IN THE NATIONAL COMPANY LAW TRIBUNAL
ALLAHABAD BENCH, PRAYAGRAJ

CP (IB) NO.512/ALD/2019

(An application under Section 7 of the Insolvency and Bankruptcy Code, 2016.)

IN THE MATTER OF:

YES BANK LIMITED
ASSIGNEE: J.C. FLOWERS ASSET RECONSTRUCTION PVT. LTD.
12th FLOOR, CROMPTON GREAVES HOUSE,
DR. ANNIE BESANT ROAD, WORLI,
MUMBAI CITY, MUMBAI, MAHARASHTRA,
INDIA-400030

.....FINANCIAL CREDITOR

Versus

JAYPEE HEALTHCARE LIMITED
Having its registered office at:-
SECTOR 128, NOIDA,
UTTAR PRADESH-201304

.....CORPORATE DEBTOR

Order pronounced on 14.06.2024

Coram:

Mr. Praveen Gupta. : Member (Judicial)

Mr. Ashish Verma : Member (Technical)

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Appearances:

Sh. Abhinav Vasishth, Sr. Adv. Assisted by Sh. Anoop Rawat, Sh. Saurav Panda, Sh. Vaijayant Paliwal, Sh. Siddhant Kant, Sh. Nikhil Mathur, Sh. Aditya Marwah, Ms. Mehak Nayak, Ms. Priya Singh, Ms. Gunjan Jadwani & Ms. Anushri Joshi, Advs.	: For the Financial Creditor
Sh. R.P. Agarwal, Sr. Adv. assisted by Sh. Abhishek Tripathi, Adv.	: For the Corporate Debtor
Sh. Alok Dhir alongwith Ms. Varsha Banerjee, Advs.	: For the Suraksha Lakshdeep-Consortium

ORDER

1. This Application has been initially filed on 02.12.2019 by the Yes Bank Limited as Applicant Financial Creditor under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "***I & B Code, 2016"***) read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016 against the M/s Jaypee Healthcare Limited (hereinafter referred as '***Respondent Corporate Debtor***') in Form 1 containing all the information as required in Part I, II, III, IV and V of the Form 1 showing a total financial debt of Rs.378,02,00,000 Crores in default declaring date of default being 01.02.2019.

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2. Subsequent to filing of the Application, as mentioned in para 1 above, an Interlocutory Application, IA No.146/2023 was filed on 23.03.2023 for substituting the name of Applicant in favour of M/s J C Flowers Asset Reconstruction Pvt Ltd. to whom debt was assigned as per assignment deed dated 16.12.2022 replacing Yes Bank Ltd. It is informed by the Ld. Counsel representing the Applicant that as per clause 2.1.1 of this assignment deed as well as the schedule attached therewith, the entire debt of M/s Jaypee Health Care Ltd. has been assigned in favour of the J C Flowers Asset Reconstruction Pvt Ltd. The same counsel who was appearing for the erstwhile Applicant i.e. Yes Bank Ltd. appeared to represent the new Applicant i.e. J.C. Flowers Asset Reconstruction Pvt Ltd and made a statement that this assignment deed has been implemented, therefore J C Flowers Asset Reconstruction Pvt Ltd has to be substituted as the Applicant/Financial Creditor in place of Yes Bank Ltd. After considering the averments made in the IA No.146/2023 and submission made by the Ld. Counsel representing M/s J C Flowers Pvt Ltd as mentioned above, this tribunal passed

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order dated 06.06.2023 substituting the name of Yes Bank Ltd. by J C Flowers Reconstruction Pvt Ltd. Consequently, in this order, J C Flowers Reconstruction Pvt Ltd. would be referred as Applicant Financial Creditor and Yes Bank Ltd as Lender Bank.

3. Now, coming to consideration of the averments made in the Application of the Applicant/Financial Creditor filed u/s 7, It is stated in Part-IV of the Application that for the purpose of financing 504 bedded Hospital in Noida (Noida Hospital Project) and other hospital projects, a total credit facility of Rs.400,00,00,000/- (Rupees Four Hundred Crores) have been extended by the Lender Bank to the Corporate Debtor as per the details given below:-

(i) **Term Loan-1**: Rs.75,00,00,000/- vide Facility Letter No YBL/DEL/FL/1575/2012-13 dated 26.03.2013 and Loan Agreement executed between Applicant and Borrower Company dated 22.04.2013 along with various Addendum Facilities as mentioned in Part IV of the Application.;

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(ii) **Term Loan- 2** Rs.100,00,00,000/- vide Facility Letter No.YBL/DEL/FL/0694/2015-16 dated 29.09.2015 and Loan Agreement executed between Applicant and Borrower Company dated 10.11.2015 along with two Addendum Facilities as mentioned in Part IV of the Application;

(iii) **Term Loan-3**: Rs.100,00,00,000/- vide Facility Letter No.YBL/DEL/FL/1569/2016-17 dated 23.01.2017 and Loan Agreement executed between Applicant and Borrower Company dated 20.04.2017 along with various Addendum Facilities as mentioned in Part IV of the Application;

(iv) **Term Loan - 4** : Rs.75,00,00,000/- vide Facility Letter No.YBL/DEL/FL/1570/2016-17 dated 23.01.2017, and Loan Agreement executed between Applicant and Borrower Company dated 23.03.2017 along with various Addendum Facilities as mentioned in Part IV of the Application;

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(v) Working capital facility in the nature of Cash Credit facility as Overdraft (OD) for an amount of Rs.50,00,00,000/- vide Facility Letter No.YBL/DEL/FL/0384/2015-16 dated 21.07.2015, and Master Facility Agreement executed between Applicant and Borrower Company dated 10.11.2015 and Supplemental Master Facility Agreement executed between Applicant and Borrower Company dated 01.03.2017 along with Addendum Facility Letter no YBL/DEL/FL/0101/2016- 17 dated 05.05.2016 along with various Addendum Facilities as mentioned in Part IV of the Application.

4. Details of disbursement under the above facilities are given on page 6 to 9 of Part IV in Vol.-I of the Application. Details of securities created on these loans are given in Part V on Pg 11-13 of Vol 1 of the Application.

5. Subsequently, as stated in the Application, the Corporate Debtor started defaulting in repayment of the principal amounts and interest and other charges in respect of the

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said Credit Facilities. Details of defaults occurred in the repayment of various loan facilities as stated in the Application are given below: -

(i) As per the facility agreement of Term Loan-1, the Corporate Debtor was required to make 36 structured quarterly instalment payments after moratorium of 51 months from date of first disbursement of the aggregate term loan of Rs.325 Crores (i.e. 01.05.2013) and monthly interest payments. The Corporate Debtor failed to repay monthly interest payment on 01.02.2019 and Principal payment of Rs.10,45,043 on 01.08.2019. Accordingly, the default date is 01.02.2019.

(ii) As per the facility Agreement of Term Loan-2 sanctioning a sum of Rs.100 Crores, the Corporate Debtor was required to make 36 structured quarterly instalment payments after moratorium of 51 months from date of first disbursement (24.11.2015) and monthly interest payments. The default occurred due

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to non-repayment of monthly interest payment which was due on 01.02.2019.

(iii) As per the facility Agreement of Term Loan-3 sanctioning a sum of INR 100 Crores, the Corporate Debtor was required to make 60 structured quarterly instalment payments after moratorium of 60 months from date of first disbursement (07.03.2017) and monthly interest payments. The default occurred due to failure to repay monthly interest payment on 01.02.2019.

(iv) As per the facility Agreement of Term Loan-4 sanctioning a sum of Rs.75 Crores, as amended from time to time, the Corporate Debtor was required to make 60 structured quarterly instalment payments after moratorium of 60 months from date of first disbursement i.e. 23.03.2017 and monthly interest payments. The default occurred due to non-repayment of monthly interest payment on 01.02.2019.

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(v) With respect to Facility-5 for a sum of Rs.50 crores, the Corporate Debtor has drawn the entire sum of Rs.50 Crores, which was demanded under the recall notice dated 08.11.19.

6. Consequent to above defaults occurring on 01.02.2019 in repayment of loans and interest, the Lender Bank classified the account of the Corporate Debtor as NPA on 02.05.2019.

7. After declaring the loan account of the Corporate Debtor as NPA, the total outstanding amount of Rs.378.02 crore has been computed as on 31.10.2019 as per the particulars given in ***Annexure D*** at page 27 of Vol.-I of the Application. This calculation is briefly reproduced as below: -

S. No.	Nature of Facility	Sanctioned	Principal Outstanding	Interest Outstanding (interest, default interest etc.)	Total Outstanding
1.	Term Loan 1	75.00	70.11	5.88	75.99
2.	Term Loan 2	100.00	98.43	7.96	106.39
3.	Term Loan 3	100.00	75.00	5.92	80.92
4.	Term Loan 4	75.00	59.71	5.01	64.72
5.	Cash Credit/Work Capital Facility (CC/WCDL)	50.00	50.00	-	50.00
TOTAL		400.00	353.25	24.77	378.02

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8. In respect of the outstanding amount of Rs.378.02 crore, a recall notice dated 08.11.2019 was issued by the Lender Bank calling upon the Corporate Debtor to pay this outstanding amount within 7 days of receipt of the notice i.e. 18.11.2019. However, no payment has been made till date. Therefore, an aggregate outstanding Rs.378.02 Crores is due and payable by the Corporate Debtor as on the date of filing of this Application with the default date being 01.02.2019 on which first default on repayment of principal amount of debt under each loan facility as well as interest amount thereon has occurred.

9. In the support of the above debt and default, particular of financial debt along with supporting documents, records and evidence of default have been filed as mentioned in Part V of the application, which include NeSL Report generated for all Credit Facilities sanctioned by the Lender Bank in favour of the Lender Bank attached at page1321-1361 of Vol.8 of Petition and Central Repository of Information on Large Credits (CRILC) report dated 14.11.2019 in respect of the

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Corporate Debtor maintained by the Reserve Bank of India showing that all the aforementioned loan facilities extended by the Lender Bank to Corporate Debtor has moved to the status of Default and declared as on 14.11.2019 to be of the category of SMA-1(Special Mention Account-1) where principal or interest is overdue 31-60 days.

10. In view of the details and supporting evidences showing a total debt of Rs.378 crores owed by the Corporate Debtor is in default which is more than the threshold limit as averred by the Lender Bank and discussed in aforementioned paras, the present Application u/s 7 of the I & B Code, 2016 has been filed to initiate CIRP against the Corporate Debtor, initially filed on 02.12.2019 by the Lender Bank but later substituted by M/s J.C Flower Asset Reconstruction Pvt Ltd as Applicant Finance Creditor vide order dated 06.06.2023 of this Tribunal after the said debt has been assigned to it as discussed in para 2 of this order.

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REPLY ON BEHALF OF THE CORPORATE DEBTOR

11. The Respondent Corporate Debtor filed Reply on 07.11.2021 objecting to the Application u/s 7 as discussed above in compliance to order dated 29.10.2021 passed by the Hon'ble NCLAT in Company Appeal No.889 of 2021 filed by the Corporate Debtor against the order dated 11.10.2021 passed by this tribunal in the instant company petition. This tribunal vide order dated 11.10.2021 rejected the prayer of the Corporate Debtor seeking four weeks' time to file reply. The Hon'ble NCLAT allowed the Corporate Debtor to file reply in the company petition by 10.11.2021 subject to payment of the cost of Rs.75,000 to Mr. Vaijayant Paliwal, Ld. Counsel of the Yes Bank Limited. The contentions raised in the Reply against the averments made in the Application are briefly discussed as under: -

(i) The entire share capital of the Corporate Debtor i.e. Jaypee Healthcare Ltd. (hereinafter referred as "***JHL***") is held by the Jaypee Infratech Ltd. (hereinafter referred as "***JIL***"). Thus, JIL is the holding company

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and JHL is wholly owned subsidiary of JIL. The JIL went into CIRP and all the shares of the Corporate Debtor were taken in the custody of Interim Resolution Professional of JIL, Mr. Anuj Jain.

(ii) The Principal Bench, NCLT, New Delhi vide order dated 03.03.2020 sanctioned a resolution plan submitted by NBCC (India) Ltd. This order was challenged by various stakeholders including the Lender Applicant Bank (Yes Bank Ltd.) before NCLAT.

(iii) As per the order of Hon'ble Supreme Court, all pending appeals (including the appeal of Yes Bank) were transferred to Supreme Court. The leading appeal was Civil Appeal No.3395 of 2020 titled as "Jaypee Kensington Boulevard Apartments Welfare Association & Ors. v. NBCC (India) Ltd. & ORs.

(iv) The Hon'ble Supreme Court vide order dated 24.3.2021 disposed of all the appeals (for sake of brevity, this judgment is herein after referred to as "***Kensington Judgment***") and set aside the order

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dated 03.03.2020 of Principal Bench, NCLT Delhi, and IRP was directed to invite fresh resolution plans from only two parties namely NBCC and Suraksha Realty Limited, to be placed before Principal Bench, NCLT, Delhi after approval of COC for taking a final decision on approving a fresh plan. Copy of the judgement dated 24.03.2021 has been annexed as Annexure-3 with the Reply.

(v) As submitted by the Corporate Debtor that in sub-paragraphs "ff" and "gg" referred to in Para 141 of the Kensington Judgment (Reply Vol. II Page 334), the Yes Bank Ltd. mooted the following proposal:

> *"**ff.** Without prejudice to any of the above and the following legal grounds raised in the present proceedings, the Appellant in the best interest of all the interested parties including the interests of the Resolution Applicant and in spirit of reconciliatory approach is still willing to work with the Resolution Applicant in finding a working solution so that JHL assets can be monetized in a timely manner. Provided, the Respondent No.2/ Resolution Applicant is willing to accept the proposals and the safeguards as requested by the Appellant. For brevity's sake, the Appellant's proposal for a workable mechanism is set out in the*

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Written Submissions filed before the Adjudicating Authority, which is reiterated below:

(i) *The lenders of JHL led by YBL will take all necessary preparatory measures required for finding a viable buyer to take over the JHL units in a completely transparent manner.*

(ii) *To the above cause, JHL lenders shall be permitted to prepare an information memorandum, seek bids from prospective buyers, appoint independent, impartial and reputed investment bankers to run the process of JHL monetization.*

(iii) *This is proposed to be done through fullest cooperation from RP of JIL as well as Board and Management of JHL as information and engagement will be critical to run an efficient and effective sale process.*

(iv) *JHL lenders shall liase with the IRP, Mr. Jain and share the status of the steps periodically with IRP and NBCC.*

(v) *A Sale Committee to be set up with participation of lenders of JHL and NBCC, for sale by JHL;*

(vi) *The decision to accept the bid of a particular buyer shall be taken by a unanimous vote of NBCC and YBL (on behalf of lenders of JHL);*

(vii) *The sale process shall be finalized within a period of 3 months from the date of approval of the resolution plan by the Hon'ble NCLT and latest by June 30, 2020 and until such time rights of lenders of JHL vis-à-vis assets of JHL as well as pledge of JHL Shares (held by JIL*

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as investment) in favour of JHL lenders shall be kept intact;

(viii) *In the event of successful disinvestment of JHL, the disinvestment funds shall be utilized for settlement of debt of JHL lenders in priority, in accordance with existing Resolution Plan;*

(ix) *During the period above, until June 30, 2020, there shall be moratorium on the rights of JHL lenders to enforce its securities held in JHL including the share pledge by JIL;*

(x) *Should the sale still not be finalized before June 30, 2020, for any reason whatsoever (including any delay due to legal proceedings), then the moratorium over enforcement of pledged shares as well as other assets of JHL, shall stand lifted; and*

(xi) *Thereafter, JHL lenders will have all rights to enforce its securities against JHL to recover its outstanding dues including but not limited to enforcement of pledge, and, or continuation of CIRP against JHL.*

"***gg***. *If the Respondent No.2 is agreeable to accept the above mechanism, then the Appellant shall not press its remedies for challenging the Resolution Plan. Failing which the entire Resolution Plan insofar as it relates to JHL Assets is required to be severed and set aside."*

(vi) The Hon'ble Supreme Court has given following important directions in Kensington Judgment in exercise of plenary powers under Article 142 of the Constitution:

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"Point N

Summation of findings: final order and conclusion

216. For what has been discussed and held on the relevant points for determination, our findings and conclusions are as follows: -

F. The issues related with the objections of YES Bank Limited and pertaining to JHL, the subsidiary of the corporate debtor JIL, are left for the resolution by the parties concerned, who will work out a viable solution in terms of paragraphs 141 and 142 of this judgment...." ***[Reply page 433 (Vol. II)]***

The ***paragraphs 141 and 142*** *referred to in the above direction are reproduced below:*

*"**141**. We have carefully examined the submissions made by the parties. In the totality of circumstances of the case and the stance of the respective parties, when it is noticed that the aforesaid proposal of YES Bank, as stated in sub-paragraphs "ff" and "gg" of paragraph 7 of the memo of appeal, is acceptable to NBCC, subject to approval of the resolution plan, we do not find any reason to say anything further on this score and would leave the parties to work out a viable solution in the best interest of all the stakeholders; and for that purpose, the parties concerned, if necessary, may seek appropriate orders from *NCLT, as regards mode and modalities of the process to be carried out.* ***[Reply Page 334 (Vol. II)]***

*[****Para- 225.6/Page444****: it is clarified that "NCLT" means Principal Bench].*

***142**. In view of the above, we do not consider it necessary to render any other finding in this point of determination except the observation that the resolution*

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*plan essentially deals with the assets of the corporate debtor JIL and not that of its subsidiary JHL. Differently put, what the resolution plan deals with are the shares in JHL, which are regarded as assets of the corporate debtor JIL. As observed, no further comments are required and we leave this aspect of the matter at that only." [**Reply Page 334 (Vol. II)**]*

(vii) In compliance with the aforesaid direction of the Hon'ble Supreme Court, the Resolution Applicants namely, NBCC (India) Ltd. and Suraksha Reality Ltd submitted their revised resolution plans.

