has even avoided complying with the amortisation schedule agreed upon by and between the Financial Creditor and the Corporate Debtor and has deliberately and consciously chosen not to regularise their account. The Corporate Debtor has failed to comply with the terms of the sanction and has made no legitimate attempts to repay the outstanding dues of the Financial Creditor.

9. Further, the Corporate Debtor has made bald objections to the admission of the captioned Company Petition in view of the proceedings initiated by the Financial Creditor against the Corporate Debtor under the SARFAESI Act, 2002. It is a well settled position of law that there is no bar against the Financial Creditor to proceed under the Code as well as the SARFAESI Act against a Corporate Debtor and the objections of the Corporate Debtor hold no water.

10. In the correspondences produced by the Corporate Debtor along with its Reply, the Corporate Debtor has clearly acknowledged (i) the persistent defaults committed on the terms of the Sanction Letters as well the Restructuring Letter, (ii) difficulties in procuring funds from other Financial Creditors, (iii) difficulties in the sale of the assets of the Corporate Debtor due to issues with the projects of the Corporate Debtor itself, (iv) the terms of Restructuring as well as the terms of penal interest applicable in terms of default thereof (v) failure to comply with the rules and regulations of the civil authorities and its failure to receive mandatory compliance certificates and (vi) the failure to sell its units at the market rates despite various efforts with

different entities, which in turn substantiate the Applicant's request for the initiation of CIRP of the Corporate Debtor.

11. Since the Corporate Debtor has committed defaults in repayment of the outstanding dues despite repeated requests and reminders of the Financial Creditor and despite the recall notice of the Financial Creditor and in view of the Corporate Debtor's inability to repay its debts, which include the outstanding dues due to the Financial Creditor, the initiation of CIRP in respect of the Corporate Debtor will be in the public interest and will benefit all creditors of the Corporate Debtor.

12. In view of what is stated hereinabove, the Corporate Debtor is in default of the dues owed to the Applicant and despite all attempts, failed to regularise its account, the captioned Petition is complete in all aspects and is well within the limitation period. Therefore, the Tribunal may be pleased to grant the relief prayed for in the captioned Petition.

13. Conclusion of the AA in the Impugned Order that simply because there is debt and default, CIRP cannot be initiated is completely misconceived, erroneous and contrary to the well-established and settled principle of law and directly against the scheme of IBC which provides that when a 'default' in payment of debt takes place and the NCLT is satisfied of the occurrence of such default, such an application for initiation of insolvency must be admitted.

14. Adjudicating Authority failed to consider that reliance upon the decision in the case of ***Vidarbha Industries Power Ltd (supra)*** on the issue of

admission of insolvency process in the facts of the present case is completely erroneous as the Supreme Court has itself held that the decision in Vidarbha was passed in the peculiar facts of that case and is an exception, not the rule. In fact, subsequently, a division bench of the Supreme Court in the case of ***M Suresh Kumar Reddy vs Canara Bank and Others*** **(2023) SCC Online SC 608 (decided on 11.05.2023)** has held that once the NCLT is satisfied that the default as occurred, there is hardly any discretion left with the NCLT to refuse admission of the Application under Section 7 IBC. The Apex Court referred to their decision in ***Innoventive Industries Limited vs ICICI Bank (Innoventive)*** wherein the entire scope of Section 7 was explained and it was held that if the NCLT is satisfied there is a debt and default, it is bound to admit a Petition under Section 7 of the IBC, which was reiterated in the judgment of ***Hon'ble Supreme Court in E S Krishnamurthy & Ors. Vs. M/s Bharath Hi Tech Builders Pvt. Ltd. Civil Appeal No. 3325 of 2020 decided on 14.12.2021***, while holding that the NCLT cannot direct parties to enter into settlement terms. The aforesaid judgment of ***M Suresh Kumar Reddy (Supra***), the Supreme Court has clearly held that the decision passed in the Vidarbha case was in the setting of the facts of that case only.

15. The Adjudicating Authority ignored the landmark precedents of the ***Hon'ble Supreme Court in the case Innoventive Industries Limited (supra) and Swiss Ribbons Pvt Ltd vs Union of India (2019) 4 SCC 17 (Swiss Ribbons)***. In the Innoventive case, the Supreme Court held that the scheme of the IBC is to ensure that when a default takes place, the insolvency resolution process begins. The Supreme Court held that the moment the

NCLT is satisfied that a default has occurred, the Application must be admitted. Further, in Swiss Ribbons the Supreme Court expanded on the decision laid down in Innoventive and held that the trigger under the IBC, is non-payment of dues owed to Creditors. It further held that the legislative policy in India has shifted from the concept of "inability to pay debts" to "determination of default". This shift enables the Financial Creditor to initiate the insolvency resolution process, the moment there is evidence of a default. This shift is highlighted in the BLRC Report of November 2015, as the committee was against introducing a test of solvency under Section 7 of the IBC. The reasoning behind this approach was that there exists no standardised, indisputable way to establish insolvency. Rather, the IBC presumes that creditors only file an application for insolvency after failing to resolve conflicts through negotiation. In this context, the BLRC specified that the trigger for the insolvency resolution process is the evidence of default.

16. The Adjudicating Authority passed the Impugned Order in ignorance of the decision passed by this Appellate Tribunal in a similar case of ***Bank of Maharashtra vs Newtech Promoters and Developers Pvt Ltd [Company Appeal (AT)(Ins) No. 1487 of 2022] (decided on 19.10.2023),*** which will be discussed in detail hereinafter in appraisal of the case.

17. Additionally, it is relevant to highlight that in complete contrast to the Vidarbha judgment, a different bench of the NCLT, New Delhi, *in* ***Indusind Bank Ltd vs Hacienda Projects Pvt Ltd MANU/NC/5231/2022 (NCLT, New Delhi, decided on November 11, 2022)***, rejected the arguments of the

Corporate Debtor (who was also a real estate developer) that (i) the project undertaken by it was almost complete; (ii) it was a financially viable company; and (iii) initiation of CIRP would not be fruitful.

