BEFORE THE NATIONAL COMPANY LAW TRIBUNAL

SPECIAL BENCH, NEW DELHI

IB-613/ND/2019

[Under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016]

IN THE MATTER OF:

STATE BANK OF INDIA

...APPLICANT/ FINANCIAL CREDITOR

VS.

SHRI LAL MAHAL LIMITED

(Now known as M/s Nutrionex Manufacture Limited)

... RESPONDENT /CORPORATE DEBTOR

Order delivered on: 25.02.2021

CORAM:

DR. DEEPTI MUKESH,
HON'BLE MEMBER (J)

SHRI HEMANT KUMAR SARANGI,
HON'BLE MEMBER (T)

MEMO OF PARTIES

STATE BANK OF INDIA

HEAD OFFICE:
State Bank Bhawan,
Madam Cama Road,
Nariman Point,
Mumbai- 400021.

BRANCH:
12th Floor,
Jawahar Vyapar Bhawan, 1,
Tolstoy Marg,
New Delhi- 110001.

...Applicant/Financial Creditor

VERSUS

SHRI LAL MAHAL LIMITED

(Now known as M/s Nutrionex Manufacture Limited)

REGISTERED OFFICE:
B-16, Bhagwan Dass Nagar,
New Delhi- 110026.

...Respondent/Corporate Debtor

For the Applicant : Mr. Ramji Srinivasan, Sr. Adv.
Mr. Ankur Mittal, Adv.
Mr. Karan Setiya, Adv.

For the Respondent : Mr. Krishnendu Datta, Adv.
Mr. Ashish Verma, Adv
Ms. Srishti Vaid, Adv.
Mr. Rahul Gupta, Adv.

ORDER

PER – DR. DEEPTI MUKESH, MEMBER (Judicial)

1. The present application is filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity **'the Code'**) read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity **'the Rules'**) by State Bank of India (for brevity **'Applicant'**) through Mr. N.D Sharma, being the Assistant General Manager, State Bank of India at Branch Office (Stressed Assets Management Branch-I) at 12th Floor, Jawahar Vyapar Bhawan, 1, Tolstoy Marg, New Delhi- 110001,duly authorised vide authority letter 16.06.2017 and relying on the gazette notification issued by the applicant on 02.05.1987 complying the regulations framed by the Reserve Bank of India as mentioned Form-I with a prayer to initiate Corporate Insolvency Resolution Process (CIRP) against Shri Lal Mahal Limited which is now known as M/s Nutrionex Manufactures Limited (for brevity **'Corporate Debtor'**).

2. The Applicant, State Bank of India is a body Corporate constituted under the State Bank of India Act, 1955 on 01.07.1955, having its registered office at State Bank Bhawan, Madam Cama Road, Nariman Point, Mumbai- 400021. The state bank of India New Delhi Branch, having its office at Parliament Street, New Delhi and amongst others a Branch Office at Stressed Assets Management Branch- I at 12th Floor, Jawahar Vyapar Bhawan, 1, Tolstoy Marg, New Delhi- 110001.

3. The Corporate Debtor, Shri Lal Mahal Limited is a company limited by shares incorporated on 12.05.1997 under the provision of Companies Act, 1956 bearing CINU74999DL1997PLC087205 and having registered office at B-16, Bhagwan Dass Nagar New Delhi - 110026.The Company was originally incorporated in the year 1907, as a proprietorship firm named "Shiv Nath Rai Harnarain (India) Limited." In 1997, the proprietorship business was taken over by incorporation of the respondent company. On 15.06.2019 the name of the company was changed from Shri Lal Mahal Limited to Nutrionex Manufacturers Limited. The copy of relevant

certificate of incorporation is annexed. As per the applicant the authorised share capital of the company is Rs. 56,00,00,000/- and the Paid-up share capital is Rs. 36,15,46,970/-..

4. The applicant submits that the corporate debtor was issued sanction letter dated 28.02.2011 for FCNR (B) term loan to the extent of Rs 25,88,00,000/- by the State Bank of Travancore (since merged with State Bank of India w.e.f 01.04.2017) for brevity the "merged SBI". In pursuance of the said loan facility, Corporate Debtor executed various loan documents being the FCNR (B) Term Loan Agreement, Term Loan Agreement for Higher Value Advances and Guarantee deed in favour of State Bank of Travancore dated 14.03.2011.Accordingly, an advance FCNR (B) term loan was disbursed by State Bank of Travancore (since merged with State Bank of India w.e.f 01.04.2017) to the extent of Rs. 25,88,00,000/-. The corporate debtor in order to avail the loan facilities, hypothecated exclusive charge on whole of its movable properties including plant, machinery, spare, tools and all the other movables.

5. The applicant submits that from September, 2011 onwards Corporate Debtor had been availing various working capital facilities from a consortium comprising State Bank of India and following banks being, State Bank of Mysore, State Bank of Travancore, State Bank of Bikaner and Jaipur, State Bank of Patiala, and State Bank of Hyderabad (since merged with State Bank of India w.e.f. 01.04.2017).The consortium also comprises of Central Bank of India, Bank of India, Bank of Baroda, Corporation Bank, and Yes Bank (collectively known as "Consortium Lenders"). The applicant states that thereafter, on 08.04.2014, the corporate debtor was granted various working capital facilities (fund based and non-fund based, SLC limit and forward contract exposure) in the form of consortium funding comprising of the State Bank of India as merged and the consortium lenders to the extent of Rs. 1169.38 crores.

6. The applicant submits that out of the total sanctioned capital, the share of the applicant as merged is Rs.783.88Cr. In respect of the said loan facility the

corporate debtor hypothecated all the current assets such as stock in trade, stores and spares, including that in possession of the corporate debtor by way of substitution and additionally vide Joint deed of Hypothecation dated 08.04.2014. Further a separate Guarantee deed dated 08.04.2014 was also signed in favour of the consortium lenders.

7. The applicant states that the said loan facilities were enhanced/modified from time to time vide separate sanction letters dated 29.10.2015, 18.03.2016 and 30.03.2016, 29.04.2016, 13.07.2016 and 07.12.2016. The Corporate Debtor accepted the terms and conditions as mentioned in the sanction letters and in pursuance of the said loan facilities, executed various loan documents in favour of Consortium Lenders vide loan documents dated 08.04.2014 which are Working Capital Consortium Agreement, Inter Se Agreement and Consent Clause.