(viii) In view of above directions, Suraksha Reality in Para 23 of its new Resolution Plan has stated to be discussing with Yes Bank Ltd. to explore the possibility of mutually acceptable amicable solution.

(ix) Relying on above developments. It has been submitted that the concerns of JHL are duly taken care by Hon'ble Supreme Court and also in the resolution plan submitted by Suraksha Reality and hence, it has been argued that this Application/Petition has become infructuous as the Applicant is having liberty to approach the Principal Bench, NCLT, New Delhi to

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work out a viable solution in terms of paragraph 141 and 142 of the Kensington Judgment and further the parties concerned, if necessary, may seek appropriate orders from NCLT, Principal Bench as regards the mode and modalities of the process to be carried out and jurisdiction of this Bench will be unwarranted as the same will be in conflict with the directions of the Honb'ble Supreme Court.

(x) In its Reply, the Respondent Corporate Debtor has further contended that the use of word ***"may"* in Section 7(5) of IBC** makes it clear that even if default is assumed, the Tribunal may not admit the petition. It can reject the petition, if the facts and circumstances of the case so warrant and in support of this submission, the Ld. Sr. Counsel has relied on Para 21 of the Judgment of Hon'ble Supreme Court in ***"Indus Biotech (P) Ltd v. Kotak India Venture (Offshore) Fund" reported in (2021) 6SCC 436,*** which is reproduced as below:

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"21. In such circumstance if the adjudicating authority find from the material available on record that the situation is not yet ripe to call it a default, that too if it is satisfied that it is profit making company and certain other factors which need consideration, appropriate orders in that regard would be made; the consequence of which could be the dismissal of the petition under Section 7 of IB Code on taking note of the stance of the corporate debtor. As otherwise if in every case where there is debt, if default is also assumed and the process becomes automatic, a company which is ably running its administration and discharging its debt in planned manner may also be pushed in to the corporate insolvency resolution process and get entangled in a proceeding with no point of return. Therefore, the adjudicating authority certainly would make an objective assessment of the whole situation before coming to a conclusion as to whether the petition under Section 7 of IB Code is to be admitted in the factual background……."

(xi) Further, reliance has also been placed at Para 34 of the Hon'ble NCLAT Judgment dated 30.06.2021 in ***Company Appeal (AT)(Ins.) No.258 of 2021 in the matter of " Hytone Merchants Pvt. Ltd. v. Satabdi Investment Consultants Pvt. Ltd."*** wherein it is stated that use of the phrase '***it may***' under section 7(5) itself leaves the discretionary scope for the adjudicating authority to exercise in admission and rejection of the application filed under section 7 of the

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I&B Code, 2016. The relevant para is reproduced below:

"34. The use of the phrase 'it may' under Sub-section (5) of section 7 itself leaves the scope of discretion exercised by the Adjudicating Authority in admitting or rejecting the Application. Section 7(5)(a) lays down parameters about general conditions to admit an Application. However, in the given situation where it appears that Application is filed collusively not with the purpose of Insolvency Resolution but otherwise, then despite fulfilling all the conditions of Section 7(5) of the Code, the Adjudicating Authority can exercise its discretion in rejecting the Application relying on Section 65 of the Code."

(xii) The Corporate Debtor has further contended that JHL is a solvent and asset rich company and only facing temporary liquidity crunch. JHL was incorporated in October 2012.It is operating a 525 bedded tertiary care multi-speciality hospital at Noida, an 85 bedded Hospital at Anoopshahar (U.P.) and a 205 bedded hospital at Chitta (U.P.). In a short period, it has established itself as a leading hospital with over 900 Liver & Kidney Transplants. The Noida Hospital, being a leading healthcare service provider, also offers multi

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super specialty services to foreign patients and thus helps in earning foreign exchange.

(xiii) The present valuation of assets of JHL is estimated between Rs.1,200-1,500 Crores; whereas the total principal outstanding debts of lenders as on date is Rs.593 Crores (plus outstanding interest). Thus, the dues of lenders are fully secured.

(xiv) Corporate Debtor further contends that it has capability of meeting expenses by generating sufficient revenue which is evident from the statement from FY 2014-15 till FY 2021-22. while operations/revenue during the FY 19-20 and 20-21 were badly affected due to corona pandemic, there has been a quantum jump in revenue during FY 2021-22 and the same are expected to improve further during FY 2022-23.

(xv) Corporate Debtor further contended that the applicant/ petitioner has violated the contractual terms of escrow agreement and thereby created liquidity problems for the Corporate Debtor. The

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Financial Creditor and JHL have executed an Escrow Agreement dated 12.12.2013 ["Escrow Agreement',] which stipulates that all the receivables by JHL would be collected in separate account, called Escrow Account, to be maintained with YES Bank at its Chanakyapuri Branch at New Delhi. As per the clause 3.4 of the Escrow Agreement, the waterfall mechanism is meant for utilization of funds in the Escrow Account. The Applicant followed the agreed Waterfall Mechanism till December 2017. However, from January 2018, the Bank unilaterally and illegally started to auto debit the interest amount in breach of above arrangement without any notice of default to JHL [Clause 4.1] and without first taking recourse to funds lying in Debt Service Reserve Account (DSRA) as per Clause 16.3 of the Facility Agreement. The default occurred on 01.02.2019 i.e. one year after the date when the Applicant started violating the Waterfall Mechanism.

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(xvi) As a consequence of this, JHL was not able to meet its statutory liabilities and operational expenses. The JHL was constrained to issue various letters informing the Applicant, inter alia, that continuous debits by the Applicant to service its own debt has impacted Jaypee Healthcare's Statutory Liabilities and Operational Expenses.

(xvii) It has also been submitted that operations/revenue of the Corporate Debtor during the FY 2019-20 and 2020-21 were badly affected due to corona pandemic but there is a quantum jump in revenue during FY 2021-2022 and the same are expected to improve further during FY 2022-2023 and thus submitted that JHL is capable of generating sufficient revenue to meet its commitments to pay its debts.

(xviii) RBI Circular dated 07.06.2019 titled as "Prudential Framework for Resolution of Stressed Assets" and stated that JHL has submitted three restructuring proposals dated 02.07.2019, 15.07.2019 and

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09.10.2019 which were in conformity with the RBI Guidelines and no haircut was proposed but still all the proposals were rejected arbitrarily and summarily on the same day on which the proposals were placed for consideration in Lenders' Meeting dated 09.07.2019, 08.08.2019 and 18.10.2019 on the ground of "uncertainty of implementation" and "plan would not result in immediate up gradation of NPA.

(xix) It is further submitted that the liquidity problems of JHL can be resolved if JHL restructuring proposal is approved within the guidelines stated in RBI circular and further referred to Clause 6,9 and 13 of the Circular and submitted that RBI's Circular mainly lays emphasis on resolution of Borrower's financial difficulty and the initiation of insolvency proceedings or recovery is a measure of last resort. It is further submitted that the main reason for rejecting resolution proposal was that the petitioner was interested to handover the hospitals to Nayati Health

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Care under O&M Arrangement whose proposals were considered in Lenders Meetings dated 09.07.2019 and 08,08,2019 but the same was not considered to be feasible due to not resulting in immediate upgradation of account and may lead to impairment of loans as it was informed to the Corporate Debtor rejecting its proposal for resolving the debt by through Nayati Hospital.

12. In view of the details and facts submitted in the Reply as discussed above, the Corporate Debtor prayed for not admitting this Petition/Application and/or dismiss it and be further pleased to initiate proceedings under section 65 of I&B Code, 2016 against the Applicant/Petitioner for filing the present Petition/Application for the sole purpose of recovery as rejection of restructuring proposal is in total disregard to RBI Circular dated 07.06.2019 and therefore, the Applicant/Petitioner is interested in recovery of their dues and not rehabilitation of the stressed company so as to preserve and maximise its value, hence in view of the

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Corporate Debtor, the present Application/Petition is filed with malicious intention in abuse of the legal process.

REJOINER ON BEHALF OF THE FINANCIAL CREDITOR

13. A Rejoinder has been filed by the Applicant on 18.11.2021 countering all the contentions raised in the Reply of the Corporate Debtor.

(i) The Applicant asserts that the Corporate Debtor has openly acknowledged its failure to meet its repayment obligations according to the terms of the facilities provided to it on Page 13 of the Reply. The legal stance, as established by the Hon'ble Supreme Court, has been explicitly confirmed in the case of **Innoventive Industries Ltd. v. ICICI Bank Ltd. (2018) 1 SCC 407 ("Innoventive Judgment")** and in numerous subsequent judgments. These rulings conclude that when adjudicating an application under Section 7 of the Code, this Tribunal's sole responsibility is to ascertain the existence of a default as specified in the Code. Once the Tribunal confirms that the Corporate

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Debtor is in default, it must admit the petition and commence the corporate insolvency resolution process ("CIR Process").

(ii) The Applicant further asserted that the Apex Court clarified in its recent decision in **Ebix Singapore Private Limited v. Committee of Creditors of Educomp Solutions Ltd. & Anr. Civil Appeal No.3224 of 2020** that this Hon'ble Tribunal does not possess any equity jurisdiction. Accordingly, it is established law that once the Adjudicating Authority has verified the existence of a debt and a default exceeding the required threshold as per the provisions of the Code, and in the absence of any bar on the Section 7 Application, the Authority must admit the petition.

(iii) It is further stated by the Applicant that in this case, the Corporate Debtor has admittedly defaulted, so this Hon'ble Tribunal should admit the Section 7 Application and the contents of the Reply should be

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disregarded on this ground alone. Additionally, Section 7(4) of the Code mandates that the existence of default be determined within 14 days of receiving the Section 7 application. Unfortunately, the current application concerning vital health infrastructure has been pending for two years.

(iv) The Hon'ble Supreme Court, in the Innoventive Judgment, held that the Adjudicating Authority must ensure that the determination of default is conducted promptly, as the objective of speedy resolution is paramount under the Code. The Applicant has also relied on the recent judgment of Ebix Singapore Private Limited v. Committee of Creditors of Educomp Solutions Limited & Anr. 2021 SCC Online SC 707, wherein the Hon'ble Supreme Court extensively observed the relevant paragraphs of the Bankruptcy Law Reforms Committee Report dated November 4, 2015, and various judgments such as the judgment in Essar Steel India Ltd. Committee of Creditors v. Satish

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Kumar Gupta, (2020) 8 SCC 531, to emphasize that time is of the essence and the rationale behind the introduction of the Code was to ensure timely resolution of stressed assets.

(v) As regards the Kensington Judgment, it is submitted by the Applicant that the directions of the Hon'ble Supreme Court in Paragraphs 141 and 142 were made in the context of the resolution plan submitted by NBCC in respect of JIL. The understanding mentioned in Paragraph 141 of the said judgment was proposed between NBCC and the Applicant and was subject to certain conditions, including the final approval of the resolution plan submitted by NBCC.

(vi) As per the Kensington Judgment, the Hon'ble Supreme Court remanded the plan approval process back to the Committee of Creditors of JIL, which is holding company of the Corporate Debtor. Consequently, fresh resolution plans were submitted by NBCC and Suraksha. On June 10, 2021, the

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Committee of Creditors of JIL rejected the fresh resolution plan submitted by NBCC, while Suraksha's plan was approved and is currently pending approval before the NCLT, Principal Bench. Thus, the applicant claims that any submissions regarding the directions in Paragraphs 141 and 142 of the Jaypee Judgment affecting the Section 7 Application are without merit due to subsequent events and the fact that the resolution plan of NBCC has not been approved by the Committee of CreditoRs.Besides the understanding between the Financial Creditor and NBCC was subject to certain timelines and the approval process outlined therein and the same has already expired, especially when resolution plan of NBCC was not approved by COC of JIL.

(vii) The Applicant asserts that the approved resolution plan for JIL submitted by Suraksha does not, under any circumstances, prevent JHL's lenders from exercising their rights against the Corporate Debtor,

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including filing the current Section 7 Application. Therefore, Suraksha's resolution plan, which has now been approved by the Committee of Creditors and, if sanctioned by the NCLT, Principal Bench, will become binding on the stakeholders, does not in any way limit the Financial Creditor's ability to initiate or continue the insolvency resolution process against the Corporate Debtor. Even if such a restriction had been included in JIL's resolution plan, it would have violated the statutory rights of the Applicant with respect to the Corporate Debtor, which is a distinct legal entity. Therefore, it is submitted in the Rejoinder that the Corporate Debtor's argument that admitting the Section 7 Application would conflict with the Kensington Judgment is unfounded. Thus, in view of the Applicant the admission of this Application/Petition would not be in conflict with the Kensington Judgment, hence should be disregarded in the light of the facts as explained above.

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(viii) Against the argument of the Corporate Debtor that it is financially stable with assets valued between Rs.1200-1500 crores and starting the CIRP against the Corporate Debtor will negatively affect the general welfare, potentially leading to the loss of doctors and other staff, and disrupting the supply of consumables, it is submitted in the Rejoinder that initiating the CIRP will not harm any stakeholder of the Corporate Debtor. In fact, the purpose of the I & B Code is to preserve and maximize the value of the Corporate Debtor's assets and to ensure that all efforts are made to resolve its debts promptly while keeping the Corporate Debtor operational.

(ix) As regards the argument of the Corporate Debtor being financially viable, the Applicant has showed that the Corporate Debtor has frequently reached out to JIL (in its capacity as a shareholder/promoter) for financial assistance and has struggled to meet its basic

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operational costs. To support this claim, the Applicant has produced additional facts.

a. The Corporate Debtor has not been able to service its electricity dues since January 2019 and an amount of Rs.16.02 crores towards electricity expenses was payable to JIL, as on 29 July 2021. In this regard, JIL issued a letter to the Corporate Debtor on 4 October, 2019 seeking payment of the outstanding electricity dues payable to it. Subsequently, on 29 July, 2021, another letter was issued by JIL seeking payment of outstanding dues of approximately Rs.16.02 crores towards electricity payable by the Corporate Debtor since January 2019.

b. A meeting of the lenders for the Corporate Debtor was convened on 8 August 2019, wherein it was highlighted that owing to the liquidity crunch being faced by the Corporate Debtor, salaries to doctors and other paramedic

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staff had not been paid which led to the attrition of 69 doctors and 336 nurses. Further, the lenders were also informed that the entire Liver Transplant team, which generated a revenue of about Rs.2 crores alone, had left the Corporate Debtor.

c. On 25 April 2020, the Corporate Debtor wrote to the Internal Monitoring Committee of JIL seeking financial assistance of an amount of Rs.7.04 crores for payment of salaries to doctors, paramedics and other service providers on account of insufficiency of cash flow.

d. On 21 November 2020, a Joint Lenders Meeting was held where it was proposed to start holding/tagging 7.50% of the Corporate Debtor's revenue. However, on 31 December 2020, due to a liquidity crunch faced by the Corporate Debtor, a request for deferment of the tagging was made to the lendeRs.The lenders

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were informed that the ongoing Covid-19 pandemic had caused a significant downturn due to restrictions on international patients. Subsequently, on 11 January 2021, another request for deferment of tagging was made.

e. On 24 May 2021, the Corporate Debtor wrote to the Resolution Professional of JIL seeking financial support of approximately Rs.20 crores to clear overdue salaries, pharmacy expenses, statutory dues, and payments to implant suppliers. A copy of the letter dated 24 May 2021 from the Corporate Debtor to the Resolution Professional of JIL is annexed as ANNEXURE R/5 to the rejoinder.