18. The Adjudicating Authority has held that since the Appellant had initiated various actions for recovery of its dues prior to and continued the same even post filing of the Section 7 Petition, the present Petition under Section 7 for initiation of CIRP cannot be maintained as the facts purportedly showed a malafide intent to misuse the provisions of the IBC. By this observation, the Adjudicating Authority incorrectly concluded that the intention of the Appellant was only to recover its dues though the process of insolvency, which is against the object of IBC and has baselessly assumed that the Appellant has filed the Section 7 Petition with a malafide intent, on account of the pendency of DRT and SARFAESI proceedings. There were no material facts on record that conclusively established or proved any "malicious" or "fraudulent" intent on the part of the Appellant to initiate CIRP against the Corporate Debtor within a malicious intent, which would stop the admission of the Petition in view of Section 65 IBC. The Appellant only took steps as prescribed in law and as available to the Appellant as a lender, to attempt to recover its dues through various legal processes such as DRT, SARFAESI etc.

19. Appellate Tribunal (Chennai Bench) in the case of ***Mr Amar Vora vs City Union Bank Ltd [Company Appeal (AT) (CH) (Ins) No. 130 of 2022 (decided on 11.05.2022)*** has held that the Financial Creditor/Operational

Creditor/Corporate Persons can file an Application under Sections 7, 9 and 10 of the Code before the respective Adjudicating Authorities even though in respect of same any proceeding may be pending before any other forums, on the ground that the provisions of Code have an overriding effect of other laws.

20. The Adjudicating Authority wrongly held that the Appellant failed to issue 'no-objection certificate' to the Corporate Debtor as per its request so that they would be able to collect funds to repay the debt. The issuance of provisional NOC by the Appellant was only on the fulfilment of the terms and conditions of the restructuring letter which were never adhered to by the Corporate Debtor whose offered rate was much lower than the pre-determined rate for grant of NOC. Further, the Corporate Debtor had failed to honour the payment schedule as agreed upon and therefore, the Appellant was within its rights under the terms to revoke and cancel the restructuring.

21. SBICAP Ventures, the intervenor in the revised contention through its Affidavit dated 12.09.2024, stated that it made several inquiries with the Corporate Debtor regarding (a) status of the pending occupation Certificate and (b) critical information relating to the Project, however, despite repeated follow-ups, the Corporate Debtor did not respond and stopped co-operating and providing information and as such, it was stated that the Corporate Debtor stopped taking any steps towards the completion of the Project in a timely manner, therefore, SBICAP was not opposed to the admission of CIRP against the Corporate Debtor. It is submitted that the Adjudicating Authority ought to have given due weightage and significance to such revised statement

of the intervenor, who was originally opposing the admission of the Section 7 Petition.

22. Section 7 Petition was complete in all respects and supported by clear and substantial evidence of debt and default. It failed to appreciate that the Corporate Debtor had committed consecutive and continuous defaults in repayment of the outstanding debt despite being provided ample time and opportunities by the Appellant Financial Creditor.

Submissions of the Respondent

23. Present Corporate Debtor is engaged in construction and development of a residential cum commercial project in the name and style of "Takshashila Elegna" in the city of Ahmedabad consisting of 259 residential units/flats and 20 commercial units/shops totalling 279 units of the project of the Corporate Debtor and the Corporate Debtor has booked/sold 185 (out of 259) residential units/flats and 1 (out of 20) commercial unit/shops totalling to 186 units out of 279 units of the project of the Corporate Debtor consisting of the homebuyers.

24. The Corporate Debtor had obtained the financial assistance/facilities from the original lender, namely, ECL Finance Limited in the year 2018 and two other financial creditors namely Axis Rera Opportunity Fund in 2020 and Swamih Investment Fund-I-SBI, Cap Venture for timely completing the project but due to delay in statutory approvals and or account of impact of COVID-19, project was delayed and it resulted into interest pile up and cost overrun.

25. Just before the recalling of the dues from the Respondent CD on 31.05.2022, original lender-ECL Finance Limited had assigned the debts in respect of Respondent – Corporate Debtor along with the underlying securities and all the rights, title and interest therein to Applicant-Edelweiss Asset Reconstruction Company Limited on 09.05.2022.

26. Immediately, thereafter on 21.07.2022, Applicant had issued notice called upon to discharge in full the total outstanding under Section 13 (2) of the SARFAESI Act, 2002. Appellant issued notice recalling the dues and invocation of guarantees on 31.05.2022 and further filed Original Application (OA) on 19.07.2022, which was numbered as OA/367/2022 before the Hon'ble Debt Recovery Tribunal, Ahmedabad, which is pending for adjudication and, again on 21.07 2022. The Appellant had issued restructuring letter containing one-time settlement of the overdue loan accounts of the Respondent – Corporate Debtor and one, M/s Raghav Conpro LLP, for total amount of Rs 55,00,00,000/- and provided the schedule of payments and first instalment commenced from 30.06.2023 and was to end on 31.03.2025. Respondent – Corporate Debtor paid the first instalment due on 30.06.2023; but could only pay Rs 86,00,000/- out of the second instalment of Rs 3,00,00,000/- due on 30.09.2023.

27. On failure Appellant issued revocation letter dated 29.12.2023 withdrawing the restructuring letter dated 23.05.2023 and, thereafter, on 23.02.2024, initiated the actions under Section 7 of the Code. Applicant has simultaneously issued notice of sale dated 10.04.2024 under Rule 8 (6), read

with Rule 9 (1) of the Security Interest (Enforcement) Rules, 2002, for the sale of the assets of the Corporate Debtor after filing the present Application. Applicant has further issued paper publication of the sale notice dated 18.05.2024 to create pressure on the Respondent – Corporate Debtor in order to extract advantage through unfair means and abuse the process of the Code to extort money from the Respondent – Corporate Debtor and not having intention to keep the Corporate Debtor as a going concern. Applicant has also issued notice dated 19.05.2022 in terms of Negotiable Instruments Act, 1881, and filed legal proceedings against the Respondent – Corporate Debtor for the purpose of recovery of amounts for the same transactions for which the present Application is filed before this Hon'ble Adjudicating Authority and not for the resolution of the Respondent – Corporate Debtor. The sequence of actions by the Applicant clearly indicate its mala fide intent and ulterior motive to recover its outstanding debts through pressure tactics and not resolution being the primary intent and object of Section 13 of the Code. Moreover, the said conduct is nothing but forum shopping through misuse of the provisions of the laws, i.e, IBC, SARFAESI Act and Negotiable Instruments Act under the guise of exercise of rights/remedies available under the said laws.