8. The applicant submits that around December 2016, the corporate debtor again approached a consortium of State bank of India and bunch of banks being, State Bank of India as merged and also Central Bank of India, Bank of India, Bank of Baroda, Corporation bank, IDBI Bank and Punjab National Bank for grant of various working capital facilities (fund based and non-fund based, SLC limit and forward contract exposure) in the form of consortium funding to the extent of Rs. 1223.72 Cr. However, the funds in this loan facility could not be disbursed as the Directorate of Revenue Intelligence (DRI) conducted a raid on 22 December 2016, at the premises of the corporate debtor and directed the applicant to freeze the accounts of the corporate debtor.

9. The applicant states that the corporate debtor first defaulted in payment of interest and in operating the loan accounts in terms of the loan documents since 29.11.2016 and thereafter the default continued for a period of three consecutive months hence on 29.03.2017, the bank declared the account of corporate debtor as Non- performing Asset (NPA). Thereafter on 31.03.2017, the corporate debtor also executed a balance confirmation letter confirming the loan amount due in favour of

the applicant. The copy of balance confirmation letter from corporate debtor dated 31.03.2017 is annexed. The applicant submits that reminders were sent to the corporate debtor for repayment of default amount but the corporate debtor did not make any payment. Hence following notices were issued to the corporate debtor and the guarantors:

a) Notice u/s 13(2) of the SARFAESI Act, 2002 dated 06.02.2019

b) Demand notice dated 13.02.2019 was served upon the Corporate debtors and its guarantors to clear the outstanding due.

c) Another Notice u/s 13(2) of the SARFAESI Act, 2002 dated 20.07.2019 was issued withdrawing the prior notice dated 06.02.2019.

13. On 01.03.2019, the applicant filed an application under Section 7 of the I&B code. As per Form I 'Part IV the total amount due and payable by the corporate debtor as on 21.01.2019 is Rs. 875,93,72,601/- (Rupees Eight hundred Seventy-Five Crores Ninety-Three Lacs Seventy-Two Thousand Six Hundred one only). Thereafter on 30.03.2019, the state Bank of India filed OA at DRT under Section 19 of RDDB & FI Act, 1993.

14. The corporate debtor filed reply to the said application, and raised various objections with respect to maintainability of the application and the application being incomplete and incorrect. Further denied the contentions of the applicant and raised the objections as under:-

I. The corporate debtor raised a preliminary objection regarding the Section 7 application being incomplete and defective stating that the Form II filed by the proposed IRP is incorrect and incomplete with regards the eligibility of proposed resolution professional as the certification is provided with respect to Action Ispat & Power Pvt. Ltd.

II. With regards the inconsistencies in the amount of loan granted and claim to be as approximately aggregated to INR 1169.32 Crore, which is not the amount in debt and the applicant has artificially inflated the total of Debt granted. The corporate debtor states that the applicant has accumulated the

debts of other banks without any authorization from any lender to claim on their behalf. The applicant further states that no other banking institution or consortium member has annexed the accounts statement.

III. That the basis of filing the present petition, i.e. classification of account as non-performing asset is under challenge at the Hon'ble Delhi High Court in WP(C) 2829 of 2017. Further also submits that the applicant has simultaneously initiated proceedings under the SARFAESI Act.

IV. That as per the RBI norms in case the export does not materialize, the PCFC liability may be extinguished in Indian Rupee.

V. That prior to December 2016, there was no stress incipient in the account. Thereafter on 22 December 2016, the Directorate of Revenue Intelligence illegally raided the premises. The said raid was conducted on the pretext of non–payment of custom duty by selling jewellery in domestic market instead of exporting it. Accordingly, a liability of Rs.17 crore, which was not accounted for was calculated as per the prevailing custom duty. The corporate debtor submits that the search was conducted a day after the consortium of banks approved an additional loan facility of Rs.125 crores. Further corporate debtor submits that the investigation and consequent raid conducted was challenged before the Hon'ble High Court of Allahabad and the action initiated by DRI was stayed vide order dated 20.02.2019.

VI. That vide letter dated 23.12.2016, the DRI directed the consortium bank to freeze the accounts of the corporate debtor. Though there is no such specific provision under law, nevertheless 45 bank accounts (including current account, cash credit and PCFC accounts) of the corporate debtor were freezed. It was a blanket freeze wherein all debit and credit transactions of the corporate debtor were restricted and the freeze was imposed on the sister concern of the corporate debtor as well. Due to this the business operations of the corporate were halted and the monetary funds for the exports and logistics of the material could not be arranged. Hence the Corporate debtor was unable to extinguish their liability under the PCFC facility and the same became due along with the penal interest.

VII. That in view of the NPA classification contained in RBI circular dated 01.07.2015, the applicant approached the consortium of banks seeking exemption/relaxation from being declared NPA and the consortium denied the same. Thereafter, on 11.03.2017 the corporate debtor wrote to the RBI seeking an exemption from classification as NPA. Further also filed a writ bearing No. WP(C) 12251 of 2016, before the Hon'ble Delhi High Court for quashing of the letters issued by the DRI and directing the applicant to lift the freeze. The Hon'ble Delhi High Court vide its order dated 16.03.2017, quashed the DRI letters noting the same as being illegal. Further also it submits that despite the order of the High Court the DRI took no steps to de freeze the accounts of the corporate debtor and issued a letter dated 20.03.2017 to the DRI.

VIII. The corporate debtor submits that in spite of the directions of the Hon'ble Delhi High Court, the applicant did not defreeze the accounts of the corporate debtor. Aggrieved by the same the corporate debtor filed WP(C) No.11123 of 2017 before the Hon'ble Delhi High Court, praying for the right to unconditionally operate the accounts frozen. Aggrieved by the lack of response by the RBI, the corporate debtor filed WP(C) 2829 of 2017 on 27.03.2017, impugning the RBI circular dated 01.07.2015.