(x) Thus, after producing these facts, the Applicant claims that the Corporate Debtor has been facing monetary issues for a long time and has not been able to resolve them to date. The Applicant also averred that the argument that the pandemic further adversely affected

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the Corporate Debtor should be disregarded, as there was an increased demand for medical services during the pandemic. According to the Corporate Debtor's own admission in its letter dated 25 April 2020, it had been providing medical services to COVID patients. This should have led to an increase in revenue. However, the information provided by the Corporate Debtor in its presentation on 6 May 2021 revealed an underutilization of hospitals under its control, with an abysmally low occupancy rate of 38% in FY 2021. This indicates inadequate management of the Corporate Debtor's affairs.

(xi) The Applicant further goes on to state that the limited functioning capacity of the Corporate Debtor directly impacts the livelihoods of its employees, who depend on the viable continuity of its operations. Therefore, admitting the Section 7 Application and placing the Corporate Debtor's affairs in the hands of a competent professional and new management, who will work to

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revive it in a timely manner, would be in the best interest of the employees. Additionally, it would benefit the public, who are the ultimate beneficiaries of the Corporate Debtor's hospitals, especially in the current climate where maintaining the country's health infrastructure is of utmost importance.

(xii) As regards the allegation of the Corporate Debtor that the Applicant did not adhere to the RBI Circular's requirements, arguing that no reasons were given for rejecting the resolution proposal submitted by the Corporate Debtor, it has been submitted in the Rejoinder that a cursory review of the said RBI Circular shows no requirement to provide reasons for rejecting a restructuring proposal is needed. Nevertheless, during a consortium meeting on July 9, 2019, the lenders considered the resolution proposal submitted by the Corporate Debtor. It is pointed out that the proposal included splitting its debt obligations into sustainable debt, long-term instruments, and

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compulsorily convertible preference shares (CCPS). After deliberation, the consortium of lenders found the proposal commercially unviable because it relied on uncertain events, such as asset monetization over two years, and involved converting debt into CCPS. Therefore, the lenders, using their commercial judgment and discretion, rejected the resolution plan. It is also pointed out that the rejection with reasons thereof were communicated in the presence of the Corporate Debtor's key managerial personnel. Therefore, any claims about the failure to provide reasons for the rejection of the resolution proposal are unfounded and should be dismissed.

(xiii) The Applicant further emphasised that the right to proceed under Section 7 of the Code is a statutory right that cannot be overridden by the stipulations of the RBI Circular, particularly due to the non obstante provisions in Section 238 of the Code. In this regard, reliance has been placed by the Applicant on the

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decision of the **Hon'ble National Company Law Appellate Tribunal in Ankit Patni v. State Bank of India & Anr. 2018 SCC Online NCLAT 789**, where it was observed that RBI circulars cannot interfere with the statutory remedies available to parties under the Code.

(xiv) Against the argument of the Corporate Debtor that the Escrow Agreement executed between the Corporate Debtor and the Applicant has been violated by not following a 'Waterfall Mechanism' for the allocation of funds received by the Corporate Debtor, which was followed by the Applicant until 2018, and as alleged that the Applicant began auto-debiting amounts from the Corporate Debtor's account towards interest payable to itself without providing any written notice of default to the Corporate Debtor, which prevented the Corporate Debtor from meeting its statutory liabilities and operational expenses, thereby affecting its profitability and cash flows, it has been submitted

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in the Rejoinder that Clause 4.1 of the Escrow Agreement permits the adjustment of dues payable to the Applicant without adhering to the waterfall mechanism in the event of a default by the Corporate Debtor. The relevant clause is reproduced below for ease of reference:

"4.1. Notwithstanding any rights of the borrower under this Agreement, if the Agent notifies the Account Bank that ***an Event of Default is likely to occur or has occurred, then, over the Agent shall immediately assume sole control over the Escrow Account and exclusively exercise all rights of the Borrower in relation to Escrow Account. All deposits in the Escrow Account shall then be used by the Agent towards repayment of the Facility in the manner provided in the Facility Agreement****."*

(xv) In this regard, it is stated that it only started to debit the amount after the Corporate Debtor defaulted on its obligations as per the repayment plan, indicating that the Corporate Debtor was already not in a position to meet its statutory liabilities. The debits were towards the repayment of facilities that were due and payable and critical payments towards sustaining hospital operations. The applicant claims that the allegation

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that the liquidity crunch faced by the Corporate Debtor is due to the debits from the Escrow Account is merely an afterthought aimed at escaping liability by the Corporate Debtor and should thus be disregarded. It is also pointed out by the Applicant that operation of hospital continued despite the allegations of the Corporate Debtor of violating Escrow Agreement.

(xvi) Against the argument of the Corporate Debtor that the Section 7 Application has been filed for recovery of outstanding debt after rejecting the Debtor's restructuring proposal moved under the RBI Circular and refused to provide further financial assistance of Rs.15 crores and raising contention for taking action against the Applicant under Section 65 of the I & B Code, it is submitted in the Rejoinder that the lenders are not obligated to accept a resolution proposal mechanically. It is reiterated that no Borrower has the right to demand consideration of its restructuring

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proposal. Lenders are free to use their commercial judgment to determine the feasibility and viability of the proposed plan. It is further explained that in this case, the lenders reviewed the resolution plan submitted by the Corporate Debtor during their meeting on 9 July 2019 and found it commercially not viable, leading to its rejection. The RBI Circular does not mandate that a resolution plan has to be approved in accordance with its provisions therein.

(xvii) Similarly, the Applicant is not obliged to provide financial assistance to the Corporate Debtor, if it is of opinion that there is no scope of recovery of the same and the asset is not commercially sound. The exercise of such discretion, which is the Applicant's legal right, cannot be construed as using the I & B Code's provisions merely as a recovery tool. The Applicant is simply exercising its statutory right under the Code to initiate the Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor.

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14. In the light of the above submissions made in the Rejoinder countering all the objections raised by the Corporate Debtor in its reply, it has been finally submitted by the Applicant that the Reply of the Corporate Debtor ought to be disregarded and Section 7 Application ought to be admitted.

15. After considering the Reply of the Corporate Debtor as discussed in para 11 of this order and Rejoinder of the Applicant discussed in para 13 of this order and considering the fact that the Resolution Plan of JIL was under consideration at the relevant time before the Hon'ble Principal Bench and it has also been noted that as per Hon'ble Supreme Court Judgment in **"Civil Appeal No.3395 of 2020 titled as "Jaypee Kensington Boulevard Apartments Welfare Association & ORs.Vs NBCC (India) Ltd. & Ors.**", the matter of JHL was left for the Resolution by the parties concerned i.e. the lenders of JHL including Yes Bank and the Resolution Applicant of JIL, and JHL to work out a viable solutions and to seek appropriate orders from NCLT as regards mode and modalities on the process carried

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out, and thereafter this Tribunal passed an order dated 27.06.2022 to keep the matter in this Application in abeyance till the order on the Resolution Plan in case of JIL is passed by the Hon'ble Principal Bench. However, the Corporate Debtor has been directed in the said order of 27.06.2022 to ensure the timely payment of the loan instalments as per the available sources with it and work out the suitable plan to extinguish its liabilities otherwise as it is made clear in the said order that on failing to pay the outstanding debt or not being able to work out any suitable plan in this regard, the Applicant/Financial Creditor will be at liberty to take any action as per law with respect to enforcement of any collateral security included in the loan agreement.

16. Against the above order dated 27.06.2022 of this Tribunal, the Applicant Lender Bank filed appeal to Hon'ble NCLAT. During the pendency of this appeal, hearing in this case has been kept on being adjourned till the pronouncement of the

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decision of the NCAT on the appeal against the order dated 27.06.2022 of this tribunal.

SECOND SUPPLEMENTARY REPLY FILED BY THE CORPORATE DEBTOR

17. Meanwhile, the Corporate Debtor filed 2nd Supplementary Reply on 12.09.2023 informing that Yes bank Ltd and J.C Flower Asset Reconstruction Pvt. Ltd executed the Deed of Assignment on 16.12.2022 wherein Yes Bank Ltd assigned the debt in favour of the J.C Flower Asset Reconstruction Pvt. Ltd and it moved an IA No.146/2023 seeking substitution of its name as Financial Creditor in this Application/Petition and the same is allowed vide order dated 06.06.2023 of this tribunal. This fact has already been discussed in para 2 of this order. Now, J. C. Flower stands substituted as Financial Creditor in place of Yes Bank Limited and it will be hereinafter referred in this order as "***Applicant/Financial Creditor/JCF***".

18. It has also been informed in this Supplementary Reply that Plan of Suraksha Realty Ltd. has been approved by the Principal Bench, NCLT Delhi vide order dated 07.03.2023

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wherein, it is ordered that issue of JHL will be discussed and resolved by Suraksha Reality with the Lenders of JHL. The Condition so imposed is stated in clause 23 which is stated below: -

"23. Treatment under the Resolution Plan with respect to the liability on Corporate Debtor with respect to the Jaypee Healthcare Ltd ("JHL"):

All contingent liabilities as more particularly detailed in the information memorandum or appearing in the books of the Corporate Debtor or otherwise, inter-alia including any contingent liabilities relating to guarantee(s), shortfall undertaking or any other similar instrument provided by the Corporate Debtor to secure the financial indebtedness of Jaypee Healthcare Limited or any other person, along with any related legal proceedings (including criminal proceedings), if any, shall stand irrevocably and unconditionally abated, and extinguished in perpetuity on and in with effect from date of approval of Resolution Plan by the Adjudicating Authority.

The Corporate Debtor shall have right of subrogation against its subsidiary JHL, in the event the pledged shares owned by the Corporate Debtor are enforced and monies are recovered by the lenders of JHL.

It is clarified that, without prejudice to the abovementioned treatment, the Resolution Applicants is in discussion with Yes Bank to explore possibility of mutually acceptable amicable solution...."

19. From above para in the order dated 07.03.2023 of the Principal Bench NCLT, New Delhi in the matter relating to JHL, it is clear that no mutually acceptable amicable

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solution has been arrived at between Suraksha Realty Ltd. and Yes Bank Ltd.

20. Besides above, it is also stated that this order has been challenged by various stake holders, which is pending. It is pointed out that Suraksha Reality Ltd. in *Annexure -VI (Definitions) of the Resolution Plan has expressly stated the "Approval Date" shall mean date on which the order of the Adjudicating Authority under section 31(1) of the Code has been passed, or the order of the National Company Law Appellate Tribunal or the Supreme Court, if an appeal is made to such tribunal or court against the order of the Adjudicating Authority, having achieved finality."* In view of this condition, the "resolution plan", though approved by the Principal Bench, appears to be in suspended animation in view of the Corporate Debtor and may not be said to have been "approved" as per the above condition. It is also otherwise argued that the order dated 07.03.3023 cannot be said to have attained finality in view of pendency of various appeals against this order. In view of these facts and circumstances

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of the case, it has been prayed to keep the present Application in abeyance till the issues in appeal against the order dated 07.03.2023 are finally resolved.

21. It is also informed that the Corporate Debtor in compliance of the above order dated 27.06.2022, submitted a Restructuring Plan to Yes Bank on 27.07.2022, which is pending for approval with lenders.

22. With respect to pledging of shares of JHL, it is submitted that Corporate Debtor earlier at the time of taking the loans was wholly owned Subsidiary of the JIL. JIL held 42,75.00.000 shares of JHL. Out of these shares, JIL pledged 27,21,09,231 shares which amounts to 63.65% of total shareholding, in favour of the security trustee of Yes Bank Ltd. and consortium of banks by way of security of credit facilities provided by them to JHL.

23. These said pledged shares had been invoked by the Yes Bank on 10.03.2023 as well as by the Consortium Members through their Security Trustee VISTRA due to continuing default by the Corporate Debtor. Now, upon enforcing the

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pledge, the 27,21,09,231 shares (constituting 63.65% of the total issued equity share capital of JHL) have been transferred to the Security Trustees, who are now the beneficial owners of the pledged shares as per the Depository's records. Consequently, JIL is now the beneficial owner of only 15,53,90,769 shares (36.35% of the total issued capital of JHCL) and can exercise voting power solely for these unencumbered shares. The lenders, through their Security Trustee, have the right to exercise voting power corresponding to 63.65% of the shares. Therefore, the majority voting power in JHL now resides with JCF, the assignee of Yes Bank and other lenders, JHCL is no longer a subsidiary of JIL. However, JCF has not yet sold the aforementioned pledged shares.

24. Therefore, the Corporate Debtor contends that the Financial Creditor i.e JCF is no longer the financial creditor of JHCL and hence, not entitled to pursue the present petition.

25. The Corporate Debtor has also placed his reliance on the decision of the Hon'ble Supreme Court in ***Civil Appeal***

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No.4633 of 2021 in case of Vidarbha Industries Power Limited vs Axis Bank Ltd. dated 12.07.2022 wherein as stated by the Corporate Debtor, the word "***may***" in Section 7(5) of the I & B Code has been analysed making it clear that even if default is assumed, the Tribunal may refuse to admit the Application, if the facts and circumstances of the case so warrant. It is further contended that this judgment can be applied in the present case as the Good Reasons exist in this case to exercise discretion u/s 7(5)(a) and refuse admission of the present Petition/Application keeping in view the law laid down by the Hon'ble Supreme Court in the above judgment.

26. The above 2nd Supplementary Reply has been taken up for consideration in the hearing held on 19.09.2023 in which the Ld. Counsel representing the Financial Creditor, JCF sought a short adjournment to file objections with respect to this Supplementary Reply filed by the Corporate Debtor.

27. Meanwhile, as regards the appeal filed against the order dated 27.06.2022 passed by this tribunal keeping the matter

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in this Application in abeyance, the Financial Creditor has filed an additional affidavit on 30.10.2023 wherein it has submitted that the judgment dated 13.10.2023 is passed by the Hon'ble NCLAT in the aforesaid appeal. The Hon'ble Appellate Authority has held as under: -

"....

11. In the light of the judgments of the Hon'ble Supreme Court in the matter of Jaypee Kensington Boulevard Apartments Welfare Association & ORs.(supra) and this Tribunal in Alok Industries (supra), we are of the clear view that now there is no bar to hear the section 7 application filed by Yes Bank, which is now being pursued by its assignee J.C. Flowers Asset Reconstruction Pvt. Ltd., which can be considered and adjudicated upon.

12. Be that as it may, the facts remains that the proceedings before the Adjudicating Authority in CP (IB) No.512/ALD/2019 filed by the Appellant under Section 7 of the Code has restarted.

13. The present appeal has been filed by the Appellant being aggrieved that his application has kept in abeyance by recording reasons which are not germane to the issue involved but once the proceedings has again been started, we deem it appropriate to dispose of this appeal with the observation that the finding recorded in the impugned order shall not come in way either of the parties for the purpose of decision of Section 7 application and all the issues shall remain open.

...."

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28. In view of the above order of the Hon'ble NCLAT, proceedings in Section 7 Application in this case has been started by us and 2nd Supplementary Reply filed by the Corporate Debtor as already been discussed in foregoing paras and objections filed by the Financial Debtor against it discussed in subsequent para have been considered by us to deicide the present Section 7 Application.

OBJECTIONS FILED BY THE FINANCIAL CREDITOR ON 2ND SUPPLEMENTARY REPLY OF THE CORPORATE DEBTOR

29. The Applicant has filed objections on 26.09.2023 against the 2nd Supplementary Reply of the Corporate Debtor denying all averments, submissions and contentions raised therein.

30. With respect to the invocation of pledged shares by the Security Trustee, it is averred by the Applicant Financial Creditor that mere invocation of pledged shares by the security trustee on behalf of the Applicant and the consortium of lenders does not mean that the debt payable to the Applicant stands satisfied and the Applicant is no more a financial creditor of the Corporate Debtor. Until the time the shares are sold and an amount equivalent to the

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total debt repayable to the Applicant is redeemed in full, the Applicant will continue to be a Financial Creditor of the Corporate Debtor. As per the Applicant Financial Creditor, the contention raised by the Corporate Debtor are in direct contravention to the settled proposition of law as expounded by various forums which clearly states that the power of the pawnee to exercise its power of sale is its sole discretion and till the pawnee exercise his right to sell the pawn after giving notice to pawner, and apply the net proceeds of the sale against the debt, the debt is not discharged. Furthermore, it has also been stated that mere transfer of pledged shares in the name of the 'beneficial owner' is different from the 'actual sale' of the pledged shares and cannot be treated as a single transaction.

31. As argued by the Applicant, this position has been well explained by the Hon'ble Supreme Court in the matter of ***PTC (India) Financial Services Ltd. v. Venkateswarlu Kari*, (2022) 9 SCC 704 : (2023) 1 SCC (Civ) 490 : 2022 SCC OnLine SC 608 at page 731** wherein it was held that

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"....