28. As per Clause 6 of the restructuring letter dated 23.05.2023, as well as Clauses 4.12 of Schedule-2 of the Loan Agreements dated 25.07.2018 and 26.09.2018, Applicant was under the obligation to issue provisional NOC at the request of the Respondent – Corporate Debtor /borrowers for monetising the secured assets at a minimum pre-determined rate as mentioned therein

which was not issued by the Applicant despite several communications with the Applicant and requests thereto which resulted into failure of the Respondent – Corporate Debtor to proceed with sale of the units to prospective buyers and generate revenue and make payments therefrom to the Applicant. Considering the abovementioned factual position, the Corporate Debtor should not be penalised/punished/brought into the rigors of CIRP on account of the wrong doings of the Applicant.

29. With the series of events as referred in above paras and actions of forum shopping by the Applicant and action of sale notice as well as publication for sale of the charged assets clearly shows malicious intent of recovery of its dues with pressure tactics and not for resolution of insolvency of the Respondent – Corporate Debtor which attracts the provisions of the Section 65 of the IBC. Also, the Applicant has not approached this Adjudicating Authority with clean hands and has preferred the present Application as a tool to recover of the monies and that the same is reflecting the fraudulent and mala fide intention to misuse and abuse the provisions of the IBC and that the said approach of the Applicant is against the intent and object of the IBC.

30. The project "Takshashila Elegna" developed by the Respondent – Corporate Debtor has construction of total 279 units and out of which total 185 residential units/flats are booked/sold to the homebuyers. Project was also financed by other two Secured Financial Creditors and other Unsecured Financial Creditors in addition to the Applicant. Only 19 commercial units

out of total 279 units are secured with the Applicant and rest of the units are secured with other two Financial Creditors. In such circumstances, the Respondent – Corporate Debtor should not be unnecessarily dragged into the rigors of the CIRP and that the homebuyers also should not be penalised/punished on, account of the conduct/wrong doings of the Applicant. Respondent – Corporate Debtor has recently obtained the building usage certificate/permission on 10.04,2024 which entitles the Respondent CD to enter into the market with full force. Respondent – Corporate Debtor is a going concern having material size real estate project on hand and has employed/engaged total 20 employees on roll and other contract labourers/workers on site and is having involvement of huge number of homebuyers as the stakeholders of the Corporate Debtor. Forceful initiation of the CIRP of the Respondent – Corporate Debtor at the behest of the Applicant will prejudice all the stakeholders with great irreparable loss. Applicant should not be encouraged considering the larger interest of the homebuyers of the scheme/project of the Respondent – Corporate Debtor and its other stakeholders, in order to deprecate the practice of forum shopping under the guise of exercise of rights/remedies available under the different laws.

31. In view of the above factual aspects and circumstances relating to the ulterior motive of the Applicant only to recover its dues by adopting and resorting to forum shopping and having no intention to resolve the insolvency of the Respondent – Corporate Debtor, the present Application deserves to be dismissed in the interest of the Respondent – Corporate Debtor, its

stakeholders including the public at large in the form of homebuyers and to avoid multiplicity of proceedings.

Appraisal

32. Heard counsels of both sides and also one intervener and also perused the material placed on record.

33. We note that this Appeal is filed by Edelweiss Asset Reconstruction Company Limited (EARCL/Appellant), challenging the Order dated 06.11.2024 passed by the Adjudicating Authority/NCLT thereby dismissing the petition under Section 7 IBC bearing C.P (IB) No. 104 (AHM)/2024, which was filed by the Appellant seeking initiation of Corporate Insolvency Resolution Process (CIRP) against 'Takshashila Heights Private Limited' ("Corporate Debtor"). The Petition sought initiation of the CIRP against the Corporate Debtor due to admitted defaults of its financial obligations.

34. It is undisputed that two loan facilities amounting to Rs 40 crores and Rs 30 crores were sanctioned in 2018 by ECL Finance Ltd. (Original Lender) to the Corporate Debtor. These loan facilities were secured through various instruments, including hypothecation deeds, personal guarantees, and registered mortgage. The Corporate Debtor/Borrower committed default in repayment of the loan facilities and maintaining financial discipline, ceasing payments after making its last payment on 30.09.2021 and, consequently, leading to the classification of the account of the Corporate Debtor as a non-performing asset (NPA) on 30.12.2021. Subsequently, the Appellant/EARCL acquired the non-performing debt of the Corporate Debtor from the original

lender through an assignment agreement executed on 09.05.2022. After the assignment of debt, in July 2022, Appellant initiated measures for recovery of the outstanding amount, filing an Original Application bearing OA No. 367/2022 before the DRT, Ahmedabad, and initiating SARFEASI measures of enforcement of security interest. Thereafter, the Appellant accepted a restructuring proposal of the Corporate Debtor in May, 2023, requiring repayment of Rs 55 crores (restructuring/settlement amount) to be paid in eight instalments as per schedule as extracted below:

"Annexure – I: Terms of the Restructuring

1. The restructuring amount payable is Rs. 55,00,00,000/- (Rupees Fifty-Five Crores Only) which is to be paid as per the schedule given below:

Sl. No.	Quarter	Amount in Cr.
1.	30.06.2023	5.5
2.	30.09.2023	3
3.	31.12.2023	3
4.	31.03.2024	5
5.	30.06.2024	5
6.	30.09.2024	10
7.	31.12.2024	10
8.	31.03.2025	13.5
	Total	**55**

Note: Out of the total amount of restructuring Rs. 39,00,00,000/- (Rupees Thirty Nine Crores Only) will be adjusted against the restructuring of dues of Takshashila Heights India Private Limited and Rs. 16,00,00,000/- (Rupees Sixteen Crores Only) will be adjusted against the restructuring of dues of Raghav Conpro LLP. However, No Dues Letter will be issued only upon the receipt of the entire restructured amount of Rs. 55,00,00,000/- (Rupees Fifty-Five Crores Only) as mentioned hereinabove."