IX. On 01.11.2017, the DRI issued a show cause notice under Section 124, of the customs act alleging that the corporate debtor had evaded custom duty of INR 17.53 Cr. Thereafter the corporate debtor filed WP (C) 11123 of 2017 before Hon'ble Delhi High Court and vide its order dated 18.12.2017 the Hon'ble High Court noted that the freeze over the remaining 43 accounts may be lifted and DRI issued a letter to the applicant bank to lift the freeze on 19.01.2018. However, on one pretext or other the applicant bank and other consortium lenders failed to lift the freeze over the accounts. Consequently, the corporate debtor could not utilize their financial limits. Subsequently, once the freeze was lifted by the DRI, the applicant bank citing the accounts to be over drawn did not permit access to unutilized limits. On 31st March 2018 the corporate debtor entered into a TRA

agreement with the applicant bank. Under this agreement all sale receivables and expenses of the corporate debtor were to be routed through the accounts as mentioned in the agreement and ensured that all dues would organically be cleared.

X. The corporate debtor states that Hon'ble High Court of Delhi vide order dated 15.05.2019 in WP(C) 11123 of 2017 directed the consortium bank to allow corporate debtor to unconditionally operate their bank account. The corporate debtor stated that the applicant failed to disclose or provide proof of the creation of collateral security.

XI. The corporate debtor stated that the applicant has not filed the prescribed certificate under Section 2A (b) of Bankers Book Evidence Act, 1879 and false information has been filed. Accordingly, the present application is liable to be dismissed. Further the corporate debtor stated that the applicant had wrongly stated the amount claimed and interest component thereon and submitted that no basis of the calculation of interest has been provided. Further, the penal interest has been levied in a non contractual manner.

XII. The corporate debtor raised objection regarding the default amount and stated that it is false and baseless. Further also stated that the corporate debtor has not defaulted in payment of dues and bare perusal of the sanction letter and agreement reflects the understanding in consideration of interest payment and principal repayment, the applicant would make available the financial facilities to the corporate debtor. Further the corporate debtor submits that the applicant has failed to produce documents to establish the alleged default on part of the corporate debtor and consequently, the sine qua non i.e. an essential condition for initiation of proceeding under Section 7 is not satisfied.

XIII. Further also stated that the corporate debtor has not defaulted in payment of dues and on bare perusal of the agreement and sanction letter executed between the parties, it reflects that the applicant bank violated its facility agreement and sanction by artificially depriving the corporate debtor of financial assistance. Also stated that the default needs to exist both in fact

and in law. Further also stated that the date of default mentioned in the petition is incorrect and is inconsistent with the other facts pleaded.

XIV. The Corporate Debtor has stated that the account was classified as NPA on 29.03.2017 and as per the RBI circular the NPA classification occurs within 90 days of non-payment. Accordingly if all default took place on 29.11.2016, as has been mentioned in the Section 7 application, then the NPA classification date is illegal and improper. The corporate debtor highlights that the consortium minute dated 21.012.2016 does not have any mention of default occurred, on the contrary, consortium minutes expressly state the agenda of the meeting to be enhancement of financial facilities. Further the latest statement of account, do not reflect any default or outstanding. The bank statements as on 31.03.2019 have been annexed.

XV. The corporate debtor states that a writ before the Hon'ble High Court of Delhi bearing No. WP(C) 2829 of 2017 was filed which is currently pending. If the prayer in the said writ is allowed the RBI circular shall be set aside to the extent that the Banks and Financial Institutions gain the discretion in classifying the accounts as non performing assets. Further states that if the relief prayed in the writ are allowed the application under Section 7 shall be rendered infructuous.

XVI. The corporate debtor has raised objection with regards to amounts due and stated that subsequent to the DRI letters the accounts were frozen and the sanctioned limits were not available for use with the corporate debtor. Further the respondent raised objection with regards the levy of penal interest. On 29.03.2017, and has denied the same in totality. The corporate debtor further highlighted that the total amount dues has been differently stated in the present application and in the Application field before the Ld. DRT.

XVII. The corporate debtor submits that the Hon'ble Delhi High court vide order dated 15.05.2019, disposed of both the Letter Patents appeal 12 of 2018 and WP(C) 11123 of 2017. In view of the said order the corporate debtor issued a letter dated 03.06.2019 to the applicants intimating the order passed by the

Hon'ble High Court and giving them notice demanding a sum of INR 2000 Crore in lieu of loss incurred. The applicant replying to the letter categorically rejected the request of the corporate debtor to utilize their sanctioned limits by citing that the accounts have been classified as NPA.

XVIII. The corporate debtor states that the applicant has failed to comply with the RBI circular dated 07.06.2019, whereby the lender was required to get into a inter creditor agreement and subject the accounts to a review. However, the accounts of the Corporate Debtor were not reviewed.

XIX. The corporate debtor stated that the application is an attempt to defraud the tribunal. The applicant had admitted that the funds could not be disbursed due to the DRI raid and on the other hand stated that dues in excess of 875 crores are due. Further also stated that the due if any is attributable to the DRI.

XX. The corporate debtor stated that the prayer clause is denied as being vague and unspecific. Further submitted that the authorization in favor of Mr. N.D. Sharma has not been provided.

XXI. Further stated that the applicant has failed to place on record any authorization to claim amounts due to the consortium lenders. Further prayed for dismissal of Section 7 application.

15. The applicant filed rejoinder to the reply and reiterated the averments made in the application and denied the contentions raised by the corporate debtor. Further submitted the following:

I. The applicant denied that the proposed IRP is not eligible under the code and stated that the revised form 2 has been filed.

II. The applicant stated that the debt claimed is the amount due, to the applicant only and the details of the funding all consortium banks have only been stated as it is a consortium funding and the applicant has the highest holding out of the total funding.

III. The applicant submits that vide letter dated 30.12.2016, the DRI had allowed the corporate debtor to deposit /credit amounts in their accounts. However,

no debit/withdrawal was permitted. The corporate debtor made no deposits, thus resulting into continuous defaults in loan accounts. Further the applicant states that after the de-freezing of accounts in compliance of order dated 12.01.2018 passed by the Delhi High Court, the corporate debtor failed to regularise the loan accounts. The fact that the accounts have been de-frozen had also been admitted by the corporate debtor in the consortium meeting dated 25.07.2018.