38. *Relying upon Lallan Prasad [Lallan Prasad v. Rahmat Ali, AIR 1967 SC 1322] and Bank of Bihar [Bank of Bihar v. State of Bihar, (1972) 3 SCC 196], this Court in Balkrishan Gupta v. Swadeshi Polytex Ltd. [Balkrishan Gupta v. Swadeshi Polytex Ltd., (1985) 2 SCC 167 : 1985 SCC (Tax) 215] has held that under Section 176, if the pawnor makes default in payment of the debt or performance as promised, and in respect of which the goods were pledged, the pawnee may bring a suit on the pawnor upon the debt or promise and may retain the goods pledged as collateral security, or the pawnee may sell the things pledged on giving the pawnor reasonable notice of sale.*

39. *Several High Courts in F. Nanak Chand v. Lal Chand [F. Nanak Chand v. Lal Chand, 1958 SCC OnLine Punj 6], Bank of Maharashtra v. Racmann Auto (P) Ltd. [Bank of Maharashtra v. Racmann Auto (P) Ltd., 1991 SCC OnLine Del 232 : AIR 1991 Del 278] and Rani Leasing & Finance Ltd. v. Sanjay Khemani [Rani Leasing & Finance Ltd. v. Sanjay Khemani, 2015 SCC OnLine Cal 450] have held that while the pawnee has a right to sell the goods after giving notice to the pawnor, he is not bound to sell at any particular time. The power of sale conferred on the pawnee is expressly for his benefit, and it is his sole discretion to exercise the power of sale or otherwise. If the pawnee does not exercise that discretion, no blame can be put on him. Even where the value of the goods deteriorates due to time, no relief can be granted to the pawnor against the pawnee as the pawnor is legally bound to clear the debt and obtain possession of the pawned goods.*

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105. *Regulation 58(8) entitles the pawnee to record himself as a "beneficial owner" in place of the pawnor. This does not result in an "actual sale". The pawnee does not receive any money from such registration which he can adjust against the debt due. The pledge creates special rights including the right to sell the pawn to a third party and adjust the sale proceeds towards the debt in terms of Section 176 of the Contract Act. The reasoning that prior notice under Section 176 of the Contract Act would interfere with transparency and certainty in the securities market and render fatal blow to the Depositories Act and the 1996 Regulations is far-fetched as it fails to notice that the right of the pawnee is to realise money on sale of the security. The objective of the pledge is not to purchase the security. Purchase by self, as held above, is conversion and does not extinguish the pledge or right of the pawnor to redeem the pledge. Equally, it may be a disincentive for both the pawnor and the pawnee in many cases, if we accept this interpretation and ratio, which would inhibit them from entering into a transaction creating a pledge. Difficulties and disputes regarding price, valuation, right to redemption, etc. could invariably arise. There would also be difficulties in case the dematerialised securities are not traded as in the present case.*

....

119. *We would, without hesitation, therefore hold that on becoming the "beneficial owner" in the records of the "depository", the pawnee had complied with the procedural requirement of Regulation 58(8) to enforce the right to sell the shares. Thereafter, such a sale should be made according to Sections 176 and 177 of the Contract Act. Violation of the said provisions, if made by PIFSL, would have its consequences as per the law. Pawn has not been sold and there is no violation of the Contract Act*

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or for that matter the Depositories Act and the 1996 Regulations. PIFSL has not overlooked its obligations under Sections 176 and 177 of the Contract Act by relying upon sub-regulation (8) of Regulation 58, which has an entirely different object and purpose. Recording change in the register of the "depository", whereby PIFSL as the pawnee has become the "beneficial owner", is only to enable the pawnee to sell and transfer the shares in accordance with the Depositories Act and the 1996 Regulations. The object and purpose of sub-regulation (8) of Regulation 58 is not to nullify the obligation of MHPL i.e. the pawnor, and PIFSL i.e. the pawnee, under the Contract Act but to enable PIFSL to exercise its rights under Section 176. It also follows that MHPL is entitled to redeem the pledge before the sale to a third party is made.

....

***120.** In view of the aforesaid findings, it has to be held that registration of the pawn, that is, the dematerialised shares, in favour of PIFSL as the "beneficial owner" does not have the effect of sale of shares by the pawnee. The pledge has not been discharged or satisfied either in full or in part. PIFSL is not required to account for any sale proceeds which are to be applied to the debt on the "actual sale". The two options available to PIFSL as the pawnee under Section 176 of the Contract Act remain and are not exhausted.*

...."

32. On the argument of the Corporate Debtor that the Applicant is no more a Financial Creditor because of becoming beneficial owner of the 63% shares of JHL after invoking them and hence, insolvency proceeding u/s 7 cannot be

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initiated by it, the Applicant Financial Creditor contended that such arguments are not tenable as the proceeding initiated under insolvency is a separate process for insolvency resolution and revival of the Corporate Debtor and cannot be interlinked and confused with the proceedings of enforcement of security interest which is primarily undertaken for recovery in case of default.

33. As regards keeping the present proceedings in abeyance till the resolution plan of JIL is finalised after the process for the appellate proceedings are completed, it is submitted by the Applicant that after approval of the resolution plan submitted by Suraksha Realty Limited in JIL vide order dated 07.03.2023, the moratorium imposed in JIL proceedings was lifted by the Ld. Adjudicating Authority on 07.03.2023 and there will not be any hindrance in transfer of shares of the Corporate Debtor held by JIL and hence, insolvency in respect of the Corporate Debtor i.e. JHL can also be resolved. Now, even the Hon'ble NCLAT vide its order dated 13.10.2023 has allowed the proceedings in present

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Application to continue by observing in the said order that the finding recorded in the impugned order (order dated 27.06.2022 of this tribunal) shall not come in way either of the parties for the purpose of decision of Section 7 application and all the issues shall remain open. Now, there is no ground to keep this proceeding in abeyance and therefore, the proceeding continued duly participated by both, the Financial Creditor as well as the Corporate Debtor.

34. During the course of the proceeding continuing in the present Application after the order dated 13.10.2023 of the Hon'ble NCLAT, an impleadment application IA No.535/2023 has been filed by the Suraksha Reality Limited (Successful Resolution Applicant of JIL) on 25.10.2023 for its impleadment as Respondents in the captioned Petition/Application u/s 7 being a necessary and proper party as recognised by the Hon'ble Supreme Court in terms of the order dated 24.03.2021 in the matter of ***Jaypee Kensington Boulevard Apartments Welfare Association and ORs.Vs. NBCC(India) Ltd & Ors 2022 1 SCC 401***. In

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respect of the IA No.535/2023, a detailed order dated 18.04.2024 has already been passed by this tribunal allowing Suraksha Reality Ltd. to be impleaded as Respondent/Intervener with limited right to intervene for the purpose of enabling them to work out a viable plan/ solution for resolving the debt of the Corporate Debtor i.e. JHL due towards the Financial Creditor i.e. JCF. They participated in the proceedings of the present Application from the date of passing of the order dated 18.04.2024 but no plan for resolving the debt of the Corporate Debtor could be produced by them till the completion of the proceedings in the present Application.

35. With respect to the use of the phrase "*may*" under Section 7(5)(a) of the Code conferring the Hon'ble Tribunal with discretionary power to reject a Section 7 Application even on the determination of existence of a debt and default on the ground of certain reasons termed as good reasons, the Corporate Debtor has placed reliance on the decisions of Hon'ble Supreme Court in case of *Vidarbha Industries Power*

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Ltd. v. Axis Bank Ltd. (2022 SCC Online SC 841) ("Vidarbha Judgment"), Indus Biotech v. Kotak India Venture (Offshore) Fund (2021) 6 SCC 436 ("Indus V. Satabdi Biotech Judgment") and Hytone Merchants Pvt. Ltd. Investments Consultants Pvt. Ltd. CA(AT)(Ins) No.258 of 2021 ("Hytone Judgment") and produced certain financials of the Corporate Debtor to substantiate that the Corporate Debtor is allegedly a financially viable entity.

36. In this regard, it is contended by the Applicant that Corporate Debtor while relying on the *Vidarbha Judgment* has failed to mention that a Review Petition was filed by the Axis Bank Limited and the Hon'ble Supreme Court vide order dated 22.09.2022 while disposing of Review Petition was pleased to limit the observations made in the Vidarbha Judgment to the specific facts of the case.

37. Furthermore, the Hon'ble Supreme Court in the matter of ***M. Suresh Kumar Reddy v Canara Bank & ORs.(2023 SCC OnLine SC 608)*** expressly holds that the decision in ***Vidarbha Judgment*** was limited to the facts of the case and

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cannot be read and understood to take a contrary view to the position of law established by the Hon'ble Supreme Court in ***Innoventive Industries Ltd. v. ICICI Bank Ltd. (2018) 1 SCC 407 ("Innoventive Judgment")*** and ***E.S. Krishnamurthy v. Bharath Hi-Tech Builders (P) Ltd., (2022) 3 SCC 161 ("ES Krishnamurthy Judgment")***.

38. In compliance of the order dated 06.10.2023 passed by this tribunal, the Corporate Debtor has filed additional Affidavit wherein Audited Annual Accounts of the FY 2020-21, 2021-2022 and 2022-23 are annexed as Annexure-1, 2 and 3 respectively.

39. Details of overdue interest on borrowings amounting to Rs.14,154.51 lakhs reflected in Note no.21 to the standalone financial statements which were outstanding as at 31st March, 2021 are given below:

Name of Lender	**Interest Default (In Rs.Lakhs)**	**Period of Default**
South Indian Bank (Taken over by ARICIL)	723.72	701 days

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Punjab National Bank	1,231.60	670 days
Union Bank of India	1,785.82	670 days
Bank of Baroda	1,116.31	640 days
Exim Bank	1,243.89	731 days
Yes Bank	6,928.35	790 days
Yes Bank (Working Capital)	1,124.83	503 days
Total	14,154.51	

40. Details of overdue principal repayments of borrowings amounting to Rs.43,504.98 lakhs reflected in Note no.21 to the standalone financial statements which were outstanding as at 31st March, 2021 are given below:

Name of Lender	**Principal Default (In Rs.Lakhs)**	**Period of Default**
South Indian Bank (Taken over by ARICIL)	419.43	701 days
Punjab National Bank	867.12	790 days
Union Bank of India	1,350.00	790 days
Bank of Baroda	4,848.83	790 days
Exim Bank	808.36	701 days

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Yes Bank	30,324.86	609 days
Yes Bank (Working Capital)	4,886.39	503 days
Total	**43,504.98**	

41. Details of overdue principal repayments and overdue interest on borrowings from banks & financial institutions amounting to Rs.45,844.61 Lakhs and Rs.22,955.16 Lakhs respectively reflected in Note No.19A to the standalone financial statements which were outstanding as at 31st March, 2022 are given below:

Nature of borrowing including debt securities	**Name of Lender**	**Amount not paid on due date (Rs.in lakhs)**	**Whether Principal or Interest**	**No.of days delay (upto the date of report)**
Term Loan	South Indian Bank (Taken over by ARCIL)	719.43	Principal	1120 days
Term Loan	Punjab National Bank	1,467.12	Principal	1209 days
Term Loan	Union Bank of India	2,250.00	Principal	1209 days
Term Loan	Bank of Baroda	4,848.83	Principal	1209 days
Term Loan	Exim Bank	1,347.98	Principal	936 days
Term Loan	Yes Bank	30,324.86	Principal	1028 days

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Working Capital	Yes Bank	4,886.39	Principal	906 days
Total Principal Overdue		**45,844.61**		
Term Loan	South Indian Bank (Taken over by ARCIL)	1,181.56	Interest	1089 days
Term Loan	Punjab National Bank	1,979.64	Interest	1059 days
Term Loan	Union Bank of India	2,998.41	Interest	1028 days
Term Loan	Bank of Baroda	1,856.52	Interest	1028 days
Term Loan	Exim Bank	2,020.24	Interest	1150 days
Term Loan	Yes Bank	10,617.86	Interest	1209 days
Working Capital	Yes Bank	2,300.93	Interest	906 days
Total Interest Overdue		**22,955.16**		
Total Principal and Interest Overdue		**68,799.77**		

42. Details of overdue principal repayments and overdue interest on borrowings from banks & financial institutions amounting to Rs.50,597.81 Lakhs and Rs.33,141.48 Lakhs respectively reflected in Note No.19B to the standalone financial statements which were outstanding as at 31st March, 2023 are given below:

Nature of borrowing including debt securities	**Name of Lender**	**Amount not paid on due date**	**Whether Principal or Interest**	**No.of days delay (upto the**

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		(Rs.in lakhs)		date of report)
Term Loan	South Indian Bank (Taken over by ARCIL)	1,081.93	Principal	1481 days
Term Loan	Punjab National Bank	2,192.12	Principal	1570 days
Term Loan	Union Bank of India	3,337.50	Principal	1570 days
Term Loan	Bank of Baroda	4,829.80	Principal	1570 days
Term Loan	Exim Bank	4,457.70	Principal	1205 days
Term Loan	Yes Bank (now assigned to J.C. Flower Asset Reconstruction Pvt. Ltd.)	30,229.25	Principal	1297 days
Working Capital	Yes Bank (now assigned to J.C. Flower Asset Reconstruction Pvt. Ltd.)	4,469.51	Principal	1290 days
Total Principal Overdue		**50,597.81**		
Term Loan	South Indian Bank (Taken over by ARCIL)	1,611.27	Interest	1328 days
Term Loan	Punjab National Bank	2,569.86	Interest	1267 days
Term Loan	Union Bank of India	4,131.38	Interest	1267 days
Term Loan	Bank of Baroda	3,660.10	Interest	1267 days
Term Loan	Exim Bank	2,969.35	Interest	1511 days
Term Loan	Yes Bank (now assigned to J.C. Flower Asset Reconstruction Pvt. Ltd.)	14,072.38	Interest	1236 days

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Working Capital	Yes Bank (now assigned to J.C. Flower Asset Reconstruction Pvt. Ltd.)	4,127.14	Interest	1236 days
Total Interest Overdue		**33,141.48**		
Total Principal and Interest Overdue		**83,739.29**		

43. The above details clearly demonstrate that the Corporate Debtor is in default of huge amount of debts, principal as well as interest amount due towards various banks including the Lender Bank in this case i.e. Yeas Bank Ltd. whose debt is assigned to J.C. Flowers Asset Reconstruction Pvt Ltd which is the Financial Creditor in the present Application making a prayer for admitting the Corporate Debtor for CIRP due to default in repayment of huge amount of debt due to it and the same has been duly found reflected in its audited balance sheet as reproduced above.

FINDINGS AND ORDER

44. We have heard the arguments of Learned Counsels appearing for both Applicant Financial Creditor and Respondent Corporate Debtor and perused the pleadings,

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records, written submissions and exhibits/annexures marked thereto. Having heard the Learned Advocates appearing for the parties and on perusal of the records, exhibits/annexures and after considering arguments advanced by respective Learned Advocates, the main issues which are before us to be decided in respect of the present Application u/s 7 are:

(I) Whether there is debt and default within the meaning of I &B Code, 2016.

(II) Whether invocation of pledged shares by the Financial Creditor make it to lose the status of being Financial Creditor making this Application infructuous and stayed till the invoked pledged shares are sold.

(III) Whether proceeding U/s 7 to be stayed till SRA of JIL provide amicable solution to resolve the debt of JPL.

(IV) Applicability of the decision of the Hon'ble Supreme Court in Vidarbha Industries Power Ltd. vs. Axis Bank Ltd. (Civil Appeal No.4633 of 2021) dated 12.07.2022.

45. It is an admitted fact that the Corporate Debtor has availed the Financial Facilities in form of taking various loans and other working capital facilities from the Financial Creditor by entering into loan agreements. The loans of Rs.400 crores are sanctioned through 05 different facility agreements, the

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details of which have already been discussed in para 3 of this order. The total amount of default as stated in Part-IV of the application is Rs.378.02 crore which includes Principal Amount as well as outstanding interest and dates of default as stated in Part-IV of the Application is 01.02.2019 due to non-repayment of monthly interest of the Term Loan 1, 2, 3 and 4 and the Cash Credit/ Working Capital Facility was recalled vide loan recall notice dated 08.11.2019. All supporting necessary documents as required under Part V of the Application in Form-1 for section 7 application under IBC, have been filed by the Financial Creditor. The Record of Default has been filed by the Financial Creditor in the NeSL shows the date of default as 01.02.2019. The account of the Corporate Debtor was classified as NPA on 02.05.2019. The entire credit facilities were recalled by the Lender Bank i.e. Yes Bank Ltd vide Loan Recall Notice dated 08.11.2019.

46. Later on, the debt was assigned to the J.C Flowers Assets Reconstruction Private Limited vide Deed of Assignment dated 16.12.2022. Therefore, this tribunal vide order dated

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06.06.2023 substituted the Present Financial Creditor in place of Yes Bank Ltd.

