NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 604 of 2024

[Arising out of the Impugned Order dated 22.02.2024 passed by the Adjudicating Authority, National Company Law Tribunal, Jaipur Bench in CP (IB) No. 05/7/JPR/2021]

In the matter of:

Mrs. Madhubala Chauhan
Suspended director of Karni Developers
& Construction Company Pvt. Ltd.
Address:- Eco Friendly Tourist Unit,
Near Kaylana Road Gram Genva,
Jodhpur Rajasthan-342009. …Appellant

Versus

Phoenix Arc Pvt. Ltd.
Having its registered office at:
3rd Floor, Wallace Towers
(earlier known as Shiv Bldg),
139-140/B/ l, Crossing of Sahar Road and
West E-Way, Vile Parle East, Mumbai,
Maharashtra- 400057. …Respondent no.1

Sh. Manoj Sehgal
Interim Resolution Professional
having Registration No.
IBBI/IPA-002/IP-N00108/2017-18/10256
Having office at:-
Flat 71, Tower- Acacia 2,
Vatika City, Sector 49, Gurgaon,
Haryana, 122018
manojsehgal 112l@yahoo.co.in …Respondent no.2

Present:

For Appellant : Mr. Ramji Srinivasan, Sr. Advocate and Mr. Abhijeet Sinha, Sr. Advocate with Mr. Syed Arsalan Abio, Mr. Prateeek Khaitan, Mr. Chatanya Sharma, Mr. Shitij Chakravarty and Mr. Udhav H. Aggarwal, Mr. Aryun Bhatia, Ms. Shefali Mundi, Advocates.

For Respondent : Mr. Amit Singh Chadha, Sr. Advocate with Mr. Suresh Dutt Dobhal, Mr. Nirmal Goenka, Mrs. Kanchan Rathuri, Advocates for R-1.

Mr. Anurag Bhatt, Mr. Lokesh Pathak, Advocates for Intervener.

J U D G M E N T

(Hybrid Mode)

Per: Barun Mitra, Member (Technical)

The present appeal filed under Section 61(1) of Insolvency and Bankruptcy Code 2016 ('**IBC**' in short) by the Appellant arises out of the Order dated 22.02.2024 (hereinafter referred to as '**Impugned Order**') passed by the Adjudicating Authority (National Company Law Tribunal, Jaipur Bench) in CP (IB) No. 05/7/JPR/2021. By the impugned order, the Adjudicating Authority admitted the Section 7 application filed by Respondent No. 1-Phoenix ARC Pvt. Ltd. and admitted the Corporate Debtor into Corporate Insolvency Resolution Process (**"CIRP"** in short). Aggrieved by the impugned order, the present Appeal has been preferred by the suspended Director of the Corporate Debtor.

2. Coming to the sequence of events which are required to be noticed for deciding the present matter are as outlined hereunder:

- The Corporate Debtor- Karni Developers & Construction Pvt. Ltd. approached the Union Bank of India for a Term Loan (hereinafter referred to as **"TL-1"**) of Rs 15 Cr. which was sanctioned on 02.12.2005. An amount of Rs 12.92 Cr. was disbursed.

- On 30.04.2007, the Union Bank of India rejected a revised proposal from the Corporate Debtor seeking enhancement of the Term Loan from Rs 15 Cr. to Rs 35.50 Cr.
- TL-1 became NPA on 31.12.2008.
- On 07.01.2009, Union Bank of India issued notice under Section 13(2) of SARFAESI Act and took symbolic possession of the mortgaged assets on 11.05.2009 and proceeded ahead with SARFAESI proceedings.
- On 03.12.2013, an Assignment Agreement was signed by which the Union Bank of India assigned the TL-I along with the interest, underlying security and guarantee to Respondent No. 1-Phoenix ARC Pvt. Ltd.
- A Memorandum of Compromise (**"MoC"** in short) was entered between the Corporate Debtor and Respondent No.1 on 03.12.2013 for a settlement amount of Rs 18.10 Cr. besides interest @ 30% p.a. and penal interest.
- The Corporate Debtor wrote to Respondent No. 1 on 03.12.2013 for a fresh Term Loan of Rs 6.90 Cr.
- On 07.02.2014, a Term Loan Agreement (hereinafter referred to as **"TL-2"**) for Term Loan of Rs 3.40 Cr. was entered between Corporate Debtor and Respondent No.1 with a rate of interest of 30% p.a. and penal interest of 36% p.a. The loan was sanctioned out of which Rs 1.59 Cr. was appropriated towards interest. As per Repayment Schedule in Schedule-III of TL-2, the repayment was to be done in 12 instalments ending on 31.12.2017.

- On 27.06.2014, the Respondent No.1 provided a revised repayment schedule on the request of the Corporate Debtor. On 30.06.2014, an Amendment Agreement was signed amending TL-2 of 07.02.2014.
- On 29.12.2015, another Amendment Agreement was signed whereby the TL-2 was amended again with regard to period of loan.
- TL-2 was declared NPA by Respondent No. 1 on 31.03.2016.
- On 29.04.2017, the Respondent No.1 revoked the Memorandum of Compromise of 03.12.2013 and issued a Recall Notice of the Term Loan. In the Recall Notice dated 29.04.2017, the Respondent No. 1 claimed an amount of Rs 5.05 Cr.
- On 23.06.2017, notice under Section 13(4) of SARFAESI Act was issued by Respondent No. l. On 14.08.2019, a demand notice was issued by Respondent No. 1 directing repayment of TL-2.
- On 09.01.2021, the Respondent No. 1 filed Section 7 application against the Corporate Debtor for an outstanding amount of Rs 5,05,89,698/- as per recall notice of 29.04.2017 alongwith further interest charges.
- On 22.02.2024, the Section 7 petition was allowed by the Adjudicating Authority and aggrieved by this impugned order the suspended Director of Corporate Debtor has come up in appeal.