IV. The applicant has relied upon order of the Hon'ble Delhi High Court in CM NO. 18272/2018, filed by the applicant, whereby it was duly recorded that the default is admitted and the banks may proceed with all actions against the corporate debtor as permissible under law. The applicant further submits that they simultaneously proceeded under the provisions of SARFAESI Act, until the moratorium was imposed and relied upon the case of *Swiss Ribbons Pvt. Ltd. Vs. UOI of Hon'ble Supreme Court of India.* The applicant states that the action of DRI and the consequences of such action are to be judged in different forums and the legality of the action of DRI herein is not the subject matter of the dispute in these proceedings.

V. The applicant stated that the outstanding in the loan was much more than the sanctioned limits. Further the applicant submits that the objection raised regarding the name of proposed IRP is denied. The certificate of registration of the IRP Mr. Sanjeev Ahuja had been filed on 27.03.2019.

VI. The applicant further states that as per Part IV the outstanding as on 21.01.2019 have been stated and even otherwise with regards the issue of dispute being raised by the corporate debtor as to extent of the debt due has been settled. The applicant has relied upon the following judgments :

Vikas Aggarwal V/s State Bank of India Appeal (AT) (Insolvency) No. 587 of 2018, decided on 08.02.2019*, wherein it was submitted that there is mismatch between the claim made by the Financial Creditor as the claim has not been correctly shown.*

6. The adjudicating authority has not given any finding as to what amount the corporate debtor defaulted to pay. The adjudicating

Authority being satisfied that there is a debt and the corporate debtor had not disputed that no debt payable in law or infact and the application under Section 7 filed by the Financial Creditor being complete admitted the application.

8. It is evident that the definition of claim means a right to payment even if it is disputed. The corporate debtor is only entitled to point out that the default had not occurred in the sense that the 'debt' which may also include disputed claim is not due. The moment Adjudicating Authority is satisfied that a default has occurred the application must be admitted unless it is incomplete. It is not the case of the Appellant or the corporate debtor that the debt is not payable in law or fact. Therefore the code gets triggered the moment Adjudicating Authority noticed the default of Rupees One Lakh or more.

VII. The applicant stated that due to typographical error, instead of 29.12.2016, the date of default was mentioned as 29.11.2016. The applicant further submits that application under Section 7 against the sister concern of the corporate debtor i.e. Kannu Aditya Limited was admitted vide order dated 22.05.2019 and a moratorium period had been imposed.

16. The corporate debtor filed an application bearing No. 307/2019 on 06.09.2019, under Section 7(5) of the I & B code, read with Rule 11 of NCLT Rules 2016, for dismissal of Application under Section 7 of the I&B Code on the grounds that the application filed before the Hon'ble Tribunal and the copy served to the respondent were different. The reply filed by the corporate debtor was as per the application served and rejoinder was filed accordingly. The discrepancies came to the knowledge of the corporate debtor during the course of arguments on 22.08.2019. The corporate debtor states that it is a trite law that if the application under Section 7 of I& B code is incomplete and has defects then it is liable to be rejected. The said application was ordered to be listed along with main IB application.

17. During the course of arguments the corporate debtor submitted that there are defects in Form -1 of the application. The applicant was granted time to file affidavit in this regards and remove defects if any. The submissions of both the parties were recorded vide order dated 30.10.2019. Accordingly, the applicant filed an affidavit and made following averments:

a) Highlighted the accounts which were cash credit accounts and stated that the date of disbursement is applicable for Term Loan Accounts and not for cash credit account.

b) The outstanding in the accounts of the applicants increased due to crystallization of FNCB(Term Loan) and new accounts were opened, the amount was converted into Rupee Term Loan due to default by company in repaying loan liabilities denominated in dollars.

c) Regarding the letter of credit, that the development in LC's after date of NPA were not reflected in the statements of account. However, have been presented in the form of a table before the Hon'ble DRT.

18. Thereafter, the corporate debtor filed an amended reply to the section 7 application and denied all the contentions of the applicant and further raised various objections. The major objections raised by the corporate debtor in addition to the objections already raised in the first reply, are as follows:

I. The corporate debtor states that as per the standard agreement, on lodging export orders with the lender, US dollars are disbursed in their accounts. Further the Corporate debtor states that vide RBI circular dated 01.07.2015, norms provide that in case the export materializes the PCFC liability may be extinguished in India Rupees. If extinguished in INR, additional penal interest is levied upon the exporter @ 18% annually, levied retrospectively from the date the finance was availed. In order to secure the facilities from the consortium the corporate debtor paid an export guarantee from the Export Credit Guarantee Corporation (ECGC). The corporate debtor submits that the ECGC claims were only known to the consortium and have been deliberately not disclosed as the same may have been already recovered by the applicant. Further the corporate

debtor specifically states that no debt is due or payable and no default has occurred. Accordingly, objected to the maintainability of this application.

II. The corporate debtor stated that principle of '*commondum ex injuria sua memo habere debet*', is applicable in the present case which states no party can be permitted to take advantage of its own wrong as the applicant herein have proceeded to freeze the accounts of the corporate debtor, in utter violation of law. Further corporate debtor states that the action of the DRI and applicant consortium bank, with regard to the freezing of accounts is in violation of fundamental right under Article 19(1) (g) of the Constitution. The said action of freezing of accounts has also been reversed by the Hon'ble High Court and therefore any action taken pursuant to freezing of accounts shall be set aside. Hence, the application shall be rejected on these grounds.

III. Further the corporate debtor has relied upon the principal of '*Ex Turpi Causa Non Oritur Actio*' i.e.: from a dishonourable cause an action does not arise. The corporate debtor submits that the applicant has illegally frozen the bank accounts of the corporate debtor due to which default occurred. Accordingly, the corporate debtor submits that the applicant has no cause of action to initiate insolvency proceedings. The corporate debtor submits that, it is the contention of the applicant that, it is not under obligation to look into the legality of directions issued by the DRI and such defence is not available to applicant and has relied upon the judgment of *Hon'ble Supreme Court of India dated 12.02.2013*, in the case of ***The Rajasthan State Industrial Development Corporation Vs. Subhash Sindhi Cooperative Housing Society*** and stated as under:

> *"Executive instructions which have no statutory force, cannot override the law. Therefore, any notice, circular, guidance etc. which run contrary to statutory laws cannot be enforced."*

Further the corporate debtor states that the heavy loss was incurred as they were unable to meet their contractual obligations. The buyers of the corporate debtor initiated arbitration proceedings wherein an arbitral award of Rs.1,49,60,68,834/-(One Hundred Forty Nine Crore, Sixty Lakhs Sixty Eight Thousand Eight Hundred Thirty Four only) was awarded against the corporate debtor.