(I) WHETHER THERE IS DEBT AND DEFAULT WITHIN THE MEANING OF I & B CODE, 2016.

47. The first issue for consideration before this tribunal for the purpose of admission of application under Section 7 of the IBC is whether there is existence of "debt" and "default" committed by the Corporate Debtor.

48. The Ld. Counsel of the Financial Creditor has argued that there is an admitted debt and default which can be easily evident from the submissions made by the Corporate Debtor in its Reply dated 01.11.2021 in Para 3.04(iii) at Page 13 wherein it is stated that *".....the debt of lenders are fully secured. Under these circumstances it will be unwise on the part of the Applicant/ Petitioner to push the company into CIRP just because it has committed default in repayment of its debts due"*. The Corporate Debtor has admitted that credit facilities availed from the Financial Creditor is secured and the default in repayment of the credit facilities is due to the liquidity crunch which is temporary in nature. The debt and

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default further stand corroborated from a perusal of the financial statements of the Corporate Debtor which has been filed by the Corporate Debtor by way of an affidavit dated 14.10.2023. These details are reproduced in para nos. 39 to 43 of this order. Thus, the Corporate Debtor is admittedly in default on repayment of its huge amount of loans of about thousands of crores payable to various banks including the present Financial Creditor, which now have become overdue. Further, as informed by the Financial Creditor, the total amount of debt owed by the Corporate Debtor as on 30.04.2024 is Rs.813 cr. to the Financial Creditor.

49. It is evident from the documents placed on record such as the CARE Ratings dated 31.01.2019, CRILC Report dated 14.11.2019 stating that the JHL was moved to default category and NeSL records as on 08.06.2020 showing that there is default committed by the Corporate Debtor.

50. After considering the entire facts of the case so far discussed and taking into account the decisions of the Apex Court in the cases of *Innoventive Industries Ltd.*, *E.S. Krishnamurthy*

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etc., we are of the considered opinion that in the present case, default on repayment of the debt has occurred and the Section 7 Petition filed by the Financial Creditor is complete providing all the details of debts and default as required in Part IV of the Application in Form 1 and attaching all the necessary supporting documents including ROD from NeSL as required in Part V of the Application. **Considering that all the above criteria are fulfilled as required under the I & B Code, we find that this Application deserves to be admitted u/s 7 for starting CIRP against the Corporate Debtor.**

(II) Whether invocation of pledged shares by the financial creditor make it to lose the status of being financial creditor making this application infructuous and stayed till the invoked pledged shares are sold.

51. In respect of this issue, the Ld. Sr. Counsel of the Corporate Debtor argued that the Corporate Debtor was fully owned subsidiary of JIL at the time of taking the loans of Rs.400 crores from the Lender Bank, which now has been assigned to the extent of outstanding amount of Rs.378 crores to the Financial Creditor. JIL initially held 42,75.00.000 shares of

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JHL i.e. Corporate Debtor. Out of these shares, JIL pledged 27,21,09,231 shares by executing Shares Pledge Agreement as a Security in favour of the security trustee of Yes Bank Ltd. and consortium of banks. These said pledged shares had been invoked by the Yes Bank on 10.03.2023 as well as by the Consortium Members through their Security Trustee VISTRA due to continuing default by the Corporate Debtor. Now, upon enforcing the pledge, the 27,21,09,231 shares (constituting 63.65% of the total issued equity share capital of JHL) have been transferred to the Security Trustees, who are now the beneficial owners of the pledged shares as per the Depository's records. Consequently, JIL is now the beneficial owner of only 15,53,90,769 shares (36.35% of the total issued capital of JHCL) and can exercise voting power solely for these unencumbered shares. The lenders, through their Security Trustee, have the right to exercise voting power corresponding to 63.65% of the shares. Therefore, the majority voting power in JHL now resides with JCF i.e the Financial Creditor, the assignee of Yes Bank and other lenders, JHCL is no longer a subsidiary of JIL. However, JCF

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has not yet sold the aforementioned pledged shares. Therefore, it has been argued that the Financial Creditor i.e JCF is no longer the financial creditor of JHL and hence, not entitled to pursue the present petition.

52. On the above argument that the Applicant is no more a Financial Creditor because of becoming beneficial owner of the 63% shares of JHL after invoking them and hence, insolvency proceeding u/s 7 cannot be initiated by it, the Ld. Sr. Counsel of the Financial Creditor contended that such arguments are not tenable as the proceeding initiated under insolvency are a separate process for insolvency resolution and revival of the Corporate Debtor and cannot be interlinked and confused with the proceedings enforcement of security interest which is primarily undertaken for recovery in case of default. As regards the pledged shares of JHL invoked from JIL, it is argued that the option available with the Financial Creditor as being pawneee as per the section 176 of the Contract Act, 1872 is either to keep the pledged shares as collateral to the outstanding loans or sell

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them in the market after giving notice to the Corporate Debtor being the pawnor. Mere invocation of pledged shares does not mean that the debt payable to the Applicant stands satisfied and the Applicant is no more a financial creditor of the Corporate Debtor. Until the time the shares are sold and an amount equivalent to the total debt repayable to the Applicant is redeemed in full, the Applicant will continue to be a Financial Creditor of the Corporate Debtor. In support of his contention, the Ld. Sr Counsel for Financial Creditor relied upon the decision of the Hon'ble Supreme Court in case of ***PTC (India) Financial Services Ltd. v. Venkateswarlu Kari(supra)*** *(hereinafter referred as '**PTC Judgment'**).*

53. Per Contra, the Ld. Sr. Counsel for the Corporate Debtor has raised the contention that the shares which are invoked on 10.03.2023 are for the purpose of selling them in the market. As per him, the object of invocation of pledged shares is clearly elaborated in judgement passed by the Hon'ble Supreme in ***PTC Judgment in para 105*** wherein it is

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observed that "*Regulation 58(8) of SEBI Regulations entitled the pawnee to record himself as a "beneficial owner" in place of the pawnor and creates special rights including right to sell the pawn to a third party and adjust the sale proceeds towards the debt in terms of Section 176 of the Contract Act".* By quoting from para 119, he submitted that it is also held in this decision that *"We would, without hesitation, therefore hold that on becoming the 'beneficial owner' in the records of the 'depository', the pawnee had complied with the procedural requirement of Regulation 58(8) to enforce the right to sell the shares. Thereafter, such sale should be made according to Section 176 and 177 of the Contract Act".*

54. Corporate Debtor has further raised the contention that pledged shares were invoked on 10.03.2023. Nearly a year has passed, yet Yes Bank (now J.C. Flowers, as the assignee) has not taken any action to sell the pledged shares. The Financial Creditor's (FC) argument that they can hold onto the invoked pledged shares indefinitely due to the absence of a specific timeline is legally unsustainable.

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55. In this respect Corporate Debtor has placed reliance on the judgment passed in ***SEBI Vs. Sunil Krishna Khaitan reported in (2022) 234 Comp. Cas. 525 (SC)*** wherein it is clearly held that where no timeline is laid down in the statute for doing some act, the act must be done within reasonable time. In Para 83 of this Judgment (Page 574-575), the SC has held: *"In the absence of any period of time and limitation prescribed by the enactment, every authority is to exercise power within a reasonable period. What would be reasonable period would depend upon facts of each case, such as whether the violation was hidden and camouflaged and thereby the Board or the authorities did not have any knowledge. Though, no hard and fast rules can be laid down in this regard as determination of the question will depend on the facts of each case, the nature of the statute, the rights and liabilities thereunder and other consequences, including prejudice caused and whether third party rights have been created are relevant factors.....therefore, exercise of power, even when no time is specified, should be done within reasonable time. This prevents miscarriage of justice, misuse*

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and abuse of the power as well as ensures that the violation of the provisions are checked and penalized without delay, thereby effectuating the purpose behind the enactment."

56. The Ld. Counsel representing the Corporate Debtor has argued that ***PTC Judgment*** relied upon by the Financial Creditor is not applicable in the instant case since those cases pertain to obligation of pawnee before invocation of pledge.

57. Ld. Counsel for the Petitioner/Applicant reiterated that it is not mandatory for the Financial Creditor to sell the shares of the JHL in order to recover the outstanding debt but rather has the option to do so at any time. In the current situation, the debt is acknowledged by the Corporate Debtor but merely invocation of the pledged shares and becoming its "beneficial owner" does not lead to repayment of debt. It is discretion of the pawnee/financial creditor in this case as to whether and when to sell the pledged goods/shares. For this purpose, reliance is placed on the order of the Hon'ble Supreme in ***PTC India Judgment.*** It is also argued that the shares of JHL

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being not listed, there are difficulties in determining the price and valuation of these shares, especially when its holding company JIL itself is under the process of insolvency resolution. These shares are not traded on Stock Exchanges as not being listed; it is difficult to find a willing buyer. As selling the pledged shares not being a good option given the fact that the shares are unlisted, the Applicant has thought it prudent to invoke the provision of section 7 of I & B Code for revival of the Company through CIR process, therefore, when a resolution plan takes off and the Corporate Debtor is brought back into the economic mainstream, it is able to repay its debts.

58. We have considered the arguments of both Ld. Sr. Counsels in respect of the effect of invocation of the pledged shares of the Corporate Debtors i.e. JHL held by its holding Company i.e. JIL in the light of the decision of the Hon'ble Supreme Court in case of ***PTC Judgment.***

59. In this regard, after relying on the ***PTC Judgment***, the argument of the Financial Creditor is that invocation of

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shares refers to the act of enforcing a pledge on shares, typically undertaken by a lender or financial institution when the borrower defaults on their loan or obligation. In this context, the pledged shares are transferred to the lender as a means of securing the repayment of the outstanding debt. Once invoked, the lender has the right to sell the shares to recover the owed amount. However, the invocation itself does not automatically mean the shares are sold; it merely transfers the control or ownership of the shares to the lender until the debt is settled. Though the Financial Creditor has the discretion to sell the pledged shares of the Corporate Debtor at any point of time, it is not bound to sell them within any prescribed time limit to satisfy the debt. As per Section 176 of the Contract Act, the Financial Creditor in the capacity of Pawnee apart from being entitled to exercise its right to sell the goods pledged (shares in this case) to recover the debt, it also has the option to bring suit against the pawnor (the Corporate Debtor) upon the debt in case of default in payment of debt and retain the goods pledged as a collateral security.

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60. Per Contra, the Corporate Debtor has argued that the pledge has been invoked obviously to sell the shares. The object of invocation of pledge is clear from para 105 of ***PTC Judgment*** wherein it is observed that "*Regulation 58(8) of SEBI Regulations entitled the pawnee to record himself as a "beneficial owner" in place of pawnor and create* ***special rights including right to sell the pawn to a third party and adjust the sale proceeds towards the debt in terms of section 176 of the Contract Act***". In order to emphasise on his contention, para 119 of this judgment is also referred wherein it is observed that "*beneficial owner in the records of the depository, the pawnee had complied with the procedural requirement of Regulation 58(8)* ***to enforce the right to sell the shares****. Thereafter, such sale should be made according to Section 176 and 177 of the Contract Act".* After quoting from the decision of the PTC Judgment as above, it has been argued that the Financial Creditor has not sold the pledged shares after invoking on 10.03.2023 despite lapse of almost one year and the contention of the Financial Creditor that since there is no timeline, they can retain the invoked

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pledged shares as long as they wish, is not sustainable in law as held in the judgment of Hon'ble Supreme Court in case of ***SEBI vs Sunil Krishan Khetan(supra)*** that where no time line is laid down in the statute for doing some act, the act must be done within reasonable time. It is then submitted that in the present case, period of one year is more than a reasonable period to effect sale of pledged shares and then by giving the valuation of shares, it is argued that value of the pledged shares is sufficient to discharged the debt liability of the Financial Creditor if they are sold. It is also pointed out that various judgments referred to in para 39 of PTC Judgment relied upon by the Financial Creditor in its Rejoinder are not applicable since those cases pertain to obligation of pawnee before invocation of pledge. Based on his arguments putting emphasis on selling of pledged shares, the Ld. Sr. Counsel for the Corporate Debtor argued that the inaction on the part of the Petitioner to sell the pledged shares within the reasonable time, is a good ground to disentitle the Petitioner from pursuing the present petition as Financial Creditor until the shares are sold.

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61. We find that both Ld. Counsels interpreted the decision of the Hon'ble Supreme Court in ***PTC Judgment*** differently to suit their arguments, Financial Creditor saying that after invocation of pledged shares, it can retain them as collateral against the debt and pursue a suit for the recovery of the debt and sale of shares is one of the option as per Section 176 of the Contract Act but not mandatory but contrary to this interpretation, the Corporate Debtor says that after invocation of the pledged shares, the Financial Creditor has to sell them within a reasonable time to recover the debt. To resolve this conflicting arguments taken before us, we have gone through the PTC Judgment carefully so as to decide this issue.

62. In the ***PTC Judgment***, the Hon'ble Supreme Court on the given facts and circumstances of that case has dealt with the legal issue whether the Depositories Act, 1996 read with the Regulation 58 of the Securities and Exchange Board of India (Depositories and Participants) Regulations, 19961 has the legal effect of overwriting the provisions relating to the

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contracts of pledge under the Indian Contract Act, 1872 and the common law as applicable in India. After a detailed analysis of various cases on the Contract Act and those relating to security transactions, the Hon'ble Apex Court has held that there is no disharmony between the Depositories Act, 1996 ("DP Act"), SEBI (Depositories and Participants) Regulations, 1996 ("DP Regulations"), and the provisions of the Indian Contract Act, 1872 ("Contract Act") in the context of a pledge of demat shares. The Hon'ble Apex Court clarified that the invocation of pledge of demat shares as per the DP Regulations does not amount to "actual sale". After the invocation, the lender may, in terms of the Contract Act, may either bring a suit against the borrower for the debt and retain the pledged shares as collateral or sell the shares upon giving reasonable notice of sale. There is no discharge or satisfaction of the debt upon invocation.

63. Facts of the case in the captioned judgment has been found to be somewhat similar to the present case under consideration as in the judgment case also, the issue for

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decision was that whether the Financial Creditor after invoking the pledged shares would remain the Financial Creditor to the extent of the value of the pledged share and can enforce its right for recovery of that debt after invoking the pledged shares as it is in the present case under consideration before us.

64. In the PTC Judgment case, PTC India Financial Services Limited ("PIFSL") advanced a loan of Rs.125 crores to NSL Nagapatnam Power and Infratech Limited ("NNPIL/Borrower"). In order to secure the loan, Borrower's promoter, Mandava Holdings Private Limited ("MHPL"), pledged the 31,80,678 (i.e. 26%) shares ("Pledged Shares") of the NSL Energy Ventures Private Limited ("NEVPL"), which was a sister company of the Borrower. The shares were in de-mat form. On 28th December, 2017, PIFSL issued a notice under the Pledge Deed apprising MHPL on the defaults on the part of Corporate Debtor and that if the debt due was not discharged within seven days, PIFSL would exercise the rights in terms of the Pledge Deed. On 16th January 2018,

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as the debt remained unpaid, PIFSL wrote to the Depository Participant invoking its rights in terms of Clause 6.1 of the Pledge Deed. Acting on the request, the Depository Participant has accorded PIFSL the status of 'beneficial owner' of 31,80,678 pledged shares of NEVPL. On 23rd January 2018, PIFSL wrote to MHPL informing that due to continued defaults in payment on the part of the Corporate Debtor, it had exercised the right under Clause 6.1, while reserving its right to sell the shares under Clause 6.2 of the Pledge Deed read with Section 176 of the Contract Act.

65. Meanwhile, the National Company Law Tribunal, Hyderabad ("NCLT") on 17.11.2017 admitted the Borrower's application for initiation of its Corporate Insolvency Resolution Process ("CIRP") under Section 10 of the I & B Code, 2016. The petition filed by the PFISL u/s 7 of the I & B Code on 17.01.208 was allowed by NCLT to be withdrawn with liberty to file proof of financial claim before the IRP in Form C.

66. On 6th February 2018, MHPL made a claim before the Interim Resolution Professional ("IRP") as a financial creditor of the

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Borrower. MHPL contended that since it no longer holds the title over the Pledged Shares, it has stepped into the shoes of PIFSL as creditor of the Borrower to the extent of the value of the Pledged Shares. Contrarily, on 10th February 2018, PIFSL also submitted a claim before the IRP in the CIRP of the Borrower. It contended that as on date of initiation of CIRP, approx. a debt of Rs.169 crore was due to it from the Borrower. PIFSL did not account for or reduce the value of Pledged Shares in its claim of outstanding dues. The IRP rejected both the claims made by MHPL and PIFSL. IRP informed MHPL and PIFSL that their claims could not be crystallised as there was no valuation provided for the Pledged Shares at the time of transfer of Pledged Shares to PIFSL. Both MHPL and PIFSL challenged this finding before the NCLT, Hyderabad.