35. However, except for making the payment of 1st instalment, the Corporate Debtor defaulted in making payment of remaining instalments in

terms of the agreed payment schedule. EARCL revoked the restructuring and demanded full repayment of entire outstanding liability and thereafter continued the legal actions which were already initiated. Subsequent requests made by the Corporate Debtor to revive the restructuring payments, were rejected by the Appellant. Thereafter, on 31.01.2024, the Appellant filed the Section 7 IBC Petition before the Adjudicating Authority, seeking admission of CIRP against the Corporate Debtor claiming an outstanding sum of Rs 93.54 crores including principal, interest, and penalties, as on the said date. The said Petition included evidence of debt, default and also disclosed efforts being made towards recovery of outstanding debt, including SARFEASI measures undertaken by the Appellant. During the pendency of the said Petition, the Appellant had also issued a notice of sale under Rule 8 (6) read with Rule 9 (1) of the Security Interest (Enforcement) Rules, 2002, in furtherance of the SARFAESI proceedings.

36. Per contra the Respondent – Corporate Debtor claims that the Appellant-Financial Creditor had issued a restructuring letter, as per which the amount was to be repaid in 8 instalments. As per the terms of the OTS, in case of any shortfall in repayment of the instalments the Corporate Debtor had the liberty to monetize the secured assets once a provisional NOC was issued by the appellant. The Corporate Debtor paid the first instalment before 30.06.2023. However, the Corporate Debtor could only pay a sum of Rs 86,00,000 as against Rs 3 crores of the 2nd instalment. Based on these belated payments, the Appellant revoked the OTS on 29.12.2023. Post revocation of the OTS the Respondent claims it found a prospective buyer and subsequently

requested for issuance of provisional NOC from the Appellant. The Appellant turned down the request of the Corporate Debtor. It is claimed by the Respondent that had the Appellant issued the NOC, the amount accrued out of the sale of such secured units would have regularized the account of the Corporate Debtor. The terms and conditions of the Letter of Restructuring stipulate that to facilitate the sale of the secured assets by the Corporate Debtor, it shall issue provisional No Objection Certificates (NOCs) to the Corporate Debtor upon deposit of the entire sale consideration into the account of the Applicant. Respondent claims that as per the terms of Clause 6 of the restructuring letter dated 23.05.2023, as well as Clauses 4.12 of Schedule-2 of the Loan Agreements dated 25.07.2018 and 26.09.2018, Applicant was under the obligation to issue provisional NOC at the request of the Respondent – Corporate Debtor/borrowers for monetising the secured assets at a minimum pre-determined rate as mentioned therein which was not issued by the Applicant despite several communications with the Applicant and requests thereto which resulted into failure of the Respondent – Corporate Debtor to proceed with sale of the units to prospective buyers and generate revenue and make payments therefrom to the Applicant. We don't find merits in the arguments of the Respondent. While the Respondent made payment of the first instalment, it failed to pay the second instalment in entirety, thereby committing a material breach and triggering an Event of Default under Clauses 8(ii) and 9(i) of the said Restructuring Letter. Furthermore, Clause 8(iii) of the Restructuring Letter explicitly entitled the Appellant to revoke the restructuring upon such default. Although a cure

period of 15-days was provided under Clause 9(ii), the Respondent failed to rectify its default within the said cure period, despite multiple reminders. Therefore, despite sufficient opportunities to adhere to the repayment terms, the Respondent failed to make necessary payments under the restructuring scheme and as such, the Appellant was well within its contractual rights to revoke the said restructuring and recall the entire outstanding liability vide its Restructuring Letter dated 29.12.2023. We cannot find fault in the course of action adopted by the Appellant. It is also inconceivable to agree with the arguments of the Respondent that the Appellant acted with mala fide intent and ulterior motive to recover its outstanding debts through pressure tactics and not resolution as against Section 13 of the Code. From the materials on record we find that the Appellant had revoked the restructuring scheme due to the Respondent's failure to make the full payment of the 2nd instalment of Rs. 3 crores. This is evidenced by the email communication annexed by the Respondent in its reply, which further clarifies that despite Appellant granting various opportunities to the Respondent to regularize its overdue amount, the Respondent admittedly failed to deposit the remaining Rs 2.25 crores (approx.) against the instalment amount of Rs. 3 crores which was due on 30.09.2023. Further, the Respondent made subsequent requests to the Appellant to re-open the restructuring. However, the Appellant re-iterated the fact that the restructuring had already been revoked and therefore, the Appellant was entitled to exercise its legal remedies available under the Code and accordingly filed the subject Section 7 petition. The Appellant was under no legal obligation to re-open the restructuring.

37. Appellant denies that it had not allowed the Corporate Debtor to adhere to the terms of the Restructuring Letter or that the failure of the Corporate Debtor in adhering to the terms of Restructuring has taken place owing to the conduct of the Applicant. The terms and conditions of the Letter of Restructuring stipulate that to facilitate the sale of the secured assets by the Corporate Debtor, it shall issue provisional No Objection Certificates (NOCs) to the Corporate Debtor upon deposit of the entire sale consideration into the account of the Applicant. But we find from the perusal of the emails exchanged between the Applicant and the Corporate Debtor that without the deposit of the entire sale proceeds towards the sale of a particular asset, the Corporate Debtor was repeatedly requesting for the issuance of the NOC, contrary to the terms of Restructuring. In view of the revocation of the terms of Restructuring, there was no obligation on the part of the Applicant to issue NOC to the Corporate Debtor. This fact was brought to the attention of the Corporate Debtor by the Applicant vide its email dated September 26, 2023. The Corporate Debtor had once again acknowledged its default and sought an extension vide its email dated February 26, 2024. Vide email dated March 01, 2024, exchanged between the Applicant and the Corporate Debtor states that since the Restructuring had already been revoked, no requests of the Corporate Debtor could be further entertained. We also note (i) the email dated March 15, 2024 addressed by the Corporate Debtor to the Applicant (ii) the response of the Applicant to the aforementioned email vide its email dated March 15, 2024, (iii) email dated March 28, 2024 addressed by the Corporate Debtor to the Applicant, (iv) email dated March 29, 2024 addressed by the

Corporate Debtor to the Applicant in which the Corporate Debtor has clearly acknowledged the persistent defaults committed on the terms of the Restructuring Letter, difficulties in procuring funds from other Financial Creditors, the difficulties in the sale of the secured assets and procuring buyers of its assets due to issues with the projects of the Corporate Debtor itself, the terms of Restructuring as well as the terms of penal interest applicable in terms of default thereof failure to comply with the rules and regulations of the Civil Authorities and its failure to receive mandatory compliance certificates and the failure to sell its units at the market rates despite various efforts with different entities, which in turn substantiates the case for the initiation of CIRP of the Corporate Debtor.