3. Making his submissions, Shri Ramji Srinivasan and Shri Abhijeet Sinha, Ld. Sr. Counsels for the Appellant submitted that Part-IV in the Section 7 application was defective and hence the petition was not maintainable. It was contended that the Section 7 petition was liable to be dismissed for not mentioning the date of default in Part-IV. The Section 7 application was also filed

without proper record of default as contained in the Information Utility or any other evidence of default. Further, the claim made in the petition was clearly time barred. The loan account of the Corporate Debtor had become NPA from 31.12.2008. Even if the NPA date was taken to be 31.03.2016 for TL-2 as claimed by the Respondent No. 1, the date of default could not have been later than 31.12.2015. However, the Section 7 application was filed on 09.01.2021 which was clearly beyond the three years limitation period. It was pointed out that the Hon'ble Supreme in the matter of ***Babu Lal Vardharji Gurjar Vs Veer Gurjar Aluminium Industries (2020) 15 SCC 1*** held that the IBC does not intend to give a new lease of life to debts which are time-barred and that when a debt is barred by time, the right to remedy is time-barred. In the present case, though the claim was not made within the prescribed limitation period, the Adjudicating Authority had erroneously come to the conclusion that the claim was within the limitation. It was also added that the same judgment had also laid down that any party seeking extension of period of limitation, requisite evidence has to be furnished and relevant facts are required to be pleaded. In the present case, the Respondent No.1 had alleged several dates of acknowledgment of the liability by the Corporate Debtor without placing the same on record. The Adjudicating Authority had wrongly relied on a letter dated 08.05.2017 in treating it as an acknowledgment of debt when no such letter was on record. The Adjudicating Authority had also wrongly relied upon the balance sheet of the Corporate Debtor for financial year 2019-2020 for the purpose of acknowledgment of debt as it was beyond three years from the alleged date of default which was 31.12.2015. Reliance was also placed on the judgment of ***Ramdas Dutta Vs IDBI Bank Ltd.***

in ***CA(AT)(Ins) No. 1285 of 2022*** wherein it has been held that the period of limitation would be attracted from the day the default occurs and not from the date of declaration of NPA unless the Financial Creditor is able to produce evidence of acknowledgement of debt on the part of the Corporate Debtor, the period of limitation has to be counted from the date of default. Hence, the benefit of Section 18 of Limitation Act could not have been claimed by Respondent No. 1 in the present factual matrix.

4. Further submission was made that Respondent No. 1 being only an Asset Reconstruction Company ('**ARC**' in short) and not a Bank or a Financial Institution, it could not have given a loan to the Corporate Debtor. The grant of Rs 3.40 Cr. by Respondent No. 1 vide TL-2 was not in accordance with RBI guidelines. The ARC was not entitled to grant loan to the Corporate Debtor when it had already slipped into the NPC category way back in 2008. Hence the debt extended to the Corporate Debtor was not a legally valid debt and the Adjudicating Authority ought to have gone into this fact before admitting the Section 7 application. It is also contended that the Respondent No. 1 had given the loan of Rs 3.40 Cr. to use this credit facility as a tool for recovery of the debt and default under TL-1 which was already time-barred and could not been revived. Moreover, the Respondent No.1 had adjusted Rs 1.59 Cr. out of the Rs 3.40 Cr. TL-2 disbursal which was a deviation from the intended purpose of the loan which was to cover project related approvals and expenses. The Adjudicating Authority had also failed to consider that an exorbitant and unreasonable rate of interest and penal interest was being charged. It was also contended that the Corporate Debtor was a solvent entity with sound experience

in the real estate sector. The Adjudicating Authority failed to appreciate that the Respondent No. 1 deliberately created a situation compelling the Corporate Debtor to face liquidity crunch by disbursing only Rs 3.40 Cr. against the request of Rs 6.90 Cr. and by declaring them to be NPA and pushing them to corporate death. It was submitted that on 31.05.2022, the Corporate Debtor had submitted a One-time Settlement (OTS) offer of Rs 18 Cr. to the Respondent No. 1 which the Corporate Debtor has ability to arrange for repayment of settlement amount by disposing of the property of the project. It was also added that their bonafide is established by the fact that they had already deposited the principal amount indicated in Part-IV with the NCLAT Registry.

5. Refuting the contentions of the Appellant, Shri Amit Singh Chadha, Ld. Sr. Advocate representing Respondent No.1 submitted that the Section 7 application was not time-barred and very much maintainable as it was filed on the basis of debt and default in terms of Schedule-III of the TL-2 dated 07.02.2014. In terms of the repayment schedule of TL-2, the loan of Rs 3.40 Cr. was to be paid in 12 quarterly instalments starting from 31.03.2015 and ending on 31.12.2017. The account of the Corporate Debtor for this TL-2 was declared as NPA on 31.03.2016. A Recall Notice had also been issued on 29.04.2017 which the Appellant has deliberately not placed on record. Instead, the Appellant has tried to mislead this Tribunal by placing on record only the Recall Notice issued in respect of recall of MoC dated 03.12.2013. The Ld. Counsel for Respondent No. l has also placed reliance on the judgment of this Tribunal in ***Koncentric Investment Ltd. & Anr. Vs Standard Chartered Bank, London & Anr*** in ***CA(AT)(Ins) No. 911 of 2021*** which held that the only statutory

requirement under Section 7 is that the default as claimed in the Section 7 application should be within three years from the date when the application is filed under Section 7. It was contended that the Appellant did not file the documents like letters dated 05.05.2017 and 11.12.2017 wherein the Corporate Debtor had clearly admitted the existence of debt and default of Term Loan of Rs 3.40 Cr. Also, there is a clear acknowledgment of the debt of the said TL-2 of 3.40 Cr. in the balance sheet of the Corporate Debtor for the FY 2019-20. Hence, in terms of the well settled legal precepts, the period of limitation stood extended from the date of acknowledgment. It was also pointed out that in view of the judgment of the Hon'ble Supreme Court in ***Suo-Motu Writ Petition (C) No. 3 of 2020*** wherein it was held that in all cases where limitation would have expired during the period between 15.03.2020 till 28.02.2022, notwithstanding the actual balance period of limitation remaining, the limitation period of 90 days was to be counted from 01.03.2022, hence, in the present case since the Section 7 application was filed on 09.01.2021, it was well within the limitation period.