67. By a common order dated 6th July 2018, the NCLT disposed of the applications filed by PIFSL and MHPL, accepting the MHPL's claim by primarily relying on the Depositories Act and Regulation 58 of the 1996 Regulations. NCLT agreed

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with MHPL that PIFSL having exercised its right under the Pledge Deed to 'transfer' 31,80,678 pledged shares, MHPL's shareholding in NEVPL got reduced by 31,80,678 shares. Therefore, MHPL is a financial creditor of the Corporate Debtor to the extent of the value of 31,80,678 shares. Further, 16th January 2018, the date on which the pledge was invoked by PIFSL, is the crucial date for determining the extent to which PIFSL and MHPL are the financial creditors of the Corporate Debtor. The IRP was directed to appoint an independent valuer to assess the fair Civil Appeal No.5443 of 2019 Page 6 of 86 market value of 31,80,678 shares of NEVPL as on 16th January 2018.

68. PIFSL challenged the orders before the National Company Law Appellate Tribunal, New Delhi, but the appeals were dismissed vide the impugned judgment dated 20th June 2019. The Appellate Authority has held that PIFSL had exercised its rights under Clause 6.1 of the Pledge Deed on 16th January 2018 and consequently, the pledged shares stood transferred in the name of PIFSL. The fact that PIFSL

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had not thereafter sold the shares under Clause 6.2 of the pledge deed would not matter. As PIFSL had become the 100% owner of the pledged shares, it could realize its dues in whole or part by sale and transfer of the shares according to the law. Once PIFSL has exercised right to become the owner of the shares, PIFSL cannot take advantage of Section 176 of the Contract Act to 'reclaim' the debt. Section 176 of the Contract Act cannot be taken into consideration by the IRP for collating the financial claim of PIFSL under Section 18 of the IBC.

69. Now, the decision of Hon'ble Supreme Court in the PTC Judgement is to be understood in the above background of the facts of the judgment case to ascertain whether after invoking the pledged share and becoming beneficial owner of the shares in Depositor Account, can it be said that the Financial Creditor has lost its right to recover the debt from the borrower and debt can be realised only after sale of the pledged shares after its invocation, the issue which is similar to the issue in the present case under consideration.

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70. Before deciding this issue, the Hon'ble Supreme Court has made detailed analysis of the provisions of Section 176 and 177 of the Contract Act in the light of various earlier decisions of the Hon'ble Supreme Court and High Courts Also, provisions of the Depositories Act, 1996 read with the Regulation 58 of the Securities and Exchange Board of India (Depositories and Participants) Regulations, 1996 have been examined with their interplay with the provisions of the Contract Act and other common laws. The relevant portions of this decision in this respect are reproduced as under:-

(ii) ***Pawnee has a special and not general right in the pledged property.***

5.1 This Court, in ***Lallan Prasad v. Rahmat Ali and Another****, observes that under the common law, a pledge is a bailment of personal property as security for payment of debt or engagement. The two essential ingredients of pledge are (i) the pawn i.e., the property pledged should be actually or constructively delivered to the pawnee24 and (ii) a pawnee has only special property in the pledge but the general property therein remains in the pawnor and wholly reverts to him on discharge of the debt. The right to property vests in the pawnee only as far as is necessary to secure*

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the debt. A pawn or pledge is an intermediate between a simple lien and a mortgage, which wholly passes the property. A pawnor has an absolute right to redeem the pledged property upon tendering the amount advanced but that right would be lost if the pawnee in the meantime has lawfully sold the pledged property. If the pawnee sells, he must appropriate the proceeds of the sale towards the pawnor's debt, for the sale proceeds are the pawnor's monies to be so applied and the pawnee must pay the pawnor any surplus after satisfying the debt.

(iv) **Notice of sale by pawnor and the pawnee's right to sue for recovery and sell the pawned goods**

7.1 Relying upon ***Lallan Prasad (supra)*** *and* ***Bank of Bihar (supra)****, this Court in* ***Balkrishan Gupta and Others v. Swadeshi Polytex Ltd. and Another*** *has held that under Section 176, if the pawnor makes default in payment of the debt or performance as promised, and in respect of which the goods were pledged, the pawnee may bring a suit on the pawnor upon the debt or promise and may retain the goods pledged as collateral security, or the pawnee may sell the things pledged on giving the pawnor reasonable notice of sale.*

7.2 Several High Courts in ***F. Nanak Chand Ramkishan Das of Hodel and Others v. Lal Chand and Others, Bank of Maharashtra v. M/s. Racmann Auto (P) Ltd.***

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and ***Rani Leasing & Finance Ltd. v. Sanjay Khemani*** *have held that while the pawnee has a right to sell the goods after giving notice to the pawnor, he is not bound to sell at any particular time. The power of sale conferred on the pawnee is expressly for his benefit, and it is his sole discretion to exercise the power of sale or otherwise. If the pawnee does not exercise that discretion, no blame can be put on him. Even where the value of the goods deteriorates due to time, no relief can be granted to the pawnor against the pawnee as the pawnor is legally bound to clear the debt and obtain possession of the pawned goods.*

E. Effect of the Depositories Act, 1996 and the Securities and Exchange Board of India (Depositories and Participants) Regulation, 1996 on the pledge under the Contract Act, 1872

10.1 As per the 1996 Regulations, the pledgor/pawnor is not entitled to sell the pledged/pawned securities. The special rights of the pledgee/pawnee in the pawn remain intact under the Depositories Act and the 1996 Regulation. However, the right to sell dematerialized securities is conferred and given to the 'beneficial owner', who exercises this right through the participants. Consequently, if a pawnee wants to exercise his right to sell dematerialized security it is mandatory for the pawnee first to get himself

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recorded as a 'beneficial owner' in the 'depository''s records. Without the said exercise, the pawnee cannot exercise its rights to sell the pledge and retrieve the monies due by taking recourse to its rights under Section 176 of the Contract Act. Right to sell the pledge after reasonable notice is one of the options, Civil Appeal No.5443 of 2019 Page 55 of 86 albeit, both under the common law and under the Contract Act, the pawnee has the choice even after issue of notice for sale to sue for the debt due while retaining possession of the pledged goods. Similarly, the pawnor under the Contract Act and the common law has the right to redeem the pledged goods till 'actual sale'. Sale by the pawnee to self does not defeat the right of redemption of the pawnor. It may amount to conversion in law. Other provisions of the Contract Act enumerated in Chapter IX may well apply.

10.5 We, however, accept that the Depositories Act, by-laws and rules relating to sale of dematerialised securities would be gravely undermined in case the pawnor is entitled to redeem the dematerialised shares from the third party on the ground that reasonable notice, as postulated under Section 176 of the Contract Act, was not given to the pawnor. To this extent, we would accept that there is a conflict between the Depositories Act and the interpretation given in Madholal Sindhu (supra), which has been followed

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in other cases, including the judgment of the Delhi High Court in Nabha Investment (supra). If this principle is applied to dematerialised securities that have been transferred to the third parties in accordance with the provisions of the Depositories Act, by-laws and rules, it would materially impact certitude in the transaction in listed dematerialised securities which would become vulnerable to challenge even when the arm's Civil Appeal No.5443 of 2019 Page 59 of 86 length purchasers are innocent third-party buyers for valuable considerations. Open market operations would be affected. To this extent, therefore, we do hold that the dictum in Madholal Sindhu (supra) and Nabha Investment (supra), that the pawnor has a right to redemption against third parties when the pawnee does not give reasonable notice under Section 176 of the Contract Act, would not apply to listed dematerialised securities which are sold by the pawnee in accordance with the provisions of the Depositories Act, by-laws and rules. In fact, the stipulations in Section 12 of the Depositories Act and Regulation 58 of the 1996 Regulations have in built provisions in terms of which the pawnor and the pawnee are informed about the change of status with the pawnee making a request and being accorded a status of the 'beneficial owner'. The pawnee cannot make the sale of dematerialised securities without being registered as a 'beneficial owner', which is a step that a pawnee must take

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before he proceeds to sell the pledged dematerialised securities. 10.6 Beyond the additional need to comply with Sections 10 and 12 of the Depositories Act and Regulation 58 of the 1996 Regulations in specific terms, we do not see any disharmony between these provisions and Sections 176 and 177 of the Contract Act. They can be read harmoniously without nullifying or altering their effect, Civil Appeal No.5443 of 2019 Page 60 of 86 subject to the exception in case of sale of listed securities to third parties in terms of paragraph 10.5 (supra). They apply independently without hindering and obstructing their application as the field and subject matter of Sections 176 and 177 of the Contract Act differ from the subject matter and the object of Sections 7, 10 and 12 of the Depositories Act and sub-regulation (8) to Regulation 58 of the 1996 Regulations.

11.6.....*We do not find any derogation or conflict between Section 176 of the Contract Act and sub-regulations (8) and (9) of Regulation 58.* ***Regulation 58(8) entitles the pawnee to record himself as a 'beneficial owner' in place of the pawnor. This does not result in an 'actual sale'. The pawnee does not receive any money from such registration which he can adjust against the debt due.***

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The pledge creates special rights including the right to sell the pawn to a third party and adjust the sale proceeds towards the debt in terms of Section 176 of the Contract Act. *The reasoning that prior notice under Section 176 of the Contract Act would interfere with transparency and certainty in the securities market and render Civil Appeal No.5443 of 2019 Page 72 of 86 fatal blow to the Depositories Act and the 1996 Regulations is farfetched as it fails to notice that the right of the pawnee is to realise money on sale of the security. The objective of the pledge is not to purchase the security. Purchase by self, as held above, is conversion and does not extinguish the pledge or right of the pawnor to redeem the pledge. Equally, it may be a disincentive for both the pawnor and the pawnee in many cases, if we accept this interpretation and ratio, which would inhibit them from entering into a transaction creating a pledge.* ***Difficulties and disputes regarding price, valuation, right to redemption etc. could invariably arise. There would also be difficulties in case the dematerialised securities are not traded as in the present case. If the case***

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pleaded by MHPL is to be accepted, the entire dues of PIFSL stand paid without in fact a single penny coming to the coffer of PIFSL. Whether or not PIFSL will be able to find a willing buyer and sell the shares is unknown given the fact that the shares are unlisted and MHPL continues to be the holding company of NEVPL. *The effect of the ratio in* ***Tendril Financial Services (supra)*** *is to enact an entirely new jurisprudence on the law of pledge, annulling and re-writing the well-established law of pledge, which gives two options to the pawnee when pawnor is in default, just because the pawnee exercises his right to be recorded as the 'beneficial owner' to exercise his right to sell. Sale to self, if accepted as the norm, would be unlawful and amounts to conversion, is applicable in case of dematerialised securities.*

71. After dealing with the relevant provisions of law, the Hon'ble Supreme Court delivered the PTC Judgment after considering the facts of the case as discussed in para 63 to 68 and examining Clauses 6.1 and 6.2 of the Pledge Deed. The relevant parts of the judgment are reproduced as under:

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12.6 PIFSL by the letter dated 23rd January 2018 had informed MHPL in terms of Clause 6.1 that there has been an occurrence of default, which has continued and, therefore, they, on 16th January 2018, in exercise of its right under Clause 6.1 of the pledge deed, have applied for transfer of the pledged shares in its name. Consequently, all the rights in the pledged shares, including but not limited to the right of attending general body meetings, voting rights, and rights to receive dividends and other distributions, now Civil Appeal No.5443 of 2019 Page 83 of 86 vests with them as per Clause 2.3(A)(ii)(b)96 of the pledge deed. This intimation to MHPL is without prejudice to any rights or remedies PIFSL has in terms of the pledge deed or security documents executed in pursuance of the bridge loan agreement. PIFSL expressly reserved its right to transfer and sell pawned shares for value providing five days' notice as required under Clause 6.2 of the pledge deed and Section 176 of the Contract Act. We would, without hesitation, therefore hold that on becoming the 'beneficial owner' in the records of the 'depository', the pawnee had complied with the procedural requirement of Regulation 58(8) to enforce the right to sell the shares. Thereafter, such a sale should be made according to Sections 176 and 177 of the Contract Act. Violation of the said provisions, if made by PIFSL, would have its consequences as per the law. Pawn has not been sold and

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there is no violation of the Contract Act or for that matter the Depositories Act and the 1996 Regulations. PIFSL has not overlooked its obligations under Sections 176 and 177 of the Contract Act by relying upon sub-regulation (8) to Regulation 58, which has an entirely different object and purpose. ***Recording change in the register of the 'depository', whereby PIFSL as the pawnee has become the 'beneficial owner', is only to enable the pawnee to sell and transfer the shares in accordance with the Depositories Act and the 1996 Regulations. The object and purpose of sub-regulation (8) to Regulation 58 is not to nullify the obligation of MHPL i.e., the pawnor, and PIFSL i.e., the pawnee, under the Contract Act but to enable PIFSL to exercise its rights under Section 176****. It also follows that MHPL is entitled to redeem the pledge before the sale to a third party is made.*

12.7 In view of the aforesaid findings, it has to be held that ***registration of the pawn, that is the dematerialised shares, in favour of PIFSL as the 'beneficial owner' does not have the effect of sale of shares by the pawnee. The pledge has not been discharged or satisfied either in full or in part. PIFSL is not required to account for any sale proceeds which are to be applied to the debt on the 'actual sale'****. The two*

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options available to PIFSL as the pawnee under Section 176 of the Contract Act remain and are not exhausted. Civil

H. Conclusion

13.1 For the aforesaid reasons, the present appeal must be allowed and ***the impugned order passed by the Appellate Authority dated 20th June 2019 upholding the orders of the Adjudicating Authority dated 6th July 2018 and the emails of the IRP dated 19th February 2018 are set aside. It is held that MHPL is not a secured creditor of the Corporate Debtor, namely NNPIL, to the extent of the value of the 31,80,678 shares. PIFSL has rightly made a claim as financial creditor of the Corporate Debtor without accounting for the value of 31,80,678 shares of NEVPL in its claim petition****. Insolvency proceedings against the Corporate Debtor, namely NNPIL, will proceed accordingly.*

72. After studying the ***PTC Judgment*** in details as discussed above, it is clear now that the Financial Creditor even after invoking the pledged shares and registering itself as beneficial holder, will remain Financial Creditor till the shares pledged are not sold as per Section 176 of the Contract Act. Also, it is the choice of the Financial Creditor in the capacity of a pawnee either to keep the pledged shares

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after becoming beneficial owner as collateral till the debt is realised or sell the shares after giving notice to pawnor. So, the contention of the Corporate Debtor that the pledged shares are to be sold after being invoked and being registered in the name of the Financial Creditor as beneficial owner within a reasonable time to recover the debt and till the pledged shares are not sold, Financial Creditor cannot enforce the debt on the Corporate Debtor, has not been found correct. We have also examined the relevant Clause of the Indenture of Pledge dated 23.06.2016 in this case also, relating to "Remedies on an Event of Default" given in Clause 2.5, which is similar to clause 6.1 in the case of ***PTC Judgment***. This clause 2.5 in the present case is reproduced as below:-

2.5 Remedies on an Event of Default

The Pledgor agrees that ***at any time after an Event of Default occurs, the Security Trustee shall have the right****, without prejudice to its other rights under any Applicable Laws, in its discretion to exercise all the rights, powers and remedies vested in it (whether vested in it by or pursuant to this Agreement or any other Financing Document or by any Applicable Laws)* ***for the protection and enforcement of its rights in respect of the Collateral,***

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and the Security Trustee shall be entitled, without limitation, to exercise the following rights,

(i) -----

(ii) ***to transfer or register in its name or in the name of any of its nominees or any other Person, as it shall deem fit, all or any of the Pledged Shares****, at the cost of the Pledgor;*

.....

Nothing contained in this Agreement shall prevent or restrict the Security Trustee from exercising its rights and remedies, with respect to the Collateral, under or pursuant to this Agreement or otherwise, including the right to sell and transfer the Pledged Shares, on the occurrence of an Event of Default."

73. After registering the pledged shares in its name through its Security Trustee in the event of default and treating the same as collateral security against the debt, the Financial Creditor through its Security Trustee can also sell them as per clause 6.2 of the Indenture of Pledge dated 23.06.2016. This clause is reproduced as under:

6.2 Sale of Collateral

(i) ***The Security Trustee shall be entitled to exercise such power of sale or transfer or disposal in such manner*** *and at such time or times and for such consideration (whether payable immediately or by installments) as it shall in its absolute discretion think fit (whether by public auction or private sale or otherwise)* ***and the Collateral (or any relevant part thereof) may he sold*** *(i) subject to any conditions which the Security Trustee or the other Secured Parties may think fit to impose, (ii) to any Person (including*

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any Person connected with the Borrower, the Fledgor or the Secured Parties) and (iii) at any price which the Security Trustee in its absolute discretion, considers to be the best obtainable in the circumstances.