38. Further the Respondent argues that the said conduct is nothing but forum shopping through misuse of the provisions of the laws, i.e, IBC, SARFAESI Act and Negotiable Instruments Act under the guise of exercise of rights/remedies available under the said laws. With such arguments being entertained against the Financial Creditor, no lender will be able to proceed in any forum and it is, therefore, difficult to agree with the arguments of the Respondents and on the contrary we find that arguments of the Appellant to be convincing that the Code is a separate and distinct enactment from the SARFAESI Act, and the measures initiated by the Appellant under either of the enactments do not have a bearing upon each other. The Corporate Debtor has, just days before the auction of its secured assets by the Corporate Debtor under the SARFAESI Act, filed Securitisation Application No. 150 of 2024 before the Hon'ble Debts Recovery Tribunal-I, Ahmedabad, inter alia,

challenging the measures initiated by the Appellant under the SARFAESI Act against the secured assets of the Corporate Debtor on false and frivolous grounds, which is pending adjudication at present. This establishes that the Corporate Debtor is merely attempting to thwart all the attempts of the repayment of its outstanding dues while also objecting to the commencement of CIRP by this Tribunal. The Adjudicating Authority has dismissed the Petition, citing misuse of insolvency proceedings for recovery purposes and the debtor's status as a "going concern."

39. Adjudicating Authority has concluded as follows in the impugned order:

> "As mentioned above, it appears that the applicant has not cooperated respondent for issuing NoC. There are some lacuna on the part of the applicant, therefore, simply because there is debt and default, CIRP cannot be initiated. Corporate Debtor is a going concern. Acts of applicant shows intent of only recovery of money through this process which is not at all object of the IBC, 2016. It appears that application is premature. Observations in Vidarbha Industries Power Limited V. Axis Bank Limited also supports non-initiation of CIRP in case of going concern Corporate Debtor. Thus, we have not satisfied that on the facts of the present case mentioned above, CIRP should be initiated against the Corporate Debtor."
>
> *[Emphasis Supplied]*

40. The relevant extract of ***Vidarbha Industries Power Ltd (supra)*** relied upon by the Adjudicating Authority is as follows:

> "The Appellate Authority (NCLAT) erred in holding that the Adjudicating Authority (NCLT) was only required to see whether there had been a debt and the Corporate Debtor had defaulted in making repayment of the debt, and that these two aspects, if satisfied, would trigger the CIRP. The existence of a financial debt and default in payment thereof only gave the financial creditor the right to apply for initiation of CIRP. The Adjudicating Authority (NCLT) was required to apply its mind to relevant factors including the feasibility of initiation of CIRP, against an electricity generating company operated under statutory control,

the impact of MERC's appeal, pending in this Court, order of APTEL referred to above and the over all financial health and viability of the Corporate Debtor under its existing management. [61]

The title "Insolvency and Bankruptcy Code" makes it amply clear that the statute deals with and/or tackles insolvency and bankruptcy. It is certainly not the object of the IBC to penalize solvent companies, temporarily defaulting in repayment of its financial debts, by initiation of CIRP. Section 7(5)(a) of the IBC, therefore, confers discretionary power on the Adjudicating Authority (NCLT) to admit an application of a Financial Creditor Under Section 7 of the IBC for initiation of CIRP. [81]
The Adjudicating Authority (NCLT) failed to appreciate that the question of time bound initiation and completion of CIRP could only arise if the companies were bankrupt or insolvent and not otherwise. Moreover, the timeline starts ticking only from the date of admission of the application for initiation of CIRP and not from the date of filing the same. [82]

Legislature has, in its wisdom made a distinction between the date of filing an application Under Section 7 of the IBC and, the date of admission of such application for the purpose of computation of timelines. CIRP commences on the date of admission of the application for initiation of CIRP and not the date of filing thereof. There is no fixed time limit within which an application Under Section 7 of the IBC has to be admitted. [85]

Even though Section 7(5)(a) of the IBC may confer discretionary power on the Adjudicating Authority, such discretionary power cannot be exercised arbitrarily or capriciously. If the facts and circumstances warrant exercise of discretion in a particular manner, discretion would have to be exercised in that manner. [86]

Ordinarily, the Adjudicating Authority (NCLT) would have to exercise its discretion to admit an application Under Section 7 of the IBC of the IBC and initiate CIRP on satisfaction of the existence of a financial debt and default on the part of the Corporate Debtor in payment of the debt, unless there are good reasons not to admit the petition. [87]

The Adjudicating Authority (NCLT) has to consider the grounds made out by the Corporate Debtor against admission, on its own merits. For example when admission is opposed on the ground

of existence of an award or a decree in favour of the Corporate Debtor, and the Awarded/decretal amount exceeds the amount of the debt, the Adjudicating Authority would have to exercise its discretion Under Section 7(5)(a) of the IBC to keep the admission of the application of the Financial Creditor in abeyance, unless there is good reason not to do so. The Adjudicating Authority may, for example, admit the application of the Financial Creditor, notwithstanding any award or decree, if the Award/Decretal amount is incapable of realisation. The example is only illustrative. [88]"

[emphasis supplied]

41. Conversely, in the case of ***ES Krishnamurthy (supra) Hon'ble Supreme Court*** has held that Adjudicating Authority under Section 7(5) of the Insolvency and Bankruptcy Code 2016 is empowered only to verify whether a default has occurred or not occurred. Relevant extracts are as follows:

"The Adjudicating Authority has clearly acted outside the terms of its jurisdiction Under Section 7(5) of the IBC. The Adjudicating Authority is empowered only to verify whether a default has occurred or if a default has not occurred. Based upon its decision, the Adjudicating Authority must then either admit or reject an application respectively. These are the only two courses of action which are open to the Adjudicating Authority in accordance with Section 7(5). The Adjudicating Authority cannot compel a party to the proceedings before it to settle a dispute.[27]

The IBC is a complete code in itself. The Adjudicating Authority and the Appellate Authority are creatures of the statute. Their jurisdiction is statutorily conferred. The statute which confers jurisdiction also structures, channelises and circumscribes the ambit of such jurisdiction. Thus, while the Adjudicating Authority and Appellate Authority can encourage settlements, they cannot direct them by acting as courts of equity.[29]