6. On the allegation that the rate of interest charged by the Respondent No.1 was unreasonable and exorbitant, it was contended that the Corporate Debtor had themselves voluntarily agreed to the same and accepted all the terms including the rate of interest as mentioned in the TL-2. It is the contention of Respondent No. 1 that the rate of interest and penal charges was mutually agreed to and was a genuine pre-estimate of the loss suffered by Respondent No. 1 due to inability of the Corporate Debtor to repay the dues. When the TL-2 was executed voluntarily and was never challenged at any stage and the Corporate Debtor had even voluntarily made interest payment at the agreed rate of interest,

it does not lie in their mouth to contend that the TL-2 was signed under undue influence, duress or coercion. As regards the contention that Respondent No. 1 being an ARC could not have given a loan, it is submitted that that this argument of the Appellant is misconceived since RBI guidelines of 22.04.2009 clearly enunciated that restructuring of loans can be undertaken by Securitisation Companies/Reconstruction Companies as one of the measures allowed for realisation of their dues. Further, it is pointed out that the Corporate Debtor had never raised the issue of RBI guidelines for not permitting additional funding when submissions and pleadings were made before the Adjudicating Authority.

7. We have duly considered the arguments advanced by the Learned Counsel for both the parties and perused the records carefully.

8. The first issue for our consideration is whether the present Section 7 petition is time-barred or not and whether TL-1 and TL-2 could have separate dates of default. It is the case of the Appellant that the Respondent No. 1 did not disclose the status of loan account acquired from Union Bank of India in the Section 7 application. This loan account of the Corporate Debtor remained NPA from 31.12.2008. This was concealed from the Adjudicating Authority as it would have otherwise revealed that the limitation commenced on 31.12.2008. Further that Respondent No. 1 had issued a Possession Notice on 23.06.2017 basis the Demand Notice dated 07.01.2009 issued by Union Bank of India tantamount to the Respondent No. 1 admitting that the loan account of Corporate Debtor remained NPA from 31.12.2008. It is also asserted that as per RBI Master Circular dated 01.07.2013, the loan account is required to be declared NPA borrower-wise and not facility-wise. Since TL-2 was part of restructuring for TL-

1, the NPA date should have remained the NPA date in terms of TL-1 i.e. 31.12.2008 in terms of RBI circular. However, to circumvent this scenario of the loan having become time-barred, the Respondent No. 1 filed the Section 7 application by declaring TL-2 as NPA on 31.03.2016. It was further contended that even if the NPA date was to be taken as 31.03.2016 for TL-2 as claimed by the Respondent No. 1, the date of default could not have been later than 31.12.2015. However, the Section 7 application was filed on 09.01.2021 which was clearly beyond the three years limitation period.

9. Per contra, the Respondent No. 1 has denied that it has concealed the NPA status of TL-1 w.e.f. 31.12.2008 or misled the Adjudicating Authority by adverting to another NPA date with respect to TL-2. On the contrary, it was the Appellant who has been trying to mislead the Appellate Tribunal by trying to mix-up the TL-1 assigned by Union Bank of India to Respondent No.1 with the TL-2 of Rs 3.40 Cr. with the latter having been clearly depicted as a "New Loan" and as a "New Facility" in the relevant clauses of the Term Loan Agreement of 07.02.2014. Further in the letters dated 05.05.2017 and 11.12.2017 in which the Corporate Debtor has clearly acknowledged debt and default, a distinction was also clearly drawn between the TL-1 and the TL-2. The balance sheet of the Corporate Debtor for FY 2019-20 and the Independent Auditor's Report attached thereto also clearly indicate the two Term Loans separately. Moreover, the Respondent No. 1 has filed the Section 7 application in respect of TL-2 of 07.02.2014 and hence the NPA date of 31.03.2016 is only applicable. Even the Demand Notice issued under Section 13(2) of the SARFAESI Act on 14.08.2019

by the Respondent No. 1 to the Corporate Debtor clearly indicated that the Demand Notice was issued in respect of TL-2 of Rs 3.40 Cr..

10. Before we delve into making our analysis, it may be pertinent to notice how the limitation issue has been treated by the Adjudicating Authority. The relevant extracts from the impugned order are as reproduced below:

> *"13. It is pertinent to mention that the Corporate Debtor has acknowledged the liability in its letter dated 8.05.2017. Further, as per the Balance Sheet of the Corporate Debtor for the Financial Year 2019-20, both the Term Loans along with the unpaid interest amount were shown under the head Other-Current Liabilities of the Corporate Debtor. As per Section 18 of the Limitation Act, 1963, a fresh period of limitation shall be computed from the date of acknowledgment of debt provided the acknowledgment is made before the expiry of the Limitation Period.*
>
> *14. In light of the settled principle of law, a fresh period of limitation will start from the date of acknowledgment. In the present case, the Corporate Debtor had acknowledged its liability in the letter dated 8.04.2017. Therefore, even if the argument of the Corporate Debtor regarding the date of default being a date not later than 31.05.2015 is considered, a fresh period of limitation will begin on 8.04.2017 as the Corporate Debtor has acknowledged the debt within a period of three years from such date of default being not later than 31.12.2015. Further, as per the guidelines issued by the Supreme Court to deal with the Covid Crisis, in cases where the limitation would have expired during the period between 15.03.2020- 28.02.2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 01.03.2022. Hence, in our consideration, the Present Application which was filed on 9.01.2021 is well within the limitation period prescribed by the law and the averment of the Corporate Debtor qua non-maintainability of the Application is untenable."*

11. When we look at the Part IV of the Section 7 application, we notice that the Respondent No. 1 has filed the Section 7 application in respect of TL-2 of 07.02.2014 and not for the amounts due and payable in respect of TL-1. The relevant portion is reproduced hereunder:

PART-IV

PARTICULARS OF FINANCIAL DEBT

1	TOTAL AMOUNT OF DEBT GRANTED DATE(S) OF THE DISBURSEMENT	a) Financial Creditor(s) in the year 2014 sanctioned a term loan of Rs. 3,40,00,00/- (Rupees three Crore forty lakhs only) vide term Loan agreement dated 07.02.2014. b) The account of the Corporate Debtor was classified as NPA on 31.03.2016 in accordance with guidelines of Reserve Bank of India.
2	Amount claimed to be in default and the date on which the default occurred.	Amount claimed to be in default is **Rs. 5,05,89,698/- (Rupees Five Crores Five Lakhs Eighty-Nine Thousand Six Hundred Ninety Eight Only** as per the Recall notice dated 29.04.2017 *Please refer updated statement of account*

12. Again, when we look at the clauses of the TL-2 of Rs 3.40 Cr, we find that it has been clearly depicted mutually as a "New Loan" and as a "New Facility". The relevant clauses of the TL-2 have been placed at Annexure-VI of APB is reproduced below:

Term Loan Agreement

This Loan Agreement is made at Jodhpur on this 7 day of February, 2014

……

……

WHEREAS

The Obligors have requested Phoenix Trust to settle/restructure the liabilities and dues in respect of the Assigned Debt (defined hereunder) and upon

mutual discussions, the Parties have recorded the terms and conditions of the settlement/restructuring, inter-alia, in the Memorandum of Compromise (defined hereunder).