(ii) The Borrower and the Pledgor shall not raise any objections regarding the regularity of the sale or transfer or disposal and/or actions taken by the Security Trustee nor shall the Secured Parties be liable or responsible for any loss that may be occasioned from the exercise of such power and/or that may arise from any act or default on the part of any broker or auctioneer or other Person or body engaged by the Security Trustee for the said purpose.

74. In the present case also, similar to PTC Judgment, as per Clause 2.5, on receipt of the notice of the occurrence of 'event of default' by the pledgor/pawnor, the pledgor/pawnee through its Security Trustee has the right to have the pledged shares transferred in its name or its nominees. Under Clause 6.2, the pawnee through its Security Trustee may, without further authority and prejudice to their other rights under the law, may sell or otherwise dispose of any or all of the pledged shares in such manner and for such consideration as it in its sole discretion deems fit. Though Right to sale of shares are available in the above Clause but selling of pledged shares is not mandatory but optional at the discretion of the pawnee i.e. the Financial Creditor.

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75. After analysis of the whole matrix of the facts and judgement in case of ***PTC*** analysed above, we find that similar to PIFSL in PTC Judgment, the Financial Creditor JCF in the present case has rightly made a claim as financial creditor of the Corporate Debtor without accounting for the value of 27,21,09,231 shares of JPL earlier held by JIL in its petition u/s 7 of I & B Code, 2016 for initiating CIRP against the Corporate Debtor, hence we are not inclined to accept the plea of the Corporate Debtor that recourse to section 7 is not permissible since Applicant has become the beneficial owner of the pledged shares and dues can be recovered by selling those pledged shares. The value of shares as provided by the Corporate Debtor to be of market value as being total realizable value of pledged shares Rs.62.88/share x 27.21 Cr shares Rs.1,710.96 Cr, has no basis and also disputed by the Financial Creditor pleading that similar to shares of NEVPL in ***PTC Judgment***, shares of JPL are also not listed, hence its true value is correctly not ascertainable and not possible to be easily sold in the market as it will be difficult to find any genuine buyer. **Therefore, the plea of the**

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Corporate Debtor JCF cannot be allowed not to pursue the application until pledged shares are sold and accordingly, such plea of staying the proceeding is rejected.

(III) WHETHER PROCEEDING U/S 7 TO BE STAYED TILL SRA OF JIL PROVIDE AMICABLE SOLUTION TO RESOLVE THE DEBT OF JPL.

76. Further, in continuation of the aforesaid plea regarding selling of pledged shares, it is also argued that proceedings under the present case should be kept in abeyance taking a plea that the SRA of JIL i.e. Suraksha Realty in its Plan in Para 23 has stated that -"Resolution Applicant is in discussion with Yes Bank to explore possibility of mutually acceptable amicable solution." This clause is pursuant to direction in Para 141 of ***Kensington Judgement***. Further, in Definitions clause of its Resolution Plan, Suraksha Realty Ltd. has stated that the "Approval Date" *shall mean date on which the order of the Adjudicating Authority under Section 31 (1) of the Code has been passed, or the order of the National Company Law Appellate Tribunal or the Supreme Court, if an appeal is made to such tribunal or court against*

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the order of the Adjudicating Authority, having achieved finality. Further, the Principal Bench has already approved the Resolution Plan of the Suraksh Reality vide order dated 07.03.2023. Appeals were filed against this order by (i) Yamuna Expressway Industrial Development. In the light of the Authority (still pending); (ii) Jaiprakash Associates Limited (still pending); (iii) Shri Manoj Gaur (Guarantor) (still pending) and (iv) Income Tax Department are pending in NCLAT and the Hon'ble Supreme Court. It is also important to mention here that the Hon'ble NCLAT vide order dated 24.05.2024 has accepted the plan of the Suraksha Reality in CA No.493 of 2023. Moreover, the resolution plan of Suraksha for JIL does not prevent the adjudication of the present application filed under Section 7 against the Corporate Debtor. The Corporate Debtor cannot exploit a limited right to intervention granted by this Adjudicating Authority to a third party i.e Suraksha vide order dated in I.A No.535 of 2023. This issue has already been dealt by the Hon'ble NCLAT in its order dated 13.10.2023 wherein it was held as under:-

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"11. In the light of the judgments of the Hon'ble Supreme Court in the matter of Jaypee Kensington Boulevard Apartments Welfare Association & Ors. (supra) and this Tribunal in Alok Industries (supra), we are of the clear view that now there is no bar to hear the section 7 application filed by Yes Bank, which is now being pursued by its assignee J.C. Flowers Asset Reconstruction Pvt. Ltd., which can be considered and adjudicated upon. …

3. The present appeal has been filed by the Appellant being aggrieved that his application has kept in abeyance by recording reasons which are not germane to the issue involved but once the proceedings has again been started, we deem it appropriate to dispose of this appeal with the observation that the finding recorded in the impugned order shall not come in way either of the parties for the purpose of decision of Section 7 application and all the issues shall remain open."

77. Moreover, in order to facilitate the amicable settlement of the debt in this case, the application of Suraksha Reality Ltd. in IA No.535/2023 for being impleaded in the present Petition/Application as respondent has been allowed vide our order dated 18.04.2024 permitting it to be impleaded as Respondent/Intervener with limited right to intervene for the purpose of enabling it to work out a viable plan/ solution for resolving the debt of the Corporate Debtor i.e. JHL due towards the Financial Creditor i.e. JCF. It participated in the

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proceedings of the present Application from the date of passing of the order dated 18.04.2024 but no plan for resolving the debt of the Corporate Debtor could be produced by it till the completion of the proceedings in the present Application. **Therefore, in the light of aforesaid position, the plea of the Corporate Debtor that present application should be kept in abeyance till the selling of pledged shares or till final adjudication on the Suraksha Reality Plan is not sustainable.**

(IV) APPLICABILITY OF THE DECISION OF THE HON'BLE SUPREME COURT IN VIDARBHA INDUSTRIES POWER LTD. VS. AXIS BANK LTD. (CIVIL APPEAL NO.4633 OF 2021) DATED 12.07.2022)

78. The last submission made by the Ld. Sr. Counsel representing the Corporate Debtor is that in the light of the decision of the Hon'ble Supreme Court in the case of ***Vidarbha Industries Power Ltd. Vs. Axis Bank Ltd. (2022) 8 SCC 352***, the Hon'ble Adjudicating Authority has wide discretionary power, either to admit or reject the instant application on consideration of the whole factual matrix of the present case. It has been pleaded by the Ld. Counsel of

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the Corporate Debtor that there are good reasons to exercise discretion u/s 7(5)(a) and refuse admission of the application by applying the discretionary power considering the above factual matrix of the present case.

79. He argued that it is held by Hon'ble SC in this Judgment that the word "may" in Section 7(5) of IBC makes it clear that even if default is assumed, the Tribunal may refuse to admit the Application, if there are good reasons to do so. He pointed out that some of the good reasons mentioned in this judgment by way of illustration for exercise of discretion under section 7(5)(a) are as under:

A: Feasibility of initiating CIRP

B: Overall Financial health of the Corporate Debtor

C: Viability of the Corporate Debtor

D: Receivables which may go to meet the outstanding debts

E: Expediency

80. He further went on to present the details about these good reasons present in case of the present Corporate Debtor i.e. JHL as under:-

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A. FEASIBILITY OF INITIATING CIRP

81. In this regard, it has been submitted by the Corporate Debtor that it is engaged in running a multi super-specialty hospital under the name "Jaypee Hospital" located at Noida. Another, 85 bedded Hospital is located at Anoopshahar (U.P.) and a 205 bedded hospital is located at Chitta (U.P.). The Hospital at Noida largely caters to the NCR region. The Hospitals at Anoopshahar and Chitta provide medical care to rural and urban population of UP which lacks standard medical facilities.

82. Further, it is also submitted by the Corporate Debtor that initiation of CIRP will cause attrition to doctors, paramedics and other critical staff working in the hospital. Not only this initiation of CIRP will lead to stoppage of supplies such as medical consumables, implants and other medical equipment's which is based on 'cash and delivery basis' provide by the pharmaceutical companies. It will create stock of outstanding dues which will affect the operation of the hospital.

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83. Jaypee hospital is on panel of large public sector undertakings, CGHS, ECHS and other state Government institutions wherein services are provided on credit of 90-150 days initiation of CIRP will hamper such services due to stressed working capital.

84. CIRP against the JHL will also affect the medical education provided by the Corporate Debtor along with clinical trials and projects which are recognized by the Department of Health and Ministry of Health Family Welfare.

B. OVERALL FINANCIAL HEALTH OF THE CORPORATE DEBTOR

85. Ld. Sr. Counsel representing the Corporate Debtor has argued that the Corporate Debtor is asset rich company which is evident from the audited accounts reflecting significant improvement in profitability trend of the last three years.

86. As per the Audited Accounts of the Corporate Debtor filed before this tribunal it can be easily stated that Net loss is showing downward trend. Cash Inflow is improving and EBITDA figures are positive and showing improvement over

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the years. This shows that overall operations of the Corporate Debtor are profitable.

87. Ld. Sr. Counsel with regard to Net Worth of the Corporate Debtor has also argued that the Present value of the Corporate Debtor is Rs.2,150.33 cr. On the other hand, principal outstanding liability of the lenders is Rs.927 Cr. The computation of Net Worth is valuation of all the assets of the Corporate Debtor also taking into account the intangible assets such as goodwill. Further the balance of the Corporate Debtor is present on historical cost basis and not on the basis of present value of the assets and liabilities.

88. For this purpose, the Corporate Debtor has placed reliance on ***J.K Industries vs UOI (2007) 13 SCC 673.*** The position in the said judgement has been reiterated in ***TEQ Green Power XIII P. Ltd. vs REMC Ltd. (2023) 239 Comp Cas 78 (Delhi).*** The relevant portion of the order is reproduced below:-

"Section 210 of the Companies Act requires a company to place before annual general meeting, a balance-sheet and a P and L account for relevant period. The function of a balance-

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sheet is to show the share capital, reserves and liabilities of the company at the date on which it is prepared and the manner in which the total monies representing them are distributed over several types of assets. A balance-sheet is a historical document. As a general rule it does not show the net worth of an undertaking at any particular date. It does not show the present realizable value of goodwill, land, plant and machinery, etc. It also does not show the realizable value of stock-in-trade, except in cases where the realizable value of stock-in-trade is less than the cost. Therefore, it cannot be said that the balance sheet shows the true financial position.

89. The argument of the Applicant in rebuttal of the aforesaid position is that net worth of the Corporate Debtor corroded and the Corporate Debtor is not a going concern. It is completely false and baseless to say that the Corporate Debtor is going concern and its financial condition is improving as no attempts have been made to pay the outstanding debts of the Financial Creditor so far, except only putting up proposals which are not being found viable.

90. The Corporate Debtor has further argued that terms of Escrow Agreement, retention amount is meant to for meeting loan repayment/ interest liabilities of lenders, the lenders are retaining 9% of revenue with effect from 08.08.2022 (earlier it was 5% and 7.5% during June-July 22.) since

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2019-20 when the account was classified as NPA. The year wise quantum of the retention amount is given below:

FY	Amount retained (Rs.in Cr)	
2019-20	19.97	
2020-21	0.58	Covid period
2021-22	3.92	Covid Period
2022-23	22.33	
2023-24	40.62	
TOTAL	**87.42**	

Therefore, the contention of the Financial Creditor that no payment is made towards interest and loan amount is completely incorrect.

C.<u>Viability of the Corporate Debtor</u>:

91. Another argument raised by the Ld. Sr. Counsel is that Corporate Debtor is a viable entity. In support of this contention, it is argued that for FY 2022-23, actual revenue is Rs.356.05 Crores and actual EBITDA is Rs.55.27Crores. For FY 2023-24, actual revenue (based on provisional

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accounts under audit) is Rs.420.85 Crores and actual EBITDA is Rs.70.21 Crores.

92. Further, the Debt Service Credit Ratio for the FY 2022-23 is 1.96 and FY-2023-24 is 1.46. This ration indicates the ability of borrower to service its debts. Ratio of more than 1 indicates that it is capable to do so.

93. Fixed Assets Credit Ratio for the FY 2022-23 is 1.81 and FY 2023-24 is 1.77. This ratio indicates the extent to which debts are secured by fixed assets. Ratio of more than 1 indicates that debts are fully secured.

94. The above figures clearly reflect that the Corporate Debtor has the ability to meet its debts as well as such debts are secured by fixed assets.

95. **D. <u>RECEIVABLES</u>**

96. It is argued by the Ld. Sr. Counsel that the consideration to be received on sale of pledged shares is expected to be:

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(i) if sold at present value of Rs.50.30/Share (without considering the premium for management right bundled in block of 63.5% of capital)-, Rs.1,368.66 Cr.

(ii) if sold at present value of Rs.62.88/Share (after consideration of premium for management right) - Rs.1,710.96 Cr.

97. Thus, upon sale of pledged shares not only the entire debts of all the lenders (Rs.1020 Cr as on 31.03.2024) are likely to be fully discharged but there is likely to be a huge surplus:

If sold @ Rs.50.30/share Surplus will be around Rs.349 Cr If sold @ Rs.62.88/share Surplus will be around Rs.691 Cr.

98. Further, the Corporate Debtor has argued that out of 18 acres of land only 7.02 acres is mortgaged and rest of the land is unencumbered and surplus land therefore, as stated in the DRP, disposal of 8 acres out of above surplus land and utilize the sale proceeds of approx. Rs.150-180 Crores will reduce the principal outstanding debts. The DRP is still pending for approval by the lenders.

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E. EXPEDIENCY OF INITIATING CIRP:

99. In compliance with the direction passed by this tribunal vide order dated 27.06.2022, the Corporate Debtor submitted Debt Restructuring Proposal to Yes Bank Ltd on 27.07.2022 wherein it was proposed that upfront payment of Rs.100 crores would be made and payment of Rs.150 crores would be made by selling surplus land and the balance debt would be paid out based on the EBITDA.

100. The DRP was submitted for approval of the Stakeholders in the JFL meeting held on 17.8.2022. The Corporate Debtor (CD) submitted the Draft Resolution Plan (DRP) On 07.10.2022, to the Interim Resolution Professional (IRP) of JIL for approval, as JIL held the entire share capital of the CD at that time. However, the IRP did not respond.

101. The DRP submitted by the Corporate Debtor is still pending before the Financial Creditor for consideration. If the DRP is approved within the RBI Guidelines then the present liquidity of the Corporate Debtor will be resolved.

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102. Ld. Sr. Counsel further submitted that it is a well-known procedure in the IBC, 2016 that the resolution plans approved by the Committee of Creditors (CoC) during the Corporate Insolvency Resolution Process (CIRP) often require financial creditors to accept significant haircuts. Additionally, the CIRP process is lengthy, often taking years for lenders to realize their dues. However, in the Draft Resolution Plan (DRP) submitted by the Corporate Debtor (CD), no haircut is proposed. Instead, it includes a substantial upfront payment of approximately Rs.250 Crores within about 6 months. There is also reasonable assurance regarding the service of the remaining debt, with the debts being fully secured, as the Debt Service Coverage Ratio (DSCR) and Fixed Asset Coverage Ratio (FACR) are positive according to the projections submitted with the DRP in the aforesaid paragraphs.

103. We have considered the above arguments of Ld. Sr. Counsel of the Corporate Debtor and also carefully gone through the

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detailed arguments taken before us in respect of all the above good reasons.