Order of the Adjudicating Authority, and the directions which eventually came to be issued, suffered from an abdication of jurisdiction. The observation that the appeal was not maintainable is erroneous. Plainly, the Adjudicating Authority failed to exercise the jurisdiction which was entrusted to it. A

clear case for the exercise of jurisdiction in appeal was thus made out, which the Appellate Authority then failed to exercise.[32]

Appeal allowed accordingly. The petition under Section 7 of the IBC restored to the NCLT for disposal afresh.[34]"

[Emphasis supplied]

42. This issue has also been settled in a subsequent judgment of the of the division bench of Hon'ble Supreme Court in the case of ***M Suresh Kumar Reddy (supra)*** wherein it has been held that once the NCLT is satisfied that the default has occurred, there is hardly any discretion left with the NCLT to refuse admission of the Application under Section 7 IBC. The Apex Court referred to their decision in ***Innoventive Industries (Supra)*** wherein the entire scope of Section 7 was explained and it was held that if the NCLT is satisfied there is a debt and default, it is bound to admit a Petition under Section 7 of the IBC, which was reiterated in ***ES Krishnamurthy (supra)***, while holding that the NCLT cannot direct parties to enter into settlement terms. In the aforesaid judgment of ***M Suresh Kumar Reddy (Supra)***, the Supreme Court has clearly held that the decision passed in the ***Vidarbha Industries (supra)*** was in the setting of the facts of that case only. Relevant portion is reproduced as under:

"10. Thus, once NCLT is satisfied that the default has occurred, there is hardly a discretion left with NCLT to refuse admission of the application under Section 7. Default is defined under sub-section 12 of Section 3 of the IB Code which reads thus:

"3. Definitions:- In this Code, unless the context otherwise requires-
(12) "default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not [paid] by the debtor or the corporate debtor) as the case may be."

11. Thus, even the non-payment of a part of debt when it becomes due and payable will amount to default on the part of a Corporate Debtor. In such a case, an order of admission under Section 7 of the IB Code must follow. If the NCLT finds that there is a debt, but it has not become due and payable, the application under Section 7 can be rejected. Otherwise, there is no ground available to reject the application.

xxx

13. A Review Petition was filed by the Axis Bank Limited seeking a review of the decision of Vidarbha Industries on the ground that the attention of the Court was not invited to the case of ES Krishnamurthy. While disposing of Review Petition by Order dated 22nd September 2022, this Court held thus:

> "The elucidation in paragraph 90 and other paragraphs were made in the context of the case at hand. It is well settled that judgments and observations in judgments are not to be read as provisions of statute. Judicial utterances and/or pronouncements are in the setting of the facts of a particular case. To interpret words and provisions of a statute) it may become necessary for the Judges to embark upon lengthy discussions. The words of Judges interpreting statutes are not to be interpreted as statutes."

The Adjudicating Authority failed to appreciate that the Supreme Court in Vidarbha applied the literal interpretation test and held that the use of the word "may" confers upon the NCLT the discretion to admit the application after it is satisfied of the existence of debt. Further, it held that Section 9(5) of the IBC by using the word "shall" in the context of an application made by an operational creditor, highlights a deliberate legislative intent to differentiate between applications made by financial creditors and operational creditors. However, in the review petition, reliance was placed on the Supreme Court's judgment in E S Krishnamurthy (Supra) in which the Supreme Court held in the context of Section 7(5) of the IBC that " ... The Adjudicating Authority is empowered only to verify whether a default has occurred or if a default has not occurred. Based upon its decision, the Adjudicating Authority must then either admit or reject an application respectively. These are the only two courses of action which are open to the Adjudicating Authority in accordance with Section 7(5) ... ".

[emphasis supplied]

43. Now we briefly look into the issue of allegations of collusion between the Appellant and SBICAP Ventures Ltd. ("SBI Venture"). We note that SBI

Venture had initially opposed the admission of CIRP against the Respondent and subsequently, in terms of its Affidavit dated 12.09.2023, resiled from this position and supported the admission of CIRP. Apart from this fact, there is no material on record for establishing collusion between the Appellant and SBI venture. We also note that the statement made by SBI Venture either supporting or opposing the admission of CIRP does not have any bearing on the decision by the Adjudicating Authority, which is required to be made after verifying the existence of debt and default basis the documents submitted. Even otherwise we note from the affidavit that the Respondent's non-cooperative, arbitrary, and malafide conduct, including its failure to furnish information as sought by SBI Venture and its inaction in progressing the underlying project— factors prompted SBI Venture to resile from its initial opposition of admission of Section 7 petition.

44. In its written submissions before us, the Respondent claims that in the project namely Takshashila Elegna there is a total of 279 units consisting of 259 residential units (flats) and 20 commercial units (shops) and out of which the Corporate Debtor has already booked/sold 185 residential units and one commercial unit. The financial assistance provided by the Appellant is only a certain part of the project i.e. only 19 commercial units and one residential flat of the group company has been provided as collateral security. Therefore, pushing the Corporate Debtor through the rigors of IBC would unfairly prejudice the homebuyers and other stakeholders. Corporate Debtor has obtained building usage certificate permission on 10th April 2024 for certain parts of the project, thereby making the Corporate Debtor eligible to sell all the

commercial units and some of the residential units. It claims that the intent of the Appellant is only to recover the defaulted amount which goes against the very spirit of IBC. On the other hand, we notice that the Corporate Debtor has committed defaults in repayment of the outstanding dues despite repeated requests and reminders of the Financial Creditor and despite the recall notice of the Financial Creditor and in view of the Corporate Debtor's inability to repay its debts, which include the outstanding dues due to the Financial Creditor, the initiation of CIRP in respect of the Corporate Debtor cannot be rejected. From the materials placed on record we notice that the Corporate Debtor has clearly acknowledged that:

- Persistent defaults committed on the terms of the Sanction Letters as well the Restructuring Letter,
- CD has been facing difficulties in procuring funds from other Financial Creditors,
- CD has been facing difficulties in the sale of the assets of the Corporate Debtor due to issues with the projects of the Corporate Debtor itself,
- the terms of Restructuring as well as the terms of penal interest applicable in terms of default thereof
- failure to comply with the rules and regulations of the civic authorities and its failure to receive mandatory compliance certificates and
- the failure to sell its units at the market rates despite various efforts with different entities.