*As a part of the terms and conditions of the restructuring/ settlement, the Obligors have also requested the Lender for additional funding for the purpose of achieving effective restructuring as above by reviving the operations of the Borrower. The Lender, at the request of the Obligors, has agreed to extend financial assistance upto an amount of Rs.3,40,00,000/- (Rupees Three Crores and Forty Lakhs Only) ("**New Loan**" and more particularly defined hereunder) for the Purpose mentioned hereinbelow and subject to the terms and conditions set out in this Agreement and such other documents in relation thereto executed/to be executed by and between the Lender and the Obligors including for creation and perfection of New Loan Security (defined hereinafter) (collectively "**Facility Documents**" and more particularly defined hereunder).*

……

……

DEFINITIONS AND INTERPRETATION

*(xivii) "**New Loan Amount**" shall mean the maximum amount of Rs.3.40,00,000/- (Rupees Three Crores and Forty Lakhs only).*

*(xiviii) "**New Facility Documents**" shall mean and include:*

(a) this Agreement;
(b) the New Loan Security Documents;
(c) any other document categorised by the Lender as a Facility Document.

*(l) **"New Loan Dues"** shall mean:*

(a) the principal of and interest payable in respect of the New Loan and all other obligations and liabilities of the Borrower, default/penal interest, indemnities, charges (including prepayment premium if any), fees, penalties, expenses, any other monies, incurred, arising out of or payable in connection with the New Loan;

(b) any and all sums incurred/advanced by Lender in order to preserve the security interest or any part thereof created/caused to be created by the Borrower and/or any Obligor in relation to the New Loan; and

(c) in the event of any proceeding for the collection or enforcement of the New Loan, after an Event of Default shall have occurred, the expenses of retaking, holding, preparing for sale or lease, selling or otherwise disposing of or realising the security interests or any part thereof, or of any exercise of and performance by Lender of its rights, powers, duties under the relevant New Facility Documents, together with legal fees and court costs.

.....
INTERPRETATION
.....
(vi) Interest
*(a) The Borrower shall pay interest on the New Loan at a rate of 30% p.a., with quarterly rest, as a part of the Instalment, subject to Clause relating to Event of Default hereinunder written. ("**Interest**")*
.....
(e) Without prejudice to the other rights and remedies that the Lender may have under the Facility Documents, law or equity, if the Borrower fails to pay any sum due and payable to the Lender on the due date(s), the Borrower shall pay Interest at the rate of 3% (Three percent) per month. For the avoidance of doubt, it is hereby clarified that, upon occurrence of a default in payment, (a) the aggregate interest to be charged on the amount due and payable as on date of such default shall be 36% p.a. instead of 30% p.a. at quarterly rest and calculated for the period beginning from the date of such default until the payment of the same; and (b) no further Interest or penal interest/Default Interest as aforesaid shall be charged from the date of such default. The Borrower acknowledges that all sums payable under the Facility Documents by way of Default Interest are reasonable and that they represent genuine pre-estimates of the loss incurred by the Lender in the event of non-payment or default by the Borrower. The Borrower acknowledges that the New Loan provided under this Agreement is for a commercial transaction and waives any defences available under usury or other laws relating to the charging of interest.

5. SECURITY
(i) Security
(a) The Borrower agrees and undertakes that the New Loan together with all New Loan Dues thereunder shall be secured by the New Loan Security.
(b) The Borrower shall satisfy the Lender that wherever necessary, the particulars of the charge, in respect of the Secured Properties, as may be applicable, have been duly registered with the Sub-Registrar of Assurances and/or appropriate Governmental Authorities."

(Emphasis supplied)

13. It is also the contention of the Respondent No. 1 that it was the Corporate Debtor which approached Respondent No. 1 to provide this additional loan as is

evident from their letter dated 03.12.2013 seeking a fresh Term Loan of Rs 6.90 Cr. which letter is as reproduced below:

To, *Date 03.12.2013*

Chief Operating Officer
Phoenix ARC Private Limited
7th Floor, Dani Corporate Park
158, C.S.T Road, Kalina,
Santacruz (E), Mumbai -400098
Dear Sir,

As per letter dated 3rd December, 2013 in view of the debt of Union Bank of India pertaining to Karni Developer & Construction Company Private Limited to your company being transferred to your organisation, we hereby propose settlement of existing Term Loan facilities at Rs. 18.10 cr. as per terms agreed under Memorandum of Compromise.

Also, we request Phoenix ARC Pvt. Ltd. as reconstruction measure, to sanction Karni Developer & Construction Company Pvt. Ltd. a Fresh Term Loan of Rs 6.90 cr., the same would be utilised towards taking necessary approval from Authority and commencing of proposed residential project at Khasra No.:- 595 to 599, 575 to 589, 600 to 602, 603 to 621, total admeasuring 33 Bigha 3 Bishwa at Village- Geva, Tehsil & District- Jodhpur (Raj.). We have already shared the estimated project outlay towards cost and expected revenue. A copy of same is enclosed herewith.

Director, Karni Developer & Construction Co. Pvt. Ltd.

(Emphasis supplied)

The use of the word "Also" in the 2nd paragraph in the above letter clearly shows that the Corporate Debtor had sought a fresh loan apart from settlement of the existing Term Loan Facility. Further, when we see the response from the Respondent No. 1 to the Corporate Debtor agreeing to disbursal of Rs 3.40 Cr., it has been treated as a "Request for additional funding for the purpose of achieving effective restructuring" as may be seen at page-112 of APB. Thus, both parties seemed to be at ad idem that the TL-2 was an additional loan and was a separate transaction from TL-1.