104. We find that in the light of the decisions of ***Vidarbha Judgment***, only the reason for there being any sufficient receivables to be received by the Corporate Debtor in near future needs to be considered to see whether these receivables are crystalised or not and in a case it is crystallised, how long it is going to take to be received by the Corporate Debtor and after this amount is received, whether the Corporate Debtor would be able to discharge its debts. Other reasons of feasibility, financial health, viability and expediency have not been found by us being of any relevance to have any bearing on admission of the Application for initiating CIRP against the Corporate Debtor, once the default has occurred. In this regard, the object of the IBC as evident from its Preamble is to be referred. While holding the constitutional validity of the IBC, the Hon'ble Supreme Court has analysed the Preamble of the IBC in the case of ***Swiss Ribbons Pvt. Ltd. vs. Union of India (Writ (Civil) No.99 of***

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2018) dated 25.01.2018 holding that the Code is first and foremost, a Code to reorganise an insolvency resolution of corporate debtors. Unless such reorganisation is effected in a time bound manner, the value of the assets of such persons will deplete. In this judgment, the purpose of IBC is further elaborated stating that 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. The relevant part of this judgment is as under :

"11. As is discernible, the Preamble gives an insight into what is sought to be achieved by the Code. ***The Code is first and foremost, a Code for reorganization and insolvency resolution of corporate debtors. Unless such reorganization is effected in a time-bound manner, the value of the assets of such persons will deplete****. Therefore, maximization of value of the assets of such persons so that they are efficiently run as going concerns is another very important objective of the Code. This, in turn, will promote entrepreneurship as the*

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persons in management of the corporate debtor are removed and replaced by entrepreneurs. When, therefore, a resolution plan takes off and the corporate debtor is brought back into the economic mainstream, it is able to repay its debts, which, in turn, enhances the viability of credit in the hands of banks and financial institutions. Above all, ultimately, the interests of all stakeholders are looked after as the corporate debtor itself becomes a beneficiary of the resolution scheme – workers are paid, the creditors in the long run will be repaid in full, and shareholders/investors are able to maximize their investment. Timely resolution of a corporate debtor who is in the red, by an effective legal framework, would go a long way to support the development of credit markets. Since more investment can be made with funds that have come back into the economy, business then eases up, which leads, overall, to higher economic growth and development of the Indian economy. What is interesting to note is that the Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark. Even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern. [See ArcelorMittal (supra) at paragraph 83, footnote 3].

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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 40 its entrepreneurial skills, resuscitate the corporate debtor to achieve all these ends.*

[Emphasis Supplied}

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105. In the above judgment of ***Swiss Ribbons***, it has been further held that in IBC the Legislative policy, it is now to move away from the concept of ―inability to pay debts to ―determination of default. So, now examining the default has become necessary rather than to go in the reasons of not paying the debts and assess whether the corporate debtor has capacity, viability, feasibility or is able to attain a financial health to be able to pay its debt. Now, in IBC examining of existence of default is only required to trigger its provisions as held by the Hon'ble Supreme Court in its many decisions including Innoventive and E Krishnamurthy as we have already discussed. The relevant portion of the decision of Swiss Ribbons in this regard is reproduced as under

"37. The trigger for a financial creditor's application is non-payment of dues when they arise under loan agreements. It is for this reason that Section 433(e) of the Companies Act, 1956 has been repealed by the Code and a change in approach has been brought about. ***Legislative policy now is to move away from the concept of ―inability to pay debts‖ to ―determination of default‖. The said shift enables the financial creditor to prove, based upon solid documentary evidence, that there was an***

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obligation to pay the debt and that the debtor has failed in such obligation. Four policy reasons have been stated by the learned Solicitor General for this shift in legislative policy. First is predictability and certainty. Secondly, the paramount interest to be safeguarded is that of the corporate debtor and admission into the insolvency resolution process does not prejudice such interest but, in fact, protects it. Thirdly, in a situation of financial stress, the cause of default is not relevant; protecting the economic interest of the corporate debtor is more relevant. Fourthly, the trigger that would lead to liquidation can only be upon failure of the resolution process"

[Emphasis Supplied]

106. Considering the above judicial pronouncements, if the Corporate Debtor feels about its viability, feasibility and financial health, it would be more beneficial for it after its resolution under IBC is done expeditiously before its assets get depleted. Therefore, we are of the opinion that its fast resolution would be in its best of interest to put it back on feet to enable it to pay its debt fast and revive its business. Therefore, we are not inclined to accept the contention of

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Feasibility, Viability and Financial Health being good reasons to apply our discretion for not admitting the application u/s 7(5) after we have determined that default has occurred.

107. As far as expediency is concerned, it is for the Financial Creditor to decide whether they want to restructure the debt with the Corporate Debtor and withdraw the application. It is important at this stage to refer to the fact that DRP was rejected by the lenders in the JLF meeting held on 17.08.2022 stating reason *that inter alia taking into account the terms of the DRP and concluding that the same was neither feasible nor acceptable to be considered as a "suitable plan to extinguish its liabilities" in compliance of the order dated 27 June 2022.* sale of certain land parcels which could already have been done by the Corporate Debtor to repay the lenders but has never been done in the 4.5 years since the account of the Corporate Debtor was declared as NPA. Even Suraksha Reality Ltd. was given opportunity to find amicable solution for the resolution of the debt but so far nothing

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concrete is reported and no application for withdrawal of present Petition/Application is made before us. Therefore, the Expediency cannot be taken as a good reason.

108. Now, we come to receivables. In this regard, the Corporate Debtor has taken the plea for repayment of the debt is that lenders being the beneficial owners of the shares as per Regulation 58(8) of the SEBI Regulations, now, it has become owner of the pledged shares, hence Financial Creditor can realize the debt amount by selling those shares whose market value as calculated by the Corporate Debtor is Rs.1368.66 Cr., within the reasonable period of time of one year. In this regard, reliance is placed on ***SEBI vs Sunil Krishna Khaitan (2022) 234 Comp. Cases 525 (SC)*** as stated in para 55 of this order.

109. It is held in the said judgement that "*though, no hard and fast rules can be laid down in this regard as determination of the question will depend on the facts of each case, the nature of the statute, the rights and liabilities thereunder and other consequences, including prejudice caused and whether third*

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party rights have been created are relevant factors." We find that this decision will not be fully applicable in the present case considering the facts of the present case as in the present case, it is not mandatory to sell the pledged shares after invocation, though being one of two options, as per the provision of Section 176 of the Contract Act, 1872 as already held by us.

110. In the instant case, Financial Creditor as pawnee being the beneficial owner of the Pledged shares, it only enables the pawnee to transfer and sell the shares in accordance with the Depositories Act and 1996 Regulations. The object and purpose of the Regulations 58(8) as stated by the Hon'ble Apex Court in ***PTC judgement (Supra)*** is not to nullify the liabilities of the pawnor and the pawnee under the Contract Act. It only entails that pawnor still has the right to redeem those shares before they are sold to third party. The prevailing market conditions, financial viability of the Company, existing statute plays a major role in determining the value of the shares and actual worth of the shares.

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111. Further, it also important to state that Corporate Debtor cannot compel or force the Financial Creditor to sell the pledged shares or to accept the DRP. Regulations 58(8) only entitles recording the name of the beneficial owner in the registry of the Depository. It does not in any manner specifies that pawnee has to sell the shares within given period of time. The right to sell the pledged shares is only for the benefit of the pawnee to realize the amount of debt which is the sole discretion of the pawnee when this right is to be exercised. Pawnor cannot blame or compel the pawnee to sell the pledged shares. Pawnor is legally bound to make repayment of outstanding liability and obtain the pawned shares released. The settlement of debt cannot be forced on the Financial Creditor. The Hon'ble Supreme Court in plethora of judgement has held that financial institutions cannot be forced by courts to accept a one-time settlement in favour of the borrowers. In the light of aforesaid analysis, invocation of pledged shares does not dissolve the liability of the Corporate Debtor towards the Financial Creditor.

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112. We have also examined the applicability of the decision of the Hon'ble Supreme Court in the case of **Vidarbha Industries Power Ltd.** and further, review petition filed in this case. On the review petition in case of **Vidarbha Industries Power Ltd. (Supra),** the Hon'ble Supreme Court has held in order dated 22.09.2022 that it is well settled that the judgements and observations in judgments are not to be read as provisions of statute and judicial utterances and/or pronouncements are in the setting of the facts of a particular case. Therefore, after clarification by the Hon'ble Supreme Court in the review petition of its decision in the case of **Vidarbha Industries Power Ltd. (Supra).**, it has been made clear that the decision given by the Hon'ble Supreme Court in the case of **Vidarbha Industries Power Ltd**. was on the facts of that particular case and no ratio was laid down about Section 7(5) of the I & B Code, 2016 being mandatory or discretionary. Now, in another decision of the Hon'ble Supreme Court in case of ***M. Suresh Kumar Reddy vs. Canara Bank & ORs. Civil Appeal No.7121 of 2022 dated 11th May, 2023*** it has been held that once NCLT is

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satisfied that the default has occurred, there is hardly a discretion left with NCLT to refuse admission on the Application under Section 7 of I & B Code, 2016. The relevant part of this decision of the Hon'ble Supreme Court is reproduced as under:

9. We have given careful consideration to the submissions. This Court in the case of ***Innoventive Industries Limited v. ICICI Bank and Another*** *has explained the scope of Section 7. Paragraph nos.28 to 30 of the said decision read thus: -*

"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 subsection (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

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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 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.*

29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-

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section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing—i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.

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 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."***

(Emphasis added)

9. The view taken in the case of ***Innoventive Industries has been followed by this Court in the case of E.S. Krishnamurthy and others.*** *Paragraph nos.32 to 34 of the said decision read thus:*

32. In Innoventive industries [Innoventive Industries Ltd. v. ICICI Bank, (2018) 1 SCC 407, paras 28 and 30: (2018) 1 SCC (Civ) 356], ***a two-Judge Bench of this Court has explained the ambit of Section 7 IBC, and held that the adjudicating authority only has to determine whether a "default" has***

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occurred i.e. whether the "debt" (which may still be disputed) was due and remained unpaid. If the adjudicating authority is of the opinion that a "default" has occurred, it has to admit the application unless it is incomplete. *Speaking through Rohinton F. Nariman, J., the Court has observed: (SCC pp. 438-39, paras 28 & 30)*

"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 [Ed.: The word between two asterisks has been emphasised in original.] any [Ed.: The word between two asterisks has been emphasised in original.] 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

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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 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

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that the adjudicating authority may reject an application and not otherwise."

33. In the present case, the adjudicating authority noted that it had listed the petition for admission on diverse dates and had adjourned it, inter alia, to allow the parties to explore the possibility of a settlement. Evidently, no settlement was arrived at by all the original petitioners who had instituted the proceedings. The adjudicating authority noticed that joint consent terms dated 12-2-2020 had been filed before it. But it is common ground that these consent terms did not cover all the original petitioners who were before the adjudicating authority. The adjudicating authority was apprised of the fact that the claims of 140 investors had been fully settled by the respondent. The respondent also noted that of the claims of the original petitioners who have moved the adjudicating authority, only 13 have been settled while, according to it "40 are in the process of settlement and 39 are pending settlements". Eventually, the adjudicating authority did not entertain the petition on the ground that the procedure under IBC is summary, and it cannot manage or decide upon each and every claim of the individual homebuyers. The adjudicating authority also held that since the process of settlement was progressing "in all seriousness", instead of examining all the individual claims, it would dispose of the petition by directing the respondent to settle all the remaining claims "seriously" within a definite time-frame. The petition was accordingly disposed of by directing the respondent to settle the remaining claims no later than within three months, and that if any of the remaining

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original petitioners were aggrieved by the settlement process, they would be at liberty to approach the adjudicating authority again in accordance with law. The adjudicating authority's decision was also upheld by the appellate authority, who supported its conclusions.

34. The adjudicating authority has clearly acted outside the terms of its jurisdiction under Section 7(5) 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."*

(Emphasis added)

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;" Thus, even the non-payment of a part of debt when it becomes due and payable will amount to default on*

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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.

11. *Reliance is placed on the decision of this Court in the case of* ***Vidarbha Industries*** *and in particular, what is held therein in paragraph nos. 86 to 89 which reads thus:-*

"86. *Even though Section 7(5) (a) 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.*

87. Ordinarily, the adjudicating authority (NCLT) would have to exercise its discretion to admit an application under Section 7 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.

88. *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)*

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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.

89. *In this case, the adjudicating authority (NCLT) has simply brushed aside the case of the appellant that an amount of Rs 1730 crores was realisable by the appellant in terms of the order passed by APTEL in favour of the appellant, with the cursory observation that disputes if any between the appellant and the recipient of electricity or between the appellant and the Electricity Regulatory Commission were inconsequential."*

(Emphasis added)

12. *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* ***E.S. 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.

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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."

***13.** Thus, it was clarified by the order in review that the decision in the case of **Vidarbha Industries** was in the setting of facts of the case before this Court. Hence, the decision in the case of **Vidarbha Industries** cannot be read and understood as taking a view which is contrary to the view taken in the cases of **Innoventive Industries** and **E.S. Krishnamurthy**. The view taken in the case of Innoventive Industries still holds good.*

113. As now, it has been clarified by the Hon'ble Supreme Court itself that the decision in the case of ***Vidarbha Industries Power Ltd***., was in the setting of facts of that case before the Hon'ble Supreme Court and the decision of Hon'ble Supreme Court in the case of ***Innoventive Industries Limited v. ICICI Bank & Another 2018 (1) SCC 407*** still holds good. In case of ***Innoventive Industries Limited***, it has been clearly held by the Hon'ble Supreme Court that if there is a debt and default in repayment of debt and application filed by the Applicant/Financial Creditor is complete in all respect, the application under Section 7 of I & B Code 2016, is to be admitted. In the present case, we have clearly found

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that there is a debt and also there is a clear default in payment of interest which is more than the threshold limit as well as the default in payment of entire loan amount even after classification of account of the Corporate Debtor as NPA, hence there cannot be no other option but to admit the present Petition/Application u/s 7.

114. In view of our above findings, we are satisfied that the Applicant/Financial Creditor has proved the debt and the default, which is more than the threshold limit of one lakh at the relevant time and even more than Rs.1 crore the limit applicable at present. The application is also filed within limitation period and complete in all respect and a resolution professional is also proposed as per section 7(3)(b). **Accordingly, the present application under Section 7, has been found fit to be admitted as per Section 7(5) of the I & B Code, 2016.**

115. The Financial Creditor has filed Supplementary Affidavit wherein it has proposed the name of new IRP in Part-III of the Application, the Financial Creditor has proposed the

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name of Mr. Bhuvan Madan as Interim Resolution Professional. His Registration Number is IBBI/IPA-IBBI/IPA-001/IP-P01004/2017-2018/11655, R/o 204, A-103 Ashok Vihar Phase-3 (Behind Laxmi Bai College), New Delhi, 110052, Email: madan.bhuvan@gmail.com. He has duly given the consent in Form No.2 dated 11.11.2019 annexed as **Annexure A-2 with the Supplementary Affidavit**. The Law Research Associate of this Tribunal, Ms. Ankita Sharma, has checked the credentials of Mr. Bhuvan Madan, and found that there are no disciplinary proceedings pending against the proposed Resolution Professional and also there is nothing adverse against him. Upon verification from the website of IBBI, it is found that IRP holds valid authorization till 24 December 2024. After considering these details, we appoint Mr. Bhuvan Madan having registration No.IBBI/IPA-IBBI/IPA-001/IP-P01004/2017-2018/11655, as Interim Resolution Professional (IRP).

116. In the given facts and circumstances of the case as per our above findings, the present application u/s 7 being complete

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in all respect and having established the default in payment of the Financial Debt for the default amount being above the threshold limit and an IRP also having been appointed as per above para 89, **the application is admitted in terms of Section 7(5) of the I & B Code, 2016 against the Corporate Debtor i.e. Jaypee Healthcare Ltd. and accordingly, moratorium is declared in terms of Section 14 of the Code**.

117. The IRP is directed to take steps as mandated under section 13 and 15 of the IBC for making public announcement about the commencement of CIRP against the Corporate Debtor and moratorium against it u/s 14, and also take necessary actions as per sections 17, 18, 20 and 21 of IBC, 2016.

118. The IRP shall after collation of all the claims received against the Corporate Debtor and the determination of the financial position of the Corporate Debtor constitute a Committee of Creditors and shall file a report certifying the constitution of the Committee to this Tribunal on or before the expiry of thirty days from the date of his appointment, and shall

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convene the first meeting of the Committee within seven days of filing the report of Constitution of the Committee. The Interim Resolution Professional is further directed to send regular progress reports to this Tribunal every month.

119. As a necessary consequence of the moratorium in terms of Section 14, the following prohibitions are imposed, which must be followed by all and sundry:

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

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(d) The recovery of any property by an owner or lessor, where such property is occupied by or in the possession of the corporate debtor.

(e) It is further directed that the supply of essential goods or services to the corporate debtor as may be specified, shall not be terminated or suspended or interrupted during the moratorium period.

(f) The provisions of Section 14(3) shall, however, not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator and to a surety in a contract of guarantee to a corporate debtor.

(g) The order of moratorium shall have effect from the date of this order till completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of the corporate debtor under Section 33 as the case may be."

120. We direct the Financial Creditor to deposit a sum of Rs.2,00,000 with the Interim Resolution Professional, to meet out the expenses to perform the functions assigned to him in accordance with Regulation 6 of Insolvency and

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Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The amount, however, is subject to adjustment by the Committee of Creditors as accounted for by the Interim Resolution Professional on the conclusion of CIRP.

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

122. List the matter on 19.07.2024 for filing of the progress report/further proceeding.

(Ashish Verma)
Member (Technical)
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(Praveen Gupta)
Member (Judicial)
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Date : 14.06.2024