IV. The corporate debtor submits that there are no dues payable to the applicant and the balance sheet for the FY 18-19 reflects that the debt of the applicant has been written off against the consortium bank. Further the corporate debtor has filed an application under Order 7 Rule 11 for rejection of the original application filed before the DRT- II, Delhi for recovery of due. In the said application the Presiding officer was prima facie satisfied that there are no dues and that the bank has no cause of action to claim amount from the corporate debtor. The corporate debtor also stated that the same amount is being pursued before the Hon'ble NCLT and the Hon'ble DRT and that the said amount has already been written off by the corporate debtor on account of loss of entire stock and book debts besides loss of business, future profits and loss of reputation. And a counter claim has also been field by the corporate debtor before the DRT-II and vide order dated 21.09.2019, notice has been issued to the applicant bank.

V. The corporate debtor submits that the applicant bank violated its facility agreement and sanctions by depriving them of financial assistance. The corporate debtor highlights that the consortium minutes dated 21.12.2016 do not have any mention of default occurred, on the contrary, consortium minutes expressly state the agenda as enhancement of financial facilities. The statement of accounts filed by the applicant also do not reflect any default or outstanding.

VI. The corporate debtor submits that the Article 8.2 of the FCNR (B) Loan Agreement dated 14.03.2013 provides that in the event of default on part of the corporate debtor, the applicant shall issue a notice to the corporate debtor giving an opportunity to cure such default within 60 days and if he fails to so, the applicant shall issue a notice in writing to the respondent declaring the principal and accumulated interest due and payable. The corporate debtor submits that no such notice was issued by the applicant and an opportunity to cure was also not granted to them. The corporate debtor further submits that the legal notice dated 13.02.2019, cannot be construed as a notice under Article 8.2, as it does not fulfil the requirements as laid down in the agreement. Accordingly, the present application is premature and, on this ground, should be rejected.

VII. The corporate debtor has raised an objection with respect to false date of defaults and stated that as per the applicant the default occurred on 29.11.2016, which is factually wrong as on perusal of the consortium meetings held in December 2016, it is clearly written that there was no default in November 2016. Further the corporate debtor submits that the as applicant had admitted that the credits and debit in the accounts of corporate debtor was blocked till 30.12.2016, hence no repayment could have been done till this date and no default can be accorded to the accounts of the corporate debtor.

VIII. The corporate debtor submits that the applicant has failed to produce relevant documents to establish the alleged default and taken a contradictory stand before the Ld. DRT wherein the applicant states that all the LC's devolved from April 2017 to May 2017 and the PCFC's were crystallized in June 2017.Accordingly, the date of default cannot be 29.11.2016.The corporate debtor stated that the applicant has filed financial statement which depicts a net positive cash flow from the corporate debtor and highlighted entries which depict various discrepancies.

IX. The corporate debtor has raised objections with regard to the date of disbursement in various loan accounts. The corporate debtor further states that the sanction letters executed between the parties are of the year 2016. The applicant had, in its own submission, admitted that the funds under the enhanced facility could not be disbursed as the DRI had conducted raid and accordingly the accounts of the corporate debtor were freezed. The corporate debtor has also highlighted various discrepancies with regards the date of disbursement.

X. The corporate debtor also denied that the PCFC amount crystallised as Rs.57,71,45,058/-, as the applicant has failed to disclose as to when the said PCFC's were disbursed. Accordingly, the amount of penal interest charged by the applicant is also denied. Additionally, the current balances in the statement of accounts do not match with the figures mentioned in the application. The default has occurred on 01.05.2018 and the present application is filed on 23.07.2019.Further the corporate debtor submits that vide letters dated

21.06.2019 and 05.08.2019, they had requested the applicant to issue the statements for various accounts, but no response of the same has been received till date.

XI. The corporate debtor has also raised an objection with regards to the description of security as per Form 1 of the application. It is the contention of the corporate debtor that the same is false and wilfully misstated. Further the corporate debtor submits that, it is averment of the applicant that the financial facilities have been provided to the corporate debtor in 2011. However, the properties have been mortgaged prior to 2011.The corporate debtor has highlighted that incorrect averments have been made with respect to ROC charges, as the same has been filed for properties owned by individuals. As per law the ROC charges can only be filed with respect to companies and not individuals. Additionally, corporate debtor submits that the applicant has failed to disclose proof for creation of collateral security and the valuation of security and submits that the ROC charges purportedly filed by the applicant are invalid.

XII. The corporate debtor has raised objection with regards the letter of balance confirmation dated 31.12.2017 and stated no such letter was ever sent by the corporate debtor. Further, also stated that the signatures of Shri. B.S. Rawat (Director of the corporate debtor) differs from his actual signatures. Hence the same is forged. Objections have also been raised by the corporate debtor with regard to the stamp used on the letter, the corporate debtor states that no such stamp has ever existed.

XIII. The corporate debtor states that the applicant has failed to comply with the RBI circular dated 07.06.2019, whereby the lender was required to get into a inter creditor agreement and subject the accounts to review. Further states that their accounts were never reviewed.

XIV. The corporate debtor states that the applicant has made false statement on oath and also states that the name of the applicant was changed on 15th June 2016 and hence the Form I is not maintainable.

XV. The corporate debtor further states that the applicant failed to comply with orders passed by Delhi High Court in various matters and did not allow the operation of accounts.