14. Even the letters of Personal Guarantee dated 07.02.2014 which have been executed by Shri Suresh Chouhan, Shri Kamlesh Chouhan and Smt. Madhubala Chouhan in favour of the Corporate Debtor, there is clear mention of the "New Loan" as defined in TL-2 of 07.02.2014 for an amount of Rs 3.40 Cr. This letter of guarantee which is a registered and stamped document has been placed at Annexure-IV by the Respondent No. 1 in their Additional Affidavit (pages 43-55). Mention of the "New Loan" of Rs 3.40 Cr. also finds place in the Memorandum relating to Deposit of Title Deeds 07.02.2014 (pages 56-65 Additional Affidavit of Respondent No.1), Deed of Hypothecation dated 07.02.2014 (pages 66-75 of Additional Affidavit of Respondent No.1), declaration and undertaking for creation/extension of mortgage dated 07.02.2014 (pages 76-78 of Additional Affidavit of Respondent No.1) all mention about the "New Loan". Even the Recall Notice dated 29.04.2017 relates only to the TL-2 of Rs 3.40 Cr. as may be seen at pages 79-82 of the Additional Affidavit wherein the interest amount has been shown as Rs 1.65 Cr. and the total outstanding shown as Rs 5.05 Cr. Interestingly, even in their communications with Respondent No.1 dated 05.05.2017 and 11.12.2017 which we shall deal with in details later, we notice that the Corporate Debtor has made a distinction between the TL-1 and the TL-2 of Rs 3.40 Cr. Even the communication dated 31.05.2022 as placed at page 248 of Appeal Paper Book ('**APB**' in short), we notice that the Corporate Debtor has sent a Onetime Settlement (OTS) proposal to the Respondent No. 1 wherein again a clear distinction has been drawn by the Corporate Debtor between TL-1 and TL-2 of Rs 3.40 Cr.

15. From the above multiple materials/documents available on record, we are persuaded to believe that the Respondent No. 1 had filed the Section 7 application in respect of a new and additional loan under TL-2 of 07.02.2014 and not for the amount due and payable in respect of TL-1 and accordingly hold that the limitation period has to be computed from the NPA date of 31.03.2016. Given this backdrop, we do not find much substance in the contention of the Appellant that present is a case where the Adjudicating Authority should have investigated the nature of transaction and exercised caution in admitting the Section 7 application. We note that reliance has been placed by the Appellant on the judgment of this Tribunal in ***Pawan Kumar Vs Utsav Securities Pvt. Ltd. in CA(AT)(Ins.) No. 251 of 2020*** in which it has been held that that where any person furnishes information under Section 7, which is false in material particulars or knowingly omits material facts, such a person may be penalised by invoking Section 65 of IBC. We have no quarrel with the above proposition of law but have to be mindful that the facts of the case in ***Pawan Kumar*** supra was distinguishable as in that case there was no agreement/document in respect of loan and interest and the period of repayment. Nor were Balance Sheets for relevant years of the Corporate Debtor placed on record in ***Pawan Kumar*** supra. It is the case of the Appellant that Respondent No. 1 was trying to use the CIRP process as a recovery tool and had supressed material facts and particulars before the Adjudicating Authority and fraudulently filed the Section 7 application. It has also been asserted that the Respondent No. 1 by supressing material facts has misused the insolvency proceedings and hence the Section 7 application attracts Section 65 of the IBC. When we see the prayers contained in

the present appeal, we do not find that Section 65 has been sought to be invoked. Furthermore, the degree of proof and evidence required to prove any transaction to be fraudulent in nature should be beyond reasonable doubt and of an unimpeachable nature which is not found established in the present case. We find no substance in this contention of the Appellant and reject the same.

16. This brings us to the next contention of the Appellant that the Section 7 application was time-barred as against the submission made by the Respondent No.1 that this standpoint of the Appellant lacks foundational basis.

17. Coming to the impugned order which has already been extracted above, we find that the Adjudicating Authority has noted that since the Corporate Debtor has acknowledged their liability in their letter dated 08.05.2017 and in the Balance Sheet of the Corporate Debtor for the Financial Year 2019-20, in terms of Section 18 of the Limitation Act, 1963, a fresh period of limitation shall be computed from the date of acknowledgement.

18. When we look at the factual matrix of the present case, we find that in terms of the repayment schedule of the TL-2 of 07.02.2014, the repayment was to end on 31.12.2017. The account of the Corporate Debtor for this Term Loan was declared as NPA on 31.03.2016. Calculating three months prior to the date of NPA, the date of default works out to be not later than 31.12.2015. The Section 7 application was filed on 09.01.2021 which is clearly beyond three years from the date of default. What therefore needs to be seen is whether the Respondent No. 1 has effectively substantiated the argument canvassed by them that the debt and default having been acknowledged by the Corporate Debtor within the three years limitation period made room for extension of the period of limitation.

19. The Appellant's contention is that the letter of 08.05.2017 which finds mention in the impugned order is not on record. We find no reasons to disagree with the Appellant on this score. However, we find other material on record which has been adverted to by the Respondent No. 1 which were also available before the Adjudicating Authority which clearly establish acknowledgement of liability. It is an undisputed fact that a Recall Notice had been issued on 29.04.2017 by the Respondent No. 1. This Recall Notice had been replied to by the Corporate Debtor on 05.05.2017 wherein the Corporate Debtor clearly admitted their debt and default and requested for postponement of the Recall Notice. The relevant excerpts of this letter placed at 184-186 of APB is as extracted below:

Date: 05.05.2017

Eshwar Karra,
Chief Executive Officer
Phoenix ARC Pvt. Ltd.

Ref: - Your Letter No. PHOENIX/RESL/331/2017-18 dated 29th April, 2017

Subject:- Request to postpone the recall notice against term loan agreement of Rs. 3.40 Crores and to initiate any legal action to enforce the security over the secured assets for the recovery of the dues.
Dear Sir,

We are very sorry for unable to pay the settlement amount as per agreed terms of Memorandum-of Compromise (MOC) dated 03rd December, 2013. We are mentioning below reasons, constraints and circumstances faced by our company due to which we could not pay the agreed amount.
.....
.....
We had reached on this conclusion after comprehensive review of the project, evaluation and detail analysis of expected cash flows. We were very confident on our project as well as our plan to re-start our project & to pay your obligation as per pre-determined schedules. On the basis our confidence,

we had obtained term loans from you at higher rate of interest i.e. 30% and 36% in case any defaults.