All above factors substantiate the Applicant's request for the initiation of CIRP of the Corporate Debtor.

45. One intervener also appeared before us whose case is being discussed hereinafter. The Intervention Application was filed by *The Elegna Co-op.*

Housing and Commercial Society Ltd. ("Intervener") and we now delve into its *locus standi* and merits. The intervener claims to be a society which enrolls the unit holders of the projects of the Corporate Debtor having named Takshashila Elegna. It is claimed that every person who buys a unit in the said building is required to mandatorily seek membership of this society, which is a maintenance society for the said building. The intervener supports the Respondent and contents that it is not a fit case to admit insolvency proceedings against the Corporate Debtor since the Corporate Debtor is in the business of real estate and that there are various ongoing projects for residential and commercial purposes by the Corporate Debtor. It claims that there are 279 units out of which 250 units are residential in nature and 20 units are commercial shops in nature. If the present Corporate Debtor is admitted in insolvency, the future of all the allottees shall become uncertain in spite of large amount having been paid by them, and they are likely to lose their right for allotment as it will be left in the hands of the creditors. Furthermore, when the home buyers are treated as financial creditors of the Corporate Debtor, it is not known as to what percentage voting rights would be given to them in the COC and hence the future of the allotments becomes uncertain. From the materials placed on record we note that he said intervenor is not a party to the underlying financial transaction forming the subject matter of the Section 7 Petition and does not qualify as a financial or Operational Creditor under the Code. Its attempt to oppose the CIRP initiation is found to be entirely without locus. We note that once the requirements of financial debt and default are satisfied, there is no scope under the Code for

unrelated third parties to intervene, particularly at the admission stage. Invocation of Rule 11 in this context is wholly impermissible and contrary to the principles laid down in the case of ***Innoventive Industries (Supra)***, which mandates admission upon establishment of debt and default. The Intervenor is a registered society of a completed tower and cannot be treated as a representative of pending allottees. We find that this is an attempt by the intervener to stall CIRP and is therefore meritless and cannot be considered as it is without any merit and is rejected.

46. Despite the claims of the Respondent Corporate Debtor of being a viable unit, the Corporate Debtor has made no payments towards their outstanding dues and the averments made with respect to the Corporate Debtor being a going concern or a viable entity do not absolve the Corporate Debtor from its liabilities to repay the outstanding dues of the Applicant Financial Creditor. The Financial Creditor had acceded to the request of settlement and restructuring of the outstanding dues of the Corporate Debtor and facilitated the survival of the Corporate Debtor and also supported the attempts of revival of the Corporate Debtor. We find that the Corporate Debtor has even avoided complying with the amortisation schedule and has not regularised their account. We don't find any bar against the Financial Creditor to proceed under the Code as well as the SARFAESI Act against a Corporate Debtor and the objections of the Corporate Debtor holds no water.

47. The Corporate Debtor has committed defaults in repayment of the outstanding dues despite repeated requests and reminders of the Financial

Creditor and despite the recall notice of the Financial Creditor. We find that the Corporate Debtor is in default of the dues owed to the Appellant and despite all attempts, failed to regularise its account. Further, the captioned Petition is complete in all aspects and is well within the limitation period. In view of the Corporate Debtor's inability to repay its debts, which include the outstanding dues due to the Financial Creditor, the initiation of CIRP in respect of the Corporate Debtor is the inevitable outcome.

48. We also note that this Appellate Tribunal in the cases of ***Mr Amar Vora (supra) and Securities & Exchange Board of India vs. Rajesh Sureshchandra Sheth & Anr., Company Appeal (AT) (Ins.) No. 1194 of 2022, decided on 4th July***, has reaffirmed the position that there is no legal embargo or bar upon a creditor to initiate CIRP subsequent to the initiation of recovery actions by the creditor before the DRT or under SARFAESI or before any other forum, as pendency of any such legal proceedings of recovery is no bar for initiating CIRP. In the judgment of this Appellate Tribunal (Chennai Bench) on ***Mr Amar Vora (supra)*** where it was held that the Financial Creditor/Operational Creditor/Corporate Persons can file an Application under Sections 7, 9 and 10 of the Code before the respective Adjudicating Authorities even though in respect of same any proceeding may be pending before any other forums, on the ground that the provisions of Code have an overriding effect of other laws. Therefore, in instant case, the stand taken that proceedings are pending before DRT and under Prohibition of Benami Property Transactions Act, 1988, cannot be sustained and the Section 7 cannot be stopped. Therefore, in the present case, we agree with the

arguments of the Appellant that the decision of the Adjudicating Authority which is fundamentally premised on the fact that the Appellant had initiated various recovery actions before DRT, under the Negotiable Instruments Act, issued Notice of Sale after filing of the Section 7, which all purportedly gave rise to a 'malafide intent' that the Appellant is only interested in recovery instead of resolution of the Corporate Debtor, is misconceived and fundamentally flawed observation and even otherwise, cannot be a sustainable ground to reject the Section 7 Petition filed by the Appellant.

49. We also note that in complete contrast to the Vidarbha judgment, a different bench of the NCLT, New Delhi, ***in Induslnd Bank Ltd vs Hacienda Projects Pvt Ltd MANU/NC/5231/2022 (NCLT, New Delhi, decided on November 11, 2022)***, rejected the arguments of the Corporate Debtor (who was also a real estate developer) that (i) the project undertaken by it was almost complete; (ii) it was a financially viable company; and (iii) initiation of CIRP would not be fruitful. NCLT, New Delhi, in its reasoning, held that had the Corporate Debtor been financially healthy, it would not have defaulted in repayment. Moreover, completion of one project cannot be the sole criteria to decide the financial viability of a company.