19. The corporate debtor on 13.01.2020 filed an application bearing No. 423/2019 seeking dismissal of Section 7 application on the following grounds:

a) The Section 7 application is incomplete, defective and contains incorrect averments, accordingly the application cannot be admitted and CIRP order cannot be passed.

b) The recovery proceedings were initiated under Section 19 of Recovery of Debts Due to Banks and Financial Institutions Act and suit No. OA No. 483 of 2019 was filed before the Hon'ble DRT-II, Delhi by the applicant. The corporate debtor further submits that the amounts claimed in the Original Application and in the Section 7 application is same, the only difference was with regard to the interest calculated.

c) Further the corporate debtor submits that written statement and counter claim (of Rs.1943.63 Crores) was filed in the OA, contending that the amounts claimed by the applicant are false and accordingly the OA is liable to be dismissed. Thereafter the applicant field rejoinder to the said WS and Counter claim with a completely new document that was neither produced before this Hon'ble Tribunal or the Hon'ble DRT. Further also/ stated that the said rejoinder changed stands in relation to the monies due.

d) The corporate debtor states that the applicant had admitted that the amounts as stated in the OA, which are same as the amounts claimed in Section 7 petition, are incorrect and outcome of a clerical error. There is a difference of Rs. 201.37 Crore in LC devolvement and Rs.246.13 cores in the PCFC crystallization. The corporate debtor submits that several details mentioned in the FORM 1are incorrect and to correct the defects a fresh affidavit was filed by the applicant wherein it was stated that the LC devolvement and the PCFC crystallization is of Rs.234.41 Crore and Rs.57.71 Crore respectively. However in the rejoinder filed before the DRT, the claim with respect to the LC

devolvement and PCFC crystallization is completely different i.e. 33.04 Crore and 303.84 crore respectively. Accordingly it can be said that the statement of debt is incorrect and in view of the same application under Section 7 is liable to be dismissed.

21. The applicant, state Bank of India, filed reply to the application filed by the corporate debtor and stated the following :-

a) The application is not maintainable as there exists no cause of action for filing this application.

b) The applicant submits that in Para 2 of the rejoinder in OA no.483 of 2019 for and specifically stated that inadvertently due to some clerical error or oversight the amount has been claimed as Rs 916,29,04,294/- in lieu of Rs.907,34,17,751/-.The applicant also filed fresh table for amounts and supporting documents.

c) The applicant states that during filing of the application before DRT, the FCNB accounts were crystallised and new Rupee Term loan Account were opened in its place. The applicant states that they are relying upon the account statements filed in the rejoinder filed at the Debt Recovery Tribunal.

d) The applicant has relied upon the following judgments :

i. ***Vikas Aggarwal Vs. State Bank of India, Company Appeal (AT) (Insolvency) No.587/2018*** with regard to the issue of debt due. The Adjudicating Authority does not decide the amount the corporate debtor defaulted. The only precondition to be satisfied is that there is a debt and has not disputed that no debt is due and payable.

ii. ***Innoventive Industries Ltd. vs. ICICI Bank and Ors. (2018) 1 SCC 407 Supreme Court,*** wherein it is clearly stated claim means a right to payment even if it is disputed.

iii. ***Surendra Trading Company vs. Juggilal Kamlapat Jute Mills Company.***

a.

22. The applicant did not file an amended rejoinder to the amended reply filed by the corporate debtor. On different dates of hearing the submissions were made that the corporate debtor has offered one time settlement proposal to the applicant and the same was put before the higher authorities of the applicant empowered to take decision. No concrete settlement could be arrived and the matter was adjourned for further consideration. The parties were involved into one time settlement but the same could not see the light of the day. The same is recorded vide order dated 09.08.2019.

23. During March 2020 the nationwide lockdown was declared as a consequence of Covid-19 pandemic and the matter could not be listed for hearing. The applicant filed an application on 18.07.2020, bearing No. 2863/2020 for urgent listing and hearing of the Section 7 application, which was allowed and the matter was listed for hearing on 27.08.2020.

24. On 07.09.2020 another application bearing no. 4041/2020, was filed by the corporate debtor, for malicious & fraudulent initiation of CIRP against the corporate debtor under Section 65 of the I&B code seeking following prayers :

    a) Initiate proceeding under Section 65 against the relevant officers of the applicant bank.
    b) Dismiss the present Section 7 petition.

    The corporate debtor states that in view of the consequent breach of fiduciary responsibility, the financial creditor filed the present application with intent to pre-empt the counter claim of the corporate debtor, the applicant herein in the present application. The corporate debtor further submits that the financial creditor had before the Hon'ble DRAT admitted that the Section 7 application is a way to take control of the counter claim preferred by the corporate debtor. The corporate debtor further states that this is a clear indication that the present proceeding initiated under Section 7 of the code is for *malafide* reasons, mainly for avoidance of the counter claim. The corporate debtor states that the order passed by the Hon'ble DRT was challenged and during the course of hearing at Hon'ble DRAT, the

financial creditor took the stand that the counter claim should not be expeditiously decided. The submission came to be recorded as follows:

> *"Ld. Counsel for the bank (SBI) has submitted that the defendants are seeking an order for early disposal of the bank's OA by moving this application under Section 17A of the RDDBFI Act, 1993, which is not maintainable because the relief sought for through this application is not covered under the said provisions of law, because by approaching NCLT the bank wants to have an order from there which will have effect upon the counter claim of the defendants in the OA."*

Further vide order dated 17.08.2020 the Hon'ble DRAT directed that both the original application and the counter claim be decided within a period of three months and disposed the appeal accordingly. The corporate debtor stated that the original application and the counter claim are germane to the present proceedings. Pursuant to the order of counter claim be decided, the entire controversy in relation to existence of debt, the defects in form I and the legality of the freeze instituted shall come to end. The corporate debtor has relied upon the following judgments in support of its contentions raised in the application filed under Section 65 of the code

i. Supreme Court in Beacon Trusteeship Limited Vs. Earthcon Infracon Private Limited, Civil Appeal No.7614 of 2019,
ii. Supreme Court in Embassy Property Development Vs. State of Kerela, Civil AppealNo.9170 of 2019
iii. Hon'ble NCLAT in Shiva Kumar Reddy Vs. Dena Bank MANU/NL/0638/2019
iv. Munish Kumar Bhansali Vs. Kotak Mahindra Bank MANU/NL/0007/2020.