……..

…….

Hence we request you to look in to genuine problems of company & bona fide borrower and provide following assistance so we can start our project or find out suitable solutions of our problems.

1. To postpone the recall notice against term loan agreement of Rs. 3.40 Crores and to initiate any legal action to enforce the security over the secured assets for the recovery of the dues.

2. To provide a bank guarantee of Rs. 25,00,000/- in favour of Jodhpur Development Authority, Jodhpur so we can obtain final approved plan from Jodhpur Development Authority, Jodhpur which will help to submit revised repayment schedule for the term loan.

3. To provide assistance in to find out suitable investors/buyers for our project so we can take necessary steps to pay your dues amount as earliest as possible.

4. To provide some additional time to make arrangement for making payment of your dues. We regularly realised about heavy cost of fund which is very risky for our company and our project.

Yours truly,
For Karni Developer and Construction

(Emphasis supplied)

Even though this letter makes reference to inability to pay the settlement amount as agreed in terms of MoC of 03.12.2013, nevertheless, there is a clear mention of postponement of the Recall Notice against TL-2 of Rs 3.40 Cr.

20. We find yet another letter addressed by the Corporate Debtor on 11.12.2017 to the Respondent No. 1 admitting the debt and default in respect of TL-2 of Rs 3.40 Cr. In the said letter, the Appellant have themselves drawn a clear distinction between the TL-1 by way of assignment by Union Bank of India on 03.12.2013 and the TL-2 of 07.02.2014 for Rs. 3.40 Cr. as extracted below:

Date11.12.2017

Mahesh Malunjkar
Authorised Officer
Phoenix ARC Pvt. Ltd.

Ref :- Your Letter
Subject :- For taking physical possession of property

Dear Sir,
You have sanctioned the term loan of Rs.18.10 Crores by way of assignment of term loan of Union Bank of India on 03rd December, 2013 and also sanctioned term loan of Rs. 3.40 Crores on 07th February, 2014 for payment against fees and charges of Jodhpur Development Authority for approval of Plan.

We have intimated the position of our project time to time through various letters, through telephonic talk and meeting with your authorized officers. But we were unable to pay your dues as per repayment schedules or agreed terms due to project constraints as intimated by us.

We have received your letter to take physical possession of said mortgaged property.

Our mortgaged property is located behind our another project property. The way to our mortgaged property passes through our another project property. Therefore, to reach to our mortgaged property we have to first cross our project property.

Therefore, whenever you or any interested investor wants to approach the mortgaged property you have to inform us at least 7 days before. So that we can assist you to approach the mortgaged property without any difficulty.

For Karni Developer and Construction

(Emphasis supplied)

From a plain reading of this letter, it becomes clear that the Appellant has expressed its inability to pay its due as per repayment schedule and have also

taken notice that their mortgaged property has been taken physical possession of by the Respondent No. 1 which is a clear acknowledgement of liability.

21. It has also been asserted by the Respondent No. 1 that there is a clear acknowledgment of the debt of the said TLA-2 of 3.40 Cr. in the balance sheet of the Corporate Debtor for the FY 2019-20. When we look at Annexure-B of the Independent Auditor's Report which is placed at page 284-286 of the APB, there is a clear mention of the TL-2 of Rs 3.40 Cr. and the default committed in respect of the same, the relevant extract of which is as reproduced below:

ANNEXURE-B OF INDEPENDENT AUDITOR'S REPORT

(viii) Company raised two term loans of Rs 18.10 Crores vide agreement dated 03.12.2013 and Rs 3.40 Crore vide agreement dated 07.02.2014 from Phoenix ARC Private Limited and company is in default for instalments of Rs 5.25 Crore from 01.04.2015 to 31.03.2016, Rs 8.38 Crore from 01.04.2016 to 31.03.2017 and Rs 6.28 Crore from 01.04.2017 to 31.03.2018 (which is after adjusting of Rs 1,59,34,415 on account of loan returned vide demand draft totalling to Rs 19.91 Crore.

(Emphasis supplied)

22. We have already seen that in the above letters dated 05.05.2017 and 11.12.2017, the Corporate Debtor has acknowledged debt and default after making a distinction between the TL-1 and the TL-2 of Rs 3.40 Cr. There is also a clear acknowledgment of TL-2 in the balance sheet of the Corporate Debtor for FY 2019-20. Furthermore, in view of the documents like the TL-2 Agreement, Amendment Agreements, Letters of Personal Guarantee, Memorandum relating to deposit of Title Deeds, Recall Notice dated 29.04.2017 and Section 13(2) Demand Notice under SARFAESI Act, we find that there is sufficient evidence to prove the existence of debt and default. The balance sheet of the Corporate

Debtor for FY 2019-20 and the Independent Auditor's Report attached thereto clearly indicate both the Term Loans along with unpaid interest amount. We therefore find no error in the impugned order that in view of the acknowledgement of liability on the part of the Corporate Debtor, the period of limitation stood extended. Hence, though the Section 7 application was filed on 09.01.2021, it fell within the limitation period in view of the judgment of the Hon'ble Supreme Court in ***Suo-Motu Writ Petition (C) No. 3 of 2020*** wherein it was held that in all case where limitation would have expired during the period between 15.03.2020 till 28.02.2022, notwithstanding the actual balance period of limitation remaining, the limitation period of 90 days was to be counted from 01.03.2022. Hence the application under Section 7 was clearly filed within limitation.

23. We now come to the next limb of argument of the Appellant that the Respondent No. 1 being an ARC was not entitled to grant fresh loan to the Corporate Debtor which had slipped into NPA from 31.12.2008. It has been further contended that the Respondent No. 1 is registered under Section 3 of SARFAESI Act, 2002 and is therefore bound by statutory provisions and rules of SARFAESI Act, including Sections 9 and 10. In terms of these provisions of SARFAESI Act, the Respondent No. 1 as an ARC can only buy NPA accounts from Banks and NBFCs, and in doing so, can only reschedule payment of debts of the borrowers but cannot sanction a fresh loan. It has been contended that TL-2 dated 07.02.2014 executed by Respondent No. 1 was not in conformity with the Sections 9 and 10 of SARFAESI Act and therefore the said debt was not enforceable under IBC. Per contra, it is the contention of the Respondent No.1

that this argument of the Corporate Debtor is misconceived since RBI guidelines of 22.04.2009 clearly enunciates that "Restructuring of loans by Securitisation Companies/Reconstruction Companies" (SC/RCs) is one of the measures allowed to be undertaken by SC/RCs for realisation of their dues.