50. We also note the judgement of this Appellate Tribunal in a similar case of ***Bank of Maharashtra (supra).*** Similar to the facts of the present case, in the said case, the Financial Creditor, Bank of Maharashtra's Application was also dismissed by the NCLT, New Delhi. Despite establishing 'debt' and 'default', the NCLT relying on the Vidarbha judgment, held that as the

Corporate Debtor was working on an ongoing housing project, initiating CIRP would impair the interests of homebuyers. It was observed that despite the Financial Creditor fulfilling all the elements of Section 7 of the Code, the NCLT, considering the rights of third parties, ie, homebuyers (who are in no manner involved in the proceedings), that will be impacted, proceeded to reject the Application. In Appeal before this Appellate Tribunal, this Appellate Tribunal held as under:

> "10. The facts are not much in dispute as a finding has been recorded by this Tribunal itself that the debt is in existence. For the purpose of Section 7, the Court has only to find out the existence of debt and default and in this case both the elements are present but the application has been dismissed on two accounts, firstly, applying the decision in the case of Vidharbha Industries (Supra) and that the proceedings under the RERA Act in respect of the Corporate Debtor initiated by it are pending which would ultimately affect its rights if the CIRP is initiated.
>
> 11. This court has also followed the said decision (M. Suresh Kumar Reddy in Mohan Nathuram Sakpal), therefore, the finding recorded in para 10 of the Impugned Order does not apply as the decision in the case of Vidharbha Industries (Supra) cannot be applied to all other cases except the case in which the decision has been rendered.
>
> xxx
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> 14. In view of the aforesaid facts and circumstances, once it has been found that there is an existence of debt and default, the application under Section 7 deserves to be admitted. Consequently, the Appeal is allowed. Application filed under Section 7 of the Code filed by the Appellant is admitted. The matter is sent back to the Tribunal for the purpose of initiation of further proceedings."
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> *[Emphasis Supplied]*

Conclusion

51. We find that at the request of the Corporate Debtor, ECL Finance Limited ("Original Lender") sanctioned two Term Loan Facilities totalling Rs 70 crores (Rupees 40 crores and Rupees 30 crores) vide sanction letters dated

19.07.2018. These facilities were disbursed on 26.07.2018 and 26.09.2018, respectively. The Corporate Debtor executed various contractual and security documents in favour of the Original Lender to secure its repayment obligations. However, the Corporate Debtor failed to comply with the repayment schedule and made its last payment on 30.09.2021. As a result, the loan account was classified as a Non-Performing Asset (NPA) on 30.12.2021. Subsequently, the Appellant acquired all rights, title, and interest in the said loan facilities and underlying securities from the Original Lender through an Assignment Agreement dated 09.05.2022. A Recall and Invocation of Guarantee Notice was then issued on 31.05.2022, demanding payment of the entire outstanding dues. The Appellant thereafter initiated recovery proceedings under the Recovery of Debts and Bankruptcy Act, 1993, and the SARFAESI Act, 2002. In response, the Corporate Debtor requested a restructuring of its outstanding dues, including those of its group entity, Raghav Conpro LLP. The Appellant accepted the request and issued a Restructuring Letter dated 23.05.2023. Despite this relief, the Corporate Debtor again defaulted on the restructured obligations. It paid only Rs 86 lakhs against the second instalment of Rs 3 crores, due on 30.09.2024. Repeated reminders and ample opportunities to cure the default were ignored. The failure to meet the restructured repayment obligations constituted an event of default under Clause 9 of the Terms of Restructuring. Accordingly, the Appellant, vide its letter dated 29.12.2023, revoked the restructuring and recalled the entire outstanding liability of the Corporate Debtor.

52. The Appellant thereafter filed a Petition under Section 7 of the Insolvency and Bankruptcy Code, 2016, bearing CP (IB) No. 104/AHM/2024 on 20.02.2024. Despite a clear and undisputed existence of debt and default, the Adjudicating Authority dismissed the petition through its Order dated 06.11.2024, relying on the Supreme Court's judgment in ***Vidarbha Industries (supra)***.

53. We find that The Appellant revoked the Restructuring Scheme due to the Corporate Debtor's failure to comply with the terms and conditions stipulated in the Restructuring Letter dated 23.05.2023. Upon valid revocation, the Appellant was under no legal or contractual obligation to re-initiate or reconsider the Restructuring Scheme. We also find that the allegation of collusion between the Appellant and SBICAP Ventures Ltd. is entirely baseless, speculative, and devoid of any evidentiary support. We also conclude that the Intervention Application filed by The Elegna Co-operative Housing and Commercial Society Ltd. ("Intervener") is misconceived, lacks legal merit, and has no locus standi. The Intervener's reliance on extraneous factors lies outside the scope of adjudication under Section 7 of the Code.

54. We also find that the adjudicating authority erred in relying upon the judgment of ***Vidarbha Industries (supra)***. It is not applicable in this case basis subsequent judgements of Hon'ble Supreme Court. The Hon'ble Supreme Court in the case of ***Mr. Suresh Kumar Reddy vs Canara Bank and Ors., 2023 SCC OnLine SC 608***, itself has held that the decision in ***Vidarbha Industries (Supra)*** was passed in the peculiar facts of that case

and is an exception, not the rule. The said judgment cannot be read as overriding or diluting the binding precedents laid down in ***Innoventive Industries Limited (supra)*** and ***E. S. Krishnamurthy vs. Bharat Hi-Tech Builders Private Limited, (2022) 3 SCC 161***, which continue to govern the legal position under Section 7 of the Code. The Hon'ble Supreme Court in the case of ***Innoventive Industries (Supra)*** has held that there is no scope for any further discretion or evaluation beyond the satisfaction of debt and default. Therefore, the conclusion by the Adjudicating Authority that CIRP cannot be initiated merely on account of the existence of debt and default is contrary to the binding precedent. In the present case, the Corporate Debtor itself has acknowledged both the debt and default, and this admission is explicitly recorded in para 17 of the Impugned Order. It leaves no room for further adjudication on the issue of debt and default. The Adjudicating Authority itself, has recorded in para 23 of the Impugned Order that there exists a debt and default. In addition to the above, the Appellant had annexed the NeSL report with the subject Section 7 petition, which clearly evidences the default committed by the Corporate Debtor. Adjudicating Authority erroneously concluded that the Appellant was more interested in recovery than in resolving the Corporate Debtor's insolvency.

Orders

55. We find that rejection of the Application for admission under Section 7 of the Code when the debt and default is clearly established in the facts and circumstances of the case, is an infirmity in the Impugned Order, which cannot be ignored. Consequently, we are constrained to set aside the order of the Adjudicating Authority and direct admission of insolvency under Section

7. Necessary orders be issued by the NCLT within 30 days of the presentation of these orders.

[Justice Ashok Bhushan]
Chairperson

[Arun Baroka]
Member (Technical)

New Delhi.
July 01, 2025.

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