The financial creditor filed reply to the application filed by the corporate debtor and stated that the application is an attempt to delay the Section 7 proceedings. The applicant further stated that the corporate debtor and its guarantors have filed various applications to expedite the disposal of OA and Counter claim filed before DRT. The applicant further relied upon Section 238 of IB Code 2016, which states that the code shall override the provisions of all other statues coming in conflict with provisions of IB Code. In the principal bench of NCLT , in the case of *State*

Bank of India vs. Kannu Aditya India Limited, which is a sister concern of the corporate debtor, an application seeking deferment of pronouncement of final order was filed, which was rejected. The financial creditor further denied all the averments made by the corporate debtor in the application under Section 65 and further stated that the judgments relied upon by the corporate debtor as mentioned above have no relevance as only selective paras have been reiterated so as to mislead the Hon'ble Court.The application was heard along with the arguments in Section 7 application.

25. The applicant filed written submissions in the application under Section 7 of IBC code and submitted the following:
    a) The applicant states that vide order dated 27.10.2020 passed in MA No.68/2020, the Hon'ble DRAT passed an order to take the written statement and counter claim off the record.However, a review application for recalling the said order was field which is still pending.
    b) Further vide additional written submission the financial creditor has confirmed the amount due against the corporate debtor is Rs.9,07,34,17,751/-.

26. The corporate debtor filed written submission and submitted the following :
    a) The application under Section 7 has not been filed with the *bonafide* intention and the CIRP has been initiated maliciously in order to take control against the corporate debtor. The corporate debtor submits that in accordance with law, they have preferred a counter claim seeking recovery of approximately INR 190,00,00,000 order to recover losses.
    b) The corporate debtor submits that the debt, alleged to be due, is not payable in law and it is a well settled position of law that no party can take advantage of their own wrong. The applicant has relied upon the case of *Innoventive Industries Vs. ICICI Bank 2018 (1) SCC 407*, hence no cause of action can arise from an illegal act.
    c) The corporate debtor has relied upon Hon'ble Supreme Court in the case of **Kusheshwar Prasad Singh Vs. State of Bihar** (2007)11 SCC 447, wherein it

has been held that *"....the authorities cannot be allowed to take undue advantage of its own default in failure to act in accordance with law."*

d) Further also relied upon the case of Hon'ble Supreme Court in the case of **Eureka Forbes Limited Vs. Allahabad Bank &Ors.,** wherein it has been held as follows "*Maxim Nullus Commodum capere potest de injuria sua propria" has a clear mandate of law that, a person who by manipulation of a process frustrates the legal rights of others, should not be permitted to take advantage of their own wrong."*

e) The respondent submits that no default has occurred and as per the submission made by the applicant the default cannot be established. Further no default could have been occurred on 29.12.2016 as no credits were allowed in the bank accounts till 30.12.2016.

f) Further the corporate debtor states that it is well settled law that on quashing of an illegal administrative action, the parties revert to status quo ante, the parties are reinstated to the position there were in prior to the illegal administrative action. To support this contention the corporate debtor has relied upon the case of *JJ Parmer Vs. State of Gujarat, Elektrans shipping Vs. Peierre D'Silva and Banya Narayan Vs. State of UP.*

g) The corporate debtor states that the application under Section 7 is incomplete and defective hence the application is liable to be dismissed. The corporate debtor has relied upon the case of Hon'ble Supreme Court in *Surendra Trading Company vs. JK Jute Mills Company;* it has been held that a defective petition is tantamount to an 'incomplete' petition. Further also relied upon the case of NCLAT in *RB Synthesis & And. Vs. Bee Ceelene Textile Mills Pvt. Ltd. Appeal (AT) (Insolvency) No.106 of 2018* wherein the view has been taken that if defects are not cured the Adjudicating Authority may dismiss the petition. The Hon'ble NCLAT in the case of *Silver Star Fashions Pvt. Ltd. Vs. Clothing Co. Pvt. Ltd.* has held that the onus of proof to prove the debt and default lies on the Applicant, especially when debt is disputed.

h) The corporate debtor states that the following defects has been admitted by the applicant :

i. With regards the name of the respondent, as the same has not been changed in the Form 1 and only has been changed in the memo of parties.

ii. With regards the date of default, it is incorrect in Form I. Different date has been changed in the rejoinder.

iii. With regards the date of disbursement, it is incorrect in Form 1the same has been corrected vide affidavit dated 14.11.2019.

iv. With regards the amount in default, it is incorrect. A new breakup has been provided by the applicant in different pleadings.

v. With regards the security description, it is incorrect in Form I. New details have been provided vide affidavit dated 14.11.2019.

i) The corporate debtor further stated that even after giving the opportunity to amend the application, an additional affidavit was filed by the financial creditor, the following defects, which were already raised by the corporate debtor in its reply, were not corrected and the application still remains incomplete and defective, which did not cure the following defects in the application filed under Section 7 of the code which are mentioned s follows:-

- Date of defaults, as the accounts were frozen on 23.12.2016, thus there can be no default in law on 29.12.2016.Further it is also stated that as per the bank statements there is a 60% variation in the amount claimed by the applicant and no reason for such discrepancies has been given.
- Defective Certificate under Bankers Book Evidence Act
- No document to show date of repayment,
- False description of security,
- Days in default is not mentioned

j. The corporate debtor submitted that the application must be dismissed, since the issue as to whether or not the debt is payable to the financial creditor is disputed. The corporate debtor relied upon the case of **Innoventive Industries Vs. ICICI bank**, wherein it has been held that "*a debt may not be due if its not payable in law or in fact*", also relied upon the case of Hon'ble NCLAT in **Pravinbhai Raninga Vs. Kotak Resources** Company Appeal (AT) (Insolvency) No. 140/2018 wherein it is held "*As per the decision of the Hon'ble Supreme*

Court , the corporate debtor is entitled to point out that a 'default' has not occurred in the sense that "debt" which may also include a disputed claim is not due. A 'debt' may not be due if it not payable in law or in fact. Therefore, it is open to the corporate debtor or its directors to point out that a debt is not payable by corporate debtor in law and in fact." The Hon'ble NCLAT in the case of **K Kesava Vs. Ajay Golpaldas Samat (HUF)** company appeal (AT) (insolvency) No. 140/2018 held "*thus, there not being a dispute about the claim arising out of a particular agreement, and as the respondents have not made it clear that as to against which agreement Rs. 5 Cr has been adjusted, we are of the view that the was not a fit case for initiation of CIRP under Sec. 7.*"

27. As per the applicant, the default occurred in Dec 2016 and the present application is filed in January 2019. Hence, the application is filed within the period and is not barred by limitation.