24. When we look at the relevant guidelines of RBI of 22.04.2009 as placed before us by the Respondent No.1, we find that there is no bar or embargo on SC/RCs deploying their funds for undertaking the restructuring of acquired loan account with the sole purpose of realising their dues, which guidelines read as under:

Acquisition of Financial Assets by Securitisation Companies/Reconstruction Companies (SC/RCs) – Clarifications

References have been received by the Bank seeking clarifications whether acquisition of financial assets by one SC/RC from another SC/RC will be in conformity with the provisions of SARFAESI Act/ guidelines issued by the Bank in the matter. Further, certain SC/RCs have desired to know if the SC/RCs can deploy their funds for the purpose of restructuring of acquired loans to enable them to realise their dues.

2. The issues were examined and our response is as under:

(i) A Securitisation Company/Reconstruction Company is neither a 'bank' in terms of provisions of Section 2(1)(c) of SARFAESI Act, 2002 nor a 'financial institution' in terms of provisions of Section 2(1)(m) of the said Act. Therefore, acquisition of financial assets by one SC/RC from another SC/RC will not be in conformity with the provisions of SARFAESI Act, 2002.

(ii) 'Restructuring of loans by SC/RC' is one of the measures allowed to be undertaken by SC/RCs for realisation of their dues. As such, there is no bar on SC/RCs deploying their funds for undertaking restructuring of acquired loan account with the sole purpose of realizing their dues.

Chief General Manager In-Charge

Apart from there being no bar, we also notice that it was the Corporate Debtor which had approached Respondent No. 1 to provide this additional loan for the

purpose of effective restructuring of the Corporate Debtor. This is evident from the letter dated 03.12.2013 from the Corporate Debtor to the Respondent No. 1 seeking a fresh Term Loan of Rs 6.90 Cr. as reconstruction measure which letter is already reproduced above at paragraph 13 above. In any case this issue was not agitated before the Adjudicating Authority and has been raised as an afterthought before this Tribunal.

25. Another argument which has been canvassed by the Appellant is that the imposition of 30% interest p.a. and penal interest 36% p.a. is unlawful under the Usurious Loans Act, 1918. This contention was repelled by the Respondent No.1 by adverting attention to the Term Loan Agreement-2 wherein the Corporate Debtor acknowledged that all sums payable under the Facility Documents by way of default interest was reasonable and that it represented genuine pre-estimates of the loss incurred by the lender in the event of non-payment or default by the Corporate Debtor.

26. When we look at the Term Loan Agreement-2, as reproduced above at para 12 above, we find that the Corporate Debtor also acknowledged that the TL-2 was for a commercial transaction and waived any defence available under usury or other laws relating to the charging of interest. Since deployment of loan was for restructuring of distressed accounts, it attracted higher rate of interest to neutralise high risk factor of default. Coming to the contention of the Appellant that the Hon'ble High Court of Delhi in ***Geetu Lakhpat and Other Vs Jaipal 2011 SCC Online Del 1706*** had held 24% p.a. interest as excessive and against public policy, we find the facts therein to be different from the present case. The distinguishing fact in that case was that the interest therein was decretal interest

and not an interest arising out of any contractual term. Reliance has also been placed by the Appellant on the judgment of this Tribunal in ***Tulip Star Hotels Ltd. Vs Anish Ranjan Nanavaty*** in ***CA(AT)(Ins.) No. 1114-1115 of 2023*** wherein the issue of admitted claim of the Asset Reconstruction Company was remanded by this Tribunal to the Adjudicating Authority to be correctly redetermined by the Resolution Professional in consultation with the CoC. This ratio is also not applicable in the facts of the present case since in ***Tulip Hotels case supra***, though the Settlement Agreement which provided for 22% interest had already been revoked, yet the Financial Creditor was trying to enforce the said rate of interest. The Corporate Debtor having signed the TL-2 dated 07.02.2014, the terms of the same have become binding. Having signed the TL-2 and adhered thereto without challenging the same, the Corporate Debtor cannot now raise the issue of legality or validity of the Term Loan Agreement. Moreover, when the TL-2 was executed voluntarily and was never challenged at any stage and the Corporate Debtor had even voluntarily made interest payment at the agreed rate of interest, we do not find much force in the contention of the Appellant of the applicability of the ***Tulip Hotels*** ratio. We do not find that the issue of rate of interest was pressed before the Adjudicating Authority. It is well settled that while dealing with a Section 7 application neither the Adjudicating Authority nor the Appellate Authority is expected to interfere with the terms of contract entered into between the concerned parties. All that is required to be seen is whether the debt and default is proven without adjudicating on whether the rate of interest was unreasonable or inflated. That being the case, raising

this fresh plea at the appellate stage of excessive interest rate cannot be looked into.

27. This brings us to the objection raised by the Corporate Debtor that no date of default has been mentioned in the Section 7 application. This technical plea has been turned down by the Adjudicating Authority in the impugned order which is as reproduced below:

> *8. In the present Application, the Corporate Debtor has raised a technical objection that the date of default has not been mentioned in the Form-1 of the Application filed by the Financial Creditor, therefore the application filed under Section 7 is defective and is not maintainable. Upon perusal of Form-1 filed by the Financial Creditor, in Part IV against the amount claimed to be in default and the date on which default occurred, the Financial Creditor has stated that "Amount claimed to be in default is Rs. 5,05,89,698/- (Rupees Five Crores Five Lakhs Eighty-Nine Thousand Six Hundred Ninety-Eight only) as per the Recall Notice dated 29.04.2017."*
>
> *9. From the Part IV of Form I, it is seen that the Financial Creditor has mentioned the amount of default but no date is mentioned regarding the date of occurrence of default. However, the Financial Creditor has annexed several documents to show the existence of debt and its default including a copy of the Term Loan Agreement, Personal Guarantee Agreements, Recall Notice dated 29.04.2017 and Notice under Section13(2) of SARFAESI dated 14.08.2019. The Financial Creditor has also stated that the Account of the Corporate Debtor was declared as NPA on 31.03.2016. Further, the Financial Creditor has also produced letters from the Corporate Debtor acknowledging the debt and the Corporate Debtor has itself annexed the OTS which was presented to the Financial Creditor.*
>
> *10. The Financial Creditor has produced all the relevant documents regarding the debt and its default. In such a situation, it will be inequitable and unjust to dismiss the Application solely on the technical ground that the Financial Creditor has failed to mention the date of default in Part IV of the Application.*