28. The registered office of the Corporate Debtor is situated at Delhi and therefore this tribunal has jurisdiction to entertain and try this application.

29. Before we decide the fate of this application under Section7 of IBC, we feel the need to observe certain compelling facts brought before us by the counsel for corporate debtor during the arguments :

    a) Under Section 7 if the default is triggered due to wrongful act of any third party and not corporate debtor (in the present case law enforcement agency), it is the corporate debtor that is made to suffer the CIR process.

    In the present case the corporate debtor has struggled before the Hon'ble DRT, Hon'ble Delhi High Court and the Hon'ble Apex court to ensure the survival of the business. The entire process was initiated in 2016 and is still continuing.

    b) Admittedly, the corporate debtor had a credible name in the market with a good reputation as an exporter. The action taken by the law enforcement agency in the present case, which later was held as illegal by Hon'ble Delhi High Court, vide order dated 16.03.2017 passed in W.P.(C) 12251/2016, has

tarnished the image and the name of the corporate debtor amongst its customers, dealers, buyers, financiers, employees and public in general. The damage caused to the corporate debtor is irrepairble and irreversible in nature The action of attachment of all 45 accounts of the corporate debtor, on information and apprehension about the suspected transactions, had a crippling effect on the business process and revenues of the corporate debtor.

c) If an authority fails in fairness and natural justice, while issuing the orders, why they should not be made liable for damages and accountable/ answerable under law. Relying upon the case of ***Ashok Munnilal Jain Vs. Assisstant Director Enforcement Directorate.***

> *"The Hon'ble Apex court has clearly indicated that the arbitrariness of anybody including statutory body cannot be overlooked while deciding a case DRI's indiscriminate invoking the presumption of guilt without even proving the facts, violates the fundamental right of citizen and the same should be tested under judicial vigil to safeguard the rights of the properties and curb the tide of the executive tyranny which has a potency of causing irreversible, irreparable damage leading to violation of principles of natural justice."*

30. As requested by the parties, opportunities were granted to reconsider the proposal of restructuring/ one time settlement, of the dues payable to the bank, including bringing investors to infuse the funds in the corporate debtor. In view of the counter claims filed by the corporate debtor which is still not decided, the decision in this application cannot be deferred, though the corporate debtor has made various efforts to convince us that the default was not intentional or due to incapacity of the corporate debtor, but a result of victimization by the statutory authority which is declared as illegal afterwards. Be that as it may, the non servicing of the debt continuing till date compels us to admit the application within the framework of the provisions of the Code. Moreover, at this stage there is no better option left with the corporate debtor than to undergo resolution.

31. Considering the documents on record and submissions made, it is clear that the default has occurred and the debt is due and payable. The corporate debtor has raised various objections with regard to the application being incomplete and defective, and has further also disputed the amount of debt. It is established that the amount of debt due is more than Rs 1 Lakh and default has occurred in servicing the debt which continues. It is beyond the purview of the Adjudicating Authority to venture in the area of reasoning for default and the intention behind default as submitted by the corporate debtor, especially when the application is field by a financial creditor under Section 7 of the code.

32. As a sequel to above discussion, the debt is due and payable and the applicant is entitled to claim the admitted amount due which is still outstanding and has remained unpaid till date. Therefore the application filed under Section 7 is admitted.

We are not convinced that the application filed under Section 7 is hit by the provisions of Section 65 of the I & B code and no malafide intention on the part of applicant is established. The applicant bank is empowered to proceed against the defaulters under various laws to safeguard the money and trust of the depositors.

Hence, the application IA/4041/2020 filed by the corporate debtor is rejected and stands disposed off.

33. As a consequence of application being admitted Mr. Sanjeev Ahuja, having registration number IBBI/IPA-002/IP-N00028/2016-17/10061 and having address at B-231, Saraswati Vihar (Basement), Pitam Pura, New Delhi, National Capital Territory of Delhi, 110034, email id: ssmr.ahuja@gmaill.com and, is be and hereby appointed as the Interim Resolution Professional, who has filed consent in Form-2 of the Insolvency & Bankruptcy Board of India (Application to Adjudicating Authority) Rule 2016 and made disclosures as required under IBBI (Insolvency Resolution Process for Corporate Person) Regulation, 2016.

34. As a consequence of the application being admitted in terms of Section 7(5) of IBC, 2016 moratorium as envisaged under the provisions of Section 14(1) shall follow

against the corporate debtor prohibiting the respondent as per proviso (a) to (d) of section 14(1) of the Code. However, during the pendency of the moratorium period, terms of Section 14(2) to 14(3) of the Code shall come in force.

35. We direct the Financial Creditor to deposit a sum of Rs. 2 lacs with the Interim Resolution Professional namely, Mr. Sanjeev Ahuja, to meet out the expense to perform the functions assigned to him in accordance with regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within three days for the date of receipt of this order by the Financial Creditor. The amount however be subject to adjustment by the Committee of Creditors as accounted for by Interim Resolution Professional and shall be paid back to the applicant.

36. In terms of above order, the application stands admitted in terms of Section 7 (5) of IBC, 2016. A copy of the order shall be communicated to the applicant as well as to the Corporate Debtor above named by the Registry. Applicant is also directed to provide a copy of the complete paper book with copy of this order to the IRP. In addition, a copy of the order shall also be forwarded to IBBI for its records and to ROC for updating the master data. ROC shall send compliance report to the Registrar, NCLT.

Sd/-

HEMANT KUMAR SARANGI
MEMBER (TECHNICAL)

Sd/-

DR. DEEPTI MUKESH
MEMBER (JUDICIAL)

Pronounced today under Rule 151 of NCLT Rules, 2016 as Hon'ble Member (Technical) Shri. Hemant Kumar Sarangi is not holding the Court today.

Court Master
(Asim Kumar Pal)