28. To examine the tenability of the impugned order in this context, we may notice the particulars given in Para-V of the Section 7 application which is as reproduced below:

PART-V

PARTICULARS OF FINANCIAL DEBT (DOCUMENTS, RECORDS AND EVIDENCE OF DEFAULT)

	THE LATEST AND COMPLETE COPY OF THE FINANCIAL CONTRACT REFLECTING ALL AMENDMENTS AND WAIVERS TO DATE (ATTACH A COPY)	Annexure-A1: Copy of certificate issued by Reserve Bank of India. Annexure-A2: Board Resolution dated 27.10.2020. Annexure-A3: Term Loan Agreement dated 07.02.2014 duly affixed on stamp paper vide serial No. 404486 of Rs. 25,000 /- Annexure-A4: First Amendment agreement dated 30.06.2014. Annexure-A5: Second Amendment agreement dated 29.12.2014. Annexure-A6: Letter of Personal Guarantee Dated 07.02.2014 executed by Sh. Suresh Chauhan, Sh. Kamlesh Chauhan and Smt. Madhubala Chauhan. Annexure-A7: Memorandum relating to Deposit of Title Deeds dated 07.02.2014 Annexure-A8: Deed of Hypothecation dated 07.02.2014.

		Annexure-A9: Declaration and Undertaking for creation/extension of Mortgage executed by Smt. Madhubala Chouhan dated 07.02.2014. Annexure-A10: Recall Notice dated 29.04.2017 issued to the Corporate Debtor and Guarantors. Annexure-A11: Notice dated 14.08.2019 U/s 13(2) of the SARFAESI Act, 2002.

From the list of documents placed in the Part-V, we notice that the Adjudicating Authority had substantial material on record placed before it for determination of date of default. We have no reasons to disagree with the Adjudicating Authority in recording its satisfaction basis the materials on record placed by Respondent No. 1 in Part-V. The Adjudicating Authority has also adverted attention to the decision of this Tribunal in the case of ***Manmohan Singh Jain Vs SBI*** in ***CA(AT)(CH)(Ins) No. 97 of 2021*** wherein it had been held that omission to mention date of default is not fatal to a Section 9 application as long as sufficient documentary evidence is adduced to establish the date of default.

29. At this juncture, we may notice the relevant findings with regard to debt and default as recorded by the Adjudicating Authority in the impugned order which has come up in appeal. The relevant portions are as excerpted below:

> *15. As far as the other contentions of the Corporate Debtor are concerned, it will be relevant to refer to Section 7 of the Code. Section 7 of the Code clarifies that the Adjudicating Authority has powers to initiate CIRP upon being satisfied that default has occurred of the financial debt. The key ingredients*

of an Application filed under Section 7 of the Code are: (i) there has to be a financial debt and; (ii) there must be a default in repayment of the financial debt. While dealing with an application under section 7, the Adjudicating Authority is not required to consider the question of the dispute between the parties as long as the 'debt' and 'default' is proved.

16. Presently, the Applicant has contended that the Corporate Debtor has defaulted in repayment of Term Loan II and the outstanding amount as per Recall Notice dated 29.04.2017 is Rs. 5,05,89,698/- (Rupees Five Crores Five Lakhs Eighty-Nine Thousand Six Hundred Ninety-Eight Only).

17. The Financial Creditor has established the existence of the debt and its default. In light of the aforementioned, we are of the view that Corporate Insolvency Resolution Process ought to be initiated against the Corporate Debtor as all the ingredients laid down under Section 7 of the Code are fulfilled in the present matter.

30. It has been well settled by the Hon'ble Supreme Court of India in ***M/s Innoventive Industries Ltd. v. ICICI Bank in C.A. Nos. 8337-8338 of 2017*** that upon the Adjudicating Authority being satisfied that a debt was due and that default had occurred, it was bound to commit the Corporate Debtor into insolvency. The Hon'ble Apex Court in the case of ***M/s Innoventive Industries Ltd. v. ICICI Bank in C.A. Nos. 8337-8338 of 2017*** has laid down the guiding principles to admit or reject an application filed under Section 7 of the IBC. It may be relevant to notice the relevant paragraph of this judgment which is as follows:

> *"30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has*

not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise."

31. On the question as to whether debt and default was adequately demonstrated before the Adjudicating Authority, basis the records made available before it, the Adjudicating Authority has rightly concluded that it was satisfied with the evidence and material produced before it by the Respondent No.1 to prove that a debt had arisen; that a default has occurred and the default is above the threshold limit. There was admittedly a debt qua the Financial Creditor and there was a default in discharge of the debt obligations by the Corporate Debtor. We find no cogent reasons to disagree with this part of the impugned order either.

32. The Ld. Sr. Counsel for the Appellant has also submitted that they have already deposited the claim set out in Part-IV of Section 7 application with the NCLAT Registry and are willing to submit a Settlement Proposal to the Respondent No. 1 to amicably resolve the dispute subject to imposition of a reasonable rate of interest.

33. In the present case, since the CoC has already been constituted, in the event the settlement proposal as proposed by the Appellant is accepted by the Respondent No. 1, it shall be open for the Respondent No. 1 to file a Section 12-A application read with Regulation 30A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 within two weeks from date of pronouncement of this order. In the event the settlement proposal is not

accepted by Respondent No. 1 and the Section 12-A application is not filed within two weeks from date of pronouncement of this order, the RP shall proceed with the CIRP of the Corporate Debtor in accordance with law. With the liberty aforesaid, the appeal is dismissed with no order as to costs. The NCLAT Registry is also directed to refund the amount deposited by the Appellant to them forthwith.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

Place: New Delhi
Date: 18.03.2025

Abdul/Harleen